



Part 2: The Intersect of COVID-19, IDEA, and Pre-K

Episode notes: prekteachandplay.com/covid-19-bonus-episode

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Kristie:

All right, Pat. So, fabulous to have you back! We're going to start off with, well, are there any updates or new things or things we need to know since our last conversation? And as we get into that, I want to tell you that when I first asked you if you'd come back and give an update, you immediately said, "Yes, Betsy's given us stuff to talk about." So, I read the news article or whatever you sent. I didn't know what to make of it. I don't trust her as far as I can throw her, so it must be bad, but is she really doing something good for us? No, I'm not sure. And so I was not, I didn't know what to do. Then, I was so glad that you started blogging again because then you're, "Okay, this is what it means, and this is what we need to be watchful of." But anyway, tell us what Betsy's up to, any other updates, and how your blog saved me that day.

Pat Radel:

Sure. Well, great! Well, thanks for reading the blog. I really appreciate it. It's something I've been wanting to do for quite some time, and I have been using this "corona" flexibility, which certainly, it's a difficult situation. But one of the upsides for me anyway, is that it gave me some time to work on some longer term projects, and the blog was one of them. So, I was happy to be able to do that and the basic gist of it is, just to set the stage, the main categories of federal law that govern the education of students with disabilities, are on the one hand IDEA, and on the other section 504, Americans with Disabilities Act. So, what happened was, neither of those categories of law have provisions that deal with extended school closures as a result of the global pandemic. Congress didn't think of that when they enacted the law.

So, school districts and school district lobbying groups, for lack of a better word, have asked Congress to authorize temporary waivers, to some of the rights of students with disabilities. For example, the deadline to complete an initial evaluation and eligibility determination. Schools were asking Congress to waive those provisions of special education law in light of the pandemic. Well, disability groups, parent groups, became very active on the other



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side saying, "You know, this is not a time to be waiving the rights of students with disabilities. We can work this out with schools and the statute provides all of the necessary flexibility. We don't need to be, having any waivers."

So, when Congress enacted the stimulus bill, it punted the issue, and it said that it wanted Secretary DeVos, the secretary of education, to issue a report within 30 days on whether she recommended any waivers to the special education law in light of the pandemic. So, we waited the 30 days with somewhat bated breath, worried about what recommendations Secretary DeVos was going to make. It turned out that Secretary DeVos recommended no waivers to the core tenets of IDEA and actually, her report to Congress contained some pretty strong language about the rights of students with disabilities, the rights of parents to participate in the development of educational programs, and my favorite part too, was it said that reemphasizing the importance of making student-centered decisions as opposed to system-focused decisions, and which I thought was really important. The main takeaway was that she recommended no waivers to the special education law.

- Kristie: And see, that's where my confusion was, because I'm, "I think she's on our side."
- Pat Radel: Well, we'll see. Yeah. So, my take is, it's mostly good news. So, it's not-
- Kristie: No, this is going to undermine education, and it's going to somehow implode.
- Pat Radel: Yeah. So, I would say this, listen, it could be worse. She could have recommended broad waivers. And obviously, anything she recommends, Congress has acted. So, we should always take stock and appreciate things that didn't happen. So, a bad thing that didn't happen is, she could have said, this could have been used as an opportunity to say, "You know, student's disabilities are a drain on the system and their rights aren't important", and that, she didn't say that. In fact, anytime someone in a position of authority is reemphasizing the importance of parental participation and the education of their students, emphasizing the importance of student disabilities, receiving a free appropriate public education, student-focused decisions, I'm all about that.
- Kristie: I was so confused.



Pat Radel: The reason why there's a little less to it than meets the eye is-

Kristie: Okay?

Pat Radel: It is not clear what this all means in a global pandemic. That was part of the argument the families were making. Look, the statute, if you think about it, already has flexibility built into the language. You're entitled to a free appropriate public education. What does appropriate mean in light of a global pandemic and extended school closures? 504 and the ADEA entitle you to, quote unquote, reasonable accommodations. Again, what's reasonable in light of a global pandemic? These are things that are, in ordinary times, the subject of conversation, and occasionally litigation, between families and schools, and all the more so now in a very fluid, uncertain environment.

I think the takeaway is, it's mostly good news because we didn't have any hardcore waivers. Congress still has the ultimate decision, but I think it's pretty unlikely that Congress is going to start waving provisions when the secretary of education isn't recommending any, but I think what's going to end up being the case is that in most situations, families and schools are going to work it out. But in other situations, it's going to end up in litigation, with hearing officers and judges deciding what was appropriate, what was reasonable under the circumstances.

I'm glad that families have the ability to access, make those arguments and have an impartial hearing officer or a judge decide them. I think where it becomes tricky is, you're going to end up with inconsistent results, and families that are able to access legal counsel and access quality legal counsel, are going to end up with different results for their students and families who don't, aren't aware of their rights, or aren't able to access legal services.

