



Ennis Roberts Fischer SCHOOL LAW REVIEW



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Revisions to DSM-5 Affect Student Diagnosis

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Ennis, Roberts & Fischer's School Law Review has been developed for use by clients of the firm. However, the review is not intended to represent legal advice or opinion. If you have questions about the application of an issue raised to your situation, please contact an attorney at Ennis, Roberts, & Fischer for consultation

The fifth version of psychiatry's diagnostic manual, the Diagnostic and Statistical Manual of Mental Disorders (DSM-5), is expected to be released in May and contains significant changes of which all districts should be aware. The DSM is a guidebook published by the American Psychiatric Association (APA) and used by mental health professionals in the United States to classify and diagnose mental disorders. The new version updates and revises the current criteria for diagnosing Attention Deficit Hyperactivity Disorder (ADHD) and creates a new broad diagnosis category called Autism Spectrum Disorder. These changes are discussed in detail below.

Attention Deficit Hyperactivity Disorder (ADHD):

DSM-5 increases the age by which ADHD symptoms must be present for a diagnosis from age seven to age twelve. The expanded age range is intended to help identify and serve older students who have previously been missed or misdiagnosed. The new diagnosis criteria also attempts to increase the level of teacher involvement in gathering diagnostic information, recommending that information be obtained from parents and teachers. Additionally, DSM-5 recognizes new symptoms in diagnosing the hyperactive/impulsive type of ADHD such as: acting without thinking,

frequently being impatient, rushing through tasks, and finding it difficult to resist temptation.

How This Affects Your District:

As a result of the expanded age range for ADHD diagnoses, an increase in general diagnoses may result and middle schools may have to field more requests from parents for Section 504 and special education evaluations related to ADHD. Districts should prepare to face the potential for increased requests, although there will be no change to the evaluation processes and the services provided once a student is diagnosed.

The DSM-5's recommendation for increased teacher involvement in diagnosing ADHD could lead to a decrease in the number of students diagnosed, as teacher input can help to prevent over-identifying students. However, the teacher involvement could also raise expectations of parents. Districts must continue to make clear that a medical diagnosis does not automatically translate into identification under 504 or IDEA.

Autism spectrum disorder:

DSM-5 creates a new category that incorporates Autism, Asperger's syndrome, childhood disintegrative disorder, and pervasive devel-

opment disorder into one diagnosis of Autism Spectrum Disorder ("ASD"). In diagnosing ASD, health professionals will look to specific social skills, deficits and behavioral issues and indicate the level of severity (mild, moderate or severe). The effect of these revisions is to completely eliminate any distinctions between currently recognized disorders.

How This Affects Your District:

The new ASD category does not influence special education classification under IDEA. However, there is a possibility that IEP development could become more complicated. By eliminating the current disorder distinctions, it will be more difficult for districts to understand a student's abilities and issues. For example, identifying children as having Asperger's under the current criteria helps districts to know the typical issues to expect as a result of their diagnosis. The broad classification of DSM-5 combines a vast array of social skills and behavioral issues.

As a result, some parents may have difficulty advocating for their child's specific needs under the new diagnosis criteria. The changes may require increased communication between school personnel and parents in ex-

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Students With Disabilities Should Have Equal Opportunities in Athletics, Cont.

plaining exactly what a child needs in order to devise an effective IEP. Discussions at IEP meetings should be extremely specific, focusing on a particular child's individual behaviors, issues, and skills, and not merely on their di-

agnosis.

There has been some concern that children will autism-related symptoms will be denied services because of the new ASD classification. APA field trials

have revealed that children diagnosed under the current criteria almost always received a diagnosis under the new criteria as well. The prevalence of diagnosis is essentially unchanged.

Civil Protection Orders And Schools

To combat the issues with bullying, some parents are now taking action to file Civil Protection Orders (a.k.a. Restraining Orders) for their children against other students within the school district.

A student, or a parent on behalf of his or her student, can file with the juvenile court for the a Civil Protection Order ("CPO"). At the time the filing is made, the court conducts an emergency hearing, and the judge decides whether there is any merit in the complaint. It does not take much for a judge to grant an emergency CPO while waiting for the full hearing. Therefore, even in cases where a full CPO will not be granted, the emergency CPO can affect schools, because it is in effect until a full hearing can be completed.

So, how can this affect schools? As

part of either an emergency CPO or full CPO the judge could, and likely would, decide that the students must be kept apart from one another. For example, the CPO might state that the student against which the CPO is filed (respondent) must remain 250 feet away from the protected student while at school and on the bus. A school bus is not 250 feet long. Therefore, the respondent cannot ride the same bus as the protected student. In some cases the school building is not large enough to accommodate the distance specified by the CPO. Since this is a court order, schools must allow for compliance. If there is no way to keep the students the specified distance apart, then the school may need to explore other options for the respondent student, such as home instruction.

