

## Q&A: Parental Consent Requirements for Evaluations, Reevaluation and Special Education Services

The Minnesota Department of Education (MDE), Division of Compliance and Monitoring, has developed this document to address questions raised by parents and school districts regarding parental consent issues related to the evaluation of children to determine initial eligibility or continuing need for special education services and for the initial provision of special education services. The intention of this document is to provide helpful, general information to the public. It does not constitute legal advice nor is it a substitute for consulting with a licensed attorney. The information below should not be relied upon as a comprehensive or definitive response to your specific legal situation. This document may not include a complete rendition of applicable state and federal law.

**Question 1: Must a district respond to a parent’s verbal request for a special education initial evaluation or reevaluation?**

**Answer:** Yes. Neither federal nor state law expressly requires requests for a special education evaluation to be in writing. In the case of an initial evaluation for special education services, federal regulations provide, “. . . either a parent of a child or a public agency may initiate a request for an initial evaluation to determine if the child is a child with a disability.” 34 C.F.R. § 300.301(b). In the case of a reevaluation, the federal regulations go on to say a public agency must ensure a reevaluation “if the child’s parent or teacher requests a reevaluation.” 34 C.F.R. § 300.303(a)(2). For both initial and reevaluations, the regulations do not require a parent to provide a written request to the school district for a special education evaluation. Accordingly, a district must respond to a parental verbal request to have his or her child evaluated for special education eligibility. Once a school district receives a verbal or written request from a parent for a special education evaluation, the district must either accept or reject the request by providing the parent with written notice following the procedures outlined in title 34, section 300.503, of the Code of Federal Regulations.

**Authority:** 34 C.F.R. § 300.301(b); 34 C.F.R. § 300.303(a)(2); 34 C.F.R. § 300.503.

**Question 2: Is parental consent required prior to a school district conducting an initial evaluation for special education services?**

**Answer:** Yes. The parent must be fully informed of all information relevant to the evaluation through a prior written notice, must receive a copy of the procedural safeguards, and must agree in writing that the school district can carry out the initial evaluation.

**Authority:** 34 C.F.R. § 300.300(a)(1)(1)(i); 34 C.F.R. § 300.309; C.F.R. § 300.503; and Minn. R. 3525.2710, subp. 1.

**Question 3: Is parental consent required for an initial evaluation if the child to be evaluated is a ward of the state?**

**Answer:** If the child is a ward of the state and certain requirements are met, there is an exception to the consent requirement for an initial evaluation. The purpose of the exception is to ensure initial evaluations are not delayed while a surrogate parent is being appointed. For the exception to exist, the district must be able to document that the child is a ward of the state and is not residing with the child's parent (as defined in title 34, section 300.30, of the Code of Federal Regulations), and one of the following conditions exist:

- A. The local education agency has made reasonable efforts to locate the parent but is unable to locate the parent;
- B. Parental rights have been terminated under state law; or
- C. Parental rights to make educational decisions have been subrogated by a judge pursuant to state law and consent for the evaluation has been given by an individual appointed by the judge to represent the child.

**Authority:** 34 C.F.R. § 300.30; 34 C.F.R. § 300.300(a)(2); and 34 C.F.R. § 300.300(a)(2), cmts. 71 Fed. Reg. 46630 (August 14, 2006).

**Question 4: How does a school district demonstrate that it has made reasonable efforts to locate a child's parent?**

**Answer:** The school district must document its attempts to obtain personal consent using the same procedures that are set out in title 34, section 300.322(d), of the Code of Federal Regulations for parental participation in Individualized Education Plan (IEP) meetings. The recorded documentation may include:

- A. Detailed records of telephone calls made or attempted and the results of the telephone calls;
- B. Copies of correspondence sent to the child's parents and any responses received; and
- C. Detailed records of visits made to the parent's home or employment site and the results of those visits.

**Authority:** 34 C.F.R. § 300.300(d)(5); and 34 C.F.R. § 300.322(d).

**Question 5: If a child's parents do not live together and both have joint legal custody, which parent has the authority to provide informed consent for an initial evaluation for special education eligibility?**

**Answer:** If the parents of a child both have joint legal custody and the court order does not limit either parent's right to participate in their student's educational planning, including special education programming, then, under state law, either parent has the authority to provide informed consent for an initial special education evaluation.

