ANDREWS & PRICE

SPECIAL EDUCATION ALERT

Published in Cooperation with the University of Pittsburgh Tri-State Area School Study Council

OCTOBER, 2009

SPECIAL POINTS OF INTEREST:

- **Functional Behavior Assessments are now required prior to developing a behavior intervention plan**
- **Review the Red Flags to look for when deciding whether to evaluate on page 3**
- **3rd Circuit holds District is not responsible to pay for a residential mental health placement**
- **Reviewing Court Orders is essential when faced with divorced, foster and surrogate parents**

INSIDE THIS ISSUE:

Following Requirements for Conducting Functional Behavioral Assessments and Developing Behavior Intervention Plans

As the school year begins, evaluations are conducted and IEPs are developed, many students with disabilities will exhibit behavior that either impedes learning and/or results in some type of disciplinary action.

When Chapter 14 of the Pennsylvania Special Education Regulations was revised last year, a key area of focus was on positive behavior supports to address students with disabilities who are exhibiting behavior issues in school. Some of the long standing practices Districts have followed have been changed.

Pursuant to the IDEA, when a child's behavior impedes the child's learning or the learning of others, the IEP Team must consider the use of positive behavior interventions, supports and other strategies to address that behavior. Chapter 14 now requires Districts to conduct functional behavior assessment (FBA) and requires that the Behavior Intervention Plan (BIP) be based upon that FBA. Additionally, the discipline provisions of the IDEA require schools to conduct FBAs and develop BIPs under some circumstances if the child has been disciplined.

This article will provide guidance on when functional behavioral assessments are required, how to conduct an FBA and what must be included in a BIP.

FIND OUT MORE INFORMATION ON FBAS AND BIPS ON PAGES 4-5

When Should Homebound Requests Trigger Evaluations?

Districts receive requests from parents for homebound instruction for a variety of issues. But should a request for homebound for an illness, condition or mental health issue trigger the District's duty to conduct an evaluation for either 504/Chapter 15 services or under the IDEA? The Office for Civil Rights (OCR) recently found that a Wyoming school district violated Section 504 for failing to timely evaluate a student who missed the majority of the school year on homebound for a medical condition.

SEE PAGE 3 FOR MORE INFORMATION ON YOUR DUTY TO EVALUATE

CASE LAW UPDATE

Mary T. v. School District of Philadelphia
Third Circuit Holds District Not Required To Pay For Placement in Residential Health Care Facility

FACTS

Courtney T. qualified for special education services for learning disabilities, ADHD, speech and other mental health disorders. The District had always paid for Courtney to attend a private school. During the 2004-2005 school year, Courtney's condition began to deteriorate. She experienced psychotic events, severe anger problems, substance abuse and self harming behaviors.

Courtney's parents placed her in a short term psychiatric hospital. Upon her release, she was enrolled by her parents in Supervised Life-Styles (SLS), a long-term psychiatric residential treatment center in New York. SLS had no educational accreditation and no on-site school or special education teachers. For the first 6 months, Courtney received acute psychiatric treatment and did not receive educational services.

The school district sought to conduct a reevaluation upon Courtney's enrollment, but were advised by the parents that she was not stable at that time. Everyone agreed that her safety and emotional well being were the priority over educational services. The District did conduct an evaluation in October, 2005 while she was still at SLS. The Team determine that Courtney still had a limited academic capacity at that time. The District provided for 3 hours of instruction a week, focusing on adaptive and vocational skills.

The parents requested due process seeking reimbursement for the cost of SLS or compensatory education if reimbursement was denied. The District opposed payment to SLS on the grounds that a medical, not educational crisis prompted her placement.

HOLDING AND ANALYSIS

In order to receive tuition reimbursement, the parents have to prove that the child is denied FAPE and that their chosen placement is appropriate. The Court in this case analyzed the second prong first—was SLS an appropriate educational placement.

The Court, in reaching its decision, considered "whether full time placement may be considered necessary for educational purposes or whether the residential placement is a response to medical, social or emotional problems that are segregable from the learning process." If the placement was required for the former, the school district was obligated to bear the cost; if the placement was necessitated by the latter, the cost of the placement was the parents' responsibility. The Court further recognized that sometimes those issues are so intertwined that it is impossible to separate them. If they are not severable, the District is required to pay.

