

## SPECIAL EDUCATION ADVOCACY FOR CHILDREN WITH DISABILITIES IN FOSTER CARE (PART 1)

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### Relevant SPED/foster care data

- 50-60% children in foster care have developmental disabilities or delays, compared with 10% general population. **TRUE**
- 40% children in foster care have mental health disorders. **BETWEEN 40-85%**
- < 50% children in foster care suffer from severe behavior and emotional problems. **FALSE 50-75%**
- Children in foster care are twice as likely to be referred for special education than their non-foster care peers. **FALSE – THREE TIMES AS LIKELY**

### Relevant data cont.

- As many as 40% children in foster care receive special education compared with 15% general population. **TRUE**
- Children in foster care are over-identified as having behavioral disorders and under-identified as having learning and language disabilities. **TRUE**
- Children classified with emotional disorders are less likely to exit foster care. **TRUE**

### Relevant data cont.

- Children with developmental delays remain in foster care for the same amount of time as their non-disabled peers. **FALSE**
- Children with disabilities have higher maltreatment prevalence rates. **TRUE – 31% EXPERIENCE MALTREATMENT COMPARED TO 9% NON-DISABLED CHILDREN**
- Children who experience maltreatment are more likely to develop physical, emotional and behavioral disabilities. **TRUE**

### What is Special Education?

Specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability. Includes instruction in

- Classrooms
- Home
- Hospitals
- Institutions
- Detention

20 U.S.C. 1401(29); 34 C.F.R. 30.39

### What is Special Education? cont.

- Special education instruction not limited to academics
  - Physical education
  - Travel training
  - Vocational education
  - Social skills
  - Behavioral modification
- Specially designed instruction means adapting as appropriate, content, methodology and/or delivery of instruction to address child's unique needs

34. C.F.R. 300.39

## What is a Child with a Disability?

A child with a physical, emotional, learning and/or cognitive disability who, because of his/her condition(s), needs special education and related services.

### NOTE:

The disability must have an *adverse effect* on the child's educational performance.

20 U.S.C. 1401(3)

## What Does the Law Provide?

Individuals with Disabilities Education Improvement Act 2004 (IDEA)

- Every child with a disability between the ages of 3 and 21 has the right to a free and appropriate public education (FAPE) in the least restrictive environment (LRE)
  - SPED designed to meet child's unique needs
  - Ensure rights of disabled children and parents are protected
  - Includes children who are homeless, suspended or expelled, and wards of the State

20 U.S.C. 1400(d); N.J.A.C. 6A:14-1.1, 1.2

## What is a FAPE?

- Free
  - At no greater cost to child and family than nondisabled student incurs (i.e. incidental fees) as part of regular education program (34 C.F.R. 300.39(b)(1))
- Appropriate
  - Meaningful educational benefit / progress
  - Achieve significant learning
  - ≠ the best
- Public
- Education - defined broadly

## What is LRE?

Least Restrictive Environment (LRE) provides:

Students with disabilities must be educated with non-disabled students to *the maximum extent appropriate*

20 U.S.C. 1412(a)(5); N.J.A.C. 6A:14-4.2

## Standard for Educational Quality

What standard for educational quality applies to children with disabilities in out-of-home care?

- Thorough and efficient education (N.J. Const.)
- Free and Appropriate Public Education (IDEA)
- Educational program that will **maximize** the child's potential (N.J. Child Placement Bill of Rights, NJSA 9:6B-2)
  - See *K.J. ex rel. Lowry v. Division of Youth and Family Services, et al.*, 363 F.Supp.2d 728 (D.N.J. 2005), holding CPBR provides private right of action

## What is the Role of Parent in SPED?

- IDEA is parent-driven
- No standing for children under 18 = no voice
- Parent right to participate in all stages of SPED process (N.J.A.C. 6A:14-2.3(i))
- Written consent of parent required for SPED evaluations, initial IEP implementation (N.J.A.C. 6A:14-2.3)
- IDEA procedural safeguards for parents, e.g. due process (N.J.A.C. 6A:14-2.1 et seq.)

