



ROSENSTEIN FIST & RINGOLD

ATTORNEYS AT LAW

A.F. Ringold
Coleman L. Robison
J. Douglas Mann
John G. Moyer, Jr.
John E. Howland
Jerry L. Zimmerman
Frederick J. Hegenbart
Andrea R. Kunkel
Eric P. Nelson
Karen L. Long
John E. Priddy
Bryan K. Drummond
Kent "Bo" Rainey
Eric D. Wade
Matthew J. Ballard
Micah T. Zomer

Of Counsel
Jerry A. Richardson
Catharine M. Bashaw
Jana R. Burk

C.H. Rosenstein
(1893-1990)

Henry L. Fist
(1893-1976)

David L. Fist
(1931-2008)

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UNDERSTANDING THE NEW PARENT REVOCATION OF CONSENT REGULATIONS UNDER THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT

by Andrea R. Kunkel

When the United States Department of Education ("Department") issued the regulations implementing the Individuals with Disabilities Education Act Amendments ("IDEA") in 2006, it commented that it was still considering how to handle a parent's desire to remove his or her child from all special education and related services once the child had begun to receive those services. At that time, the parent of a child with a disability was the final decisionmaker concerning the child's initial receipt of special education and related services. If the parent chose to refuse consent for initial services, a school district had no right to override the refusal to consent by filing a due process hearing complaint or even seeking mediation. However, once the parent had provided initial consent, the parent could not unilaterally withdraw it. At that point, the IEP team, not the parent, decided whether the child would continue to receive special education and related services. That struck many, including many in the Department, as inconsistent. After all, if a par-

ent could make the initial decision to refuse services, why not a subsequent decision to cease services?

The Department recently stopped thinking about this issue and took decisive action. Effective December 31, 2008, the Department's new IDEA implementing regulations permit parents to revoke consent for their child's continued receipt of special education and related services. There are some conditions attached to this process, but, ultimately, parents now have the sole authority to decide this very important issue. This article will explore how the process will work and answer questions school personnel will likely have about the ramifications of a parent's decision to end all services.

The only condition placed upon a parent's right to revoke consent is that the parent must submit the revocation decision in writing. An oral request is insufficient. If school personnel have some doubt that the parent actually submitted the request they received, which could occur when the district receives a typewritten document, then

they should contact the parent to confirm it and document the contacts on the Record of Parent Contact form (OSDE Form 2).

Adult students have the same right as parents to revoke consent for services. When a child with a disability turns 18 and assumes his or her IDEA responsibilities, then the adult student may choose to revoke consent.

A revocation does not take effect immediately, though. Upon receipt of the written revocation, school personnel must send the parent a Written Notice to Parents form (OSDE Form 9). The purpose of the Written Notice is to propose the discontinuation of all special education and related services to the child and the child's return to the status of a general education student at parent request. School personnel must send the Written Notice promptly and enclose a copy of Parents Rights in Special Education: Notice of Procedural Safeguards. If ten calendar days pass following

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the parent's receipt of the Written Notice without the parent withdrawing his or her written revocation of consent, then, on the 11th day, all special education and related services will cease

and the child will be considered a general education student for all purposes.

Although the Written Notice form is often used

by school districts to refuse a parent's request, the form cannot be used for that purpose here. School personnel may adamantly believe that the child continues to need special education and related services, but the parent, not the IEP team, now makes the final decision. In the Written Notice, school personnel can make clear their belief that the child continues to need the services and should explain that the child will be treated as a general education student once the revocation becomes effective. They should create an individualized Written Notice for each child's situation and not rely on generic wording to fit all situations.

A parent cannot use this process to revoke consent for less than all of the child's special education and related services. In other words, the parent cannot revoke consent for direct instruction delivered in a special education setting and demand that the student receive specialized instruction in the regular education setting with modifications, sup-

plementary aids and services and personnel supports. That type of situation will continue to be handled through the IEP team process, Written Notice, mediation and/or a due process hearing complaint, just as before. The new IDEA regulations address only a parent's decision to revoke consent for all services.

