


IMPORTANT ASPECTS OF THE SPECIAL EDUCATION PROCESS:
LEAST RESTRICTIVE ENVIRONMENT, THE CREATION, MAINTENANCE AND DISCLOSURE OF STUDENT RECORDS, AND ATTORNEY INVOLVEMENT

CSE CHAIRPERSONS' LEADERSHIP CONFERENCE

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Presented by:
Office of State-Municipal Legal Services
Therese Collins, Esq., School Attorney

300M STATE STREET
WATKINSVILLE, NY 13441-1000
TEL: 518/779-7648
FAX: 518/779-7689
www.boces.org

Discussion Outline

- ▶ 1) Least Restrictive Environment
 - Legal Basis and Framework
 - LRE Test
 - Addressing Behavioral Challenges
 - Case Studies
- ▶ 2) Student Records
 - FERPA
 - HIPAA
 - Impact of Including Parentally Supplied Materials
- ▶ 3) Attorney Involvement in Special Education
 - Notice
 - Constraints and Limitations

LRE Cases Generally

- ▶ Among the Most Litigated and Most Complex
- ▶ Extremely Fact Dependent
- ▶ Often turn on how thoroughly the CSE considered the underlying issue of need

Least Restrictive Environment (LRE)

Multiple statutes and administrative regulations mandate that where it can be done so successfully, students with disabilities be educated alongside their non-disabled peers to the maximum extent appropriate.

- IDEA – 20 USC §1412(a)(5)(a)
- CFR – 34 CFR §300.114(a)(2)(i)
- 8 NYCRR 200.1(cc); 200.6(a)(1)
- This applies to ESY programming as well

LRE Defined

Least restrictive environment means that placement of students with disabilities in special classes, separate schools or other removal from the regular educational environment occurs only when the nature or severity of the disability is such that even with the use of supplementary aids and services, education cannot be satisfactorily achieved.

The placement of an individual student with a disability in the least restrictive environment shall:

- (1) provide the special education needed by the student;
- (2) provide for education of the student to the maximum extent appropriate to the needs of the student with other students who do not have disabilities; and
- (3) be as close as possible to the student's home

LRE as Derived by the Courts

- ▶ Per the Courts, there is a multi part test for determining LRE:
- ▶ (1) Whether education in the general classroom, with the use of supplemental aids and services, can be achieved satisfactorily for a given student, and, if not,
- ▶ (2) whether the school has mainstreamed the student to the maximum extent appropriate, and
- ▶ (3) the possible negative effects of the inclusion of the child on the education of the other students in the class.
- ▶ LRE is not the level of support the student receives in a particular placement; it's the type of classroom setting placed in with the goal of maintaining them in a regular classroom.
- ▶ Where the severity or nature of a student's handicap indicates they cannot be satisfactorily educated in regular classes, mainstreaming is not appropriate.

P. vs. Newington, 544 F.3d 111, 120 (2d Cir. 2008) citing Ober, 995 F.2d at 1115.
 N.E. v. NYC DOE, 2015 WL 1244288 (2d Cir. 2015)
 Briggs v. BEC, 852 F.2d 688 (1988)

LRE and the Placement Continuum

- ▶ Disabled students may not be removed from age appropriate inclusive classrooms just because of their need for modifications to the general ed curriculum
- ▶ Every school is required to have a continuum of services available

LRE – Factors for Consideration

- ▶ The result of various court decisions and opinions from the Office of State Review indicate the following are to be considered by the CSE in making its LRE determinations:
 - ▶ Severity of the disability
 - ▶ Age of the child
 - ▶ Ability to benefit from the placement
 - ▶ Opportunity for interaction with nondisabled peers
 - ▶ Any disruptive behaviors
 - ▶ The effect of the placement on the education of the other students
 - ▶ Training of staff
 - ▶ Input of teachers regarding the appropriate placement
 - ▶ Input of experts, with greater weight being given to those experts with more contact with the child
 - ▶ Attendance at the neighborhood school
 - ▶ Private versus public placement
 - ▶ Proposed increase in services while remaining in the public schools
 - ▶ Bullying*

Addressing Behavioral Challenges Tools in your LRE Toolbox

- ▶ THERE IS NO MAGIC BULLET!!!
- ▶ Newington's 3 part test
- ▶ Ed Law §3214's suspension and teacher removal provisions
- ▶ FBA's & BIP's
- ▶ Document your efforts, the CSE's considerations and the student's behaviors/needs!!!

LRE Case Studies

- ▶ Mr. & Mrs. P v. Newington, 546 F.3d 111
- ▶ Application of ???, SRO Appeal 09-057
- ▶ Application of a Student with a Disability, Appeal No. 17-008
- ▶ Application of BOE of Minsink Valley CSD, Appeal No. 17-027

Newington

- ▶ Student diagnosed with Downs Syndrome, hearing impairments, other challenges and modest behavior issues
- ▶ Kicking, grabbing, pulling hair
- ▶ At 8 yoa, behaviors likely to increase as ability gap increased between child and classmates
- ▶ Behaviors improved, educational challenges remained
- ▶ Parents fought for inclusion, seeking 80% of the time
- ▶ IEP provided for 60% of the day
- ▶ 2nd Cir. adopts two part test as "elucidated and augmented" by 3rd Circuit, i.e., a 3 part test.
- ▶ "Providing an education tailored to each student's particular needs does not admit of statistical generalizations"