## Defining the Parent

- Who is the parent for a child in out-of-home placement?
  - Regular education → DYFS authorizes resource parents to make routine educational decisions
  - Special education → "Parent" defined by federal and state law and regulations

## Who is the "Parent" for SPED purposes?

- Birth or adoptive parent / legal guardian
- Relative caregiver with whom child is living (person in parental relationship)
- Foster /Resource parent when willing to so serve
- Surrogate parent
- Person appointed by the Court to act as "parent" or to make educational decisions
- Adult student

N.J.A.C. 6A:14-1.3

## What is the "parent" hierarchy?

If more than one person qualifies as the "parent":

- Biological or adoptive parent who is "attempting to act as the parent" is presumed to be the parent unless s/he no longer has *legal authority* to make educational decisions
- BUT, if court order identifies specific person to be the "parent" or to make educational decisions for a child, then such person is the "parent" for educational purposes

34 C.F.R. 300.30

## What is "attempting to act as parent"?

- Is expressing interest/desire in parenting enough?
- Are certain actions required?
- What if parent impaired due to mental illness, disabling condition or substance use/abuse?
- What if there is a no contact order?
- Who determines if parent is "attempting to act as the parent?"
  - DYFS?
  - School district?
  - Judge?

## TAKE NOTE



### **NO AUTOMATIC CHANGE**

**in parent's right to make educational decisions  
when child enters out-of-home placement**

## When should A Surrogate Parent be Appointed?

IF:

- No parent/guardian can be identified;
- Whereabouts of the parent or guardian are unknown after reasonable efforts to locate;
- Parental rights have been terminated;
- Student is an unaccompanied youth; OR
- Rights of the parent/guardian to make educational decisions have been removed by the Court

N.J.A.C. 6A:14-2.2; 34 C.F.R. 300.519

## Surrogate parent requirements

- Local school districts must have processes in place
  - ▣ To identify need for surrogate parent
  - ▣ To appoint surrogate parent within 30 days
- Surrogate parent must:
  - ▣ Not have personal or professional interest that conflicts with child's interests
  - ▣ Have knowledge and skills for adequate representation
  - ▣ *Cannot be employee of any state agency involved in education or care of child*

N.J.A.C. 6A:14-2.2; 34 C.F.R. 300.519

## Who appoints a Surrogate Parent?

- Local school district, in consultation with DYFS  
OR
- Family court judge overseeing child's care

N.J.A.C. 6A:14-2.2; 34 C.F.R. 300.519

## Case Study of Jonah

- Jonah lives with grandmother. Parental rights not terminated. Mother resides in home. Father unknown.
  - ▣ What if mother resides elsewhere?
- Jonah lives in resource family home. Parental rights not terminated.
  - ▣ What if Jonah lives in a group home?
- Jonah lives in group home. Parents deceased. No known family. Jonah very close with DYFS worker.
- Jonah lives in resource home. Father incarcerated. Mother cannot be located.

## REVIEW – “Parent” for SPED

- Can a parent or legal guardian from whom child is removed serve as a child's “parent”? **Yes, if...**
- Can a relative serve as a child's “parent”? **Yes, if...**
- Can a resource parent serve as a child's “parent”? **Yes, if...**
- Can a favorite school teacher serve as a child's “parent”? **No**
- Can a law guardian serve as a child's “parent”? **No**
- Can a DYFS worker serve as a child's “parent”? **No**

## Who is the child's “parent” for SPED?

- Has the court terminated parental rights?
- Has the court terminated parent's right to make educational decisions about the child (entered limited guardian order)?
- Can the child's parent be identified and located?
- Are there other persons who can act as the child's parent for special education purposes?
- If there are other persons who can act as the child's parent for special education purposes, is the child's parent “attempting to act as a parent”?
- If not, who is the child's parent for special education purposes?

**\*ALWAYS ENSURE A SPED PARENT IS IDENTIFIED AND ACTING\***

## One Last Case Study on “Parent”

Juan R. is 10 years old and has been living with his maternal aunt since he was a toddler. His mother has a substance abuse history and visits Juan at her sister's apartment every few months. His father is deceased. Recently, Juan's teachers expressed concern about his lack of progress in math. The school suggests to Juan's aunt that he be evaluated by the District's child study team. Who can consent to this evaluation?

