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CONSENT VS. NOTICE UNDER THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT: WHICH DO YOU NEED, AND WHEN DO YOU NEED IT?

A frequent area of discussion and concern amongst public school special education personnel is the concept of parental *consent* versus parental *notice*. These terms each carry a separate, distinct legal significance, and the difference between the two can go a great way toward shaping the nature and scope of special education services provided to a particular child. The following is a basic overview of the two concepts, when each is required, and the effect of each upon a child's special education services.

What is "notice" and when must it be provided?

Generally speaking, a legal *notice* requirement is fairly self-explanatory: one party must simply impart certain information upon the other. In the context of the Individuals with Disabilities Education Act (IDEA), Local Educational Agencies (LEAs) must provide prior *written* notice to parents of children with disabilities in the following circumstances (bolded items indicate items that also require parental *consent*, as discussed below):

1. **When the LEA proposes to *initiate* the provision of special education services to the child;**
2. **When the LEA seeks to *evaluate* or *reevaluate* the child;**
3. When the LEA proposes to change the *identification* of the child;
4. When the LEA seeks to change the child's educational *placement*;
5. When the LEA proposes a change of placement for disciplinary purposes;
6. When the LEA proposes ESY services;
7. When the LEA requests a due process hearing, or an expedited due process hearing;
8. When the LEA proposes student's graduation from high school;
9. When the LEA is proposing student is exited from special education services;
10. When the student is exiting from high school due to exceeding the age eligibility for a *Free Appropriate Public Education* (FAPE)
11. When the LEA proposes to change the nature of its provision of a FAPE to the child;
12. When the LEA refuses to initiate the provision of special education services to the child;
13. When the LEA refuses to change the identification of the child;
14. When the LEA refuses to evaluate or reevaluate the child;
15. When the LEA refuses to change the child's educational placement;
16. When the LEA refuses to change the nature of its provision of a FAPE to the child; or
17. When the parents of the child have, in writing, requested that the child be withdrawn from special education services.

In Pennsylvania, the vehicle through which such prior written notice is accomplished is the Notice of Recommended Educational Placement/Prior Written Notice (NOREP/PWN) form. The NOREP/PWN has been created by the Pennsylvania Department of Education for use by its constituent LEAs in all of the situations listed above with the exception of item #2, which is governed by the Permission to Evaluate/Reevaluate (PTE/PTRE) forms. For all of the other items listed above, the NOREP/PWN *must* be provided to parents.



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For which of these items is parental “consent” required?

The IDEA also calls for a heightened requirement for items #1 and #2 above: informed consent. Informed consent is a party’s agreement to allow something to happen after being apprised of the risks involved and the alternatives. Under the IDEA, an LEA *must* await the parent’s written approval on the NOREP/PWN or PTE/PTRE before proceeding with the *initial* provision of special education services or proceeding with a multidisciplinary evaluation or reevaluation.

The parent’s refusal to consent to each of these items carries vastly different consequences. If a parent refuses the initial provision of special education services (in other words, they do not consent to the NOREP/PWN that accompanies the very first IEP offered to the child), the LEA can take *no further action*. It must accept the parent’s decision, even if the consequence is the denial of special education services to a child who, in the professional opinion of the LEA, requires such services. At this point, the LEA’s obligation to locate and identify the child for special education services has been satisfied.

In the case of parental refusal to consent to an evaluation or reevaluation, however, the LEA does have the *option* of seeking a due process hearing to gain a hearing officer’s order allowing the evaluation or reevaluation to proceed. The LEA, however, is not required to do so. The IDEA’s implementing regulations clarify that the LEA’s “child find” obligation is satisfied once a parent refuses to consent.

If items #3 through #17 only require written notice, what happens once that notice has been provided?

Once a NOREP/PWN is sent to the parents, and provided that it does not concern items #1 or #2 above, the LEA’s obligation to provide *notice* is satisfied. In cases where the LEA proposes an action, a parent can only prevent that action by filing a due process complaint or mediation request with the Pennsylvania Office for Dispute Resolution (ODR) within 10 *calendar days* of the parents’ *receipt* of the NOREP/PWN.

If the parents (a) do not return the NOREP/PWN; (b) return it without indicating their intentions; (c) return it by indicating that they intend to seek a due process hearing or mediation but do not actually contact ODR to do so, the district must proceed with its proposed action beginning on day 11. This “10 day rule,” which has been determined by PDE and has not been disturbed by Pennsylvania Special Education Due Process Hearing Officers, strikes the delicate balance between providing parents with notice and an opportunity to contest the LEA’s recommendation and the LEA’s obligation to ensure that children are receiving a FAPE on an ongoing basis.

Parents can, of course, still seek due process or mediation after the 10-day deadline. If they do so, however, the district is no longer under an obligation to implement the *previous* program and placement while mediation and/or due process proceedings play out.

A note about the PTE/PTRE forms.

As referenced above, Pennsylvania has created the PTE and PTRE to serve the purpose of the NOREP/PWN when it comes to obtaining parental consent for evaluations and reevaluations. In other words, Pennsylvania uses one form of prior written notice—the PTE and PTRE—to provide notice of evaluations and reevaluations, and another (the NOREP/PWN) to provide notice of everything else.

In investigating a particular parent complaint, PDE decided that the PTE and PTRE did not contain all of the

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IDEA's required elements for prior written notice (specifically, those forms did not include a description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action; a description of other options that the IEP team considered and the reasons why those options were rejected; and a description of other factors that are relevant to the agency's proposal or refusal). Rather than simply add those missing elements to the existing PTE and PTRE, PDE advised all LEAs to send out *both* a NOREP/PWN *and* a PTE/PTRE simultaneously. We do not recommend this course of action; we instead recommend that our clients revise the existing PTE/PTRE to include the missing information described herein. Please contact us if you require further assistance in doing so.

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.