



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES

APR 10 2003

Mr. Lawrence C. Gloeckler
Deputy Commissioner
Office of Vocational and Educational Services for
Individuals with Disabilities
Room 1606 One Commerce Plaza
Albany, New York 12234

Dear Mr. Gloeckler:

Thank you for your letter to Stephanie S. Lee, Director, Office of Special Education Programs (OSEP), requesting clarification regarding the inability of public agencies to override a parent's refusal to consent to the initial provision of special education and related services under the Individuals with Disabilities Education Act (IDEA) by using the IDEA due process hearing procedures. You also asked about how this provision relates to the State mandate under IDEA to provide a free appropriate public education (FAPE). Our responses to your questions are as follows:

- 1. How does OSEP reconcile an interpretation of its regulations that would diminish the protections provided to students with disabilities with the provisions of 20 U.S.C. §1406(b) that prohibit the Secretary from implementing a regulation that would lessen the protections that were embodied in regulations in effect on July 20, 1983 with respect to parental consent to initial placement in special education, unless the regulation reflects the clear and unequivocal intent of Congress.**

Part B of the IDEA requires parental consent for the initial provision of special education and related services and does not permit public agencies to use the IDEA due process hearing procedures to override a parental refusal to consent to the initial provision of special education and related services. Section 614(a)(1)(C)(i) of the IDEA Amendments of 1997 states that parental consent must be obtained before an evaluation is conducted. It further states that "parental consent for evaluation shall not be construed as consent for placement for receipt of special education and related services." This provision is immediately followed by section 614(a)(1)(C)(ii), which states that if the parents of such child refuse consent for evaluation, the agency may continue to pursue an evaluation by utilizing the mediation and due process procedures under section 615, except to the extent inconsistent with State law relating to parental consent. There is no similar provision authorizing public agencies to use mediation or due process procedures to override a parent's refusal to consent to the initial provision of special education and related services.

The IDEA statute was silent on this issue prior to the 1997 Amendments. In enacting the consent provisions of section 614(a)(1)(C) in 1997, Congress was clearly aware of the long-standing regulatory requirement that parental consent must be obtained before the initial provision of special education and related services and of the requirement expressly allowing States to override parental refusal to the initial provision of special education and related services by using the IDEA due process hearing procedures. Congress failed in the 1997 Amendments to IDEA to include express provisions allowing States to use the due process hearing procedures to override parental refusal to consent to the initial provision of special education and related services. This statutory language is paralleled in the Part B regulations at 34 CFR §300.505(a) and (b).

The 1997 IDEA Amendments reflect Congress' intent to provide parents the ultimate choice or decision regarding the initial provision of special education and related services for their child. Congress chose not to allow school districts to use the IDEA due process hearing procedures to override a parent's refusal to consent to the initial provision of special education and related services under section §614(a)(1)(c), although an express provision was included for refusal to consent to initial evaluations. This distinction indicates a clear congressional intent to support parents' rights to choose whether their children would be enrolled initially in special education. The provision allowing school districts to proceed to due process for non-consent on evaluations was enacted to ensure that parents' choices were informed (such that parents would have information about the special education and related services needs of each individual child) while still enabling the parent to ultimately determine if his or her child would be initially placed in special education. We believe that the IDEA statute and Part B regulations reflect the clear and unequivocal intent of Congress. We enclose for your information the 2003 OSEP Letter to Gantwerk and the 2003 OSEP Letter to Yudien as additional background information on the implementation of 20 U.S.C. §1414(a)(1)(C) and 34 CFR §505(a)(1)(ii).

Finally, we note that there is a discrepancy in the New York State Education Department (NYSED) regulations regarding the implementation of the consent provisions under the IDEA. While NYSED regulations at sections 200.5(b)(1)(ii)(b) and (iii)(a) for 5-20 year olds require the school district board of education to initiate an impartial hearing to determine if special education shall be provided without parental consent, New York regulations at section 200.16(g)(5) for preschool children (ages 3-5) expressly state that "in the event the parent does not provide consent for the initial provision of special education services, no further action will be taken by the [NY] committee on preschool special education until such consent is obtained. NYSED must delete the provisions of sections 200.5(b)(1)(ii)(b) and (iii)(a) that allow school districts to initiate an impartial hearing to determine if special education shall be provided without parental consent in order to make such regulations consistent with the IDEA's express statutory and regulatory provisions.