Kristie: Yeah. I think for me, in all of this, is that inequity keeps coming up in so many different ways, even within populations that you think, "Okay, here's a group of students with disabilities that are already marginalized by the greater society, that, at least the United States, that we live under white dominant culture." You're going to have populations of children, for whatever reason, because of intersecting variables, are further marginalized. One of the things I wanted to ask you, and maybe there are other updates, so we can come back, but for example, one of the things that I see, I'm for and against local control, because many times I think local education agencies know

their population and their families and their system better than a federal government. But then, at the same time, I worry about people making arbitrary and capricious decisions.

So, I hear some teams saying, "Well, we can't do eligibility right now, so, you choose, you should wait till school reopens because we cannot observe your child in an educational setting." So, things like that, I hear people saying at even a team level, not even a district or an LEA level, make me a little worried, because from my understanding, that's not anywhere in the provisions of the rules. So, maybe just speak to, because we've brought up eligibility, do kids, students have to be observed in an educational setting, and/or, how do we provide guidance for people to not over-interpret?

Pat Radel: A few things. First of all that the regulation, as I read it, is that the evaluation is supposed to be made in an educational setting, but it provides for the situation of, what if the student is not in an educational setting, that it must be in an environment appropriate for a child of that age? So, the statute and regulations already contemplate the possibility that the student may not be attending a traditional educational setting.

Kristie: Well, particularly as it goes back to preschool, there isn't. I understand for specific learning disabilities, I even understand from a K-12 perspective, the assumption is, the free and appropriate public education takes place where education does, but for three, fours, and not yet going to kindergarten or compulsory education, as five-year-olds, it really doesn't make sense, to me, to draw the line that it has to be an educational setting, because the team, even after child becomes eligible for preschool special education, may decide that the child's not going to be placed in educational settings or receive IEP services. So, to say, we can't observe a three, four, a five year old now is even stricter than what you were saying, in terms of, no one's in an educational setting right now.

Pat Radel: Right.

Kristie: They are complicated, more so, but-

Pat Radel: Yeah. The other thing, I think is, it would be important to make the argument that we shouldn't lose the forest for the trees.

Kristie: Okay.



Pat Radel:

Why is it that regulation references observing the child in an educational setting? Because you want to make sure that you're getting all of the information you need to make an appropriate assessment of that child's individual needs. It wasn't meant as a barrier or a choke point on getting the student services and support they need. So, I think if you were to say, "We're gonna say, because there are no educational settings available for any student, that is going to mean that they're not entitled to, you know, "the ed." The eligibility has to stop and we're just going to sit around and wait," seems to me defeats the purpose. Unless you really said, "Look, we really cannot speak intelligently about what the student's needs are in any dimension, unless and until we see them in an educational setting." I'll give you an example.

Oftentimes we'll have a situation where a student will have challenging behavior, and will want to do a functional behavioral assessment. Well, if we're waiting, and we might be waiting for a spot in an alternative placement to open up. Well, does it make sense to do a functional behavioral assessment in a placement where the student's not going to be attending school, because the very nature of the assessment requires you to understand the triggers and antecedents in that setting. So, you're not really gaining useful information. They might not be having any behaviors at all. So, it's not a useful thing to engage in a functional behavioral assessment outside of that setting.

In this situation, I could see lots of scenarios under which we could gain lots of really important information about the student's needs and come to a pretty good consensus as a team on what we think the student might need, understanding that that might be subject to revision. Once we finally did have the opportunity to observe them in an educational setting.

Kristie:

Right, exactly because in three months from now, even if it were an IEP under past normal circumstances, things may change over the summer. It's a difficult time of year anyway and/or a student that's transitioning from a play-based preschool to a traditional maybe kindergarten, all of those would be reasons for revision as well.

Pat Radel:

Right.

Kristie:

Is there anything else that's by a way of an update? Has anything changed, or have been clarified that we should let people know about, or direct them to?



Pat Radel:

No. I'll just say two more things about Secretary DeVos' report. The one was, and I mentioned this in the blog, is that great, I'm really appreciative that Secretary DeVos made statements about the importance of students with disabilities and their education and the role of parents that participate in that, but we need to put your money where your mouth is. I think schools are already facing, states are already facing enormous budgetary challenges. Doing this the right way and transitioning to remote learning is going to require technological infrastructure that doesn't exist, especially for our rural communities and for other communities of lower socioeconomic status. I think more parents need, have always needed parent training and parent support. That's even more necessary now.

Just a coming attraction, my blog post for this week is going to be about parents justment. So, I think it's up to Congress to not just say that the rights of students with disabilities continue to exist during this pandemic, but that they have the resources necessary to make those rights a reality.

Kristie:

Beautiful. Okay.

