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OPINION	:	No. 79-617
of	:	November 30, 1979
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SUBJECT: PARENTAL CONSENT FOR INDIVIDUALIZED EDUCATION PROGRAM—Parental consent is required with respect to the contents of an individualized education program developed for a child if the intended result is that the child shall be required to participate in a special class or program within the meaning of Education Code section 56338.

The Honorable Wilson C. Riles, Superintendent of Public Instruction and Director of the Department of Education, requests an opinion on the following: question:

Is a parent's consent required for the contents of the individualized education program developed for special education students, as defined by chapter 2 of part 30 of the Education Code, under P.L. 94–142 and California law and regulations?

CONCLUSION

A parent's consent is required with respect to the contents of an individualized education program developed for a child if the intended result is that the child shall be required to participate in a special class or program within the meaning of Education Code section 56338.

ANALYSIS

The question refers to California law and regulations and to federal law. We shall address California law and regulations first.

Part 30 of the Education Code[1] contains six chapters relating to special education programs. Chapter 2 of part 30 relates to "special education" for individuals with exceptional needs. (§ 56300 *et seq*.) Section 56302, subdivision (g) defines "special education" as meaning programs or services especially designed to meet the educational requirements of individuals with exceptional needs. Some types of exceptional needs identified in that section are those resulting from disabilities in one or more of the communication skills, physical disabilities such as vision and mobility impairments, significant disabilities in learning or behavior such as learning disabilities resulting from visual perceptual disorders and visual motor disorders, behavior disorders, and educational retardation. Section 56304 provides that every individual with exceptional needs, as defined pursuant to section 56302, who is eligible to receive such educational services authorized "under this chapter" is entitled to educational programs or services free of charge to his or her parents. Both the State Board of Education (§ 56310) and the Superintendent of Public Instruction (§ 56312) have been charged with administering the provisions of chapter 2. (See also § 56314, duties of county superintendents.)

Section 56338 provides that:

> "No pupil may be required to participate in any special class or program under this chapter unless the parent of the pupil is first informed of the facts which make participation in the special program necessary or desirable and thereafter consents in writing to such participation.
>
> "After consultation with a member of the school appraisal team, or educational assessment service, such consent may be withdrawn at any time."

Section 56311 provides in part that "any responsible local agency in its application for approval of a plan, may request the board to grant a waiver of the provisions of any specifically enumerated sections of this code except sections . . . 56338. . . ."

The Legislature has established parallel provisions to those contained in section 56338, requiring parental consent before placement of a pupil in other types of special education programs, e.g., section 56506 of chapter 3, relating to mentally retarded pupils,

[1] All unidentified section references are to the Reorganized Education Code.

section 56605 (a) of chapter 4, relating to exceptionally handicapped pupils and section 56719 of chapter 5, relating to physically handicapped pupils.

These provisions evidence a legislative determination to make the parent of a child who may have a need for some form of special education, the final arbiter of any difference of opinion between the parent and the school officials concerning the needs of the child vis-a-vis different programs of special education or between special education programs and regular education programs.

This legislative provision appears to be consistent with the applicable legal principles. Such principles were summarized *in Kate' School v. Department of Health* (1979) 94 Cal. App. 3d 606, 620 as follows:

> "Decisions regarding child rearing, care and education have been recognized as being entitled to protection as a fundamental right of personal liberty under the Constitution. (*Whalen v. Roe* (1977) 429 U.S. 589, 599–600 [51 L. Ed. 2d 64, 73, 97 S. Ct. 869]; *People v. Privitera* (1979) 23 Cal. 3d 697, 702 [153 Cal. Rptr. 431, 591 P.2d 919]; *In re Roger S.* (1977) 19 Cal. 3d 921, 928 [141 Cal. Rptr. 298, 569 P.2d 1286].) However, this parental duty and right is subject to limitations 'if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens.' (*Wisconsin v. Yoder* (1972) 406 U.S. 205, 234 [32 L. Ed. 2d 15, 35, 92 S. Ct. 1526]; *People v. Privitera, supra*, 23 Cal. 3d at p. 703; *In re Roger S., supra*, 19 Cal. 3d at p. 928.) If these conditions are present the state may assert important interests in safeguarding health and safety and in maintaining medical standards. (*Roe v. Wade* (1973) 410 U.S. 113, 153–154 [35 L. Ed.2d 147, 177,93 S. Ct. 705]; *People v. Privitera, supra*, 23 Cal. 3d at p. 703.)"