**Authority:** Minn. Stat. § 518.003, Subd. 3(b). See also Letter to Biondi, 29 IDELR 972 (OSEP October 7, 1997).

**Question 6: What options does a school district have if both parents have joint legal custody and the right to participate equally in their student's education planning and one parent consents to an initial evaluation while the other parent objects to an initial evaluation?**

**Answer:** The Individuals with Disabilities Education Act (IDEA) 2004 and the 2006 federal regulations do not specifically address this issue. In an unpublished decision, the Minnesota Court of Appeals held that congress does not provide guidance as to what constitutes consent to conduct an initial evaluation when parents with equal rights disagree regarding decisions related to their child's education. The appellate court held that a school district could not override a parent's refusal to consent to an initial evaluation or reevaluation through a due process hearing.

The appellate court held that when both parents have joint decision making in the area of educational programming, if either parent provides written refusal to the evaluation, the school district could not proceed with the evaluation. The parent who consented to the evaluation was not a party in the appeal, and the decision did not address whether that parent's constitutional rights were violated. The appellate court also stated that the parents could go to district court to address who should have the authority to make educational planning decisions for their child.

**Authority:** Minn. Stat. § 125A.091, Subd. 5(a); 34 C.F.R. § 300.300(a)(3)(i) and 34 C.F.R. § 300.300(b)(4)(i); 52 IDELR 165, 109 LRP 26170, In the Matter of JH v. Northfield Public Sch. Dist. (Minn. Ct. App. May 5, 2009).

**Question 7: If a child has more than one parent, as defined under title 34, section 300.30, of the Code of Federal Regulations, who is presumed to be the parent for consent purposes?**

**Answer:** The Individual with Disabilities Education Act (IDEA) provides a broad definition of "parent." Under IDEA a parent is:

- (1) A biological or adoptive parent of a child;
- (2) A foster parent, unless State law, regulations, or contractual obligations with a State or local entity prohibit a foster parent from acting as a parent;

- (3) A guardian generally authorized to act as the child's parent, or authorized to make educational decisions for the child (but not the State if the child is a ward of the State);
- (4) An individual acting in the place of a biological or adoptive parent (including a grandparent, stepparent, or other relative) with whom the child lives, or an individual who is legally responsible for the child's welfare; or
- (5) A surrogate parent who has been appointed in accordance with § 300.519 or section 639(a)(5) of the Act. 34 C.F.R. § 300.30(a).

For consent purposes, the biological or adoptive parent, under title 34, section 300.30(a)(1), of the Code of Federal Regulations, when attempting to act as a parent, is presumed to be the parent unless that parent does not have legal authority to make educational decisions on behalf of the child. That parent's consent would normally be the only consent necessary for a district to proceed with an evaluation or initial provision of special education services. If the child's biological or adoptive parent affirmatively refuses to consent to an evaluation or reevaluation, then someone who fits another definition of parent under title 34, section 300.30, of the Code of Federal Regulations, cannot supersede that refusal by providing consent. If two parents, both with legal authority, disagree, the parents may have to go to district court to resolve the issue of who shall make education decisions.

However, there is an exception if there is a judicial decree or order that authorizes another person to act as a parent to make educational decisions on behalf of a child. If a judicial decree or order identifies a specific person or persons under title 34, sections 300.30(a)(1) through (a)(4), of the Code of Federal Regulations, cited above, and the order or decree states that that individual is to act as the "parent" of the child or to make educational decisions on behalf of a child, then such person or persons shall be determined to be the "parent" for consent purposes.

**Authority:** 34 C.F.R. § 300.30(b); U.S. Dept. Educ., Office of Special Education and Rehabilitative Services (OSERS), Questions and Answers on IEPs, Evaluations and Reevaluations, Question D-7 Page 24 (June 2010).

**Question 8: Can a parent appoint a surrogate parent on their own behalf?**

**Answer:** In the case of a surrogate parent under title 34, section 300.30(a)(5) of the Code of Federal Regulations, the surrogate parent may represent the child in all matters relating to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education (FAPE) to the child. 34 C.F.R. § 300.519(g). However, if a child has two parents as defined under title 34, section 300.30(a)(1), of the Code of Federal Regulations, and one of these parents appoints a surrogate parent under Minnesota Rule 3525.2440, the biological or adoptive parent that did not appoint a surrogate parent is presumed to be the parent for consent purposes, unless that parent

does not have legal authority to make educational decisions on behalf of the child. 34 C.F.R. § 300.30(b)(1).

Therefore, if one biological or adoptive parent under title 34, section 300.30(a)(1), of the Code of Federal Regulations has legal authority to make educational decisions on behalf of the child and refuses to provide consent required under IDEA, a surrogate parent appointed by the other biological or adoptive parent cannot supersede the refusal by providing consent.

**Authority:** 34 C.F.R. § 300.30; Minn. R. 3525.2440; U.S. Dept. Educ., Office of Special Education and Rehabilitative Services (OSERS), Questions and Answers on IEPs, Evaluations and Reevaluations, Question D-7 Page 24 (June 2010).

