Action Item: Rules for Adoption - Part 226 (Special Education)

Materials: Recommended Amendments

Staff Contacts: Christopher Koch
              Anthony Sims
              Harry Blackburn

Purpose of Agenda Item

To present the proposed amendments for adoption.

Expected Outcome of Agenda Item

The Board’s adoption of the proposed amendments to Part 226.

Background Information

These amendments have three purposes.

- They include a number of wording changes identified as necessary by the U.S. Department of Education’s Office of Special Education Programs (OSEP).

- They include further revisions to the rule on parental consent (Section 226.540) that respond to recent litigation.

- They explain how the current system of issuing State approval for individuals to serve as directors of special education will be closed out in favor of a standards-based endorsement. These changes are necessary to complement the amendments to Part 29 (Standards for Administrative Certification) that were adopted in January.

These amendments were presented for the Board’s initial review in September of this year and subsequently published in the Illinois Register to elicit public comment. Seven
letters were received. Please see the Summary and Analysis of Public Comment below for a discussion of the issues raised.

**Analysis and Implications for Policy, Budget, Legislative Action, and Communications**

Policy Implications: Please see above. Establishment of the new administrative credential is a further step in establishing the standards-based system of credentials for Illinois educators and approval of preparation programs. Most of the amendments requested by OSEP incorporate no substantive changes and merely serve to emphasize certain requirements that are already present in the rules. The change in the rule regarding parents’ revocation of consent is among those identified by OSEP and is also needed in order to conform the rule to the federal regulations implementing the Individuals with Disabilities Education Act pursuant to recent litigation.

Budget Implications: This rulemaking has no budgetary implications for the agency.

Legislative Action: None needed.

Communications: Please see “Next Steps” below.

**Superintendent’s Recommendation**

Adopt the following motion:

> The State Board of Education hereby adopts the proposed rulemaking, including the changes recommended in response to public comment, for:

> Special Education (23 Illinois Administrative Code 226).

Further, the Board authorizes the State Superintendent of Education to make such technical or nonsubstantive changes as the State Superintendent may deem necessary in response to suggestions or objections of the Joint Committee on Administrative Rules.

**Next Steps**

Notice of the adopted rules will be submitted to the Joint Committee on Administrative Rules to initiate JCAR’s review. When that process is complete, the adopted rules will be filed with the Secretary of State and disseminated as appropriate.
Comment
All those who submitted comments were troubled about the proposed changes in Section 226.540(a)(3) and (i) that eliminate the need for a parent to request a due process hearing in order to revoke consent for an action related to special education. The commenters voiced a number of different objections to this change. Some stated that allowing a parent to revoke consent at will would eliminate the equal partnership that the federal regulations strive to establish by making the efforts of the IEP team meaningless. They stated that this change in the rule would undermine schools’ expertise by granting parents the only say in matters that might involve disagreement. It was pointed out that the IEP team is to develop a comprehensive program of education and related services for the student but that this change would have the effect of allowing parents to pick and choose from a “service menu”. Along the same lines, it was noted that there are good reasons for requiring an IEP team meeting prior to any changes in a student’s placement, and that the proposed amendment would make a sham of the educational planning process delineated elsewhere in the rules.

Other respondents feared creating a “revolving door” and foresaw repeated disruptions in services to students when parents became angry or frustrated. They noted the potential for violation of students’ rights, not only in the case of students with disabilities whose placement would be changed without the IEP team’s consideration, but also for students in the general population whose environment could be disrupted by the placement of severely disabled students into their classes without any opportunity for planning. Concerns about all students’ educational opportunity and safety were also voiced in this context. It was emphasized that a student with a disability would lose his or her related services as well as educational placement when consent for special education was withdrawn. Students with severe disabilities might be placed into environments where they had little or no chance of succeeding, with all the negative consequences related to that frustration.

The potential for “systemic neglect and possible abuse” was highlighted. Related to these concerns was also the potential for subsequent litigation and claims for compensatory services based on students’ receipt of an inadequate or inappropriate education. Commenters believed that the existing requirement for a due process hearing protects the student’s interests and that this is preferable to a one-sided response to the parent’s interest. Some stated that parents may not always understand all the issues involved in the education of their student, while others questioned the “immediate” effect of the revocation of consent, particularly when one parent has acted without involving the other. On a related note, we were asked to define “immediate”.

It was also stated on behalf of the Illinois Association of Administrators of Special Education (IAASE) that the proposed rule would create questions regarding the district’s reaction to a parent’s revocation of consent. Reference was made to a position taken by the U.S. Department of Education to the effect that refusal of parental consent for
initial placement was absolute and could not be challenged by a district via due process. This reference implied that the same conclusion might apply to revocation of consent within Section 226.540. The IAASE suggested either leaving the existing rule unchanged or changing it to add more specificity on the district’s subsequent actions, in order to clarify the rights and obligations of both parent and school, protect the interests of students, and avoid needless litigation and expense.

The State Advisory Council suggested identifying a mechanism that would be less burdensome on parents than the pursuit of due process but would do more to protect the interests of the student.

Finally, it was stated that the USDE’s policies should not drive ISBE’s policies, and the State Board was urged to communicate with federal representatives about the significant detrimental effects of this proposed change.

Analysis
We believe that the relationship among several aspects of existing rules was not apparent to some commenters and that the complexity of issues surrounding consent requires some further explanation within this rule.