However, the question presented is not as to placement of the child in such a program, but rather concerns the "contents" of an "individualized" education program. This is a distinction without significance. The concept of "placement" in a special education program, as that term is used in section 56338 necessarily addresses the "contents" of the program in which the child might be placed. However, the parent is not thereby given a choice of either the program offered by the school district, assuming all agree that some form of special program is advisable, or no such special program for his or her child.

Section 56339 provides that:

> "Whenever a pupil is being assessed by a school appraisal team or an educational service, the parents shall be notified in advance of their rights

pursuant to Sections 56340 and 56341 that they have the right to present information to the team or service in person or through a representative, and to participate in the meeting devoted to eligibility, recommendations, and program planning."

Section 56341 provides that:

> "(a) Both a parent and a pupil are guaranteed and may initiate procedural due process by a fair and impartial administrative hearing before a fair hearing panel in any decision regarding, and resulting from, the pupil's identification as an individual with exceptional needs; the pupil's assessment and the implementation of the individualized education program; and the denial, placement, transfer, or determination of the pupil in a special education and related services program.
>
> "(b) Each school district shall take steps to insure that each hearing and review conducted: (a) is commenced and completed is quickly as possible, consistent with fair consideration of the issues involved, but not later than 45 days after receipt of a complaint, unless the parties agree to an extension; and (h) is conducted at a time and place which is reasonably convenient to the parent and pupil involved."

Thus, the parent and the affected pupil are provided an opportunity to have a "hearing" which may lead to a resolution of any differences of opinion concerning the particular needs of the child. However, the Jurisdiction or "power" of the "fair hearing panel" does not extend to the "overruling" of the parent's nonconsent to placement of the child in a particular program, whether "individualized" for the child or not. If the parent does not consent to a particular special education program and the child is of compulsory school-attendance age, the child would attend the regular school program, at the grade appropriate to his or her level of educational achievement. This assumes, of course, that a fair hearing decision upheld the determination of the school authorities that the "individualized" special education program was appropriate to the needs of the child and the parent continued to refuse to consent to the individualized program thus offered to the child.

We turn to the federal law. Several provisions implementing the Federal Education of the Handicapped Act, title 45, Code of Federal Regulations section 121a.2 *et seq*. must be considered.

Title 45, Code of Federal Regulations section 121a.500 provides in part as follows:

> "As used in this part: 'Consent' means that: (a) The patent has been fully informed of all information relevant to the activity for which consent is sought, in his or her native language or other mode of communication;
>
> "(b) The parent understands and agrees in writing to the carrying out of the activity for which his or her consent is sought, and the consent describes that activity and lists the records of any) which will be released and to whom; and
>
> "(c) The parent understands that the granting of consent is voluntary on the part of the parent and may be revoked at any time.
>
> "'Evaluation' means procedures used in accordance with §§ 121a.530–121a.534 to determine whether a child is handicapped and the nature and extent of the special education and related services that the child needs. The term means procedures used selectively with an individual child and does not include basic tests administered to or procedures used with all children in a school, grade, or class."

Title 45, Code of Federal Regulations section 121a.504 provides as follows:

> "(a) *Notice*. Written notice which meets the requirements under § 121a.505 must be given to the parents of a handicapped child a reasonable time before the public agency:
>
> (1) Proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child, or
>
> "(2) Refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child.
>
> "(b) *Consent*. (1) Parental consent must be obtained before:
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> "(i) Conducting a preplacement evaluation; and
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> "(ii) Initial placement of a handicapped child in a program providing special education and related services.