- 2. How does OSEP reconcile this interpretation with the provisions of 20 U.S.C. §1406(c) that prohibit the Secretary, through policy letters or other statements, from establishing a rule that is required for compliance or eligibility without following the rule-making requirements of section 553 of Title 5 of the United States Code?**

The IDEA statutory and regulatory provisions are clear as explained above in response to question 1. The Secretary is implementing congressional mandates as reflected in express IDEA statutory and regulatory provisions.

3. How does OSEP reconcile its interpretation of 34 C.F.R. §300.505 with the provisions of 34 CFR §300.507(a) which authorize a public agency to commence an impartial hearing on any matter relating to the provision of FAPE to a student?

The more specific statutory and regulatory language regarding parental consent would take precedence over the more general language regarding due process hearing procedures. The IDEA does not permit public agencies to initiate a due process hearing if a parent refuses to consent to the initial provision of special education and related services. Under §300.505(a)(1)(ii), informed parent consent must be obtained before the initial provision of special education and related services to a child with a disability. Informed parent consent means that the parent has been fully informed of all information relevant to the activity for which consent is sought (including in the case of the initial provision of special education and related services the fact that FAPE services and IDEA protections are not available to the child if consent is not provided), in his or her native language, or other mode of communication (see 34 CFR §300.500(b)(1)). The public agency may not override this requirement by using the due process procedures or other methods under the IDEA. In States that offer mediation prior to a due process hearing request, school districts may use mediation to try and resolve parental refusal to consent to the initial provision of services, provided, however, that it must be clear to both parties that participation in mediation is voluntary on the part of the parents and the local education agency. See 34 CFR §§300.506(a) and (b)(1). The public agency may use mediation to informally explain to the parent the potential consequences to their child's education if the parent chooses not to provide consent for the initial provision of special education and related services for their child.

4. How does OSEP reconcile its interpretation of 34 CFR §300.505(a) and (b) with the provisions of 34 CFR §300.505(d) which authorizes a State to impose additional consent requirements if it ensures that public agencies have procedures in place to ensure that a parent's refusal to consent does result in a failure to provide FAPE?

The provisions of 34 CFR §300.505(d) do not authorize a State to impose additional consent requirements that contravene the express IDEA statutory and regulatory provisions regarding non-consent override for the initial provision of special education and related services. As noted in response to question 1, the congressional mandate and intent is clear that parental consent must be obtained before the initial provision of special education and related services and in the section immediately following reference to that consent requirement only provided for States to be able to use the IDEA due process hearing procedures to override parental refusal to consent to evaluations.

5. How can States and local educational agencies carry out their responsibilities to ensure the provision of FAPE to all students with disabilities, if an impartial hearing to override the withholding of parental consent may not be initiated?

Under the IDEA, an individual parent's refusal to consent to the initial provision of special education and related services relieves the State's obligation to provide FAPE to that child until the parent provides that consent. Once a parent consents to the initial provision of special education and related services for a child with a disability, States have an ongoing mandate to provide FAPE to that child including, if appropriate, using the due process hearing procedures to override parental refusal to consent to subsequent special education and related services. In the 1997 IDEA Amendments, Congress expressed the judgment that once parents are knowledgeable about their child's eligibility for special education and related services under the IDEA and receive an individualized education program, they have the right to make the decision as to whether the initial receipt of special education and related services is appropriate for their child.

I hope that you find this explanation helpful. If you would like further assistance, please contact Dr. JoLeta Reynolds of my office at (202) 205-5507.

Sincerely,

A handwritten signature in black ink that reads "Stephanie S. Lee". The signature is written in a cursive style with a large initial 'S'.

Stephanie S. Lee

Director

Office of Special Education Programs

Enclosures