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LEGAL UPDATE

December 30, 2008

To: Superintendents, Member School Districts (K-12)

From: Carl D. Corbin, Schools Legal Counsel CDC

**Subject: New Federal Regulations Allow Parents to Revoke Consent to Special Education Services Without Liability for Districts
Memo No. 33-2008**

The U.S. Department of Education published new regulations¹ regarding the Individuals with Disabilities Education Act (“IDEA”) on December 1, 2008, which become effective on December 31, 2008. The revised federal regulations address several compliance and reporting issues at the state level and other issues of less immediate concern; however, the revised federal regulations also provide much needed guidance on the issue of parental revocation of consent for special education services. The revised federal regulations govern parental revocations that occur on or after December 31, 2008 and do not apply retroactively to parental revocations that occurred prior to this date.

The revised federal regulations continue the previously existing rule that when parents refuse to consent to a student’s initial receipt of special education services, a Local Educational Agency (“LEA”) cannot file a request for a due process hearing or otherwise seek to override the parents’ refusal to consent to services.² Under these circumstances the LEA is not liable for failure to provide the student with a Free Appropriate Public Education (“FAPE”).³ However, a question had remained as to the duty and liability of the LEA where the parents wished to revoke

¹ The regulations are available at: http://www.access.gpo.gov/su_docs/fedreg/a081201c.html.

² This Legal Update refers to “parents” in the plural; however, please be advised that one parent, with educational rights over the child, may revoke consent for special education services. In the case of two parents disagreeing, with one parent consenting and the other parent revoking consent, an LEA should continue to provide the services.

³ 34 C.F.R. 300.300(b)(3)-(4).

consent after their child had received special education services. California resolved this issue through Education Code section 56346(f), which requires the LEA to file for a due process hearing in this circumstance where the LEA believed the student required such special education services in order to receive a FAPE.

The revised federal regulations, which supersede Education Code section 56346(f), provide that when parents revoke consent for the provision of special education services to a student who is receiving special education services the LEA will not be liable for failure to provide the student with a FAPE under the IDEA, so long as the following revocation process is followed.⁴

Process for Revocation

1. The parents must revoke the special education services in writing;
2. The LEA must “promptly” and within a “reasonable time” respond to the parents’ request with prior written notice before discontinuing the services; and
3. After sending the parents prior written notice, the LEA may discontinue the special education services.

Parental revocation of consent for services cannot be retroactive; therefore, an LEA is not required to amend education records to remove any references to a student’s prior receipt of special education assessment and services.⁵ An LEA or Special Education Local Plan Area (“SELPA”) may choose to develop a standard form for parents to use to revoke consent for special education services, but the use of the form cannot delay the discontinuation of the services.⁶ An LEA may request from parents, but cannot require, the reason for their revocation of special education services for their child.⁷

Prior Written Notice

The prior written notice, in conformance with 34 C.F.R. 300.503, should provide the student’s parents with the following:

1. A statement that the parents are requesting to revoke consent for special education services for their child, which will result in the discontinuance of special education services and result in the child being treated as a general education student for all purposes (to include disciplinary matters);
2. A statement describing the general education program and services the student will receive;
3. A statement that while the LEA believes the student still requires special education services to receive a FAPE, the parents are revoking consent for the special education services;

⁴ 34 C.F.R. 300.300(b)(4).

⁵ 34 C.F.R. 300.9(c)(3).

⁶ Comments to the Regulations, 73 Fed.Reg. 73008 (Dec. 1, 2008).

⁷ *Id.*

4. A statement that the LEA believes the student still requires special education services based on the students most recent assessments, reports, and other information (which should be listed in some detail);
5. A statement that the student's parents have protection under the procedural safeguards of the IDEA (and we also advise a copy of the procedural safeguards accompany the prior written notice);
6. A statement regarding sources of information for the parents to contact to understand the requirements of the IDEA such as the LEA special education administrator; and
7. A statement regarding any other relevant factors or issues.

