



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

JUL 14 2004

Mr. Howard J. Fulfrost
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Dear Mr. Fulfrost:

This is in response to your letter to the Office of Special Education Programs (OSEP) containing four sets of questions regarding school districts' inability under Part B of the Individuals with Disabilities Education Act (IDEA) to use the Part B due process hearing procedures to override a parent's refusal to consent to the initial provision of special education and related services under the IDEA.

In your letter you specifically reference 34 CFR §300.507(a) of the regulations, which states that "a parent or a public agency may initiate a hearing on any of the matters described in §300.503(a)(1) and (2) relating to the identification, evaluation or educational placement of a child with a disability, or the provision of FAPE [free appropriate public education] to the child." The more specific regulatory language regarding parental consent would take precedence over the more general language in 34 CFR §300.507(a) regarding due process hearing procedures. 34 CFR §300.505(a) states that parental consent must be obtained before an evaluation is conducted. It further states that parental consent for initial evaluation may not be construed as consent for initial placement for receipt of special education and related services. This provision is immediately followed by 34 CFR §300.505(b), 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 34 CFR §§300.506-300.509, except to the extent inconsistent with State law relating to parental consent. There is no similar express authority for 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. In fact, the express authorization to override a parent's refusal to consent in this case was removed from the Part B regulations in response to the 1997 Amendments to the IDEA.

Your letter raises several questions, which are stated below with our response to each question. We have grouped questions that are similar.

- **How should school districts address lack of parental consent to the initial provision of services? How should a district respond where a parent does not consent to any of the initial services and the district believes that the program is necessary for the student to receive FAPE?**

Under the IDEA, a parent's refusal to consent to the initial provision of special education and related services relieves the school district of the obligation to provide FAPE to that child until the parent provides that consent. However, in order for the school district to meet its obligation to make FAPE available to that child, it must ensure it has met its obligations under the IDEA to (1) make FAPE available to the child with disabilities (34 CFR §300.300(a)(1)); (2) attempt to obtain parent consent to conduct an initial evaluation or reevaluation and for the initial provision of special education and related services (34 CFR. §300.505(a)); and (3) fully inform the parent of all information relevant to the activity for which consent is sought, which for the initial provision of special education and related services includes information enabling the parent to determine the appropriateness of the services to be provided and the fact that FAPE services and IDEA protections are not available to the child if consent is not provided (34 CFR §300.500(b)(1)). The 1997 IDEA Amendments reflect a judgment that once parents are knowledgeable about their child's eligibility for special education and related services under the IDEA and receive a proposed 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. School districts may wish to maintain written documentation of their efforts in meeting the obligations outlined above and the parents' refusal to consent to the initial provision of special education and related services.

Although the school district may not use the due process procedures or other methods under the IDEA to override a parent's refusal to consent to the initial provision of special education and related services, in California, where mediation is offered prior to a due process hearing request, school districts may offer mediation to try and resolve parental refusal to consent to the initial provision of special education and related 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 school district. 34 CFR §§300.506(a) and (b)(1). The school district 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.

- **What if the parent later claims that the lack of consent was due to the district's failure to offer FAPE, and not due to a refusal to accept all special education services? In this instance, how can the district protect itself from possible future claims by the parent if it cannot seek a due process hearing? How can the district protect itself from possible future claims if it cannot seek a due process hearing when a parent fails and/or refuses to consent to the initial provision of special education and related services?**

If a school district is diligent in meeting its responsibilities under the IDEA as outlined above, the district will have met its obligation to offer FAPE. However, school districts may wish to document their offer of FAPE and attempts by school officials to fully inform parents in order to obtain their consent in the event there are any later questions as to whether a school district met its duty to fully inform parents and offer FAPE to the child. If school districts are concerned about school officials being able to demonstrate that they made good faith efforts to obtain consent for the initial provision of special

education and related services, they may wish to advise school officials to consider the measures used to document attempts to obtain consent for reevaluations, such as (1) detailed records of telephone calls made or attempted and the results of those calls; (2) copies of correspondence sent to parents and any responses received; and (3) detailed records of visits to the parent's home or place of employment.