Districts must comply with the CPO and this compliance must be in

favor of the protected student. At no time should it seem like the district is punishing the protected student for filing for the CPO.

Districts are encouraged to advocate for reasonable restrictions against the respondent students so that both the protected and respondent students are able to participate fully in the educational process. If a member of your staff is subpoenaed to the full hearing, and it is evident that the CPO will be granted, the staff member should express to the judge the ways that the district can keep the students apart, without making it impossible for both students to attend the school.

Overall, schools must understand that whenever a CPO is in place, the school is bound to comply with that CPO even if it seems unreasonable.

Boards Should Be Careful With Abstentions

There are many different voting requirements for school boards to follow when doing business. Depending on the type of vote, the number of board members present, the number who abstain, and the bylaws of a particular board, it is possible that with a 5 member board one motion will only require 2 "aye" votes to pass while another might require 4. It is imperative that boards understand the difference between the need for a majority vote versus the need for a majority of the full membership vote.

For example, if a board intends to elect or appoint an officer, R.C. 3313.18 requires a roll call vote, and requires that a majority of all the members of the board vote "aye." In that case, if there are 5 members on the board, 3 members must vote "aye." If 2 mem-

bers abstain while 2 vote "aye" and 1 vote "nay," the motion cannot pass because there were not 3 votes in the affirmative. The important piece of the statute is that the vote needed is a majority of the **full membership**.

This can get confusing if a motion only requires a majority vote (not a majority of all members), because abstentions can, in effect, appear to act like affirmative votes. An Attorney General's Opinion from 1998 covered this topic. The AG Opinion stated that the term "majority vote," when used without qualification means "more than half of the votes cast by persons legally entitled to vote, excluding blanks or abstentions, at a regular or properly called meeting at which a quorum...is present."

For example, where only a "majority vote" is needed and there are 5 members of the board, if 2 members abstain, 2 members vote "aye," and 1 member votes "nay," the motion will pass, despite less than a majority of those present voting "aye."

The main point of this is that where a requirement of "majority vote" is qualified by some other statement such as "of all members" or "of members present," the abstentions will effectively count as "nay" votes. Therefore, boards should be careful when voting to ensure that abstentions do not cause issues with allowing the business of the board to be completed.

President Signs Uninterrupted Scholars Act

Senate Bill 3472

On January 14th, President Obama signed the Uninterrupted Scholars Act (“Act”) that was almost completely unopposed in Congress. This Act modifies the Family Educational Rights and Privacy Act of 1974 (FERPA). The change adds one more exception to when a school is allowed to release education records without parental consent.

A school may now release the education records of a student without parental consent to an agency caseworker or other representative of a State or local child welfare agency. This excep-

tion applies when the child welfare agency is legally responsible for the care and protection of the student and when the caseworker is the person with the right to access the student’s case plan.

Also, when a parent is party to a court proceeding that involves child abuse, neglect, and dependency matters and the court subpoenas the child’s education records the school no longer has any duty to notify the parents of that subpoena. In the past, any time a child’s education records were requested by the court, the parents had to be notified.

Since parents do not necessarily lose their parental rights when a child is taken into protective custody, the child welfare agencies have had a hard time gaining access to student education records. This new provision should help to reduce the absenteeism that is prevalent with students who come into child custody or change schools while in child custody. Now, schools will be able to release education records to the child welfare agency and the agency will be able to move the students to the appropriate school where they will be residing.

Though Still Tenuous, Online Comments By Employees Can Be Punishable

In re Tenure Hearing of Jennifer O’Brien, No. A-2452-11T4 (N.J. Super. Ct., App. Div. Jan. 11, 2013).

In March 2012, an elementary teacher in New Jersey made derogatory comments on Facebook about her students. For example, she referred to her students as “future criminals.” The school district’s superintendent filed charges against the teacher for conduct unbecoming a teacher and recommended her termination. The teacher argued that her comments were protected by the First Amendment because her comments were a matter of public concern. However, an Administrative Law Judge (“ALJ”) did not agree.

The teacher appealed the decision and the N.J. Superior Court agreed with the ALJ. The court decided that the teacher’s comments were not protected because they were personal comments that were motivated only by her frustration with her job and the behavior of some of her students. Further, the

court held that the comments made about the students were serious enough to justify her termination.