The prior written notice should be provided in the native language of the student's parents unless it is clearly not feasible to do so. In the case of a student who is eighteen or older and requests to revoke consent for services, the prior written notice should be provided to both the student and the student's parents although the student holds the revocation rights.⁸ We recommend that the prior written notice provide a short time period in which the special education services will continue to be provided, such as five school days, before the services are discontinued in order to allow the students' parents to fully consider their action and change their minds (i.e. request for the services to continue).

Revocation of Services Changes Status of Student to General Education

Once a student's parents revoke the consent for special education services, the student should be treated the same as any other general education student, which includes matters of discipline.⁹ The student may be placed in any classroom where other general education students are placed, including general education classrooms co-taught by a special education teacher.¹⁰ If the student's parents later change their minds and request special education services for their child, then the LEA must treat the parents' request as an initial request for services.¹¹ This means the LEA must assess the student (although the assessment can be abbreviated at the LEA's discretion based upon previous assessment information), convene an Individualized Education Program ("IEP") meeting to determine eligibility for special education, and provide an appropriate offer of services if the student qualifies. All timelines regarding initial referrals, assessments and IEP meetings would apply.

An LEA should neither try and "convince" parents to continue to consent to special education services for their child¹² nor try to "encourage" parents to revoke consent for special education services where the LEA believes the student still requires special education services in order to receive a FAPE.¹³ The comments to the regulations make clear that the parents are presumed to have the "best interests" of their child in mind when revoking consent for special education services.¹⁴ Nevertheless, an LEA is still authorized to file a complaint with child

⁸ Comments to the Regulations, 73 Fed.Reg. 73010 (Dec. 1, 2008).

⁹ Comments to the Regulations, 73 Fed.Reg. 73012 (Dec. 1, 2008).

¹⁰ Comments to the Regulations, 73 Fed.Reg. 73013 (Dec. 1, 2008).

¹¹ Comments to the Regulations, 73 Fed.Reg. 73015 (Dec. 1, 2008).

¹² *Id.*

¹³ Comments to the Regulations, 73 Fed.Reg. 73014 (Dec. 1, 2008).

¹⁴ Comments to the Regulations, 73 Fed.Reg. 73009-73010 (Dec. 1, 2008).

protective services when abuse or neglect is suspected, which may be triggered by parents revoking consent for special education services for their child.¹⁵

No Need to Develop a 504 Plan

The United States Department of Education, Office of Civil Rights (“OCR”) has advised that when a parent rejects consent for implementation of an IEP developed under the IDEA the parent is essentially rejecting what would be offered under Section 504 of the 1973 Rehabilitation Act.¹⁶ Therefore, an LEA is not required to develop a 504 Plan for a student whose parents have refused to consent or revoked consent for special education services.

Partial Revocation of Parental Consent

In California, Education Code section 56346(f) states that LEAs must file for due process hearing if a student’s parents refuse to consent to a component of the student’s existing special education program where the LEA believes the student requires the component in order to receive a FAPE. The federal regulations unfortunately do not clearly resolve the issue of partial revocation of parental consent. However, a comment to the federal regulations strongly suggests that parents may not partially revoke consent for special education services – in other words, consent may be an all or nothing proposition:

If, however, the parent and public agency disagree about whether the child would be provided with FAPE if the child did not receive a particular special education or related service, the **parent** may use the due process procedures...to obtain a ruling that the service with which the parent disagrees is not appropriate for their child.¹⁷ (Emphasis added).

Comments to the federal regulations do not carry the force of law, but are persuasive authority cited by the Office of Administrative Hearings (“OAH”) and the courts in interpreting the law. Therefore, based on the above, we suggest that districts contact legal counsel to obtain assistance in resolving an issue of partial parent consent or partial parent revocation of existing special education services. We will keep you updated as OAH and the courts further clarify this legal issue.

Please contact any of our attorneys if you have any questions regarding this legal update.

¹⁵ Comments to the Regulations, 73 Fed.Reg. 73016 (Dec. 1, 2008).

¹⁶ *Letter to McKethan* (OCR 1996) 25 IDELR 295.

¹⁷ Comments to the Regulations, 73 Fed.Reg. 73011 (Dec. 1, 2008).