



August 1, 2023

The Honorable Miguel Cardona
Secretary
U.S. Department of Education
400 Maryland Ave, SW
Washington, DC 20202

RE: [Docket ID ED–2022–OSERS–0052] Assistance to States for the Education of Children with Disabilities

Dear Secretary Cardona,

The National Disability Rights Network (NDRN)* writes today to provide feedback on the Notice of Proposed Rulemaking (NPRM) issued by the Office of Special Education and Rehabilitative Services (OSERS) that would “amend the Individuals with Disabilities Education Act (IDEA) Part B regulations to remove the requirement for public agencies to obtain parental consent prior to accessing for the first time a child’s public benefits or insurance (e.g., Medicaid, Children’s Health Insurance Program (CHIP)) to provide or pay for required IDEA Part B services.” NDRN supports the comments submitted by the Consortium for Constituents with Disabilities (CCD). In addition, we appreciate the opportunity to highlight concerns relevant to the nationwide network of P&A Systems.

While the intent of this proposed rule is honorable, we ask that the Department of Education (Department) not make any changes at this time, retain the yearly parental consent requirement before billing Medicaid for IDEA-related services, address implementation issues with third-party

billing, and focus on a glidepath for fully funding IDEA, which would guarantee schools the funds needed to deliver required services for students with disabilities.

We share the ultimate goal with the Department to proactively address confusion around the general consent process and consent to bill Medicaid. However, it remains unclear as to whether or not the parent or legal guardian is confused or is intentionally withholding consent to bill Medicaid for services. Moreover, the NPRM does not cite a demonstrative study or general information to establish whether the consent process is too burdensome and confusing or if the parents are intentionally denying consent based on their informed and deliberate choices.

Advocates in favor of removing parental consent to bill Medicaid presume that parents are “confused” about what this form means for their child or “scared” to sign it and say that “chasing consents is a real problem and takes up many hours of non-reimbursable time. Even if some parents truly do not understand the form, many parents choose to withhold consent to bill Medicaid for entirely valid and substantiated reasons. *Parents withhold consent because services offered outside the schools are negatively impacted by school-based billing.*

Parents are routinely informed, sometimes even after services in other settings have already been rendered, that the Medicaid agency has deemed them duplicative with school-based services and their coverage is denied. Children receiving extensive services outside of the school often lose this coverage due to the Medicaid agency or Managed Care Organization (MCO) determining that they have received said services on the same day or that the same type of provider is used. Despite the existence of the “no cost” guardrails at §300.154(d)(2)(i) through (iii) already in place to prevent this type of scenario from occurring, in the situations where parents *have* given consent, MCOs and/or the state Medicaid agency routinely ignore the requirement to cover services in other settings for Medicaid-enrolled kids whose healthcare services are billed to Medicaid in the school setting.

NDRN acknowledges that these outcomes are restricted by current law but emphasizes that they still occur due to significant and problematic implementation of the 3rd Party billing process. As such, it is imperative that these implementation issues are addressed before the Department

changes the parent consent regulations in 300.154. Students with disabilities and their families should not bear the brunt of school district and/or state Medicaid agency problems.

Moreover, NDRN maintains that the current consent process fosters active participation from parents in determining the best setting for children to receive services and allows them to prevent third-party billing because of implementation issues. If parents lose the opportunity to directly withhold consent, these problems could be absolutely intensified if services for children who had previously not been billed to Medicaid now face the same coverage challenges across settings.

Next, NDRN agrees that there are other components of parental consent involved in the third-party billing process (e.g., consent for FERPA-based information sharing, consent for IDEA evaluation, consent for IDEA services). However, those components serve distinctly different purposes. For example, FERPA is primarily about consent for the disclosure of personally identifiable information to educational records and thus does not specifically speak to providing consent to receive IDEA nor to consent for a school to bill for 3rd party reimbursement and the impact of such consent on the ability of a child to access future non-IDEA Medicaid health care services.

Further, consent for the disclosure of information under FERPA is different than consent for evaluation or services under IDEA. The IDEA consent process for initial evaluations and re-evaluations do not refer to third-party billing and NDRN asserts that parents should be able to provide consent for IDEA evaluations without worrying about whether their consent for evaluations is connected to providing consent for the school to engage in third-party billing. The evaluation process should be neutral and objective, as well as separated from any ability for a school to obtain third-party billing for services premised in an evaluation. This is part of the reason the requirements of FERPA are different than the consent for a child to be evaluated for IDEA eligibility per 34 CFR 300.300(a) and consent for a child to receive education services under IDEA per 34 CFR 300.300(b).

Similarly, parents must have the right to consent to IDEA services without regard to whether the school has permission to seek third-party reimbursement. Those are and must be separate issues. Parents may have good reason to consent to the provision of IDEA services and to reject

third-party reimbursement. In this way, the consent process for Medicaid approved providers to bill for Individualized Educational Plan (IEP) services in 34 CFR 300.154(d)(2)(iv) is an important guardrail to ensure parents understand and appreciate the distinctions between the various forms of consent. NDRN also emphasizes that the current third-party consent provision in IDEA is the most direct and clear process for parents to understand the school's intent to bill Medicaid for IEP services. This provision is separate and distinct from the FERPA consent process as well as from other IDEA provisions governing parental consent to IDEA services or evaluations.

For these reasons, NDRN recommends maintaining the current language that "specifies that the parent understands and agrees that the public agency may access the parent's or child's public benefits or insurance to pay for services under Part 300." This current requirement is a key safeguard to help ensure that IEP services cannot diminish other Medicaid-reimbursable services and that services are delivered at no cost to the child's family.

If the Department continues to move forward with the proposed changes despite the serious concerns discussed above, NDRN recommends the explanation of parent rights of IDEA (Sec. 300.504) must be improved to provide more complete notice of parent rights, distinguish between the forms of consent and give families direct and reliable information. For example, NDRN suggests that the notice be revised to ensure that schools provide information to parents regarding what specific benefits have been accessed by the school and that schools have a responsibility to ensure that parents do not incur any costs as the school bills for services and that there is no negative impact on lifetime coverage or access to services outside of school.

NDRN also suggests an additional requirement that schools that access public benefits must provide an explanation of what benefits were accessed and in what amounts on an annual basis. Further, NDRN recommends that the notice be revised to ensure that students with disabilities and their families understand the various forms of consent with easy-to-understand and accessible resources, plain language materials, materials in the family's primary language, and, among others, materials in alternative electronic formats.

Thank you for the opportunity to provide feedback on the proposed rule. If you have any questions or need additional information, please contact Dan Stewart, Managing Attorney for Education and Employment at dan.stewart@ndrn.org.

Sincerely,

A handwritten signature in blue ink that reads "Marlene Sallo". The signature is fluid and cursive, with a long, sweeping underline that extends to the right.

Marlene Sallo
Executive Director
National Disability Rights Network

*NDRN is the non-profit membership association of Protection and Advocacy (P&A) agencies located in all 50 States, the District of Columbia, and the United States Territories. In addition, there is a P&A affiliated with the Native American Consortium which includes the Hopi, Navajo, and San Juan Southern Paiute Nations in the Four Corners region of the Southwest.

P&A agencies are authorized under various federal statutes to provide legal representation and related advocacy services, and to investigate abuse and neglect of individuals with disabilities in a variety of settings. The P&A Network comprises the nation's largest provider of legally based advocacy services for persons with disabilities. NDRN and the P&A Network advocate for many students with disabilities around education related issues.