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Mr. Tracy R. Justesen
Assistant Secretary for Special Education and Rehabilitative Services
U.S. Department of Education
550 12th Street, SW
Potomac Center Plaza
Room 5107
Washington, DC 20202-2641

LeRoy S. Rooker, Director
Family Policy Compliance Office
U.S. Department of Education
400 Maryland Avenue, SW
Room 6W243
Washington, DC 20202-5920

Dear Assistant Secretary Justesen and Director Rooker:

I am requesting the Department of Education provide additional guidance on parental consent and the Medicaid program. Since the issuance of the most recent Individuals with Disabilities Education Act (IDEA) regulations on June 5, 2006, and the subsequent Family Educational Rights and Privacy Act (FERPA) regulations on December 9, 2008, there is considerable confusion over securing in the Medicaid application process conforming consent. Some states say their Medicaid application is informed consent and others say it can never meet the requirements of your Department.

As background the IDEA regulation at 300.9 specify the following:

Sec. 300.9 Consent. Consent means that--

- (a) The parent has been fully informed of all information relevant to the activity for which consent is sought, in his or her native language, or other mode of communication;
- (b) The parent understands and agrees in writing to the carrying out of the activity for which his or her consent is sought, and the consent describes that activity and lists the records (if any) that will be released and to whom; and
- (c)(1) The parent understands that the granting of consent is voluntary on the part of the parent and may be revoked at anytime. (2) If a parent revokes consent, that revocation is not retroactive (i.e., it does not negate an action that has occurred after the consent was given and before the consent was revoked).

From <http://idea.ed.gov/download/finalregulations.html>

The comments in FERPA regulations released on December 9, 2008 contain the following:

Additionally, many agencies providing services to low income or at- risk families have parents sign a consent form authorizing disclosure of [[Page 74829]] information at intake time so that the agency can receive necessary information from schools. In 1993, we amended the FERPA regulations to help facilitate this

practice. In final regulations published in the Federal Register on January 7, 1993 (58 FR 3188), we removed the previous requirement in the regulations that schools ``obtain" consent from parents and eligible students so that parents and eligible students may ``provide" a signed and dated consent to third parties in order for the school to disclose education records to those parties. Therefore, parents can provide consent at intake time to State and local social services and other non-educational agencies serving the needs of students in order to permit their children's schools (or the SEA) to disclose education records to the agency. For example, parents routinely provide consent to the Medicaid agency that permits that agency to collect information from other agencies on the family being served. In many cases those consents are written in a manner that complies with the consent requirement in Sec. 99.30, and the student's school may disclose information to the Medicaid agency necessary for reimbursement purposes for services provided the student. Changes: None.

From: FR Doc E8-28864[Federal Register: December 9, 2008 (Volume 73, Number 237)] [Rules and Regulations] [Page 74805-74855] From the Federal Register Online via GPO Access [wais.access.gpo.gov] [DOCID:fr09de08-8]

Comparing the requirements at 300.9 to those of the Medicaid application process, we find that in the Medicaid process:

- The parent is fully informed in their native language, or other appropriate means,
- Their agreement is documented in writing by their signing the application form, and
- The act of applying is voluntary and it can be withdrawn at any time. It is fully understood withdrawing the Medicaid application has no impact on services they are receiving from an LEA.

Much of the national discussion is focused on what language must actually appear on the Medicaid application. Frankly, in some states it has stopped with state education agency saying no wording will meet federal requirements. Below is part of the language found on the state Medicaid application forms for Florida, New York and Wisconsin. I have also included a link to the online forms. It would be a great benefit to all involved if the Department of Education can advise if any of these meet its requirements. (The Wisconsin language had been previously approved.) If you find that none meet the requirement, please provide an example of the language you would like used so states may make the appropriate changes to their Medicaid forms.

Following is the language used by the three states.

Florida:

<http://www.dcf.state.fl.us/ess/agencyforms.shtml>

"I understand that information that I provide with this application, interview, or when requesting other benefits, including computer information matches with other agencies, is subject to verification by DCF and other Federal and State agencies including Public Assistance Fraud. I understand and agree to the following: DCF, Public Assistance Fraud (PAF), and authorized Federal Agencies may verify the information I give on this form, interview, or when requesting other benefits. Information may be obtained from my past or present employers. My signature authorizes release of such information to DCF and/or PAF. As a condition of participation in Medicaid, I consent to review and release of all medical records deemed necessary by Medicaid under its auditing and investigatory powers. If any information is incorrect, benefits may be reduced or denied and I may be subject to criminal prosecution or disqualified from the program for knowingly providing incorrect or false information or hiding information. I have read my Rights and Responsibilities. I certify under penalty of perjury that the information on this form is true to the best of my knowledge, including the citizen or noncitizen status of those who are applying for benefits. I hereby acknowledge receipt of the Florida DCF CFOP 60-17, Chapter 1, Attachment 2, Management and Protection of Personal Health Information Policy."

New York

<http://www.health.state.ny.us/forms/doh-4220.pdf>

FOR MEDICAID APPLICANTS ONLY

- **Release of Educational Records** I give permission to the local Department of Social Services and New York State to obtain any information regarding the educational records of my child(ren), herein named, necessary for claiming Medicaid reimbursements for healthrelated educational services, and to provide the appropriate federal government agency access to this information for the sole purpose of audit.
- **Early Intervention Program** If my child is evaluated for or participates in the New York State Early Intervention Program, I give permission to the local Department of Social Services and New York State to share my child's Medicaid eligibility information with my county Early Intervention Program for the purpose of billing Medicaid.

Wisconsin:

<http://dhs.wisconsin.gov/forms/F1/F10182.pdf>

I understand that my signature authorizes the local agency and the Wisconsin Department of Health Services to request any information that's appropriate and necessary for the proper administration of BadgerCare Plus as authorized under Wisconsin law.

It is also worth mentioning Medicaid requires access to all beneficiary service information. This necessary so Medicaid can determine what additional services it is required to pay for. This includes service being provided in an education setting. It must avoid paying for services that duplicate those provided in another program. Whether or not it pays for these services is immaterial. The receipt of the services impacts ones eligibility for additional Medicaid funded services.

If I can provide any additional information or if there are any questions, I can be reached at 518-371-0176, extension 101.

Thank you in advance for your time and attention to this matter.

Sincerely,



Joseph Kinney
Member, Kinney Management Services, LLC