**Question 9: What may a local education agency do if a parent refuses to consent to an initial evaluation to determine eligibility for special education services?**

**Answer:** If a child's parent refuses to consent to an initial evaluation, under Minnesota state law, the local education agency may not override the parent's written refusal to consent to an evaluation or reevaluation.

**Authority:** Minn. Stat. § 125A.091, Subd. 5(a)1; See also 34 C.F.R. § 300.300(3)(i) and (ii).

**Question 10: Who has the authority to request that a child be evaluated to determine initial special education eligibility?**

**Answer:** The parent of a child or the local education agency. While other persons are involved in child find procedures, only the parent or district can request an evaluation.

**Authority:** 34 C.F.R. § 300.301.

**Question 11: May a school district proceed with a reevaluation of a child with a disability without the consent of a parent?**

**Answer:** If the district sends prior written notice to a parent and the parent does not notify the district of an objection within 14 days of when the district sends the prior written notice to the parent, the district may proceed with the reevaluation. If the parent does provide a written refusal to the proposed reevaluation, the district cannot override the parent's written refusal for a reevaluation.

**Authority:** 34 C.F.R. § 300.300(c)(1)(ii); Minn. Stat. § 125A.091, Subd. 5(a); and Minn. R. 3525.2550, subp. 2.

**Question 12: What can a school district do if a parent affirmatively refuses to provide consent for a triennial reevaluation?**

**Answer:** After the school receives the parent's affirmative refusal for a reevaluation, the school district must first determine if it can proceed with a review of existing data to determine continued eligibility for special education services. Parental consent is not required for a review of existing data which includes prior evaluation, state and district assessments, classroom observations, and observations by teachers and related service providers.

**Authority:** 34 C.F.R. § 300.305(a)(1); 34 C.F.R. § 300.300(d)(1)(i).

**Question 13: What if a school district determines that a reevaluation is necessary in order to determine continued need for special education services?**

**Answer:** Under Minnesota state law, a school district may not override a parent's written refusal to provide consent for a reevaluation. If the school district does not believe the child continues to be in need of special education services, it may send prior written notice to the child's parent that it proposes to terminate special education services.

**Authority:** 34 C.F.R. § 300.300(c)(1)(ii); 34 C.F.R. § 300.503(a)(2); and Minn. Stat. § 125A.091, Subd. 5(a).

**Question 14: Must a parent provide consent for the initial provision of special education services?**

**Answer:** Yes. Once a child is evaluated and determined to meet eligibility for special education services, the parent of the child must provide informed consent prior to the initial provision of special education services. The school district must make reasonable efforts to obtain informed consent from the parent for the initial provision of special education and related services. The Office of Special Education Programs (OSEP) has defined the term "fully informed" in this provision to mean, "that a parent has been given an explanation of what special education and related services are and the type of services that might be found to be needed for their child, rather than the exact program of services that would be included in an IEP."

**Authority:** 34 C.F.R. § 300.300(b)(1)(2) and (d)(5); and 34 C.F.R. § 300.300(b)(4)(ii), cmts. at 71 Fed. Reg. 46634 (August 14, 2006).

**Question 15: Once a school district has made reasonable efforts to obtain parental consent and the parent has been fully informed of what special education and related services means and the type of services the student might receive, is the school district required to hold an IEP meeting to develop a specific plan for special education and related services for the child?**

**Answer:** The district must hold an IEP meeting if the parent has consented to the initial provision of special education services. However, if the parent refuses to provide consent for the initial provision of special education services, despite the school district's reasonable efforts to

obtain parental consent consistent with title 34, section 300.300(d)(5), of the Code of Federal Regulations, and fully informing the parent about what special education and related services would be provided if the parents did consent, the school district is not required to convene an IEP meeting to develop an initial IEP. While not required, one way for a school district to obtain informed consent would be to convene an IEP meeting and develop an IEP that would inform the parent of the services the child would be provided if consent is provided.

**Authority:** 34 C.F.R. § 300.300(b); and 34 C.F.R. § 300.300(b)(4)(ii), cmts. at 71 Fed. Reg. 46634 (August 14, 2006).

**Question 16: May a school district proceed with the initial provision of special education services prior to obtaining written consent for the IEP?**

**Answer:** No. A district may not proceed with the initial provision of special education services until it has provided prior written notice of the proposed special education and related services and a parent has provided written informed consent for the IEP.

**Authority:** 34 C.F.R. § 300.503(a)(1); and 34 C.F.R. § 300.300(b).