## SPECIAL EDUCATION SYSTEM AND PROCESS

### Special Education - Process

- Child Find
- Referral
- Evaluation
- Eligibility and Classification
- Individual Education Plan (IEP)
- Placement
- Reevaluation

### Child Find

- Duty of State and Local School Districts to identify, locate and evaluate students who may be in need of special education, including:
    - Children in private schools
    - Children youth detention facilities
    - "Highly mobile" children, e.g. migrant and homeless children
    - Children who are wards of the State
- N.J.A.C. 6A:14-3.3, 34 C.F.R. 300.111

## HOW DOES A CHILD GET EVALUATED FOR SPECIAL EDUCATION?

### The Referral

### Who may refer a child to SPED?

The following may request a child be evaluated for SPED:

- Parent
- Teacher
- Professional
- Administrator
- Agency
- Court Order

20 U.S.C. 1414(a)(1); N.J.A.C. 6A:14-3.3

### How is a child referred to SPED?

- Written request to school principal, school administrator or Child Study Team (CST)

#### PRACTICE TIPS

- REQUEST IN WRITING
- DATE
- INCLUDE PARENTAL CONSET TO EVALUATE
- SEND COPY OF LETTER TO DISTRICT'S DIRECTOR OF SPECIAL SERVICES
- MAINTAIN COPY FOR RECORDS

## Referral - Next Steps

- CST convenes referral meeting within 20 calendar days of receipt of request
  - ▣ Child Study Team
  - ▣ Parent
  - ▣ Teacher
- Decision made re whether evaluation needed and, if yes, nature and scope

N.J.A.C. 6A:14-3.3

## Child Study Team

Child Study Team MUST include:

- School Psychologist
- Learning Disabilities Teacher-Consultant (LDT-C)
- School Social Worker
- If child is preschool age, must also include Speech and Language Specialist (SLS)

All CST members must be employees of school district

N.J.A.C. 6A:14-3.1, 3.3

## Referral – Next Steps cont.

- Within 15 days of meeting, CST must give parent written notice of decision to evaluate
- Notice must include:
  - ▣ If decide to evaluate, nature and scope of evaluations
  - ▣ If decide not to evaluate, basis for decision and right to appeal
  - ▣ Request for parental consent
    - Triggers 90 day timeline to conduct evaluation, determine eligibility and develop IEP

N.J.A.C. 6A:14-2.3

## Consent to Evaluate

- Consent of “parent” required to evaluate child with a disability
- District must make reasonable efforts to obtain parental consent where child is ward of State and not living with parent

N.J.A.C. 6A:14-2.2

## Consent to Evaluate cont.

- Parent’s informed consent for an *initial* evaluation not required if:
  - ▣ Parent cannot be located despite reasonable efforts;
  - ▣ Parent’s rights have been terminated; or
  - ▣ Rights to make educational decisions have been subrogated by a judge

NOTE: If child ward of state, Judge overseeing child’s care may appoint person to consent to *initial* CST evaluation if parent cannot be located after reasonable efforts

N.J.A.C. 6A:14-2.3(b); 34 C.F.R. 300.300(a)(2)

## SPED Referral - Possible Alternatives

- Intervention and Referral Services (I&RS)
  - ▣ Services for students with learning, behavior, health or other difficulties
    - in the general education program and/or
    - in accordance with IEP
  - ▣ Emphasis on early identification of concerns and implementation of interventions

N.J.A.C. 6A:16-7

**NOTE:** PARENT CAN INSIST ON CST REFERRAL WITHOUT HAVING TO PARTICIPATE IN I&RS FIRST (N.J.A.C. 6A:14-3.3)

## SPED Referral – Alternatives cont.

- Section 504 of Rehabilitation Act
  - ▣ Provides FAPE
  - ▣ Broader definition of disability
  - ▣ Fewer protections

29 U.S.C. 794; 34 C.F.R. 104.100 et seq.

## Case study of Karima

Karima is in the third grade and struggling with reading grade appropriate material, spelling and writing. Her parent requests assistance from the school district and the district refers her to the I&RS team.

WHAT ARE YOUR THOUGHTS, QUESTIONS, CONCERNS?

