Current Ethical & Legal Issues in Special Education

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When Parent Requests an IDEA or 504 Evaluation, Must the District Agree?

- Why is this an issue right now?
- If the District has reason to suspect the student has a disability and needs special education services, **then the District must agree**
- If it doesn't have reason to suspect disability and need for special ed, then District can refuse
  - But it may be better to evaluate anyway
- Respond to parent requests for evaluation – oral or written – with a *Written Notice to Parents* and a copy of *Parents Rights* **within about ten school days of the request**

Must District Have Parent Consent under FERPA to Verify/Clarify Outside Medical Information?

- *Letter to Anonymous*, 118 LRP 42848 (FPCO 6/12/18) - Decision from Family Policy Compliance Office on FERPA complaint
- Parent gave District a doctor's note stating child needed help with catheterization at school by a licensed registered nurse. Because District would need to hire a nurse to help the student, Superintendent called doctor to confirm they wrote the note and clarify instructions. Parent alleged Superintendent improperly made the phone call and disclosed personally identifiable information (PII) to the doctor in violation of FERPA. FPCO found no FERPA violation and closed the complaint.

- FPCO Director noted that under FERPA, a district must generally obtain prior written consent from parent or eligible student before disclosing PII from student education records to third parties
- However, **"[W]e amended the FERPA regulations a few years ago . . . to permit a school official to verify whether a doctor wrote specific medical instructions in a letter or provided an excuse for student absence, as long as other information from the student's education records isn't disclosed."**
- Evidence indicated Superintendent and doctor discussed District's resources for nursing care, but not child's specific care, so there was no District disclosure of PII

- The specific regulation isn't identified, but decision seems to hinge on the FERPA regulatory definition of "Disclosure" - "[T]o permit access to or the release, transfer, or other communication of personally identifiable information contained in education records by any means, including oral, written, or electronic means, to any party except the party identified as the party that provided or created the record." 34 C.F.R. 99.3

What's the Consequence to the District of COVID-related Noncompliance with the 45-school Day Initial Evaluation Timeline?

- **SY 2019-20**
  - Districts could report noncompliance with this timeline for COVID-related reasons during school closure period and distance learning period
  - OSDE-SES didn't utilize district noncompliance during either time period in the calculation for Differentiated Monitoring Results (DMR), but must report it to OSEP, and districts must develop a corrective action plan for it
- **SY 2020-21**
  - OSDE-SES must again report all instances of noncompliance, but will continue to be as flexible as possible with districts when the noncompliance can be verified as due to COVID-related reasons through documentation in EDPlan

What Is a DMR?

- OSDE-SES identifies a differentiated monitoring result (DMR) for each Oklahoma Local Education Agency (LEA) based on an assessment of risk and the district's determination rating
- The DMR initiates a series of integrated monitoring and improvement activities the LEA must complete that correspond with a "level of support" OSDE-SES determines is necessary for the LEA to meet requirements and mitigate risk in subsequent years
- For more information, see OSDE-SES General Supervision System Special Education Monitoring and Result-Based Accountability (November 2020)

Can Parents Seek an Independent Educational Evaluation at Public Expense if They Disagree with a District's FBA?

- No, according to the Second Circuit Court of Appeals in *D.S. v. Trumbull Board of Education*, No. 19-644 (2d Cir. 2020)
- This case isn't binding in the Tenth Circuit Court of Appeals, which hasn't yet ruled on this issue, and OSEP has twice taken the position that an FBA can be the basis for an independent educational evaluation – an independent FBA

- D.S. had his last comprehensive reevaluation in October 2014. Every year thereafter the District conducted an FBA, with parent consent, "to understand how D.S.'s problematic behavior interfered with his academic performance." District conducted the last FBA in March 2017.
- Parents disagreed with the results of that FBA and the October 2014 reevaluation and sought a comprehensive independent educational evaluation (IEE) at public expense regarding behavior and all other areas of disability. They refused District's offer to conduct evaluation in those areas. Parents and District filed due process hearing complaints.

- The Second Circuit Court stated that an FBA, standing alone, is not an evaluation, meaning an initial evaluation or reevaluation.
- "By title and definition, an FBA is not a comprehensive assessment of a child's disability. It is a purposefully targeted examination of the child's behavior. Unlike an initial evaluation or reevaluation, which must 'assess[] [the child] in all areas of suspected disability,' 20 U.S.C.§ 1414(b)(3)(B), an FBA looks at just one part: the child's behavior."