First, we should separate OSEP’s position on refusal of consent for initial placement from the concept of revocation of consent. Revocation can only occur when consent has first been given, so these two situations are fundamentally different. While OSEP has held that a district may not challenge a parent’s refusal of consent for initial placement, the same is not true with respect to revocation of consent. Therefore, if a district disagrees with a parent’s revocation of consent, its representative certainly can request a due process hearing, and we should clarify this point in the rule. In addition, the rule should explain clearly what happens when a district submits such a request since there will be a different effect depending upon the circumstances. (A district cannot proceed with an evaluation or re-evaluation when a parent revokes consent for it, but when a parent revokes consent for services that are being provided, the district’s request for due process has the effect of staying the placement pending the outcome of the hearing.)

Further, when a student is receiving special education services and the parent disagrees with some aspect of the placement or services, he or she has two choices. If a parent wishes to effect a change in placement or services, he or she should request an IEP meeting. Revocation of consent, on the other hand, applies to the entire placement and all the services currently being provided. It will result in the return of the student to the general school population. Once a placement is in effect, a parent cannot pick and choose among a “menu” of items to revise by selective revocation of consent, as some commenters feared.

It may be true that some parents’ changes of heart will result in unfortunate disruptions in service to their children and in the educational environment in general. It will be important for both the State Board and school districts to inform parents carefully about their options and about the effects of revoking consent. OSEP has reiterated that the State Board must remove from this rule the requirement that a parent seek a due process hearing in order to revoke consent.
We understand districts’ concern with regard to the immediate effectiveness of the revocation of consent. Clearly some actions or services can be discontinued more rapidly than others can, and it is in everyone’s interest to provide an appropriate period of time in which to help students make the transition out of special education when consent for it is revoked. It will be advisable to state in the rule a reasonable standard for “immediate” in order to avoid as many misunderstandings and challenges as possible.

**Recommendation**

The proposed language of subsection (j) of Section 226.540 should be amplified as shown below, and a new subsection (k) should be added to explain what happens when the district requests a due process hearing.

i) Any revocation of consent is effective immediately, subject to the provisions of subsection (k) of this Section, but is not retroactive, i.e., it does not negate an action that occurred after the consent was given and before it was revoked. For purposes of this subsection (j), a district shall be considered to have given immediate effect to a parent’s revocation of consent when it either discontinues the action that is the subject of the revocation prior to its next scheduled occurrence or provides to the parent a written explanation of the timeline for the district's action and the reasons for that timeline. The district or cooperative entity shall ensure that each staff member whose activities are affected by the revocation of consent is promptly informed of the revocation.

k) If a district disagrees with a parent’s revocation of consent, the district may request a due process hearing pursuant to Section 226.605 of this Part.

1) If the parent’s revocation of consent pertains to an evaluation or re-evaluation of the student, the district shall not proceed with the evaluation or re-evaluation during the pendency of due process.

2) If the parent’s revocation of consent pertains to a special education placement for the student that is already in effect, the district’s request for a due process hearing shall have the effect of staying that placement, provided that the district submits the request in writing to the State Board of Education in keeping with the provisions of Section 226.615 of this Part and within three business days after the parent’s revocation occurred.

**Comment**

The State Advisory Council did not support the new language that had been added as subsection (d) to Section 226.610, permitting local districts to require parents who choose not to use available mediation to meet with a disinterested party (required to be under contract to a federally funded parent training and information center or community parent resource center). The letter of comment stated that this rule would leave the “offering” of contact with these centers to districts’ discretion and that the State Board’s rule should make consistent remedies available across the state instead. The Council
also questioned the assumption that the specified individuals were necessarily impartial and skilled at assisting parents. Members had discussed the potential for mandating mediation and acknowledged that this would not be feasible. However, the Council believed the use of mediation should be encouraged as a preferable alternative to due process hearings.

**Analysis**
We believe that the intent behind this rule was not correctly understood during the Council’s discussion. The language of subsection (d) does not discuss the “offering” of the services of disinterested parties but rather the ability of districts to *require* parents to meet with such individuals if they refuse mediation. The proposed rule does reflect a desire on the part of the U.S. Department of Education to emphasize the usefulness of mediation, just as the Council suggested. The rule would mean that, if mediation were rejected, the parents could be caused to engage in some discussion with one of the individuals specified. However, it would be up to each district to determine whether it wanted to impose this requirement on parents.

It should be noted that insertion of this provision was proposed in response to the Office of Special Education Programs (OSEP) and that the proposed language was specified by OSEP.

**Recommendation**
No change should be made as a result of this comment.

**Comment**
The State Advisory Council objected to the deletion of subsection (c) from Section 226.770, out of concern that this would allow districts to use the Medicaid or KidCare reimbursement they receive for services unrelated to special education. The Council preferred to have some assurance that these funds would be used to augment special education and related services.

**Analysis**
We have no objection to restoring a portion of the language proposed for deletion to match the other existing rule on this subject (Section 226.710(b)(13)), which states that each district’s policies and procedures must address the district’s compliance with, “the use of federal matching funds under the Medicaid (Title XIX) or Children’s Health Insurance (KidCare; Title XXI) program to supplement special education programs and services (if the district is participating in one or more of those federal programs)”. However, the State Board does not need to collect expenditure reports from districts reflecting this information.

**Recommendation**
Subsection (c) should be partially restored as shown below.

> c) School districts and cooperative entities shall use federal matching funds received under Medicaid or the KidCare program only to supplement special education programs and services. Each school district or cooperative entity shall submit an annual record of its expenditures of these funds on a form supplied by the State Board of Education.
(The relabeling of subsections (d) and (e) in the proposed amendments should also be reversed.)