



Fagen Friedman & Fulfroft LLP

Here and Now

Parental Consent



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What's On the Agenda . . .

Things To Do	
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- Key Definitions
- When Is Consent Required?
 - In General
 - Assessments and Reassessments
 - Initial and Subsequent Provision of Services
- Revocation of Consent



I. Key Definitions



Consent

- Three-part legal definition
 - Parent has been fully informed of all information relevant to activity for which consent is sought, in his or her native language, or through another mode of communication
 - Parent understands and agrees in writing to carrying out activity for which consent is sought
 - Parent understands that granting of consent is voluntary and may be revoked at any time

(34 C.F.R. § 300.9; Ed. Code, § 56021.1)



Fully Informed

- Law does not provide definition of what constitutes “fully informed” consent
 - OSEP: Parent need not have an in-depth understanding of all services that student’s IEP might provide or every aspect of proposed assessment; parent must merely have general understanding of activity for which he or she is providing consent

([Letter to Johnson](#) (OSEP 2010) 56 IDELR 51)



Fully Informed – Case Example

Oakland Unified School Dist. (OAH 2016)

■ Facts:

- Parents consented to kindergarten placement for “profoundly gifted” Student with autism
- Shortly after school year began, Parents asked District to move Student to first grade
- After District refused, Parents filed for due process
- Claimed consent was not “fully informed” because they were misled about Student’s predicted academic aptitude



Fully Informed – Case Example

Oakland Unified School Dist. (OAH 2016)

■ Decision:

- ALJ rejected Parents' claim
- District did not deceive Parents into agreeing to kindergarten placement
- Parents were attorneys with knowledge of special education law and understood that no placement would be made until Student was assessed
- Fully understood reasons for kindergarten placement and consented; changed minds later

(Student v. Oakland Unified School Dist. (OAH 2016) Case No. 2015120810)



Consent vs. Agreement

- “Whenever consent is used . . . , it means that the consent is both informed and in writing”
- “The meaning of the terms ‘agree’ or ‘agreement’ is not the same as consent”
- “‘Agree’ or ‘agreement’ refers to an understanding between the parent and the public agency about a particular question or issue, which may be in writing, depending on the context”

(71 Fed. Reg. 46551 (Aug. 14, 2006))



Parent

- “Parent” means:
 - Biological or adoptive parent
 - Foster parent if authority of biological or adoptive parents to make educational decisions specifically has been limited by court order
 - Guardian generally authorized to act as child's parent or to make educational decisions
 - Individual acting in the place of a biological or adoptive parent
 - Surrogate parent appointed by court

(Ed. Code, § 56028)



Who Cannot Qualify as a Parent?

- The state or any subdivision of state
- Nonpublic, nonsectarian school or agency under contract with district for provision of special education or designated instruction and services for child

(Ed. Code, § 56028, subs. (c) and (d))



Divorced Parents

- When parents are divorced, all IDEA parental rights apply to both parents, unless court order or state law specifies otherwise
 - If a judicial decree or custody order specifically identifies one parent (or another individual) to make educational decisions for child, then that person would be determined to be the “parent”

(34 C.F.R. § 300.30(b)(1); 71 Fed. Reg. 46,568 (2006); Ed. Code, § 56028, subd. (b))



Divorced Parents – Case Example

Val Verde Unified School Dist. (OAH 2014)

■ Facts:

- Parents were divorced with joint custody
- Mother consented to assessment; Father did not
- Court order required Parents to “confer” in making educational decisions but did not require mutual consent
- District delayed assessment until it obtained Father’s consent
- Mother filed for due process claiming District missed 60-day assessment time frame



Divorced Parents – Case Example

Val Verde Unified School Dist. (OAH 2014)

■ Decision:

- ALJ found Mother's consent was sufficient to start 60-day assessment timeline
- Court order did not specify circumstances requiring both Parents' consent, so District was required to accept consent from either Parent
- Delay was procedural violation, but did not deny FAPE
- Student ultimately found ineligible for special ed