Here, the Court concluded that the residential placement at SLS was in response to Courtney's medical or emotional deterioration and was not necessary to provide Courtney with special education. SLS addressed Courtney's medical needs, not her learning needs. In fact, SLS is licensed under the NY Office of Mental Health and had no educational accreditation or on sight teachers. The facility was far more comparable to a hospital than to a school. In light of the above, the Court found the placement to be inappropriate and denied tuition reimbursement.

The Court also denied compensatory education. The Court held that the school district acted promptly and attempted to provide educational services but were unable to do so because of Courtney's medical condition. The Court concluded they could not fault the district for its efforts.

When Should A Medical Condition Trigger an Evaluation

(Continued from page 1)

OCR addressed a Complaint against the Laramie County School District. In this case, the student was placed on homebound instruction for most of the 2007 -2008 school year because of illness. The parents requested a 504 plan during the spring semester.

The District established a 504 plan for the student, but did not conduct an evaluation. OCR found that the District failed to evaluate the student in a timely manner. The District had notice that the child was ill and should have begun an evaluation to determine whether he qualified for services. Further, OCR found that the District should have conducted an evaluation to determine the student's unique needs. Because they did not conduct an evaluation, OCR found that the 504 Plan did not identify the accommodations that the student required.

Section 504 protects otherwise qualified handicapped students who have physical, mental or health impairments from discrimination because of the impairment. Schools are required to provide related aids, services or accommodations that are necessary to afford the student equal opportunity to participate in and obtain benefits from school programs and extracurricular activities.

Like the IDEA, schools have an obligation to locate and identify any student that it believes may have a disability that substantially limits a major life activity, such as learning or that needs accommodations to access and benefit from school. If a District believes that a child may be a protected handicapped student, it can make the decision based on the information that it has or either ask the family for additional medical information or obtain permission to evaluate the child.

Most often parents who have children with a medical condition will notify the District and request a 504 Agreement. Clearly a specific request for a 504 Service Agreement will trigger the identification process. However, some parents do not know to make a specific request. Based on the above OCR decision, some **RED FLAGS** that your District should look for are:

- Cumulating "excused" absences for a student with a medical condition
- Requests for homebound instruction for ongoing medical/mental health conditions
- Parents who provide the District with medical reports
- Parents who mention that their child has been diagnosed with a medical/mental health condition
- Notice that a child has been absent for a hospitalization for an ongoing medical/mental health condition.

Districts risk liability when they do not initiate the evaluation even after a red flag has been raised. DO NOT wait for the parents to request the evaluation or for parents to bring the medical records to the District. Too often parents, for whatever reason, delay in providing the information which results in the child not receiving services.

If a red flag exists, begin the evaluation process. Although District psychologists certainly cannot diagnose medical conditions, they can determine if there is a learning and/or emotional condition that results in a need for accommodations. If the parents do not provide medical information, issue a Release of Records for the parents to sign so that the District can directly contact the Doctor for information about the child's diagnosis and/or condition.

Not every child on homebound or who has a medical excuse is going to qualify for a 504 plan. For example, temporary illnesses or conditions do not qualify as "disabilities" under Section 504. What is important is that a Team has thoroughly analyzed the information provided and made an informed decision.

FBAS AND BIPS

(Continued from p. 1)

When Are BIPs Required?

There are different requirements for behavior plans depending upon whether or not a disciplinary incident is involved.

No Discipline: If there is no specific disciplinary incident, the IEP Team must consider the use of positive behavior interventions and supports and other strategies to address behavior that is impeding the child's ability to learn or impedes the learning of other children. In these cases, the intent of developing a BIP is to provide proactive positive support for the child to prevent the child's behaviors from leading to a major disciplinary referral.

In this situation, the Team should review the evaluation or reevaluation report, the IEP present education levels and input from the parent and teachers to determine whether behavior is impeding learning. If behavior issues are identified, a BIP should be considered as part of the IEP.

If the Team, after reviewing the information does not believe a BIP is required for the child to receive FAPE, the reasons for that decision should be documented in the IEP's present education levels. Districts open themselves up to liability if behaviors are identified, yet no BIP is included in the IEP.

Remember that behavior encompasses more than simply disciplinary referrals. Any behavior that is impeding learning should be dealt with through positive behavior intervention. This may include attendance issues, attention issues, homework or work refusal.