## SPED Evaluation

- If the school district decides the child should be evaluated for special education, it must provide a *multi-disciplinary evaluation at no cost*
- Must evaluate within 90 days of parent's consent
  - ▣ Exceptions
    - Parent does not cooperate
    - Child moves to another district during evaluation process and parent and district agree to specific modified timeframe for completing evaluation

N.J.A.C. 6A:14-3.4

## Case Study of Charlie

Charlie, age 10, is removed from his home in Edison and placed by DYFS in a resource home in Elizabeth. Charlie was being evaluated for SPED by the Edison District. The evaluation process commenced 40 days earlier. The resource parent is told Charlie must stay at home until he undergoes a full child study team evaluation by Elizabeth District.

WHAT QUESTIONS/CONCERNS DO YOU HAVE?



## Evaluations – RED FLAGS

- Single assessment/procedure used as sole basis for eligibility
- Child not assessed in all areas of suspected disability
- Assessment not in language/form most likely to yield accurate information
- Identifying information in report incorrect
- No observation performed outside of testing
- Evaluators not properly qualified
- Parent not receive initial evaluation reports at least 10 calendar days prior to eligibility meeting

N.J.A.C. 6A:14-3.4, 3.5

## Types of Evaluations by School District

- |                          |                               |
|--------------------------|-------------------------------|
| □ Hearing and Vision     | □ Neuropsychological          |
| □ Psychological          | □ Neuropsychiatric            |
| □ Educational / Learning | □ Central Auditory Processing |
| □ Speech & Language      | □ Assistive Technology        |
| □ Occupational Therapy   | □ Vocational                  |
| □ Physical Therapy       | □ Functional Behavioral       |
| □ Psychiatric            | NOTE: List NOT exhaustive     |
| □ Neurological           |                               |

## Case Study of Christopher

Christopher is four years old and has a history of disruptive behavior in his preschool, including kicking, spitting, and throwing objects. His parent asks that he be evaluated for special education. The school district conducts a psychological evaluation, a learning assessment and a social history, and finds him ineligible because there are no cognitive issues.

What concerns do you have about this?

## Independent Evaluations

- "Parent" has right to request independent evaluation if disagrees with results of District evaluation
  - Written request
  - 20 days for District to file for due process
- If District does not file for due process within 20 days, must pay for independent evaluation
  - Parent selects evaluator, NOT district (must be reasonable)
  - District may provide parent with list of qualified evaluators but parent not bound to choose from list

N.J.A.C. 6A:14-2.5(c)

## Independent Evaluation cont.

- Parent ALSO has right to request independent evaluation if District decides not to evaluate child
  - Written request
  - District has 10 days to decide if will conduct its own evaluation first
  - If decides to do own evaluation, has 45 calendar days from date to request to complete evaluation
  - If decides not to do own evaluation, has 20 days to file for due process

N.J.A.C. 6A:14-2.5(c)

## Independent Evaluation cont.

DISTRICT HAS **DUTY TO CONSIDER**  
INDEPENDENT EVALUATION RESULTS –  
**DOES NOT HAVE TO FOLLOW THEM**

## Other Sources of Evaluations

At DYFS's initiative or by Court Order:

- Psychological
- Psychiatric
- Medical
- Neurological / Neurodevelopmental / Neuropsychiatric
- Occupational/Physical/Speech-Language Therapy
- At age 14, Basic Life Skills and Ansell-Casey strengths and needs

## Using Evaluations Across Systems

QUESTIONS TO ASK:

- Does the child need additional evaluations?
- Through which system can/should the evaluation(s) be obtained?
  - System dictates purpose of evaluation
  - Timing issues
- What are limits on sharing/using results across systems?
  - Confidentiality and need for redaction
  - Educational versus other benefit



## Case Study of Joseph

Joseph is nine years old and in regular education programming. His mother is arrested and incarcerated and he is placed with his maternal grandmother. Joseph's behavior is challenging, and it is hard for his grandmother to control his behaviors and ensure his safety.

WHAT QUESTIONS/THOUGHTS DO YOU HAVE?

## Case Study of Joseph cont.

- Should a referral be made for a CST evaluation?
  - Why or why not?
- If yes, when? Do you want to obtain any outside evaluations first, either from DYFS or independent evaluators?
- How will you refer Joseph for a CST evaluation?
- Who can consent to the CST evaluation?
- What evaluations do you want to have performed?
  - Why?