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CLIENT NEWS BRIEF

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AMENDMENTS TO IDEA REGULATIONS GIVE PARENTS RIGHT TO REVOKE CONSENT TO SPECIAL EDUCATION

New federal regulations under the Individuals with Disabilities Education Act of 2004 (“IDEA”) authorize parents to revoke consent to the provision of special education and related services for their children. These regulations became effective on December 31, 2008, and have a number of specific requirements described below. We note that the regulations now conflict with state law, leaving some open questions as to their effect.

Previously, a parent could refuse the initial assessment or provision of special education to his or her student, but could not unilaterally remove a student from special education after that student had begun receiving services. Under the new regulations, a parent may revoke consent to the provision of special education, even if the student has already received special education.

Parental revocation of consent must be made in writing. Once revoked, the school district must discontinue providing all special education to the child within a reasonable time. However, the school district must give prior written notice that it will cease providing special education before the district exits the student from special education. A parent may change his or her mind after revoking consent and request that a student be reinstated in special education. At that point, the district’s special education obligations to the child would resume.

After a parent revokes consent, a school district will not be considered in violation of its duty to make a free appropriate public education available to the child. Additionally, after parental revocation, school districts do not need to hold Individualized Education Plan (“IEP”) team meetings or develop IEPs for the child.

School districts’ child find obligations continue to apply to students who have been exited from special education by revocation of parental consent. Child find is an ongoing duty, and a child exited from special education should not be treated any differently than other children. Students exited from special education can reasonably be considered “found” with respect to the disabilities for which they had previously been served, though the child find obligation would apply to any new or different suspected areas of disability that may arise in the future.

Effectively, a district will not take subsequent action on previously identified disabilities unless new areas of need emerge

When a parent revokes consent after initial provision of special education and related services, the school district is not required to remove from the education records any reference to the child's receipt of special education and related services. Maintaining such records may be beneficial because a school district may need documentation in future litigation or may need background information to better assist placement of the student if a new need for special education arises in the future.

California law conflicts with these new regulations. Under California law (which is aligned with the previous federal regulations), a parent cannot unilaterally remove a child from special education if the child is already receiving services. It is likely that the federal regulations will take precedence over the state law, and the federal Office of Special Education Programs has advised us that it believes that the federal regulations override the conflicting state law. However, until the California law is revised or formal guidance is issued from the Office of Administrative Hearings or California Department of Education, there is some legal uncertainty regarding this issue. Districts should consult with counsel before relying upon law in this area.

The federal regulations also address whether parents or districts may be represented in due process hearings by non-attorney advocates. The U.S. Department of Education previously took the position that parents and districts have the right to be represented by either an attorney or an "individual with special knowledge or training with respect to the problems of children with disabilities." The new regulations allow states individually to decide whether to allow advocates to participate in due process hearings. California has not clearly stated in legislation, regulations, or case law that a non-attorney advocate may represent a party at a due process hearing. Historically, in California, non-attorney advocates have regularly appeared at OAH hearings as a matter of practice. It remains to be seen whether the new regulations will change this practice.

Please contact any of our seven offices statewide with any questions regarding this topic.

As the information contained herein is necessarily general, its application to a particular set of facts and circumstances may vary. For this reason, this News Brief does not constitute legal advice. We recommend that you consult with your counsel prior to acting on the information contained herein.

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