Discipline: If the child has committed a disciplinary infraction, the IDEA requires FBAs and BIPs in certain situations. Pursuant to the IDEA and PA State Regulations, a child with a disability may be disciplined for 10 consecutive days and 15 total days in a school year. However, the child may be disciplined further if the behavior was not a manifestation of the child's disability. Additionally, a child with a disability may be placed in a 45 school day alternative placement for a drug violation, a weapons violation or if the child has seriously injured another person.

If the child's behavior is found to be a manifestation of his or her disability or if the child is being placed in a 45 calendar day placement, the law requires the IEP Team to conduct an FBA of the child and prepare a BIP. If the child already has a BIP, the Team is required to review the plan and modify it as necessary to address the behavior.

Although not required by law, it is good practice to think about an FBA and BIP even before the child's behavior reaches this level of discipline. If you have a child with behavior issues that is continuously being suspended for one or two days at a time, consider developing the BIP before the suspensions reach 10 days.

When Is An FBA Required?

Pursuant to Chapter 14, all behavior support programs and plans must be based on a functional behavior assessment and utilize positive behavior techniques. This new language means that every child with a BIP should have had an FBA. The FBA can be conducted as part of an initial evaluation, during the reevaluation process or as a separate evaluation if the Team determines a need. If an FBA is done outside of the triannual reevaluation process, be sure to revise the child's ER to include the results of the FBA.

According to the Office of Special Education and Rehabilitative Services (OSERS), the FBA focuses on identifying the function or purpose behind the child's behaviors. The process should involve looking closely at a wide range of factors, including but not limited to social, affective and environmental factors to determine why a child misbehaves. That information should then be used by the IEP Team to develop the BIP to reduce or eliminate the behavior.