Application of ???, Appeal No. 09-057

- ▶ Student classified as LD, FSIQ 95 – numerous deficits
- ▶ Frequent incidents of avoidance, frustration and resistance behaviors
- ▶ Numerous behavioral incidents resulting in out of school suspensions and detention
- ▶ District recommended a resource based program with inclusion support for academic subjects of History and ELA
- ▶ Parent sought placement in a humanities course where supports were not available
- ▶ District agreed to the parent's request

**Application of a Student with a Disability
- Appeal No. 17-008**

- ▶ Autistic Kindergarten Student
- ▶ Parents made numerous demands re ABA services, that teacher also be a certified behavioral therapist, etc.
- ▶ District offered a ½ day 12/1/1 program with significant supports geared towards students with autism and ½ day in an inclusive kindergarten program with supports
- ▶ No discussion by CSE whether student could have been successfully educated in a full day inclusive program with supports because the District did not have such a program

**Appeal of Minisink Valley CSD
Appeal No. 17-027**

- ▶ Extensive Fact Pattern
- ▶ Student diagnosed ASD, ODD, ADHD, etc.
- ▶ Significant behaviors
- ▶ Made some major mistakes
- ▶ Got away with a couple
- ▶ No Good Deed Goes Unpunished

LRE Points to Ponder...

- ▶ "Even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives.""

Andrew F., 137 S. Ct. #11000.

LRE Best Practices

- ▶ 1) Do the work
- ▶ 2) Insure the IEP indicates the extent to which the student will not participate in the regular ed classroom
- ▶ Be sure the IEP can be implemented in the student's recommended placement
- ▶ DOCUMENT, DOCUMENT, DOCUMENT

Creating, Amending Maintaining and Disclosing Student records

- ▶ FERPA – Family Educational Rights and Privacy Act, 20 USC §1232g; 34 CFR Part 99
 - Applies only to Education Records
- ▶ HIPAA – Health Insurance Portability and Accountability Act of 1996, 45 CFR Part 160
 - Applies only to "covered entities," i.e. health plans, health care clearing houses and health care providers that transmit health information in electronic form regarding "covered transactions," e.g. claims submitted to a health plan.

FERPA's Two Key Provisions

- ▶ FERPA gives parents or eligible students the right to:
 - inspect the student's education records,
 - challenge the accuracy of those records, and
 - seek to have the records amended
- ▶ And:
 - FERPA protects the privacy of those records by prohibiting their disclosure to third parties without the consent of the parent or the eligible student, except under limited circumstances.

FERPA's Privacy and Disclosure Protections Do Not Apply to Every Kind of Record

- FERPA applies only to "education records."
- Education records are defined as records that;
- (a) contain information directly related to a student, i.e., PII, and
- (b), are maintained by an educational agency or institution, or by a party acting for the agency or institution.

What Are Considered as Being Education Records

- Nearly everything generated during a student's educational career that is maintained, i.e., exams transcripts, papers, etc., but it also includes:
 - Attendance and absence records
 - Discipline records, including complaints
 - Disability accommodation records
 - Records that might be publicly available elsewhere
 - Records of information that the student had publicly revealed
 - Notes taken while interviewing, testing, or providing services or assistance to students that are retained afterward by the educational agency or institution
 - Treatment records once shared

These Are Not Records

Excluded from the definition of "records" are

- Sole possession records/memory joggers
- Classroom work and assignments graded by other students
- Law enforcement records
- Employment records
- Treatment records – only if not shared
- School Calendars, Student Handbooks, Code of Conduct Documents, General Notices regarding parent teacher conferences
- Alumni records – but not if they "relate back" to the student's school activities

Disclosure w/o Consent

- ▶ Per FERPA, education records may be disclosed without prior consent to the following:
- ▶ Other school officials, including teachers, within the school system who have a legitimate educational interest in such records
- ▶ Officials of another school, school system, or institution of post-secondary education where the student seeks to enroll
- ▶ Individuals and/or agencies in connection with a health or safety emergency

FERPA, HIPAA AND STUDENT RECORDS

- ▶ "At the elementary or secondary level, a student's health records, including immunization records, maintained by an educational agency or institution subject to FERPA, as well as records maintained by a school nurse, are "education records" subject to FERPA. In addition, records that schools maintain on special education students, including records on services provided to students under the Individuals with Disabilities Education Act (IDEA), are "education records" under FERPA. This is because these records are (1) directly related to a student, (2) maintained by the school or a party acting for the school, and (3) not excluded from the definition of "education records."

Joint Guidance on the Application of FERPA and HIPAA, U.S. Dept's of HHS & DOE, 2008.

Parentally Supplied Materials and Information

- ▶ Materials submitted by parents must be reviewed, but are not controlling with regard to the outcome of the CSE/IEP process.
- ▶ Materials submitted by parents which are directly related to the student and maintained by the District afterward and which contain personally identifiable information become education records subject to FERPA.
- ▶ Oral Reports???
- ▶ Doctor/patient confidentiality???
- ▶ What happens if we mess up???

Attorney Involvement in Special Education

- ▶ What is the purpose of the attorney's presence...
- ▶ On behalf of the parent?
- ▶ On behalf of the District?
- ▶ Who must provide notice of attendees?
- ▶ USDOE OSERS guidance

- ▶ QUESTIONS???
- ▶ THANK YOU!