Some parents may use the new regulations as a sort of bargaining chip to try to negotiate IEP team decisions. For example, a parent may suggest that unless the school team members agree to place the child in the general education setting with modifications, supplementary aids and services and personnel supports for all or a greater portion of the school day, the parent will revoke consent for all special education and related services. School personnel should remember that is their responsibility to offer district students a free appropriate public education in the least restrictive environment. To the extent they believe that they will fail to fulfill this responsibility by acceding to a parent request, they must refuse the request. It is the parent's decision whether or not to respond to a team's difference of opinion concerning programming, services or placement by revoking consent for all services.

The school district cannot demand a reevaluation of the child or an IEP team meeting upon receipt of a parent's decision to revoke consent. If the parent wants a reevaluation or to participate in an IEP team meeting before making a final revocation decision, then school personnel should accommodate him or her. But the Department specifically considered and rejected these as

inappropriate pre-revocation conditions in developing the final regulations.

The child will not continue to receive the modifications, supplementary aids and services and personnel supports previously recorded on his or her IEP upon return to the regular classroom. The Department anticipates, though, that the regular education teachers will provide the child with the same types of modifications they would provide any other child to support regular classroom instruction. To the extent that other nondisabled children receive their general education instruction in a co-teaching situation, this child may do so as well.

Of course, if school personnel continue to believe that the child needs special education and related services, they may question how to fulfill their "child find" responsibility, thinking that they are precluded from saying anything further to the parent about special education once the parent revokes consent. If school personnel continue to believe the child has a disability, then they should periodically contact the parent to share their opinion and ask if the parent is interested in discussing an evaluation of the child to determine whether he or she has a disability. School personnel should document these parent contacts on the Record of Parent Contact. If the parent expresses disinterest, then they should take no further action except to approach the parent again at a reasonable interval if they continue to believe the child has a disability.

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“Effective December 31, 2008, the Department’s new IDEA implementing regulations permit parents to revoke consent for their child’s continued receipt of special education and related services.”

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Parents can change their minds, though. If a parent changes his or her mind during the Written Notice waiting period, then the revocation of consent will not become effective. District personnel should either request written confirmation of the parent's decision or issue a second Written Notice to Parents form proposing the continuation of services due to the parent's change of mind.

But parents can also change their minds after the first Written Notice becomes effective. In that case, a multidisciplinary group should complete a Review of Existing Data form ("RED") (OSDE Form 3) to determine whether it has sufficient current information to determine that the child meets IDEA criteria for some eligibility category or whether additional assessment is necessary to make the decision. This will likely depend upon the amount of time that has passed since the parent revoked consent. If additional assessment data is needed, the evaluation will be considered an initial evaluation, and the district will have 45 school days to complete it.

Many of those commenting about this issue to the Department asked it to place limits upon parents to prevent them from giving and revoking consent repeatedly. The Department refused to set any limits and stated that parents were presumed to act in their children's best interest in making such decisions. Therefore, it is possible that school districts will encounter situations in which parents give and revoke consent a number of times

throughout a child's educational career for reasons school personnel may find faulty or even ridiculous. Nevertheless, the Department has made clear that the opinions of school personnel are insufficient to overcome the parent's choice. Even if faced with a parent who has frequent changes of mind, school personnel should continue to follow this process through every revocation cycle.

Some commenters questioned how to discipline a child whose parent had revoked consent if school personnel continued to believe that the child had a disability. After all, they reasoned, don't we have "knowledge" that the child has a disability, which would preclude the discipline one would impose on a nondisabled child? In considering this issue, the Department stated that the district would not be presumed to have such knowledge in light of the parent's decision and that the child could be disciplined as would a nondisabled student. However, if the parent changed his or her mind about the child's status as a child with a disability as a result of the behavior issue, then the district would handle that as it would any other change of mind, by convening a multidisciplinary group to complete a RED. That change, though, would not impair the district's ability to impose discipline for the misconduct the child committed as a general education student.

Still others questioned how a child would participate in a statewide assessment following a revocation of consent. If a parent revokes consent after the school year begins but before administration of the statewide

assessment, the child is considered a general education student who has exited special education for accountability purposes. Section 200.20(f) of the Title I regulations allows states to include, for a period of up to two AYP determination cycles, the scores of students who were previously



identified with a disability under the IDEA, but who no longer receive special education services, in the special education subgroup for purposes of calculating AYP (but not for reporting purposes). Therefore, the state may continue to include a child whose parent revoked consent in the special education subgroup for purposes of calculating AYP for two years following the revocation. However, because the child no longer has an IEP, the district will no longer be required under the IDEA to provide the testing accommodations previously included in the IEP.