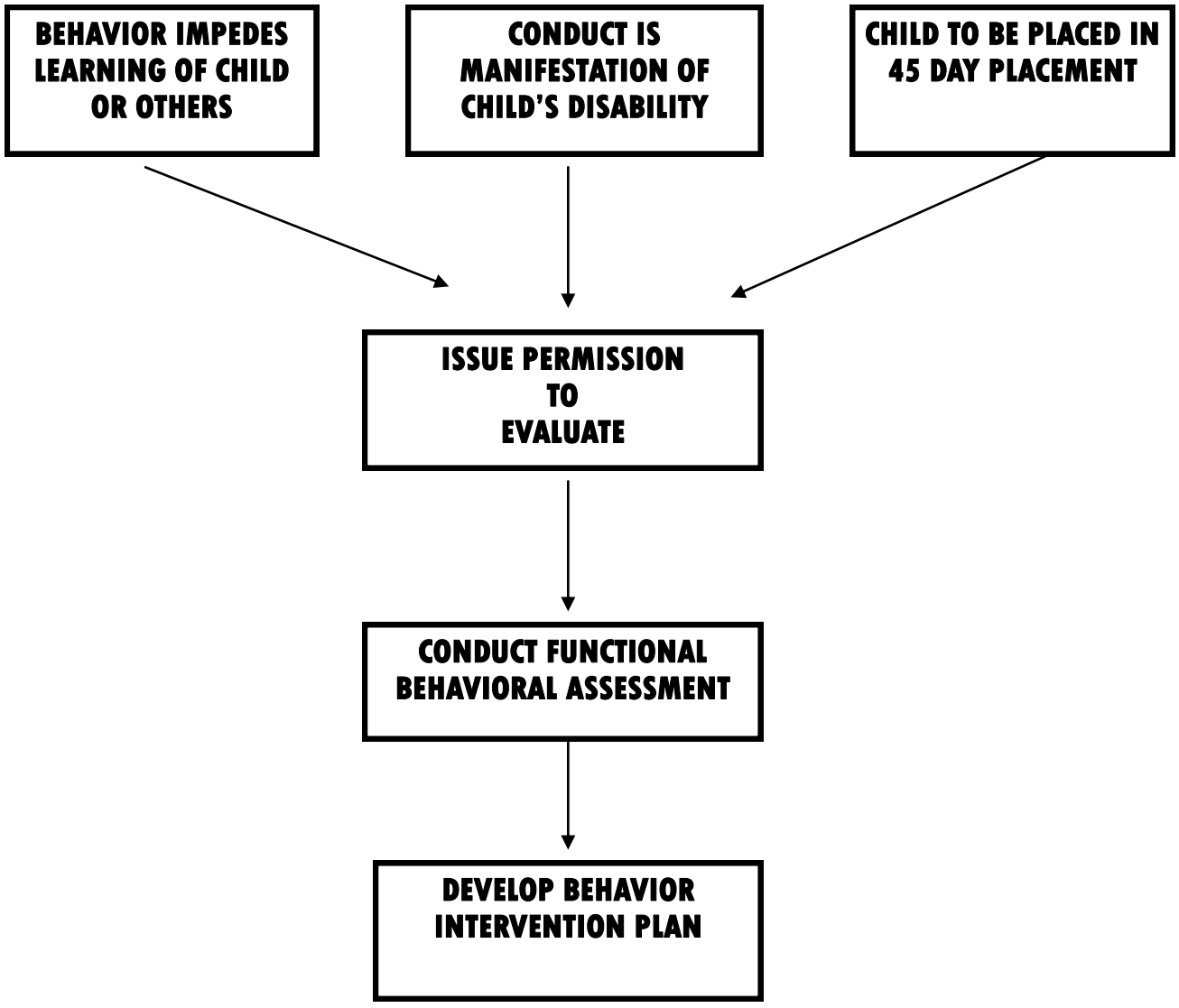
FBAS AND BIPS

Is Consent Required to Do An FBA?

According to both PDE and OSERS, Yes. Because an FBA is considered to be an individualized assessment of a child that assists in determining whether the child is or continues to be a child with a disability and is frequently used to determine the nature and extent of the special education and related services that the child needs, it would be considered an evaluation under the IDEA. As with other evaluations, parental consent would then be required to conduct the FBA.

Can Parents Request an IEE?

Because an FBA is considered to be an evaluation, parents can request an IEE if they disagree with the FBA conducted by the school district. As with any request for an IEE at public expense, the District has the option of paying for the IEE or requesting a due process hearing to show that its evaluation and functional behavioral assessment is appropriate. If the District's FBA is determined to be appropriate, it will not be required to pay for an independent FBA.



Custody issues

Schools often are faced with questions about parental rights in special education situations when the child's parents are divorced. Those questions range from who can access educational records? To who should we invite to IEP meetings? To who makes the decisions at those meetings? To what do we do if the parents disagree?

Many of the answers can be found in the family's Court Order or Custody Agreement. Therefore, in any situation where parents are divorced, ask for a copy of the Court Order or Custody Agreement for the school's records. It is advisable to ask both parents to provide a copy or to confirm with both parents that the District was given the correct or most up to date version of the Order or Agreement. Ask the parents to update the District if changes are made to any legal document.

Once you have a copy of the Order or Agreement, you must next determine who has "physical custody" of the child and who has "legal custody" of the child. Physical custody determine where the child lives. Legal custody determines which parent has the right to make decisions, including medical, legal and educational decision, for the child. The Court Order or Agreement may specify which parent has the right to make the educational decisions. More often, however, the parents have "joint legal custody" meaning that both parents have the right to make educational decisions for their child.

The Family Educational Rights and Privacy Act (FERPA) provides that both parents have access to their child's educational records, unless the Court Order specifically revokes that right. If the Court Order does not clearly limit a parent's right to access records (which most Orders do not) both parents have the right to review educational records, regardless of which parent has physical or legal custody.

Additionally, each parent would have the right to be invited to and attend their child's IEP meeting, again, unless a Court Order specifically says he or she is not permitted to do so.

Just because a parent has the right to access educational records or attend IEP meetings does not mean that the parent has the right to make educational decisions. Again, this would be determined by the Court Order or Agreement. The parent with "legal custody" has the right to make educational decisions. If one parent has sole legal custody, that is the parent that should make the educational decisions, including signing the Permission to Evaluate, agreeing or disagreeing to the ER or RR and signing the NOREP and ask for due process.

If the parents have joint legal custody, they can both make educational decisions for the child. While that is fine in the majority of cases where parents work together in the best interest of the child, sometimes Districts are faced with divorced parents who disagree to the child's evaluation, program or placement.

In the case of joint legal custody, as a general rule the school district can proceed with the signature of only one parent. The school does not have to obtain the signature of both parents on the PTE or NOREP. What should you do if one parent signs, but the other disagrees? First, issue Procedural Safeguard Notices to both parents. The parent who disagrees still has the right to request a due process hearing to challenge the decision.

