

Revocation of Consent for Services and 504 Plans: Legal Issues & Practical Advice

Question: What should a school district do if a parent revokes consent under IDEA?

Answer: Pursuant to 34 C.F.R. §§300.9 and 300.300(b)(4), a parent may revoke her consent in writing for all special education services at any time after her initial consent. A parent may revoke services in their entirety. 34 C.F.R. §300.300(b)(4). At that point, the school district is required to provide a prior written notice before ceasing to provide the special education and related services. *Id.* at (i). The school district may not use procedures such as mediation or a due process hearing to either obtain an agreement from the parent or a ruling that the services may be provided to the student. *Id.* at (ii). The school district “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 is not required to hold an individualized education program (“IEP”) team meeting or develop an IEP to further provide special education and related services to the student. *Id.* at (iii-iv).

Question: Does the school district have any obligations under Section 504?

Answer: We advise our clients that when a parent revokes consent under the IDEA or refuses initial services, the district should consider:

1. Whether the student may be eligible under Section 504 by completing a 504 evaluation; and
2. What program changes the student may need to prevent discrimination by the school based on her disability.

Our advice has evolved over the years.

Previously. Neither the statutory language nor the regulations for either IDEA or Section 504 explains the effect of a parental revocation of consent for IDEA services on the district’s responsibilities under Section 504. Initially, we read *Letter to McKethan*, to preclude a 504 plan if the parent rejects IDEA services in part because a FAPE under IDEA would not be provided via a 504 plan. 25 IDELR 295 (OCR 1996). One court has found *Letter to McKethan* to still be persuasive. *See Lamkin v. Lone Jack C-6 Sch. Dist.*, No. 11-CV-1072-DW-W, 2012 WL 8969061 (W.D. Mo. Mar. 1, 2012).

The Department of Education intentionally avoided taking a position on the question when commenting on the 2008 amendments to the IDEA regulations.¹ (“These final regulations implement provisions of the IDEA only. They do not attempt to address any overlap between the

¹ See Assistance to States for the Education of Children With Disabilities and Preschool Grants for Children With Disabilities, 73 Fed. Reg. 73013 (Dec. 1, 2008).
[https://1.next.westlaw.com/Link/Document/FullText?findType=l&pubNum=0001037&cite=UUID\(ID9DA5D80BF9211DDB5CDFA92039B975E\)&originatingDoc=1800004cc7fb111e28a21ccb9036b2470&refType=CP&originationContext=document&transitionType=DocumentItem&contextData=\(sc.RelatedInfo\)#co_pp_sp_1037_73013](https://1.next.westlaw.com/Link/Document/FullText?findType=l&pubNum=0001037&cite=UUID(ID9DA5D80BF9211DDB5CDFA92039B975E)&originatingDoc=1800004cc7fb111e28a21ccb9036b2470&refType=CP&originationContext=document&transitionType=DocumentItem&contextData=(sc.RelatedInfo)#co_pp_sp_1037_73013)

protections and requirements of the IDEA, and those of Section 504 and the ADA.”). *Kimble v. Douglas Cty. Sch. Dist. RE-1*, 925 F. Supp. 2d 1176, 1183 (D. Colo. 2013).

Current State of the Law. More recently courts have concluded the revocation of consent under the IDEA does not eliminate the broader protection for students with disabilities under Section 504 and the ADA. *Kimble v. Douglas Cty. Sch. Dist. RE-1*, 925 F. Supp. 2d 1176, 1184 (D. Colo. 2013). “Section 504 permits Defendant to offer any other educational modifications or accommodations not encompassed by the IDEA's definitions of those services in order to meet its obligation to provide a FAPE.” *Id.* at 1185. Even though a parent who revokes consent under the IDEA she still has rights under Section 504. *Northampton Area School District 63 IDELR 89* (SEA PA 2014). One court specified that “a parent’s refusal to consent to a more-comprehensive plan does not necessarily authorize a school district to refuse to provide technology to help a student hear in other classes.” *D.F. ex rel. L.M.P. v. Leon Cty. Sch. Bd.*, No. 4:13CV3-RH/CAS, 2014 WL 28798, at *3 (N.D. Fla. Jan. 2, 2014) (parent was refusing a one hour class for students with disabilities, but continued to request technology to help her child hear in the classroom.)

Finally, “although both the IDEA and §504 require the provision of a FAPE, FAPE under the IDEA and FAPE as defined in the Section 504 regulations are similar but not identical.” *Jason E. ex rel. Linda E. v. Dep’t of Educ.*, No. CIV. 12-00354 ACK, 2014 WL 6609213, at *10 (D. Haw. Nov. 20, 2014)(internal quotation omitted). “[U]nlike FAPE under the IDEA, FAPE under §504 is defined to require a comparison between the manner in which the needs of disabled and non-disabled children are met, and focuses on the ‘design’ of a child's educational program.” *Id.* (internal quotation omitted).

Question: What should be in the Prior Written Notice?

Answer: We counsel our school district clients to advise parents in a prior written notice that the 504 plan will not provide a FAPE under IDEA but that the district will implement the accommodations, modifications, specialized instruction as required by Section 504.

Question: Do school districts still need parental consent for the 504 evaluation?

Answer: Finally, we remind our clients that under Section 504, the school needs parental consent to evaluate for Section 504 and the evaluation must be done before services can be provided. However, the school does not need parental consent to implement program changes for the student and should do so even if the parent disagrees. Parents can then use the grievance procedure to object to the services if they choose. The school district remains obligated to prevent discrimination against the student with disabilities regardless of the parent’s agreement or disagreement with the 504 plan.