"(2) Except for preplacement evaluation and initial placement, consent may not be required as a condition of any benefit to the parent or child.

"(c) Procedures where parent refuses consent. (1) Where State law requires parental consent before a handicapped child is evaluated or initially provided special education and related services, State procedures govern the public agency on overriding a parent's refusal to consent.

"(2) (i) Where there is no State law requiring consent before a handicapped child is evaluated or initially provided special education and related services, the public agency may use the hearing procedures in §§ 121a.506–121a.508 to determine if the child may be evaluated or initially provided special education and related services without parental consent.

"(ii) If the hearing officer upholds the agency, the agency may evaluate or initially provide special education and related services to the child without the parent's consent, subject to the parent's rights under §§ 121a.510–121a.513."

Thus, federal law defers to state law and state procedures with respect to the issue of a parent's consent, including state procedures "governing" the public agency in overriding a parent's refusal to consent.

In that respect the State Board of Education has adopted a regulation authorizing an override of a parent's consent. Section 3308, title 5, California Administrative Code provides that:

"(a) A parent or public education agency may initiate a hearing pursuant to Title 45, Code of Federal Regulations, Sections 121a.506 through 121a.514 before a fair hearing panel on any of the matters described in Title 45, Code of Federal Regulations, Sections 121a.504(a) (1) and (2).

"In accordance with Title 45, Code of Federal Regulations, 121a.504(b), if a parent(s) refuses to consent to an assessment of their child or to the placement of their child in a special education program, the public education agency may initiate a hearing pursuant to Section 3308 to determine if the child may be assessed or placed in a special education program without parental consent.

Section 3308, title 5, California Administrative Code provides a procedure to assess or place a child in a special education program without parental consent "in accordance with Title 45, C.F.R., § 111a.504(b)." Title 45, Code of Federal Regulations, section 121a.504(b) was quoted in full, *supra*. Title 45, Code of Federal Regulations, sections 121a.500 and 121'a.504 are applicable to programs that are funded under the Federal Education of the Handicapped Act. (See 45 C.F.R., § 121a.2 *et seq*.) No provision of the applicable provisions of title 45 of the Code of Federal Regulations, of which we are aware, requires a state to override a parent's consent as a condition of the state continuing to receive federal funds pursuant to the Education of the Handicapped Act. Certainly, 45 Code of Federal Regulations sections 121a.500 and 121a.504 do not contain such a requirement. Thus, the validity of section 3308, title 5, California Administrative Code must be considered.

An administrative agency has no authority to enact rules or regulations which have the effect of altering, enlarging, or amending the terms of legislative enactments. (*California Sch. Employees Assn. v. Personnel Comm.* (1970) 3 Cal. 3J 139, 144; *Morris v. Williams* (1967) 67 Cal. 2d 733, 748.) The validity of a regulation depends upon whether the administrative agency is empowered to adopt it. (*Whitcomb Hotel, Inc. v. Cal. Emp. Com.* (1944) 24 Cal. 2d 753, 756; *County of L.A. v. State Dept. Pub. Health* (1958) 158 Cal. App. 2d 425, 435–436.)

To the extent that section 3308, title 5, California Administrative Code purports to authorize an override of a parent's lack of consent as to a state-funded program, the regulation alters and amends the clear language to the contrary of section 56338. Further, since federal law does not require such an override as to programs using federal funds but rather defers to state law, section 330B, title 5, California Administrative Code similarly runs afoul of section 56338. Thus, the provision authorizing a "determination" leading to the assessment or placing of a child in a special education program "without parental consent" is void and unenforceable.

Therefore, we conclude that a parent's consent is required with respect to the contents of an individualized education program developed for a child if the intended result is that the child shall be required to participate in a special class or program within the meaning of section 56338.

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