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TO: District Superintendents
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Directors of Special Education
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Chairpersons of Committees on Special Education
Chairpersons of Committees on Preschool Special Education
Organizations, Parents and Individuals Concerned with Special Education

FROM: Christopher Suriano 

SUBJECT: Decision from the Second Circuit Court of Appeals D.S. v. Trumbull Board of Education

On September 17, 2020 the United States Court of Appeals for the Second Circuit issued a decision in D.S. v. Trumbull Board of Education, 120 L.R.P. 28133 (2d Cir. 2020) pertaining to independent educational evaluations (IEE). The decision rejected the United States Department of Education (USDE) Office of Special Education Programs' (OSEP) guidance that a parent may seek an IEE if they disagree with a functional behavioral assessment (FBA) conducted for the purpose of developing a student's individualized educational program (IEP). Additionally, the Court determined that a two-year statute of limitations does not apply to a parent's request for an IEE since they are not required to file a due process complaint to obtain an IEE at public expense. The jurisdiction of the Second Circuit includes New York State and a request for "en banc" review (a request that the case be reheard by a majority of active Circuit Court judges because the case presents questions of exceptional importance) was denied.

This case stems from a Connecticut student who had a three-year reevaluation in October 2014 and was scheduled for another three-year reevaluation in October 2017. Additionally, FBAs were conducted in the spring of each year to help understand the student's problematic behaviors and their interference with his educational performance. After a March 2017 FBA, the parents sought a comprehensive IEE, at public expense, addressing not only behavior but all other areas of the student's disability. The Trumbull Board of Education refused the parents' request and filed a due process complaint

challenging the IEE request. The hearing officer denied the parents' request because an FBA only examines behavior and therefore, there was no connection between the FBA and the request for a comprehensive set of publicly funded non-behavioral evaluations.

On appeal, the federal district court agreed with the evaluation scope theory employed by the hearing officer and also found that any dispute regarding disagreement with the 2014 evaluations was time barred by the Individuals with Disabilities Education Act's (IDEA) two-year statute of limitations. This decision was appealed.

The United States Court of Appeals for the Second Circuit opined that it was required to address "what constitutes an evaluation" and ultimately determined that an evaluation "means a comprehensive assessment of a child that follows mandatory procedures outlined in Section 1414 of the IDEA, including assessing the child in all areas of their disability." The Court concluded, therefore, that an evaluation is an initial evaluation or a reevaluation and an FBA, "standing alone" is neither. "An assessment tool is not an 'evaluation' in its own right – at least not with respect to a parent's entitlement to an IEE at public expense."

In New York, FBAs may be included in the initial evaluation or reevaluation in accordance with section 200.4 (b)(1)(v) of the Regulations of the Commissioner of Education. Consent is required for these comprehensive evaluations in accordance with section 200.4(a)(iv) of the Regulations of the Commissioner of Education. Communication between parents in their preferred language or mode of communication and school personnel is paramount to ensure meaningful parent engagement in their child's special education programs and services, as required by the IDEA. Therefore, when an FBA is being conducted outside of the initial evaluation or reevaluation process and thus not deemed a "comprehensive evaluation" as defined by the Trumbull decision, it is strongly recommended that districts continue to obtain parental consent and ensure that parents have knowledge of the uses of any evaluations conducted by the school district.

The United States Court of Appeals for the Second Circuit also held that the IDEA's two-year statute of limitations period for filing a due process complaint does not apply to requests by parents for IEEs. The Court found that the parents' challenge to an October 2014 reevaluation was timely even though the next reevaluation was due in five months.

School districts should consult with their attorneys regarding the implications of the Trumbull decision on parents' requests for IEEs.