(Student v. Val Verde Unified School Dist. (OAH 2014) Case No. 2013090251)





Practice Pointers: Consent and Divorced Parents

- Do not assume that just because student lives with one parent that other parent lacks decision-making rights or authority
- Ask for and review most recent family court documents; look for custody definition and its parameters
- At IEP meeting and on IEP notes, specify who has right to make educational decisions



II. When Is Consent Required?



Consent Generally

- IDEA regulations specify parental consent is required for district actions in conjunction with the following educational events:
 - Preplacement assessments and reassessments
 - Initial provision of services
- State law can establish additional consent requirements (e.g., Ed. Code, section 56346)

(34 C.F.R. § 300.300(a)-(c))



Consent Generally

- IDEA requires parental consent for various other activities not specified in 34 C.F.R. section 300.300
- Examples:
 - To invite representative from agency responsible for providing or paying for transition services to IEP team meeting
 - To disclose personally identifiable information from student's education records

(34 C.F.R. § 300.321(b)(3); 34 C.F.R. § 300.622)



When Is Consent Not Required?

- Review of existing data as part of an evaluation or a reevaluation
- Administration of test or other evaluation given to all students
 - Unless, before administration of that test or evaluation, consent is required of all students
- Collection of data in general ed setting at primary level of RTI

(34 C.F.R. § 300.300(d)(1); Ed. Code, § 56321; Letter to Gallo (OSEP 2013) 61 IDELR 173)



Initial Assessments

- Consent for initial assessment is separate and distinct from consent for initial placement or provision of services
- Districts must make “reasonable efforts” to obtain the informed consent from parents for initial assessment plan
 - Must document efforts
 - Parent have at least 15 days to decide

(34 C.F.R. § 300.300; Ed. Code, § 56321)



Initial Assessments

- If parents do not consent to initial assessment plan, district may, but is not required to, pursue assessment by showing, at due process, that it needs to assess student and is lawfully entitled to do so
 - District does not violate child find, assessment obligations, or its obligations to determine eligibility if it declines to pursue assessment through due process

(34 C.F.R. § 300.300(a); Ed. Code, § 56321, subd. (c))



Initial Assessments

- Consent override procedures are not available for:
 - Children who are home-schooled or placed by their parents in private school
 - Infants and toddlers covered under Part C (because participation in program is considered voluntary)
- Screening to determine appropriate instructional strategies is not considered to be assessment for eligibility

(71 Fed. Reg. 46653 (Aug. 14, 2006); 34 C.F.R. § 303.420; Ed. Code, § 56321, subd. (f))



Reassessments

- Reassessment must be conducted if district determines that educational or related services needs warrant reassessment, or if parents or teacher requests reassessment
 - Not more frequently than once a year, unless parent and district agree otherwise
 - Must occur at least once every 3 years, unless parent and district agree, in writing, that reassessment is unnecessary

(34 C.F.R. § 300.300(c); Ed. Code, § 56381, subd. (f))



Reassessments

- District must make documented “reasonable efforts” to obtain parental consent
- If parents fail to respond, district may proceed with reassessment without parental consent

(34 C.F.R. § 300.300(c); Ed. Code, § 56506, subd. (e); Ed. Code, § 56381, subd. (f))



Reassessments

- If parents refuse consent to reassessment plan, district may, but is not required to, pursue reassessment by showing, at due process, that it needs to reassess student and is lawfully entitled to do so
 - District does not violate child find, reassessment obligations, or its obligations to determine eligibility if it declines to pursue assessment through due process

(34 C.F.R. § 300.300(c); Ed. Code, § 56381, subd. (f))



Assessments – Case Example

Castro Valley Unified School Dist. (OAH 2016)

■ Facts:

