

New IDEA Regulation Allows Unilateral Parental Withdrawal of Students from Special Education

By Thomas C. Warner

Effective January 1, 2009, the United States Department of Education adopted several revisions to the federal regulations implementing the Individuals with Disabilities Education Act (“IDEA”). While we emphasize that our clients should become familiar with all of these revisions, one change of particular interest is the revision located at Section 300.300(b)(4), which states:

(4) If, at any time subsequent to the initial provision of special education and related services, the parent of a child revokes consent *in writing* for the continued provision of special education and related services, the public agency-

- (i) *may not* continue to provide special education and related services to the child, but *must provide prior written notice* in accordance with § 300.503 before ceasing the provision of special education and related services;
- (ii) *may not use the procedures in subpart E of this part (including the mediation procedures under § 300.506 or the due process procedures under §§ 300.507 through 300.516 in order to obtain agreement or a ruling that the services may be provided to the child;*
- (iii) *will not be considered to be in violation of the requirement to make FAPE available to the child because of the failure to provide the child with further special education and related services, and*
- (iv) *is not required to convene an IEP Team meeting or develop an IEP under §§ 300.320 and 300.324 for the child for further provision of special education and related services.*

This regulation provides that a student who was previously identified by a school district for special education or related services under the IDEA may be withdrawn from services by his or her parents at any time and for any reason, provided that such withdrawal is in writing. By way of further analysis, we offer five points of emphasis in interpreting this new provision:

1) Revocation of consent must be in Writing.

A parent may conceivably request his or her child’s withdrawal orally or in writing. We advise our clients to create a withdrawal form for this purpose. Should any of our clients require assistance in drafting a withdrawal form, please contact us. Should a school district receive revocation of consent from a parent in writing, even if not on the district’s withdrawal form, the district may accept that writing as sufficient to revoke consent pursuant to the new regulation. If, however, a parent indicates such intent to revoke

consent *orally*, the District must follow up with that parent to obtain their intent in written form.

2) Districts must, After receipt of parental revocation of consent in writing, follow up with a NOREP/PWN.

Pursuant to part (i) above, school districts must provide “prior written notice” before ceasing the provision of special education and related services. As soon as written notice revoking consent has been received from the parent(s), the district must issue a NOREP/PWN prior to the discontinuation of services. If the NOREP/PWN is returned as “Approved” within ten (10) days of the parents’ receipt, the District may discontinue services at that time. As the NOREP/PWN is only designed to provide notice to the parents of the LEA’s proposed action, such approval is not required. Thus, the District may also discontinue services if the parent fails to return the NOREP/PWN after ten (10) days of parents’ receipt of same.

3) Districts may not invoke due process and/or mediation procedures to dispute the Parent’s attempted revocation of consent.

Despite the fact that the best interests of the child presumably are not served by parents’ unilateral withdrawal of their child from the receipt of special education, school districts may not challenge that decision through the resolution mechanisms provided by the Office for Dispute Resolution. Essentially, this precludes districts from seeking a ruling that special education services must be provided to a child, leaving the parents as the sole decision-makers.

4) After revocation, Districts will not be bound to provide FAPE to the student.

Once revocation of special education services has been properly affected by way of parental written consent and the issuance of a NOREP/PWN, school districts are no longer bound to provide a FAPE to that particular student. The student should be treated as a regular education student from that point forward. However, as a point of caution, the comments that accompany the new regulations make clear that the Department of Education does not intend this regulation as an extinguishment of each district’s ongoing “child find” obligation. Regrettably, this commentary makes little practical sense, as in these situations, it is the parents, not the school district, who propose to remove the student from special education.

Thus, a literal reading of the comments would lead a school district to believe that, as the district would, of course, still suspect the student is disabled, it should issue a Permission to Evaluate Request form *the moment after* the student is withdrawn by the parents. Because such an interpretation of the new regulation would destroy its intention (that being to honor the parents’ request for withdrawal from special education), we do not recommend that course of action. Instead, these comments should be interpreted as re-

emphasizing the district's ongoing child find obligation with regard to *other disability categories under which the student was never identified*. For example, we can certainly envision an instance where a parent withdraws his or her child, previously identified with specific learning disabilities in reading, writing, and written expression, from special education pursuant to this new regulation. Here, while the district would not be subject to future "child find" claims for *those* particular disabilities, it is still obligated to timely identify emotional disturbances, other health impairment, or any of the other disability categories described in the IDEA.

5) Districts will not have to remove references to special education services and eligibility from a withdrawn student's record.

Parental withdrawal of a student from special education pursuant to this new regulation *does not* require school districts to remove special education documentation from that student's record. We recommend that districts preserve these records. Parents who have realized that their child is not receiving the supports and services that he or she needs may later have second thoughts, opting to bring "child find" claims against the district. It is in those instances where it will be vital for districts to demonstrate that they did timely identify and program for those students.

Clients who have questions regarding issues discussed in this article, or any education law matter, should feel free to call us at 215-345-9111.