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NOTICE AND CONSENT WHEN PARENTS HAVE JOINT CUSTODY

By Jeffrey F. Champagne

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

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WHAT WE SAY TO PARENTS ABOUT BEHAVIOR PLANS AND FBAs

By Jeffrey F. Champagne

With the encouragement of the Pennsylvania Department of Education ("PDE"), most Pennsylvania school districts issue Individualized Education Programs ("IEPs") in which parents are advised that if a student exhibits behaviors that impede his or her education (or that of others), then the "IEP team must develop a Positive Behavior Support Plan that is based on a functional assessment of behavior …." PDE goes on to suggest that the "clear measurable plan" can be in the Goals and Specially Designed Instruction section of the IEP, or in the Positive Behavior Support Plan if this is a separate document that is attached to the IEP. PDE is wise to guide districts toward imbedding behavior goals and interventions in the fabric of the IEP. But there are two reasons to believe that it is not accurate to say that any behaviors that interfere with learning always compel the development of a Behavior Plan based on a Functional Behavioral Assessment ("FBA").

The first reason is that no statute or regulation has that requirement. The statute and regulations require an FBA and a Behavior Plan in certain disciplinary situations. Also, the statute and regulations say that the IEP must **consider the use of** positive behavior interventions and support to address the behavior when a child's behavior impedes his/her/others' learning. The law does not say that there must always be a Behavior Plan based on an FBA whenever there is interfering behavior.

The second reason is that a federal court in Pennsylvania has recently confirmed that "Although a functional behavioral analysis could arguably be performed by a school district as a matter of good practice, the Individual with Disabilities Education Act ("IDEA") only requires such analysis when a child … has an IEP in place" and then is subjected to the disciplinary change in placement. The Court agreed that "the presence of any problematic behavior does not automatically require a functional behavior analysis under the law."

Good IEPs will often have special *behavioral* instruction and support - along with special *academic* instruction and support. Behavioral components in IEPs should routinely be **considered**. However, the statement – which Pennsylvania school districts routinely make to parents – that there must always be an FBA and a Behavior Plan when the student exhibits interfering behaviors, is not backed by the law. ■

NOTICE AND CONSENT WHEN PARENTS HAVE JOINT CUSTODY

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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 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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AREAS OF SUSPECTED DISABILITY: THE STARTING PLACE FOR A SPECIAL EDUCATION EVALUATION *By Jeffrey F. Champagne*

My son's Middle School Principal used to say, "As you climb the ladder, make sure it is leaning against the right building." There are some lessons in this expression for special education evaluations. I would say, "As you start a special education evaluation, make sure you are evaluating all areas of suspected disability." After all, it is hard to convince someone that you have all the right answers if they believe that you have not asked all the right questions. In the context of a special education evaluation, asking the right *questions* has at least three components:

(1) make sure you are starting from -- and staying with -- the definitions of the 13 categories (12 really, plus "multi") of handicapping conditions;

(2) make sure that parents know what categorical "suspicions" are your starting points; and

(3) make sure that parents have an opportunity to give you input on whether those starting points are the right ones.

In some situations, a fourth component also may be important:

(4) make sure you have a conscious way of taking into account medical information and *DSM-IV* diagnoses, while ultimately dealing with them in the context of the 13 categories of disability under the IDEA.

If information that a school district considers to be "medical" information is necessary in order to evaluate the child with regard to particular IDEA disabilities, then it is the district's responsibility to ensure that it promptly gets that information without imposing costs on an unwilling parent. Simply referring a parent to their own physician, or informing the parent of another public agency's free evaluation service, is not enough if the district does not promptly get the information it needs in order to explore all suspected disabilities. Thus, thinking of some information as medical, or as available through somebody else, does not place it beyond the scope of the district's duty to evaluate.

This can be tricky, in part because it means balancing two things. One is that it is the district's job – not the parent's responsibility – to figure out what the "suspected disabilities". The other is that if the parent has a suspicion, theory or a diagnosis, it would behoove a school district to understand and absorb the parent's "suspicions" early in the process. Dealing with them later, in a hearing after the evaluation report has been completed, can be costly.

In many cases, school districts need not fuss over the suspected categories in detail. In many cases, it will be obvious that what is on everyone's mind is a specific learning disability in reading, an emotional disturbance, or a speech impairment. But in other cases, very careful communication is necessary. This careful communication can be in the form of a letter or a request for permission to evaluate. Simply writing down what *concerns have been expressed and what types of assessments will be used* (which you are already doing if you use the PDE forms) may not be sufficient if doing so does not address which *IDEA disabilities are suspected.*

A suspected disability is like a question to be answered or a hypothesis to be tested. If you don't start out with consensus on the questions, you are likely to wind up with conflict over the adequacy of the answers. Therefore, school districts should consider adding the following to its letters

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and/or its requests for permission to evaluate where the "suspected disability" is not obvious to all.

The purpose of the evaluation is to understand your child's needs in relation to the following categories of disability in the special education law:

- ________ autism
- ________ hearing impairment, visual impairment, or a combination
- ________ emotional disturbance
- ________ mental retardation
- ________ orthopedic impairment
- ________ other health impairment involving strength, alertness, etc.
- ________ specific learning disability in any of six areas (reading, etc.)
- ________ speech impairments and language impairments
- ________ traumatic brain injury

There is a special education definition for each of these. Those definitions, in Section 300.8 of the Special Education Regulations, are attached. We have placed an "x" next to the disabilities that will be actively considered in the evaluation. If the evaluation leads us to believe that we ought to actively consider any of the others beyond basic screening measures, we will do so with additional types of tests after getting consent from you. If you feel that we should be actively considering any of the above *disabilities* that do not have an "x" next to them, please let me know.

In many cases, going into such detail may be overkill. In other cases, however, including language like this is the best way to avoid conflicts later. Because hearing officers and judges are inclined to say (fairly or not) that you can't have an appropriate IEP without an evaluation that looked appropriately at all areas of suspected disability, the best way for a district to protect itself is to make sure that everybody is together, at the *permission to evaluate* stage, on the issue of what disabilities are being explored because they are "suspected." ■

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