- 17-year-old Student with intellectual disability and visual impairment
- District determined Student required reassessment, but had difficulty obtaining parental consent
- Parent believed assessments were too numerous to be completed within 60 days; would agree only if numerous conditions were met
- District filed for due process



Assessments – Case Example

Castro Valley Unified School Dist. (OAH 2016)

■ **Decision:**

- ALJ ruled that District properly treated Parent's response as refusal to consent to assessment
- Parent who places conditions on assessments is regarded as having refused consent
- District demonstrated that it could adequately assess Student within 60 days
 - Assessments would primarily involve the interaction of adults in reviewing records; Student would have limited direct involvement

(Castro Valley Unified School Dist. v. Student (OAH 2016) Case No. 2015110947)



Assessments – Case Example

Pasadena Unified School Dist. (OAH 2016)

■ Facts:

- After Student was involved in traumatic incident in science camp, Parents requested that District fund counseling services from NPA
- District sent Parents assessment plan for educationally-related intensive counseling services assessment to identify Student's mental health needs
 - Parents refused to consent, as they did not believe Student had educational needs related to his social-emotional functioning that warranted reassessment



Assessments – Case Example

Pasadena Unified School Dist. (OAH 2016)

■ **Decision:**

- ALJ: District failed to prove that counseling services assessment of Student was warranted
 - Student made good progress on IEP goals and had no behavior issues in the classroom
- District's assessment plan was legally deficient
 - Did not explain types of assessments to be conducted, what assessment would measure, assessment tools to be used, or additional data needed
 - Even if assessment was warranted, faulty assessment plan would prohibit District from proceeding without consent

(Pasadena Unified School Dist. v. Student (OAH 2016) Case No. 2016060614)





Practice Pointers: Consent and Assessments

- If parents are refusing to consent, take steps to discover why
- When parents object to specific assessor, ask if they are willing to meet to work out their concerns
- If parents are concerned that results will assign “label” to their child, try to focus instead on services that can help their child
- Do what is in best interest of child, which might mean filing for due process, but be prepared to show why assessment is necessary



Initial Services

- Consent is required before initial provision of special education and related services
- If parent does not consent, districts are prohibited from using due process procedures to override lack of consent
 - Will not violate FAPE obligations
 - No requirement to convene IEP team meeting or develop IEP

(34 C.F.R. § 300.300(b); Ed. Code § 56346(c)(1)-(2))



Subsequent Services

- IDEA does not require a parent to consent to an IEP – after initial consent – before district can implement subsequent IEPs
- California law contains stricter requirements
 - Education Code section 56346 imposes specific obligations on districts when parents do not consent to subsequent IEP after previously consenting to provision of services or when parents consent to provision of certain services but not to all components of a proposed IEP



Subsequent Services

- Implementation of agreed-upon services
 - If parent provides written consent to receipt of special education and related services for student, but does not consent to all components of IEP, the district must – without delay – implement components to which parent has consented

(Ed. Code, § 56346, subd. (d); I.R. v. Los Angeles Unified Sch. Dist. (9th Cir. 2015) 805 F.3d 1164)



Subsequent Services

- Obligation to file for due process
 - If district “determines that the proposed special education program component to which the parent does not consent is necessary to provide” a FAPE, “a due process hearing shall be initiated”
 - Hearing must be initiated “expeditiously” to “ensure that the conflict between the school district and the parents is resolved promptly”

(Ed. Code, § 56346, subd. (f); I.R. v. Los Angeles Unified Sch. Dist. (9th Cir. 2015) 805 F.3d 1164)



Subsequent Services

- As yet unresolved issues
 - Do districts need to file for due process if parents consent to IEP services, but not to goals?
 - Do districts need to file for due process before exiting student from special ed?
 - Exiting is technically not an offer of FAPE
 - Mixed authority



Services – Case Example

I.R. v. Los Angeles Unified School Dist. (9th Cir. 2015)

■ Facts:

