



Early Childhood, Special Education and Title Programs

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DATE: August 3, 2017

TO: Office of Special Education Programs
Hilary Malawer
400 Maryland Avenue, SW., Room 6E231
Washington, D.C. 20202

FROM: Early Childhood, Special Education, and Title Services at the Kansas State Department of Education

RE: ED Regulatory Reform Task Force Progress Report and a Request for Comments: A proposal to rescind guidance regarding 34 C.F.R. 300.300(b)(4) in OSEP Letter to Cox (Attachment 1) and Letter to Ward (Attachment 2).

To whom it may concern:

This letter is in response to a published notice in the Federal Register to provide members of the public the opportunity to submit comments concerning regulations and policy guidance they recommend the Department repeal, replace, or modify. I am recommending the Department rescind its special education guidance in Letter to Cox and Letter to Ward (see attachments) for the following reasons:

Letter to Cox, issued by OSEP on August 21, 2009, addresses the question of what LEAs are required to do when two parents, both with legal authority to make educational decisions for their child, disagree on the revocation of consent for special education and related services. This letter makes the following conclusions:

1. Under 34 C.F.R. § 300.9(c), a parent may revoke consent for his or her child's receipt of special education and related services.
2. Under 34 C.F.R. § 300.30(b)(1), when more than one person is qualified to act as a parent, the biological or adoptive parent is presumed to be the parent.
3. Therefore, the LEA must accept either parent's revocation of consent and provide both parents with prior written notice before ceasing special education and related services.
4. After revocation of consent, if the still consenting parent requests services for the student, the request must be treated as a request for an initial evaluation. With this reasoning, the revoking parent may revoke that consent for the initial evaluation, and if so, the LEA must provide a prior written notice ceasing the evaluation, whereupon, the consenting parent may subsequently again request an initial

evaluation. In the meantime, an identified student who has a consenting parent is denied his or her right under the law to receive a Free Appropriate Public Education.

5. The consenting parent does not have a right to a due process hearing to contest the revocation of consent because the revocation of consent is not an action by a public agency.

6. The public agency does not have a right to request a due process hearing because 34 C.F.R. § 300.300(b)(4)(ii) precludes due process procedures to obtain a ruling that the services may be provided to the student.

I believe the flaws contained in this guidance are that:

Conclusion 2 is based on a regulation providing a parent with a right to revoke consent for special education services to his or her child. It does not take into account the fact that, in the scenario described in Letter to Cox, there are more than one persons qualified to act as a parent, but both are biological parents. Thus, the regulation requires both parents to be presumed to be the parent of the child. Both are presumed to have a right to provide consent, or revoke consent, for services. The regulation itself, however, does not address this particular situation, where the competing parents are both presumed to be the parent.

Conclusion 3 favors a revoking parent over a consenting parent, when there is nothing in the regulation that requires this conclusion, and directly results in a child with a disability being denied a Free Appropriate Public Education.

Conclusion 5 is incorrect. The consenting parent does have a right to a due process hearing. The consenting parent does not have to allege that the revocation of consent is improper, and does not have to bring the due process action against the revoking parent. Rather, the consenting parent, after receiving a prior written notice from the LEA notifying the consenting parent that the LEA is proposing to end services, retains the right to request a due process against the LEA to challenge the LEA's decision to end services to a student: (a) that it has evaluated and found eligible for special education services; (b) that it has developed an IEP it believes the student needs to receive FAPE; and (c) for whom it has current parent consent to provide the services specified in that IEP. Not only does the consenting parent continue to have this right, when the equities of the case are presented to an impartial hearing officer, the consenting parent is likely to be the prevailing party. That would result in an LEA which follows the guidance in Letter to Cox being needlessly responsible for compensatory services and attorney fees.

The analysis in Letter to Cox is not compelled by the regulations cited. Moreover, the conclusions made in Letter to Cox are inconsistent with both the language and the purposes of the IDEA. The Cox analysis turns the IDEA upside down because it favors the revocation of consent while denying: (1) the due process rights of the consenting parent; and the right of an identified child, with a current IEP and parent consent to implement the IEP, to a Free Appropriate Public Education. These rights are statutory. The right to revoke consent is in regulation. No agency should attempt to remove either of these statutory rights through a guidance letter, based on a faulty interpretation of agency regulations. Letter to Ward was issued by OSEP on August 31, 2010. In Letter to Ward, OSEP declined a request to change its interpretation in Letter to Cox. As a result of the Regulatory Reform Task Force Progress Report and Request for Comments, I am taking this opportunity to again ask OSEP to rescind the OSEP guidance provided in Letter to Cox and Letter to Ward.

