

Notice and Consent When Parents Have Joint Custody

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Question

What is a district obligated to do with regard to shared custody when requesting permission to evaluate? Can the district communicate with just one parent and rely on that parent's response?

Answer

When parents have joint custody, notice to both parents is the right way to go, unless it is quite clear from a parent's own written statement that he or she does not wish to play any role in the child's education. When consent is required, consent from either parent is sufficient. Either parent can pursue a due process hearing.

Discussion

When a student has parents who are separated or divorced, questions regarding the special education process should be approached in two steps:

- First, what does the law require of a school district when dealing with an intact, two-parent family?
- Second, should the answer be any different in light of the fact that the parents are separated or divorced?

Often, the answer to the first question is the most important, because the law usually does not change when the parents are separated or divorced.

Also, school districts should distinguish between *notice* and *consent*. The rules for notice are not the same as the rules for *consent*, so the answer may not be the same for *notice* questions as for *consent* questions.

Whenever notice is required, the better practice is to notify both parents, particularly if both parents are playing an active role in the care of the student. If they are divorced or separated, then presumably they have different addresses. A school district administrator cannot assume that one envelope will reach both parents. Thus, two separate notices are a good idea, and are probably required when both parents retain a role in the care and education of the child.

In some sense, a *permission to evaluate* request form is a notice that the school district believes that an evaluation or reevaluation is necessary. Because it is partly a notice, it should be sent to both parents. Also, sending it to both parents increases the likelihood of getting permission from at least one of them. This provides a second reason to send the permission to evaluate form to both parents.

Consent, however, is another matter. Consent is required for initial evaluation, and consent is important in reevaluations. (A reevaluation could legally proceed if both parents are repeatedly unresponsive.) In an intact family, a district can take action based on the consent of one parent. This is not really because the district can assume that both parents agree; rather, it is simply because one parent's consent is enough. Congress has never been interpreted as requiring school districts to get both parents' consent.

When parents are divorced and neither has been divested by a court of their parental rights, the result is the same: Consent from one parent is all a district needs in order to move forward. If the non-consenting parent wants to stop the district from moving forward, there are two things that the parent can do. One is to go back to the divorce court and ask the court to remove the other parent from educational decision-making. The other is to start a special education due process hearing by filing a due process complaint notice with the Office for Dispute Resolution ("ODR"). Once it is clear that one of the parents is an actively non-consenting parent, that parent should be informed of these two options by the school district in writing, with a copy to the other parent. The objection of one parent, however, does not negate the consent given by the other.

If there is a special education hearing in such a situation, then there will presumably be three parties: the district and the consenting parent on one side, and the non-consenting parent on the other. Once a hearing is requested, a school district should consult with its attorney to decide whether to stop the evaluation while the hearing is pending. Ultimately, the Hearing Officer gets to decide whether the evaluation will occur (or was proper), after the District - and, optionally, the consenting parent - describes to the Hearing Officer why they think an evaluation should occur.

Certainly, the school district can try to mediate between the parents or try to get one of them to acquiesce to the position of the other. However, the district has no obligation to try to bridge the gap between the parents, whether the parents are living together or not.

Conclusion

Parents who are divorced or separated are like other parents: Unless the school district has a copy of a court order signed by a judge and the order terminates a parent's right to make educational decisions, both parents have rights and beliefs that can conflict with each other. A school district's obligations are to:

- pursue the child's disability-related education needs;
- provide notice to parents;
- actively pursue the child's needs once any needed consent is obtained from any one parent; and
- let each parent know his/her rights and procedural options.

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