- District provided services to which Parent consented, but did not implement portions of IEPs to which she did not consent
 - As a result, Student remained in general education classroom from November 2010 until February 2012
- Parent ultimately filed for due process
- Court addressed issue of whether District violated Ed. Code section 56346



Services – Case Example

I.R. v. Los Angeles Unified School Dist. (9th Cir. 2015)

■ Decision:

- Court rejected District's argument that it did not unreasonably delay filing because it was still attempting to use IEP meeting process
 - Delay of more than one year was unreasonable
 - Districts must act with "reasonable promptness" to minimize duration of any denial of FAPE
- "Vague hope that maybe an agreement . . . will be reached someday [does not] justify putting off the obligation imposed by section 56346"

(I.R. v. Los Angeles Unified School Dist. (9th Cir. 2015) 805 F.3d 1164)



Services – Case Example

Tehachapi Unified School Dist. (OAH 2016)

■ Facts:

- Grandparents were advised not to sign IEP for 5-year-old Student because advocate was not present at May 2014 IEP team meeting
- Grandparents subsequently removed Student from school after incident with aide
- District attempted to reconvene meeting
- In January 2015, Grandparents agreed to May 2014 IEP, except for allowing Student to return to current teacher's classroom



Services – Case Example

Tehachapi Unified School Dist. (OAH 2016)

■ Decision:

- ALJ rejected claim that District denied Student FAPE by failing to initiate due process hearing within reasonable time after Grandparents failed to provide consent to May 2014 IEP
- Did not fail to comply with directive in I.R.
- “District must have some flexibility to allow for due consideration of the parent’s reasons for withholding consent to an IEP component”

(Student v. Tehachapi Unified School Dist. (OAH 2016) Case No. 2015120889)



Services – Case Example

Capistrano Unified School Dist. (OAH 2018)

■ Facts:

- Parents consented to implementation of goals and services, but did not consent to IEP as provision of FAPE because they believed Student required full-time or 1:1 aide support
- District began implementing IEP without aide
- Parent claimed District denied FAPE by not filing for due process; District claimed aide was not necessary component of FAPE



Services – Case Example

Capistrano Unified School Dist. (OAH 2018)

■ **Decision:**

- ALJ determined that District was not required to file for due process
- No evidence suggested that Student's progress was significantly based on full-time aide support
- Full-time aide accommodations more restrictive and unnecessary where the ultimate target was to make Student independent and prompt-free

(Student v. Capistrano Unified School Dist. (OAH 2018) Case No. 2017120674)





Practice Pointers: Consent and Services

- Train team members to ensure they are aware of law concerning what districts may, must or cannot do when parents refuse to provide consent
- If parents object to one or more proposed services, convene IEP meeting as soon as possible to discuss whether service(s) is necessary for FAPE
- Regularly ask for parent input and questions to ensure they understand services being proposed
- Verbal consent to services is not effective



III. Revocation of Consent



Legal Guidelines

- Any party meeting legal definition of “parent” may revoke consent for continued provision of services at any time
- Either parent may revoke
- Revocation must be in writing
- Revocation is prospective only

(34 C.F.R. § 300.9(c); 34 C.F.R. § 300.300(b)(4); Letter to Cox (OSEP 2009) 54 IDELR 60; Letter to Ward (OSEP 2010) 56 IDELR 237)



District Obligations

- Upon receipt of written revocation, district:
 - May not continue to provide special education and related services (but must provide PWN before ceasing services)
 - May not use mediation or due process procedures to obtain ruling to provide services
 - Will not be considered in violation of requirement to make FAPE available to child because of failure to provide further services

(34 C.F.R. § 300.300(b)(4); Ed. Code, § 56346, subd. (d))



District Obligations

- District must provide PWN prior to terminating services to give time for parents to consider consequences of revocation
- Although revocation is effective when given by one parent (even if the other parent opposes it), PWN must be given to “parents,” not just to one of them

