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July 28, 2008

Tracy R. Justesen
U.S. Department of Education
400 Maryland Avenue S.W.
Room 5107
Potomac Center Plaza
Washington, D.C. 20202-2600

RE: Department of Education, Part III, Proposed Regulations of May 13, 2008.

Dear Mr. Justesen:

I am an attorney presently practicing in Alaska, who has also practiced in Indiana and Minnesota. As an attorney who has represented children with disabilities for some 20 years, and as the only private attorney who represents children in Alaska, I believe my comments on the proposed regulations may be helpful to you.

34 C.F.R. §300.534(c). Parental Withholding of Consent.

Recommendation: I urge you to withdraw this interpretation.

Reasons: There are two key reasons why this interpretation should be withdrawn.

Reason No. 1. It is not infrequent that parents are unaware of their rights and the rights of their children to even be identified as having special education needs. In Alaska, this is a frequent problem of “child find.” I am fearful that this interpretation will be used to protect school districts from violations of “child find” and children will not be identified as having disabilities. I would urge you to insist that there be an effort to ensure that parents are fully aware of their rights and that they are not just handed a brochure that is above their reading level or not in their language.

Reason No. 2. In many states, and Alaska is no exception, children with disabilities are often not identified until they find themselves in disciplinary situations. The current section 300.534, consistent with the statute, 20 U.S.C. 1415(k)(5) expressly applies to children who are not yet determined to be eligible for special education and related services who have engaged in conduct in violation of conduct codes. The rule cannot apply to children the local school district has determined to be eligible for special

education and related services. The Department must correct its statement that these children could be disciplined as any other child and as if they had never been determined to be a child with a disability.

34 C.F.R. §300.177 Positive Efforts to Employ Individuals with Disabilities

Recommendation: I wholly support this and recommend that it be passed. Many, many children with disabilities have no “role model” and the ability of schools, as a whole, to understand disabilities will be improved if there are more teachers and staff who can serve as role models.

34 C.F.R. §300.512 Hearing Rights

Recommendation: I ask that you withdraw this proposed regulation.

Reasons: There are four reasons this regulation should be withdrawn.

Reason No. 1. School Administrators/Quasi-Lawyers Exist; Lay Advocates Needed.

In some states, including at least Minnesota and Alaska, there are individuals within the school district administration who are attorneys but who are not identified as attorneys to the general public. Anchorage, Alaska’s largest district, has a Director of Compliance who is an attorney, who practiced as an attorney prior to holding this position. A couple of the larger districts in Minnesota employ in-house counsel. These individuals, who have been trained in legal tactics, and who hold law degrees, even if they are not practicing attorneys, have a distinct advantage over non-lawyer parents. If the proposed regulation is passed, these individuals, as well as other special education administrators, will have an overwhelming advantage in hearing situations with non-lawyer parents. Non-lawyer advocates can at least even the odds in these scenarios.

Reason No. 2. School Lawyers Outnumber Parent Lawyers; Lay Advocates Needed.

In nearly all states, there are simply more school lawyers than there are parent lawyers. In the three states in which I have practiced the most over the years, it has nearly always been a large firm representing the school district, sometimes in addition to the “in-house” compliance director or in-house lawyer.

- Minnesota: Ratwik, Rozsak, (www.ratwiklaw.com, 21 attorney firm, 4-5 in education); Kennedy-Graven (www.Kennedy-Graven, 35 lawyers, 6 in education)
- Indiana: Bose, McKinney and Evans (www.boselaw.com, 130 attorneys, 9 in education)
- Alaska: Jermain, Dunnagan and Owens (www.jdolaw.com, recently rated Alaska’s largest law firm, has 20 attorneys with 6-8 in education)

It is wholly unfair to eliminate lay advocates from assisting parents, when school lawyers or in-house school lawyers will continue to advise and represent school districts. If anything, we need more lay advocates, not fewer.

If there are concerns about the quality of lay advocate representation, then OSEP should look at options such as are used with other similar areas. In Social Security cases, lay advocates can assist but must pass a competency test. The same could be done for lay advocates in the area of special education.

Reason No. 3. Shortage of qualified attorneys; Lay Advocates Needed.

Despite efforts, there is a extreme shortage of qualified and experienced attorneys to represent parents of children with disabilities. Estimates are approximately 350-400 attorneys who represent children nationwide. Matching up the numbers¹ one can see the disparity state by state:

State	School Lawyers	Parent Lawyers
Minnesota	10	3-4
Indiana	6	3
Alaska	6-8	2

The shortage of qualified attorneys is even more acute in states which are rural in nature. It is far more likely that a parent may be able to secure a lay advocate, especially in remote areas of the country, than to obtain an attorney.

The proposed regulation is inappropriate because it would allow school “non-attorneys” to represent schools without allowing lay advocates to help parents. This is not only unfair but it is also unwise. Many times lay advocates are the ones most likely to help resolve problems and the most likely to be able to advise parents about solutions. Limiting lay advocates will only lead to more litigation, not less.

Reason No. 4. Keeping the Playing Field Even; Lay Advocates Needed.

It will only increase litigation to reduce the ability of lay advocates to assist parents at hearing. Parents, even very educated ones, cannot usually do hearings on their own. I recently worked with a family where both parents are college graduates and very intelligent and they tried to set up and do the hearing themselves. They were not able to do so. If they had access to a lay advocate, they might have been able to do so and that would have reduced attorneys’ fees in the end for all concerned.

Allowing states to decide whether lay advocates can represent or assist parents at hearing will only lead to more disparity among the states. There are fewer lay advocates in some states and more lay advocates in others. If lay advocates cannot assist parents at hearings in some states, but can in others, IDEA will be unequally enforced in those states without as many lay advocates. I have trained lay advocates for many years and it is my belief that there are some lay advocates who are better than some of the attorneys! Of course

¹ These are approximate numbers based on my personal knowledge and recollections.

there are also some that are not, but that is not because they are “lay advocates.” It is usually the result of lack of training.

Finally, I wish to point out that in Alaska, unlike the other 49 states, we have no law school. Parents do not have access to legal clinics like they might in other states. Our need for lay advocates is very great. Pro se litigants are very common in our state in many areas of law because of the lack of attorneys. Lay advocates can help bridge the gap.

Thank you for taking the time to consider these comments. If you should want further information or discussion about these comments, please let me know.

Very truly yours,
s/Sonja D. Kerr
Sonja D. Kerr

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