Mark Ward



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

AUG 21 2009

H. Douglas Cox
Assistant Superintendent
Special Education and Student Services
Commonwealth of Virginia
Department of Education
P.O. Box 2120
Richmond, VA 23218-2120

Dear Mr. Cox,

This is in response to your letter to me as Acting Director of the Office of Special Education Programs (OSEP) at the U.S. Department of Education, dated April 3, 2009. In your letter, you request that OSEP provide guidance regarding what local educational agencies (LEAs) are required to do when parents, both with legal authority to make educational decisions for their child, disagree on the revocation of consent for special education and related services, pursuant to the December 2008 supplemental regulations issued for the Individuals with Disabilities Education Act (IDEA). You ask which parent's consent right prevails and whether, under 34 CFR §300.300, a parent is precluded from appealing the other parent's revocation of consent. IDEA does not address this issue, as State law governs the resolution of disagreements between parents. However, a district may, based on State or local law, provide or refer parents to alternative dispute resolution systems to attempt to resolve their disagreements.

Under 34 CFR §300.9(c), once a child is receiving special education services under Part B of the IDEA, a parent may revoke consent for his or her child's receipt of special education and related services at anytime.¹ In determining who the LEA must consider a parent, and who therefore has the parental right to revoke consent, 34 CFR §300.30(b)(1) provides that the biological or adoptive parent, when attempting to act as the parent under Part B, and when more than one

¹ This situation differs from the one discussed in OSEP's April 2009 non regulatory guidance, The IDEA Part B Supplemental Regulations Issued December 1, 2008 and Effective December 31, 2008, where OSEP discussed the revocation of consent for a particular service (rather than all special education and related services). The guidance states, on page 4:

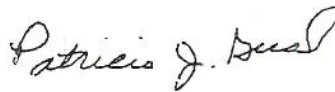
Revocation of consent for a particular service: If a parent disagrees with the provision of a particular special education or related service and the parent and public agency agree that the child would be provided with a free appropriate public education (FAPE) if the child did not receive that service, the public agency should remove the service from the child's individualized education program (IEP) and, since it does not disagree with the parents, would not have a basis for using the procedures in Subpart E of the regulations to require the service be provided to the child. If, however, the parent and public agency disagree about whether the child would be provided FAPE if the child did not receive a particular special education or related service, the parent may use the due process procedures in Subpart F of the regulations to obtain a ruling that the Service with which the parent disagrees is not appropriate for their child.

included as a "party" to mediation. Accordingly, the IDEA does not provide a mechanism for parents to resolve disputes with one another; such disputes must be settled privately or through whatever State law processes exist.

Based on section 607(e) of IDEA, we are informing you that our response is provided as informal guidance and is not legally binding, but represents an interpretation by the U.S. Department of Education of IDEA in the context of the specific facts presented.

I hope this information is helpful to you. If you have questions, please contact Dr. Deborah Morrow at 202-245-7456.

Sincerely,

A handwritten signature in cursive script, appearing to read "Patricia J. Guard".

Patricia J. Guard
Acting Director
Office of Special Education
Programs



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

AUG 31 2010

Mark Ward
Attorney – Special Education Services
Kansas State Department of Education
120 SE 10th Avenue
Topeka, KS 66612

Dear Mr. Ward:

This is in response to your March 23, 2010 letter to Patricia J. Guard, former Deputy Director of the Office of Special Education Programs (OSEP) at the U.S. Department of Education (Department). In your letter, you ask that OSEP review the policy on parental revocation of consent in the letter to H. Douglas Cox of the Virginia Department of Education, dated August 21, 2009. The referenced OSEP letter interprets Part B of the Individuals with Disabilities Education Act (Part B) as requiring a local educational agency to accept either parent's revocation of consent for his or her child's continued receipt of special education and related services under 34 CFR §300.300(b)(4), provided that the parent has legal authority to make educational decisions on behalf of the child.

As we understand the essence of your inquiry, your view is that only the parent who gave consent has the right to revoke that consent at any time, and that OSEP should not interpret the regulations to give the non-consenting parent the right to revoke that consent. We believe that OSEP lacks the authority to adopt such an interpretation. The Part B regulations require that the public agency obtain consent from the parent of a child for the initial provision of special education and related services, and that the parent of a child may revoke consent in writing for the child's continued receipt of special education and related services any time subsequent to the initial provision of special education and related services. Once the parent of a child revokes consent in writing for the child's continued receipt of special education and related services, the public agency may not continue providing special education and related services to the child, but must provide prior written notice to both parents, consistent with 34 CFR §300.503, before ceasing the provision of such services. 34 CFR §300.300(b)(4)(i).

Under Part B, any person who meets the definition of the term "parent" in 34 CFR §300.30(a) with legal authority to make educational decisions on behalf of the child has the right to revoke consent in writing to the child's continued receipt of special education and related services any time subsequent to the initial provision of special education and related services. There is no requirement in Part B that the public agency obtain consent for the initial provision of special education and related services, or accept revocation of consent for the child's continued receipt of special education and related services, from both parents with legal authority to make educational decisions on behalf of the child. Further, Part B does not condition a public agency's

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