Pat Radel:

Oh, one last thing, because it relates to preschool. The one change that Secretary DeVos did recommend was extending the deadline for initial preschool evaluation until the date on which health and safety allow for face to face meetings and for the toddler to be evaluated. So, under that waiver, early intervention services would be allowed to continue. The student wouldn't have to age out of early intervention to continue to receive services until such time as they were able to complete that preschool evaluation. as educators, and what a tremendous opportunity that provides now for the role of parents as real members of the school team to be recognized, but that's not going to pay dividends if we're not providing the support that many families need to make that happen. I think when, if students return to school, our population of students is going to face unprecedented challenges with making that transition back into school. I think you're going to have students with pretty significant post traumatic stress type behaviors and trauma, and are really going to struggle in school. Teams are really going to struggle with that read

Kristie:

Yeah because that's always been a very difficult timeline for teams. For part C to B, it's just this wonky transition. We, sometimes say, it's leaving Disneyland. It's that abrupt. You could leave Disneyland and



go to the real world. For lots of different reasons it's been a challenge on both sides, 619 and part C. So, that will be interesting to allow those teams a way to maybe even strengthen how they do that transition so that post pandemic we can not feel so rushed to get that IEP in place by the child's third birthday, because it's been a challenge for us. That's just a recommendation though. So, there's been no ruling on whether or not that timeline has been adjusted?

Pat Radel: Right. Congress has not acted yet.

Kristie: Okay.

Pat Radel: On any of the recommendations.

Kristie: Okay. So, one of the hot topics, Pat, remember when we talked last time, was this idea, it's still around eligibility, but it pops up in different places. We're going to touch on, in early childhood, we talk about assessment for screening, which is a bit different. The screening in school age eligibility, program planning, progress monitoring, program evaluation, and accountability. We talk about testing and assessment for six different distinct purposes and oftentimes for eligibility there is a rule, at least in the state language, that a standardized test has to be used. I'm just going to set it up for a bit for people, because this is so tricky.

Standardized has actually two meanings in the world and I don't mean for you to have to talk to any of this, Pat. I want you to talk about what you know about how we can interpret rules. I'm just going to give the example of it. From a measurement perspective, standardized often means the assessment tool has undergone standardization. It's this process by which we take data, we distribute it across a normal distribution, and therefore we can get standard scores, like, a mean, and a standard deviation, which is important because most states for preschool eligibility use that as part of the body of evidence. A child must be so many standard deviations below the mean, which requires that we use a test that has standard scores.

Standard scores are only produced from norm referenced assessments or assessments that have undergone standardization. Unfortunately, this word, standardized, has a secondary meaning. Many instruments, in order to ensure that the instrument has the interpretations and the scores are valid and reliable, you have to follow standardized procedures. You have to have a script, you have to have materials, you have to do it a certain way, you may even



have to be trained and reach a level of fidelity of administration before you're allowed to administer it. That level of script, or a kit that comes with standard materials, is not what it means from a measurement perspective to produce a standard score.

But people mush those. They picked assessments that are both standardized and have undergone standardization. If they have a tool that they commonly use, or they read their rule and it says you have to use a standardized test, people are thinking, "How will I administer something with fidelity when I can't have you near me?" So, that's just an example of a very particular rule that's very pervasive. My question is, how do you, like you said, don't lose the forest through the trees, how do you approach that?

Pat Radel:

Yeah. I think I would start with a big picture, as you could get on the whole subject. So, what is happening? What is IDEA at the end of the day? What it is, is the federal government giving money to the states. In turn, the states have promised to provide students with disabilities a free appropriate public education in accordance with the procedures and regulations set forth by the federal government. With the state retaining, I would say, some degree of flexibility and implementation about how it's going to determine eligibility, how it's going to deliver services, but all within the framework of what Congress has said it's looking for in exchange for giving this money. So, one of the things Congress has said is that no single measure or assessment should be used as the sole criteria for determining eligibility for special education supports and services.

Now, at the same time, it's also pretty clear that one of the pillars of IDEA are assessments. And there is lots of language in the statute and regs about assessments being appropriate for the area of suspected disability, about the assessments being performed by qualified professionals, because we're wanting to make sure ... I think we touched on this the last time, there's always this balance between we want to be flexible, we want to be mindful of individual needs and circumstances, but we don't want to be ad hoc. We want to make sure that there are some objective, norm referenced, research driven criteria that we can make reference to.

But if there is a state who's saying, "Well, we require this specific test, and, because of the circumstances, we cannot give this test in accordance with its standardization, and therefore we cannot determine the student's eligibility," to me, that would be using one single assessment or the inability to complete that assessment as the sole criterion for determining the student's eligibility.

Kristie: Yeah. So, the easy, quote unquote, workaround is, pick another test.