Obviously, it is beneficial for the child for the parents to agree. Therefore, try to encourage the parents to cooperate for the best interest of the child. Try to schedule a meeting with the parents to resolve any disagreements. If the parents still cannot agree, encourage mediation or a facilitated IEP meeting before proceeding to due process.

If the parents disagreement cause delay in beginning the evaluation, developing the IEP or implementing the program—DOCUMENT the reasons for the delay.

Custody Issues—Foster Parents

Custody issues also arise when children with disabilities are placed in foster care or some other placement outside their home by a child welfare agency. Keep in mind that the IDEA has a very broad definition of "parent." The parent may be:

- A biological or adoptive parent
- A foster parent
- A legal guardian (but not the State if the child is a ward of the State)
- An individual acting in the place of a parent, including a grandparent, stepparent or other relative, with whom the child lives or who is legally responsible for the child's welfare
- A surrogate parent

Typically, even if there is more than one person that fits the definition of "parent" above, the biological or adoptive parent must be treated as the decision maker if that person is available. The biological parent must be invited to attend the IEP Team meeting. For example, if a child is living with a foster family and the birth parent is present and attempting to participate, the birth parent has the right to make decisions over the foster parent.

However, it still is probably going to be necessary to view the Court Order. If a judicial decree or order identifies a specific person to act or the birth parents rights have been terminated, then the person so identified will be considered the "parent" of the child and have the right to make educational decisions.

Additionally, if the birth parent is known but does not attempt to participate, even though he/she has been invited to attend, the foster parent can then be treated as the "parent" and make educational decisions for the child.

So remember, foster parents are to be treated as the parent if the biological parent's rights have been terminated or the biological parent refuses to participate. If the biological parent does choose to participate, they make the decisions. The school cannot accept the foster parent as the parent simply because it does not like the decisions made by the biological parent.

SURROGATE PARENTS

Schools are responsible for making reasonable efforts to appoint a surrogate parent if:

- No parent can be identified—remember to use the definition above to determine if the child has a parent. If there is no biological parent, but the child has a foster parent, the foster parent is able to make decisions for the child. No surrogate parent can be appointed.
- The school, after reasonable efforts, cannot locate the parent
- The child is a ward of the State
- The child is an "unaccompanied homeless youth"

The surrogate parent should be appointed within 30 days after the district determines the child needs a surrogate parent. The surrogate parent cannot be a caseworker or other employee of CYS or a school district employee. The surrogate parent should have no personal or professional conflict of interest and should be knowledgeable and have skills to adequately represent the child.

Surrogate parents then have the same rights as a parent to request and consent to evaluations; participate in the IEP process and make decisions regarding FAPE for the child; sign NOREPs and request due process.

Again, surrogate parents are not appointed simply because the child's parents are being unreasonable or uncooperative or making what the District considers to be "bad" choices for the child.

TRI-STATE AREA SCHOOL STUDY COUNCIL
SCHOOL LEADERSHIP COLLABORATIVE
ADMINISTRATIVE AND POLICY STUDIES
SCHOOL OF EDUCATION
UNIVERSITY OF PITTSBURGH

THE SCHOOL LEADERSHIP COLLABORATIVE (SLC) SCHOOL OF EDUCATION UNIVERSITY OF PITTSBURGH

The SLC of the Department of Administrative and Policy Studies Department of the School of Education, University of Pittsburgh functions to integrate the activities and resources of the Leadership Development Programs, the Principal's Academy of Western Pennsylvania, the Superintendent's Academy and the Tri-State Area School Study Council. All of these units are working toward the implementation of a synergistic force for school and community renewal. The goal of the Collaborative is to stimulate school and community renewal by improving the quality of educational leadership in Western Pennsylvania. Activities of the Collaborative include the preparation of present and future leaders through formal degree and certificate programs ranging from the masters through the doctorate. In addition, continuing professional development of school leaders is aligned with the formal programs and connected to ongoing organizational and community renewal projects.

Dr. Diane Kirk, Director
PH: (412) 648-7086

Consult Your Solicitor!

The legal issues discussed herein are for the purpose of providing general knowledge and guidance in the area of special education. This newsletter should not be construed as legal advice and does not replace the need for legal counsel with respect to particular problems which arise in each district. As each child is unique, each legal problem is unique. Accordingly, when districts are faced with a particular legal problem, they should consult their solicitor or with special education counsel to work through the issues on a case by case basis.