A similar situation occurred in Akron, where a teacher posted a picture of her students with duct tape over their mouths with the comment: “Finally found a way to get them to be quiet!!!” The Board of Education in Akron expressed its intent to terminate the teacher at its next Board meeting. Currently, the Akron Education Association is requesting a referee to step in and make a recommendation to the Board. Currently, the termination is pending before a referee.

When deciding whether an employee’s speech is punishable, there are four First Amendment questions that should be analyzed to come to a conclusion.

- 1) Was the comment about a private matter (as opposed to a matter of public concern)?
- 2) Was the comment made in the course of performing the employ-

ee’s duties (as opposed to as a private citizen)?

- 3) Will the comment interfere with the normal operation of the schools?
- 4) Were the comments knowingly incorrect?

If the answer to any of these questions is yes, then the analysis leans towards the speech being punishable.

This case serves as a good example to remind districts of how the First Amendment analysis affects employee speech rights. However, we are not involved with the case in Akron and are not privy to the specific details related to the case. From the details available, it seems that the behavior exhibited by the Akron teacher is not “protected” free speech, because much like the NJ case, this teacher appeared to be motivated not by any public concern, but rather by her private frustration with her students.

Governor’s New Education Funding Plan Unveiled

Governor John Kasich unveiled his new school-funding plan on January 31.

The \$15.1 billion two-year plan seeks to reduce spending gaps be-

tween the state’s wealthy and poor districts and will expand Ohio’s voucher program. For a more in-depth look at Governor Kasich’s new plan and what it means for your district, check out

ERF’s Education Law blog at: <http://blog.erflegal.com/> or visit the firm’s Twitter (@erflegal) for updates.

State Board Approves Restraint And Seclusion Policy

The State Board was presented with and ultimately approved the revised "Policy on Positive Behavior Interventions and Support (PBIS) and Restraint and Seclusion" in mid-January. The approval process will continue with a public hearing on the rule in March and a probable final adoption in April. If final adoption occurs, the policy will be effective beginning with the 2013-2014 school year.

The policy states that restraint and seclusion shall not occur except in situations where there is an immediate risk of physical harm to the students or others, and, if they are used, they must be used in a way that protects the safety of all students and adults at the school.

Under the policy, each school district must develop, publish, and implement written policies that govern the use of physical restraint and seclusion in all of its schools. These policies must be made available to parents annually and must be posted on the district's website. The minimum requirements for the policy are outlined in O.A.C. 3301-35-15(H). The policy must be consistent with the State Board's Policy, and must contain complaint procedures for parents. The complaint procedures require that a parent be allowed to present a written complaint to the Superintendent of the school district in order to initiate an investigation regarding a particular incident of restraint or seclusion. Further, the district's policy must state that the district will respond to a parent in writing within thirty (30) days of the parent filing the complaint.

Any school that plans to use physical restraint or seclusion must have pre-established emergency procedures, specific procedures and training related to the use of restraint and seclusion, and a process for collecting data regarding the use of restraint and seclusion.

One of the main pieces of this policy is the required implementation of PBIS. The theory is that where PBIS are used, there will be less of a need for restraint and seclusion. The main components of PBIS include training school staff on identifying conditions when

inappropriate behavior may occur and how to analyze the situation to keep that behavior from occurring without using restraints or seclusion techniques. Essentially, this piece of the policy requires districts to implement a system that supports student efforts to manage their own behavior rather than the staff managing the student's behavior.

Additionally, this policy prohibits particular types of restraints and seclusion in all cases, including emergency safety situations. These prohibited types include: prone restraint, corporal punishment, child endangerment, seclusion or restraint of preschool students, deprivation of basic needs, particular restraints that unduly risk serious harm or needless pain to the student, aversive behavioral interventions, seclusion of students in a locked room, and in most situations mechanical or chemical restraints.

Each school district must have a policy that specifically prohibits the use of prone restraint, physical restraint that obstructs the airway of a student, or any physical restraint that impacts a student's primary mode of communication. If a school district plans to allow the use of physical restraint, it must specify that it can only be used when there is an immediate risk of physical harm to the student or others and there is no other effective intervention that is possible. In addition to being trained to ensure student safety, staff members using physical restraints must continually observe the student for distress, use de-escalation techniques, discontinue the restraint as soon the student is of no danger to himself or others, de-brief with all involved staff, and complete the necessary reports and documentation.

As with physical restraints, seclusion can also only be used when there is an immediate risk of physical harm to the student or others and there is no other effective intervention possible. All rooms used for seclusion must be safe for the student. This includes providing adequate space, lighting, ventilation, and clear visibility. The room must remain unlocked. Again, if a district plans to allow seclusion, the

staff must be trained in the same ways noted above for physical restraints. Overall, staff must ensure that the student remains safe and that the seclusion is only used for as long as absolutely necessary. De-briefing and completion of necessary reports and documentation are also required.

