

RICHARD C.,

Appellant

v.

ANNE ARUNDEL COUNTY
BOARD OF EDUCATION,

Appellee.

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 19-27

OPINION

INTRODUCTION

Appellant challenges the decision of the Anne Arundel County Board of Education (local board) dismissing his request to amend his son's education record. The local board filed a Memorandum in Response to Appeal maintaining that its decision is not arbitrary, unreasonable, or illegal and should be affirmed. The Appellant responded and the local board replied to the response.

FACTUAL BACKGROUND

This case is about the interplay between the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. §1232g; 34 C.F.R. Part 99, and the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400 *et seq.* FERPA is the federal statute that protects the confidentiality of education records and gives parents various rights regarding their child's education record. IDEA is the federal statute that ensures that children with disabilities receive a free and appropriate public education through the provision of special education and related services. The interplay between the two laws can admittedly create a confusing landscape for a parent. Winding one's way through the somewhat intricate processes established by FERPA and IDEA is a task that can lead to frustration and confusion. This case is an example of that.

After briefly addressing the facts of this case, we will explain how FERPA and IDEA work together. It is critical to note here that this Board has repeatedly determined that it lacks jurisdiction to decide FERPA complaints and IDEA complaints. *See S.K. v. Montgomery County Bd. of Educ.*, MSBE Op. No. 19-14 (2019); *Phil N. v. Anne Arundel County Bd. of Educ.*, MSBE Op. No. 18-42 (2018); *George and Sharon K. v. Montgomery County Bd. of Educ.*, MSBE Op. No. 12-09 (2012); *Philip and Deborah W. v. Prince George's County Bd. of Educ.*, MSBE Op. No. 11-48 (2011). That we take this opportunity to address the FERPA/IDEA interplay is meant to be advisory only.

Appellant's son, N.C., attended the 7th grade at Magothy River Middle School during the 2017-2018 school year. On May 9, 2018, the Appellant participated in an individualized education plan (IEP) team meeting for his son, who was receiving special education services. After that meeting, Appellant came to believe that certain data and documentation was missing

from N.C.'s special education record. The Appellant requested that Anne Arundel County Public Schools (AACPS) amend N.C.'s education record by adding information to his "2018 assessment reports." (Ex.2, Emails, 5/21/18). As best we can tell from the record, the information Appellant wanted to add was the following:¹

- 9/11/17: 4th day of school.
Many things were going on at once in class.
I glanced over and briefly saw [N.C.] dab at his eyes with his shirtsleeve.
I went over and privately spoke to [N.C.].
[N.C.] verbalized that just a lot was going on. I agreed and he smiled and seemed to take comfort in that reassurance. He regained composure within minutes. [N.C.] did not leave the classroom or miss instruction time.
- 10/3/17: 2nd period science class was in the media center having a lesson on the science fair process.
[N.C.] became teary-eyed.
Teacher and Substitute teacher spoke with [N.C.].
[N.C.] verbalized that he was just frustrated. He regained composure quickly and remained in class.
- 5/4/18: 5th period.
Students in Spanish class getting out assignment. [N.C.] did not have it completed because he had been pulled from class for testing last class meeting.
[N.C.] approached teacher and look[ed] tearful.
Teacher assured [N.C.] that he gets extra time to do work and that it wasn't a problem.
[N.C.] returned to seat and participated in class activity.
- 5/16/18: 1st period.
Entering classroom talking with peer.
[N.C.] in discussion with peer about TRF versus Cornell.
Teacher noticed conversation upon entry, clarified TRF, and then showed [N.C.] sample.
[N.C.] completed TRF form.
- 5/17/18: 5th period.
[Father] reported that [N.C.] came home and said he was frustrated by missing a chorus practice.
[N.C.'s] chorus, math, Spanish, and PE teachers were interviewed regarding this reported incident. None of the teachers observed any concerning difficulties for [N.C.] during the day regarding the missed chorus class.

[N.C.] participated in class as usual.

¹ In his emails, the Appellant stated that he wanted four behavior events added to the record in which N.C. acted out, experienced anxiety, and/or experienced frustration, plus a bullying and intimidation incident on June 4, 2018 involving floor hockey, but never provided specifics. The notes cited here are the only information in the record we could find regarding specific incidents involving N.C. It is unclear who authored the notes.

The school principal, Christopher Mirenzi, responded to the Appellant on June 14, 2018. He agreed to amend the Functional Behavioral Assessment (FBA) to include four of the events that the Appellant believed were missing from the record.² He advised the Appellant to contact him if he also wanted to amend the FBA to include travel anxiety. He found no basis, however, to include the additional behavioral events in the Psychological Assessment Report written on May 2, 2018. (Ex.2, Email to Appellant, 6/14/18).

Thereafter followed a round of reviews of the Principal's decision by administrative staff. In the first round, the Appellant asked that the behavior events be included in the Psychological Assessment Record. (See Ex. 2, Email to Davis, 6/15/18). No further amendments were made to the record and the Principal's decision was affirmed. The Appellant's request was reviewed again in two more rounds by administrative staff before it reached the local board. All reviewers affirmed the decision of the Principal.