- Further, "An FBA seeks to understand to what extent the child's behavior is a manifestation of their disability and how the child's behavior impacts their ability to learn. By its nature, it is limited to understanding and improving one aspect of the child's overall learning experience."
- "Accordingly, an FBA is best considered as an 'assessment tool' or 'evaluation material' that a school can use in conducting an evaluation. . . . But an assessment tool is not an "evaluation" in its own right —at least not with respect to a parent's entitlement to an IEE at public expense."

- Finally, "Because the March 2017 FBA was not an evaluation as that term is employed in the IDEA, D.S.'s parents did not have a right to an IEE at public expense based on their disagreement with that assessment. Rather than demand a comprehensive IEE at public expense in response to this targeted assessment of D.S.'s behavior, the parents could have requested that the school conduct another reevaluation of D.S.—as is their right, and as the school had already scheduled to take place in a few months."

Does Excluding the Student from a MEEGS Meeting Violate the IDEA?

- No, according to OSEP in *Letter to Anonymous* (OSEP 9/9/2019)
- This agency letter isn't binding, and there is no Tenth Circuit case on this issue
- IDEA doesn't address student participation at meetings to discuss the results of testing, the student's evaluation or reevaluation, or the student's disability category, other than upon transfer of rights
- According to OSEP, "the public agency may, but would not be required to, permit the student to attend at the parent's request."

What Happens when the Qualified Examiner and the Rest of the Team Disagree about IDEA Eligibility?

- The qualified examiner is a required team member for this discussion, but there's no IDEA requirement for agreement – not even parent agreement
- **Who is the ultimate "decider" at MEEGS and IEP meetings?**
- If the parent supports eligibility, one wouldn't anticipate a parent challenge to a decision in favor of eligibility
- However, other potentially unwelcome consequences could result

What Information Must the Manifestation Determination Team Consider?

- In conducting the manifestation determination, the IEP or 504 team must review all relevant information in the child's file, including, but not limited to the IEP or 504 Plan, any teacher observations and any relevant information provided by the parents
- The team determines whether there is a nexus between the student's disability and the misconduct for which disciplinary removal is proposed
  - Was the conduct caused by or did it have a direct and substantial relationship to the child's disability?
  - Was the conduct the direct result of the district's failure to implement the IEP or 504 Plan?

What is the "Disability" for Purposes of a Manifestation Determination?

- In *Bangor School Dept*., 113 LRP 923 (SEA ME 3/8/12), Student's IEP listed ADHD as the primary disability, but noted other impairments, including oppositional defiant disorder and a mood disorder
- Student began getting angry for reasons that couldn't be identified
- The manifestation determination team convened to review an incident during which Student refused a request to move her backpack, pushed a teacher, grabbed keys around another teacher's neck and threatened to kill the teacher
- The team determined that the Student's behavior wasn't a manifestation of her identified primary disability – ADHD

- The Maine Department of Education concluded that the team failed to take **all** of Student's disabilities into consideration and, had they done so, would have to determine that the behaviors were a manifestation of her disability

Is the Behavior of a Student Identified with an "Emotional Disturbance" Always a Manifestation of Their Disability?

- Staff members may think that a student's ED category forecloses disciplinary removal, except in situations involving "special circumstances" under the IDEA, and therefore prepare insufficient descriptions of student behavior incidents
- Every behavior may not be a manifestation of the student's disability, even if the team previously determined or acknowledged that certain behaviors under certain circumstances were manifestations
- It's so important to have specific descriptions of student behaviors and needs to help the team distinguish behaviors that are and aren't manifestations of their disability

- Always focus on this question – Was the conduct at issue caused by or did it have a direct and substantial relationship to the child's disability?
- In making this decision, the team focuses on the student's unique needs, not on generic characteristics from the DSM-5

Let's Close with an Interesting Case

- In *Independent School Dist. No. 283 v. E.M.D.H.*, No. 19-1269 (8th Cir. 6/3/2020), the Eighth Circuit Court found that District failed to meet its IDEA Child Find obligation and failed to identify the student with a disability, denying her FAPE under the IDEA
- Student's diagnoses - generalized anxiety disorder, school phobia, autism spectrum disorder (with unspecified obsessive compulsive disorder traits), panic disorder with associated agoraphobia, ADHD and severe recurrent major depressive disorder
- These conditions manifested quickly, but Student progressed through and excelled in elementary school
- By fall of 8th grade, her absences from school increased