If a student is regularly engaging in dangerous behavior that ultimately leads to the use of physical restraints and seclusion, the district must conduct a functional behavioral assessment (FBA) in order to identify the student's needs and whether there are more effective ways of addressing those needs. If necessary, a behavioral intervention plan should also be developed.

School districts planning to use restraints and seclusion must train staff on the policy and maintain written or electronic documentation on who has participated and what type of training has been provided. Training must be conducted annually and districts must ensure that an adequate number of personnel in each building are trained in crisis management and de-escalation techniques.

Any time seclusion or restraint is used, it must be documented in writing and reported to the building administration and parent(s) immediately. Then, it must be documented in a written report. That report must be made available to the parent or guardian within 24 hours and must also be kept in the student's file. This report is an educational record that is protected by FERPA. Therefore the district is prohibited from releasing the report to anyone other than the student's parent.

Each year, each school district must report information regarding the use of restraint and seclusion to ODE. Additionally, it is ODE's responsibility to complete periodic reviews of district policies regarding restraint and seclusion. When requested, school districts should make their policies and other requested documentation available to ODE for this purpose.

We will update you if anything regarding this policy changes before it is finalized.

Education Law Speeches/Seminars

Administrator's Academy Dates at Great Oaks Instructional Resource Center

You can enroll in an Administrator's Academy session using the form on our website or by emailing Pam Leist at pleist@erflegal.com.

March 7th, 2013—*Advanced Topics in School Finance Law*

June 13th—*Special Education Legal Update*

July 11th—*Education Law Legal Updates 2012-2013*

"Filling in the Blanks" on Your Teacher Evaluation Policy

Ennis Roberts & Fischer will join with **Britton Smith Peters & Kalail** to develop a unique workshop for school administrators designed to help ease the apprehension we all feel about finalizing a comprehensive teacher evaluation policy.

Our goal is to get your district to "yes" on all the important issues surrounding the new OTES system.

At the workshop, key stakeholders—including school law attorneys, labor negotiations representatives, state government representatives, and local educational leaders—will participate in a frank discussion regarding the major obstacles to completion so that educators are better able to understand the needs of all involved in the process. In addition the presenters will walk step by step through each of the required component of the evaluation policy and provide suggestions for how districts can address potential areas of contention and move forward in a positive way. In addition, workshop participants will be given a copy of a sample evaluation policy.

The workshop will be available statewide, and is free of charge. Registration is required. To register, contact Pam Leist (pleist@erflegal.com; 513-421-2540). Please specify which workshop you plan to attend and provide a valid email address at the time of registration.

Columbus

March 19th, 2013
8:00 a.m. to 12:00 p.m.
Columbus Education & Conference
Center (Hilliard)

Cincinnati

March 20th, 2013
8:00 a.m. to 12:00 p.m.
Lakota West High School

Cleveland

April 12th, 2013
8:00 a.m. to 12:00 p.m.
Cleveland Marriott East

Other Upcoming Presentations

Jeremy Neff
Brown County ESC on February 25, 2013
Special Education Update

Pamela Leist
Miami University on March 14, 2013
Practical Legal Advice for Teachers

Webinar Archives

Did you miss a past webinar or would you like to view a webinar again? If so, we are happy to provide that resource to you. To obtain a link to an archived presentation, send your request to Pam Leist at pleist@erflegal.com or 513-421-2540. Archived topics include:

- Education Law Legal Update - Including SB 316
- Student Residency, Custody and Homeless Students
- Effective IEP Teams
- Ohio Budget Bill/House Bill 153
- Cyberlaw
- Student Discipline
- FMLA, ADA and Other Types of Leave
- Media and Public Relations
- Tax Incentives
- Gearing Up for Negotiations
- Prior Written Notice

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ERF Practice Teams

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 Ryan LaFlamme
 Gary Stedronsky

Workers' Compensation

*Administrative Hearings, Court Appeals, Collaboration
 with TPA's, General Advice*

Team Members:
 Ryan LaFlamme
 Pam Leist
 Erin Wessendorf-Wortman

Special Education

*Due Process Claims, IEP's, Change of Placement,
 FAPE, IDEA, Section 504, and any other topic related
 to Special Education*

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 Pam Leist
 Jeremy Neff
 Erin Wessendorf-Wortman
 Michael Fischer

School Finance

Taxes, School Levies, Bonds, Board of Revision

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