

July 20, 2023

The Honorable Miguel Cardona
Secretary of Education
U.S. Department of Education
400 Maryland Avenue, SW
Washington, DC 20202
Via <https://www.federalregister.gov>

Docket ID ED-2022-OSERS-0052

Dear Secretary Cardona:

This letter presents comments on the proposed rule related to “Assistance to States for the Education of Children With Disabilities” published by your department in the *Federal Register* on May 18, 2023. This proposed rule concerns children with special needs and who qualify for services under the Individuals with Disabilities Education Act (IDEA, Part B). Parents and school personnel collaborate to write an Individualized Education Plan (IEP) for children eligible under IDEA Part B. The IEP defines the services that school officials will perform for the parent’s child such as occupational therapy, speech therapy, and other interventions.

The U.S. Department of Education provides taxpayer spending through IDEA to pay for the delivery of these services. Educators, however, may also seek reimbursement for special education services by filing for Medicaid if the child is eligible. For mainstream children eligible for Medicaid (students who do not qualify for services under IDEA) families must provide school officials with consent once to allow educators to view a student’s insurance status. In these cases involving mainstream students, educators can view the student’s insurance status and file for Medicaid for services appropriate to those children, apart from IDEA.

For children with special needs, however, families provide consent under IDEA for school officials to view a student’s insurance status to file for reimbursement under IDEA. For school personnel to bill for Medicaid, officials must also obtain parental consent prior to accessing a child’s insurance information for the first time.¹ The Education Department claims these provisions are duplicative and create an additional administrative burden that may prevent schools from receiving reimbursement under Medicaid for children with special needs.

The proposed rule would allow school personnel to view the insurance status of a student with special needs and file for Medicaid without obtaining parental consent for these benefits, since

¹ U.S. Department of Education, Individuals with Disabilities Education Act, Sec. 300.154(d), <https://sites.ed.gov/idea/regs/b/b/300.154/d>.

consent is already required to file for reimbursement under IDEA (34 CFR 300.622 and 34 CFR 300.300(b) and (c), for example, already require consent).

This comment will not address the claims that the additional steps currently required to obtain consent to file for Medicaid are an administrative burden. Regardless of the administrative efforts, the Education Department is responsible for making sure schools comply with IDEA and provide services to children with special needs according to the student's IEP. The agency is also responsible for overseeing the appropriate use of taxpayer spending under federal law.

This comment emphasizes that should this rule be changed to eliminate this consent requirement, school officials should still be prohibited from billing Medicaid for any special education services provided to a student without parents' permission.²

No adjustments from the proposed rule change should remove the requirement that school officials obtain parent consent for an IEP evaluation or reevaluation.

Federal officials should explicitly state in the rule that

- Any services for children with special needs for which school personnel bill for Medicaid are services specified in the student's IEP and were contained in the document when parents and educators originally drafted the IEP and
- Any services for children with special needs for which school personnel bill for Medicaid are services that were added to or changed in an IEP in subsequent revisions to the IEP for which parents provided consent.

In general, school personnel should receive consent from parents before administering any health-related service to a child with special needs—and every other student—at school, including counseling services, except in the case of a life-threatening emergency. Crucially, many state lawmakers who have adopted parent bills of rights have included such provisions calling for parental oversight in state legislation.³ Federal law and the ensuing rules should not interfere with these state laws.

Furthermore, parents are a child's primary caregivers and are responsible for a child's upbringing. The U.S. Supreme Court has ruled that "the child is not the mere creature of the state"⁴ and parents' role as caregivers in their children's lives is "established beyond debate as an enduring American tradition."⁵ The proposed rule change regarding children with special needs and school officials' ability to file for reimbursement from Medicaid for services performed should not disturb or alter these fundamental principles.

² 34 C.F.R. §300.300(c) (2010). The Congressional Research Service explains, "In general, parental consent is required for reevaluations [of an IEP] as well as for the initial evaluation." See Congressional Research Service, "The Individuals with Disabilities Education Act (IDEA), Part B: Key Statutory and Regulatory Provisions," August 29, 2019, <https://crsreports.congress.gov/product/pdf/R/R41833>.

³ See, for example, 2021 Florida Legislature, HB 241, <http://laws.flrules.org/2021/199>: Parents have the "right to make health care decisions for his or her minor child, unless otherwise prohibited by law."

⁴ *Pierce v. Society of Sisters*, 268 US 510 (1925).

⁵ *Wisconsin v. Yoder*, 406 US 205 (1972).

Sincerely,

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