(34 C.F.R. § 300.300(b)(4); Ed. Code, § 565400; Letter to Ward (OSEP 2010) 56 IDELR 237))



Revocation – Case Example

Roseville Joint Union High School Dist. (OAH 2017)

■ Facts:

- Divorced Parents agreed that Student needed later start time and independent study to address hypersomnia
- Parents believed IEP could not be implemented at school that allowed late start
- Father revoked consent to special ed; District mailed PWN to Father (but not Mother) and immediately terminated services



Revocation – Case Example

Roseville Joint Union High School Dist. (OAH 2017)

■ Decision:

- Failure to provide both Parents with legally compliant PWN denied FAPE
- Immediately ending services did not allow time to resolve confusion about available options
- Mother testified she would have attempted to reverse revocation had she received PWN

(Student v. Roseville Joint Union High School Dist. (OAH 2017) Case No. 2017070292)



Revocation – Case Example

Capistrano Unified School Dist. (OAH 2014)

■ Facts:

- Parents advised District they were “formally revoking” IEP; disagreed with assessments and requested three IEEs
- District treated Parents’ letter as revocation of consent for all special ed services and denied IEE
- As a result, District did not provide IEEs or seek due process to defend assessments
- Parents claimed denial of FAPE for refusal to fund IEEs



Revocation – Case Example

Capistrano Unified School Dist. (OAH 2014)

■ Decision:

- ALJ found that “plain language” of Parents’ “revocation” pertained exclusively to IEP
- Because Parents also notified District they would be providing Student with another placement and would seek reimbursement, District should have been aware Parents did not intend to revoke all consent for eligibility and services
- District ordered to fund IEEs

(Student v. Capistrano Unified School Dist. (OAH 2014) Case No. 2014040723)



Revocation: Specific Issues

- Accommodations: Teacher may provide accommodations available to nondisabled students under relevant state standards
- Child Find: District is not absolved of child find responsibilities
 - But at least one decision holds that child find will not be triggered unless there is evidence that student for whom parents revoked consent has new or different needs

(IDEA Part B Supplemental Regulations, Non-Regulatory Guidance (OSEP April 2009); Houston Indep. School Dist. (SEA TX 2014) 114 LRP 44750)



Revocation: Specific Issues

- Discipline: Student may be disciplined as general education student and is not entitled to IDEA's discipline protections
- Education Records: Districts not required to amend student's education records to remove references to receipt of special education

(Questions and Answers on Disciplinary Procedures (OSERS 2009) 52 IDELR 231; 73 Fed. Reg. 73014 (Dec. 1, 2008))



Revocation: Specific Issues

- Placement: District may place student in any classroom where it places other general education students
- Reinstatement: Following revocation, if either parent requests that his or her child be re-enrolled in special education, district must treat such request as request for initial assessment
 - No limit to number of times parent may revoke consent and then subsequently request reinstatement of services

(Letter to Cox (OSEP 2009) 54 IDELR 60; 73 Fed. Reg. 73014 (Dec. 1, 2008))



Revocation: Specific Issues

- Obligations under Section 504 when special ed consent is revoked?
- Split in authority
 - Revocation of services under IDEA is tantamount to revocation under Section 504

vs.

- Student who is no longer being served under IDEA IEP due to revocation of consent should nonetheless be evaluated under Section 504





Practice Pointers: Revocation of Consent

- Examine language and circumstances surrounding any revocation to make sure it is intended to apply to all special education and related services
- Provide PWN “promptly” after receipt of revocation
- Provide PWN “reasonable” time before discontinuing services
- Provide detail in PWN about consequences of revocation, specifically that student will no longer receive special education services of any kind



Take Aways . . .



- Consent is one of parents' most important special education procedural safeguards
- Rules governing parental consent encompass broad range of responsibilities for districts
- Continue to emphasize meaningful parent participation as standard for IEP team meetings and entire IEP development and implementation process



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