- District disenrolled Student spring of 8th grade
- Before 9th grade, parents contacted 9th grade counselor that Student had been absent for latter part of 8th grade year due to anxiety and school phobia
- Student had inconsistent 9th grade attendance before quitting school and being admitted to a psychiatric facility for treatment. District disenrolled Student fall of 9th grade.
- District discussed evaluating Student for special education spring of 9th grade

- 9th grade counselor talked to parents about evaluation spring of 9th grade. Parents had impression they were to make decisions about special education and that if they chose special education, Student couldn't remain in honors classes.
- Parents didn't request an evaluation and District didn't pursue it. Student was disenrolled from District again in spring of 9th grade.
- Student spent most of summer after 9th grade at a treatment facility getting therapy for anxiety, depression and ADHD

- For 10th grade, District developed a plan that allowed Student more time on assignments, adjustments in workload, breaks from class to visit counseling office and use of a fidget spinner. Inconsistent attendance continued.
- After six weeks in 10th grade, Student's attended almost no classes, and District disenrolled her
- In second semester of 10th grade, District staff met with parents to discuss special education. Parents were again told that if Student was placed in special education, she would be removed from honors classes. Student attended just one day during second semester, and District disenrolled her in February of 10th grade

- In April of 10th grade, parents requested District evaluation for special education. Parents made request just after Student was readmitted to psychiatric facility, where facility staff performed a comprehensive psychological evaluation. That evaluation yielded multiple mental health diagnoses and conclusions that those impairments "resulted in an inability to attend school, increasing social isolation, and continued need for intensive therapeutic treatment."
- During junior year, Student attended three days in District's program designed for emotional and behavioral disorders and stopped attending mid-September

- In November of Student's junior year, District provided parents with a report evaluating Student's IDEA eligibility and concluding she didn't qualify
- Parents obtained an IEE that confirmed Student's diagnoses and included a recommendation that she receive special education that would allow her to complete rigorous coursework while managing the symptoms that had limited or precluded previous efforts
- District rejected the recommendation and continued to support its own initial assessment. Parents filed a due process hearing complaint.

- Hearing Officer found that Student was IDEA eligible; District must develop an IEP with quarterly meetings to consider changes; District must reimburse the parents >$25,000 for past diagnostic and educational expenses; and District must pay for compensatory services in the form of private tutoring and attendance of Student's psychiatrist and private tutor at IEP meetings
- On District's appeal to District Court, that Court affirmed the Hearing Officer's order except for the order to pay for future private tutoring services

- On appeal to the Eighth Circuit Court, as to District's evaluation, the Court noted that District admittedly didn't conduct an FBA or make systematic observations of Student
- District claimed that Student's absences made it impossible to conduct a comprehensive evaluation, but the Court disagreed, finding "The District's failure to avail itself of these possibilities or develop another way of gathering the necessary data is virtually conclusive evidence that the District's evaluation of the Student was insufficiently informed and legally deficient."

- The Court likewise disagreed with the District's conclusion that Student's symptoms were insufficient to constitute an emotional disturbance or other health impairment, stating, "For years, the Student has suffered from a panoply of mental health issues that have kept her in her bedroom, socially isolated, and terrified to attend school."
- It found sufficient evidence in the record to demonstrate that Student had a serious emotional disturbance as she was unable to build or maintain satisfactory interpersonal relationships with peers and teachers

- Regarding eligibility, the Court also rejected District's argument that Student's "high standardized test scores and her exceptional performance on the rare occasions she made it to class are strong indicators that there are no services it can provide that would improve her educational situation."
- Stating, "The District confuses intellect for an education," the Court concluded, "The record demonstrates that the Student's intellect alone was insufficient for her to progress academically and that she was in need of special education and related services."

- As to the Child Find issue, the Court pointed out "Even if the District was confronted with an unusual case marked by some confusion, in just the same way that the Student's eligibility for special education was not foreclosed by her intellect, the District's child-find obligation was not suspended because of her innate intelligence."
- The Court found the evidence in the record supported the conclusion the District breached its Child Find obligation