Some commenters wondered what would prevent a child or even the parent from filing a due process hearing complaint or a lawsuit against a district, alleging the denial of a free appropriate public education to the child following revocation

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"Therefore, a district should be protected from liability by its issuance of Written Notice and its periodic efforts thereafter to fulfill its "child find" responsibilities."

**TULSA OFFICE:**

**525 S. MAIN, SUITE 700
TULSA, OKLAHOMA 74103
PHONE: 918.585.9211
FAX: 918.583.5617
TOLL FREE: 800.767.5291**

OKLAHOMA CITY OFFICE:

**2801 N. LINCOLN BLVD., SUITE 224
OKLAHOMA CITY, OKLAHOMA 73105
PHONE: 405.521.0202
FAX: 405.521.1515
TOLL FREE: 888.414.5291**

NEGOTIATIONS

It is that time of year again when School Districts that have bargaining units enter into negotiations with their employees. Because of the long term effects provisions in a negotiated agreement can have on many aspects of a School District, it is important to always have your school attorney involved in negotiations in some manner.

The attorneys at RF&R have many years of experience with negotiations and can provide whatever level of service you need with negotiations in your particular situation. This service can range from reviewing your negotiated agreement and making suggested changes to acting as lead negotiator during negotiations and all levels in between.

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of consent. The Department expressly stated that a district does not deny a child FAPE by honoring a parent's decision to revoke consent. Therefore, a district should be protected from liability by its issuance of Written Notice and its periodic efforts thereafter to fulfill its "child find" responsibilities.

Yet other commenters questioned how the new regulations would impact a district's responsibility to the same child under Section 504 of the Rehabilitation Act. The Department declined to speculate about that issue, stating that its commentary was specific to the IDEA only. If a parent revokes consent for services under the IDEA and then seeks services under Section 504, the district should convene a group of knowledgeable persons to make the Section 504 eligibility determination and develop a Section 504 plan for the student, which could include services in a special education setting.

Oklahoma school personnel have questioned how the new regulations will impact student transfers and enrollment in alternative schools and other educational programs. For example, what is to prevent a parent from revoking consent for special education and related services in the child's district of residence, seeking the child's transfer into another school district as a general education student and then, once enrolled in the receive-

ing district, seeking special education and related services for the child? The answer is that nothing prevents that scenario from occurring. District personnel should contact their school attorney for advice concerning their specific situations to ensure that they do not run afoul of the nondiscrimination provisions of state and federal law in the content and implementation of their student transfer policies.

School personnel should remember that the Oklahoma State Department of Education ("SDE") has not yet weighed in on the revocation of consent issue and that it may make decisions that change some part of the process. SDE will certainly need to amend the Parents Rights in Special Education: Notice of Procedural Safeguards form to add language informing parents of their right to revoke consent. In the meantime, school personnel should be prepared to explain the new regulations and the implementation process to parents when the issue arises.

These new regulations will certainly lead to novel questions for school districts. School administrators, special education teachers, school psychologists and psychometrists should familiarize themselves with these requirements and prepare to deal with yet another brand new set of issues affecting services for children with disabilities.

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Chalkboard is a Rosenstein, Fist & Ringold publication that addresses current education law issues. *Chalkboard* is published four times a year and is sent without charge to all education clients of Rosenstein, Fist & Ringold and all other persons who are interested in education law issues. We invite you to share *Chalkboard* with your friends and colleagues. We think you will find *Chalkboard* to be informative and helpful with the difficult task of operating our educational institutions.

Chalkboard is designed to provide current and accurate information regarding current education law issues. *Chalkboard* is not intended to provide legal or other professional advice to its readers. If legal advice or assistance is required, the services of a competent attorney familiar with education law issues should be sought.

We welcome your comments, criticisms and suggestions. Correspondence should be directed to Rosenstein, Fist & Ringold, 525 South Main, Seventh Floor, Tulsa, Oklahoma 74103-4508, or call us at (918) 585-9211 or 1-800-767-5291. Our FAX number is (918) 583-5617. Help us make *Chalkboard* an asset to you.