- **How should a district respond where it believes that, without special education a student might harm himself and/or other students; or that the student interferes with others' learning in the general education program? In this instance, does the district have any way of requiring the student to participate in special education and related services without initial parent consent?**

Part B of the IDEA does not permit a school district 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 or require a student to participate in special education and related services without initial parent consent, even if a student might harm himself and/or other students or interfere with the learning of other students. A school district may take measures necessary to ensure the safety of all students including a student with a disability whose parents will not consent to the initial provision of special education and related services. However, a student with a disability who is not receiving special education and related services because his or her parent has refused to provide consent to the initial provision of special education and related services is not provided the discipline protections under the IDEA at 34 CFR §§300.520 – 300.529 and, therefore, may be disciplined in the same manner as nondisabled students. This means if nondisabled students are suspended or expelled for a particular violation of school rules, a student with a disability whose parent has refused to consent to the initial provision of special education and related services may also be suspended or expelled. Finally, school officials can report crimes committed by children with disabilities to appropriate law enforcement authorities to the same extent as they do for crimes committed by nondisabled students.

- **Is California law consistent with federal law in light of *Letter to Cox* and *Letter to Yudien*, 38 IDELR 267 (OSEP 2003)?**

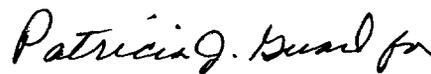
Your last question asks whether California Education Code provisions at 30 Cal. Educ. Code §56346 are consistent with 34 CFR §300.505(a)(1) of the IDEA in light of *Letter to Cox* and *Letter to Yudien*. The California Department of Education (CDE) previously submitted 30 Cal. Educ. Code §56346 as part of its eligibility documents under Part B and OSEP's analysis of this statutory provision requested that the State clarify that 30 Cal. Educ. Code §56346 does not allow school districts to use the Part B due process hearing procedures to override a parent's refusal to consent to the initial provision of special education and related services. CDE indicated in its March 2003 response that 30 Cal. Educ. Code §56346 is consistent with 34 CFR §300.505(a)(1) because it "does not override parental refusal to initiate services since the parent has signed consent to those portions of the IEP they are in agreement." CDE further clarified in its April 2004 response to OSEP that:

“... EC 56346(a) requires that if the parent refuses all services, an LEA cannot initiate any services. If a parent refuses only a part, as in EC 56345(b) [sic 56346(b)] of the proposed IEP, logically they agreed with the other part ala (a), otherwise they agreed to none. CDE assures an agency may not use due process to override a parent's refusal for all services.”

In the memorandum and issues chart that OSEP sent to CDE on May 20, 2004, OSEP informed CDE that it must include and maintain as a part of the State's eligibility document the issues chart and the assurance that an agency may not use due process to override a parent's refusal to consent to the initial provision of special education and related services. Furthermore, OSEP has requested that CDE clarify the language in EC 56346 with regard to situations where the parent refuses consent to all but a related service on the initial IEP. OSEP explained that: (1) if a parent refuses consent to all but a related service in the initial IEP and has not previously separately provided consent to the initial provision of special education and related services, the school district is not required to (but may as California's statute indicates) provide that related service; and (2) the school district may not, under these circumstances, use the Part B due process hearing procedures to override the parent's refusal to consent to the initial provision of special education and other related services. OSEP has also requested that CDE clarify that Part B funds are not used to provide the related service under these specific circumstances (when a parent has not consented to the initial provision of special education and related services but has only provided consent to a related service). In its April 2004 submission, CDE informed OSEP that the State has proposed changes to EC 56346(a) in AB 152 that contain the provision that parent consent must be obtained before initial provision of special education and related services to a child with a disability.

I hope you find this response helpful. If you would like further assistance, please contact Dale King at (202) 245-7405 or Larry Ringer at (202) 245-7496.

Sincerely,



Stephanie Smith Lee
Director
Office of Special Education Programs

cc: Dr. Alice Parker
California Department of Education