While the local board appeal was pending, the Appellant filed a special education complaint requesting that the Maryland State Department of Education (MSDE) initiate a complaint investigation under IDEA. On September 18, 2018, MSDE issued a decision addressing a variety of issues but found no violations of IDEA. Based on our review, MSDE did not specifically address the issue of Appellant's request to amend the education record, nor is it clear to what extent the Appellant raised the issue. (See Ex.2, Wilson Letters, 8/20/18 & 9/18/19).

On or about September 10, 2018, Appellant also submitted a document to the local board that appeared to be a copy of a Complaint addressed to the U.S. Department of Education, Family Policy Compliance Office (FPCO). The complaint generally alleges that AACPS violated FERPA. It does not set forth the specific violations.³ (See Ex. 2, Complaint, 9/10/18).

In a decision issued on April 8, 2019, the local board dismissed as moot the appeal regarding the Appellant's request to amend the education record. The local board also noted that the Appellant had already filed a FERPA violation claim with FPCO, such that the local board was divested of jurisdiction of the issue or, at the very least, would need to wait for the outcome of the FPCO complaint before taking any further action.

Thereafter, Appellant filed this appeal with the State Board in which he maintains that AACPS denied him his right to a hearing on his request to amend his son's education record.

STANDARD OF REVIEW

With regard to appeals in which this Board's jurisdiction is at issue, the State Board exercises its independent judgment on the record before it. COMAR 13A.01.05.06E.

² It is not clear from the record which four events out of the five listed above were added to the FBA.

³ In preparation of this case, legal counsel for the State Board contacted staff at the U.S. Department of Education FPCO, and confirmed that FPCO has no pending FERPA complaint from the Appellant alleging that AACPS violated his right to a hearing on his request to amend his son's education record. Thus, despite the local board's suggestions that one was already filed, the Appellant would have to file a Complaint with the FPCO to have it review his claims on the record amendment and hearing issues.

LEGAL ANALYSIS

Interplay between FERPA and IDEA

In the special education context, IDEA controls whether or not a child will receive special education services. Under IDEA, a child is often assessed by a professional, in this case by a psychologist, and also by school system staff, in this case, using the Functional Behavior Assessment (FBA). The IEP team reviews those assessments and other records to determine if the child is eligible for specific special education services. During the IEP process, if a parent believes that additional assessments are needed, such as a follow-up psychological assessment to supplement the original one, a request for that follow-up assessment needs to be made to the IEP team. Such a follow-up assessment is not a “correction” of a student’s record, it is the creation of a new record.

FERPA sets out the process to “correct” or amend the student’s record if the information is “inaccurate, [or] misleading.” 34 CFR §99.20. We point out, however, that a parent’s right to amend the education record is limited. In particular, the FCPO has held that the right does not include the right to amend an evaluation or an individual opinion unless it has been inaccurately recorded. *Letter to Anonymous* (April 16, 2013); *Letter to Parent re: Amendment of Special Education Records* (August 13, 2004). Here, the Appellant requested amendment to the Psychological Assessment Report. Such a report is the professional assessment, evaluation and opinion of the psychologist at a specific point in time in the student’s life. School personnel confirmed with the psychologist that the information in the report was accurate at the time it was recorded. One of the reviewers, Ms. Barmat, explained that Psychological Assessment Reports do not include every small incident or interaction that occurs, and do not include behaviors in which staff intervention is the same as that provided to any student.

Recognizing all of this, the school system amended the portion of the record that was not a part of the psychologist’s report, and included the requested information on the FBA so that it would be part of the education record and available for review, including review by any IEP or 504 team meeting to address N.C.’s educational needs.

That being said, we point out that the parent has the right to an evidentiary hearing on the request to amend the record. *Id.* §99.21. In addition, if the school system decides against amending the record after the hearing, the parent has a right to place a statement in the record commenting on the contested information or stating why the parent disagrees with the decision. *Id.* at §99.21(b) and (c). It is clear from the record, despite the multiple levels of review, AACPS did not provide the Appellant with an evidentiary hearing. Nor did it permit the Appellant to provide a statement in the record.

While we must dismiss the appeal because we do not have jurisdiction to decide FERPA complaints or IDEA complaints, we note that we are at the start of a new school year. The special education process is fluid and the Appellant can request that his son be reevaluated for special education services. If the Appellant believes an additional psychological evaluation is necessary, such a request can be made a part of the special education process.

CONCLUSION

For the reasons stated above, we dismiss the Appellant's appeal for lack of jurisdiction.

Signatures on File:

Warner I. Sumpter
President

Jean C. Halle
Vice-President

Gail H. Bates

Clarence C. Crawford

Vermelle D. Greene

Justin M. Hartings

Rose Maria Li

Joan Mele-McCarthy

Michael Phillips

David Steiner

August 27, 2019