



Information UPDATE

Wisconsin Department of Public Instruction/Tony Evers, State Superintendent/P.O. Box 7841/ Madison, WI 53707-7841

BULLETIN NO. 10.01

April 2010

TO: District Administrators, CESA Administrators, CCDEB Administrators,
Directors of Special Education and Pupil Services, and Other Interested Parties

FROM: Carolyn Stanford Taylor, Assistant State Superintendent
Division for Learning Support: Equity and Advocacy

SUBJECT: Parent Consent Requirements When Parents Who Share Legal Custody Do Not Agree

Special education law requires a district to obtain “informed consent” from a parent before conducting an initial evaluation or a reevaluation of a child with a disability (34 CFR 300.300(a) and (c)). The law also requires “informed consent” from a parent before initial provision of special education and related services to the child with a disability (34 CFR 300.300(c)).

Consent is defined at 34 CFR 300.9 as follows:

Consent means that—

- (a) The parent has been fully informed of all information relevant to the activity for which consent is sought, in his or her native language, or other mode of communication;
- (b) The parent understands and agrees in writing to the carrying out of the activity for which his or her consent is sought, and the consent describes that activity and lists the records (if any) that will be released and to whom; and
- (c)(1) The parent understands that the granting of consent is voluntary on the part of the parent and may be revoked at anytime.
- (2) If a parent revokes consent, that revocation is not retroactive (i.e., it does not negate an action that has occurred after the consent was given and before the consent was revoked).

Current federal regulations, in defining “parent,” require that when more than one party under the definition qualifies to act as a parent, the biological or adoptive parent attempting to act as the parent must be presumed to be the parent unless that person does not have legal authority to make educational decisions for the child. Therefore, as long as the parent has the legal authority to make educational decisions for the child, the local educational agency (LEA) must accept either parent’s consent (letter to Cox, OSEP 2009, 110 LRP 10357). Consequently, the LEA must proceed with an evaluation of a child with a suspected or known disability or provide initial special education services to a child with a disability when consent from one custodial parent is received. This is true whether the parents are married, separated, or divorced as long as the parent providing consent has educational decision-making authority for the child. This also remains true in situations where one parent has given consent and the other parent has notified the district of his or her refusal to consent. However, the LEA must ensure both custodial parents are afforded an opportunity to participate in the evaluation and placement process, and that both custodial parents receive proper notice of decisions regarding their child’s education.

If the parents are separated or divorced, both parents retain parental rights under special education law, unless a court order provides otherwise (letter to Biondi, OSEP 1997, 29 IDELR 972; letter to Best, OSEP 1998, 30 IDELR 145). In situations of separation or divorce, the LEA should determine whether one or both parents have educational decision-making authority for the child. In the absence of a court order to the contrary, both parents have equal decision-making authority. If a court order exists, the LEA should determine its content. "Legal custody" means the right and responsibility to make major decisions for the child, including educational decisions. "Joint legal custody" means the parents share decision-making authority. If a court orders joint legal custody and makes no other specific provision related to educational decisions, the parents share that decision-making authority. However, a court may order joint legal custody and give one parent sole power to make specified decisions such as educational decisions. Because court orders can vary considerably, it is important to determine the specific provisions.

Similarly, if one parent who retains legal custody revokes consent for the provision of special education and related services to their child, the LEA must discontinue providing special education and related services to the child after first providing both parents with prior written notice in accordance with 34 CFR § 300.300(b)(4)(i). After revoking consent for special education and related services for his or her child, a parent maintains the right to subsequently request an initial evaluation to determine if the child is a child with a disability who needs special education and related services. If a parent -- including a parent other than the parent who revoked consent -- later requests that his or her child receive special education and related services, the LEA must treat this request as a request for an initial evaluation under 34 CFR § 300.301, rather than a reevaluation under 34 CFR § 300.303. Disputes between parents who share the right to make educational decisions for their child, and who disagree about the provision of special education and related services for their child, may place the LEA in a difficult situation. However, under 34 CFR § 300.300(b)(4)(ii), the LEA may not use Due Process Procedures to overcome a parent's written revocation of consent for the continued provision of special education and related services (see letter to Cox above).

Questions regarding this bulletin may be directed to the Special Education Team at (608) 266-1781.

jrm

This information update can also be accessed through the Internet: <http://dpi.wi.gov/sped/bulindex.html>