Pat Radel: Pick another test, or I was doing some research and many of the companies now that put out these tests, they don't want you looking for another test. They want you to keep using their tests. So, they have. I came across four or five different companies, Pearson, several different companies who were actually issuing statements, a limited waiver, saying, "Look, we're not saying this is okay, um, forever, but now in light of the pandemic, you know, we're willing to, um, allow for this part of the test to be done via the following alternative means so that you don't need to, um, actually have a face to face assessment."

Kristie: Well, isn't that interesting, because that would suggest that we've done research to show that those test interpretations and scores are valid and reliable in said nontraditional manner. How convenient? Sorry. We won't get on that one either.

Pat Radel: Yeah. And I think, for example, I was in New York, the New York regulations specifically contemplate that the practitioner may need to deviate from the standardized test and calls out a requirement that when they do that, they are specific about in what manner they have deviated from it, and why they did it.

Kristie: Yeah. I think part of that has been long term because we know that many of these tests haven't been found to be reliable or valid for the population or the purpose for which they're being used. So, we've given states this paradox of saying, "Use these instruments, this particular type, though we know that they aren't valid, reliable, and, or unbiased." By federal law, you can't use tools that are biased, so, well, you have to use it, but we know it's biased. If you want a real workaround, you can explain your workaround. Okay.

Pat Radel: Yeah. I think if I was going to boil it down, the law clearly is looking for informed clinical judgment being brought to bear on the question of eligibility, but to the extent we're saying that we're going to rely solely on one assessment, even though there are other assessments that an informed clinician might deem reasonably appropriate and that we're not going to permit any deviation from that, the standards of that assessment. I think in that point, actually, if you think about it, you're undermining the principle of informed clinical judgment. Because the clinician is saying, "This is out of my hands, right? I'm being told I have to use this only, only this assessment even though I know there are other assessments, I'm

being told I have to administer it in a specific way even though there's reason to think that that might not be just positive in terms of yielding, uh, objective results."

Kristie: Another purpose of assessment is progress monitoring of children's IEP goals and objectives. I just was getting a lot of conversations from teachers and teams saying that not only were they struggling with delivering instruction virtually, but now, figuring out how to monitor the measurement of a child's progress towards IEP goals. What have been your forest and tree conversations you can bring us back from the brink of that one as well?

Pat Radel: Sure. Well, I would cycle back to, are they good measurable goals-

Kristie: Well, I know it. Don't go there.

Pat Radel: I know. So, often you just said to yourself, "How on earth did anyone think this was measurable?" So, I would go back to, sorry?

Kristie: We're good.

Pat Radel: Right. Yeah. So let's go. Let's begin at the beginning and go back and say, are these goals actually measurable? I think you're going to hear again, the parent, if possible, is going to need to be part of the team. I think they're going to need to be part of the process and facilitate some of that data collection. That's what I've been telling families. I say, "I hate to add things to your plate, in these, uh, challenging times, but, you know, especially if you're having concerns about your child's progress, about the level of service that's being provided to you by the school team, you're now." I was always having the conversation with my clients that, we were at a disadvantage as parents because the school had a monopoly on firsthand educational information. And now, that's been exactly flipped. You're the one that has the monopoly on firsthand educational information.

But then that puts the burden on you to take data and document. How many sessions did the student have? Are they making progress toward their goals? What were they able to do before they're not able to do now? So, yeah, I don't know how school teams are practically going to do it for a student that can't just attend one-on-one via some remote mechanism other than enlisting the parent as a partner in the process of progress monitoring. But again, that's going to be a lot easier to do if the goals are good. Goals are really good measures.



Kristie: Well, I appreciate what you're saying too. Where do you have concerns? It's not just, we've got 800 goals and we're down to. We said we would collect data on all of them. This is an opportunity to really talk about what is the child's needs right now, what are we supporting, and then, is that support helping, is really what we're asking, versus, I wrote these goals eight months ago, and now I just have to collect data on them.

Pat Radel: Right and I think too often goals end up at the low end of the priority in terms of drafting the document. Lots are focused on how many sessions of speech are we going to have, are they going to be group or individual, but we don't spend that time. Oftentimes I'll be at a CSE meeting and we'll be an hour or two hours in, we haven't even started talking about the goals yet and that's really unfortunate. Because goals are one of those things. If you ran a not-for-profit organization, nobody cares about the bylaws until something goes wrong. Then, everyone wants to go look for the bylaws. And it's the same thing. The goals, oftentimes, the goals and progress monitoring take a backseat until there's an issue, until there's a question of, is the student actually making progress. Then everyone says, "Oh, well, what do the goals say? What does the progress plan say?"

Kristie: That's what I usually think of. I always call it an insurance policy. You don't really think about, are you covered for flood insurance, until you have a flood. Then you're, "Are we covered?" So, that's progress monitoring. I don't know if we want to say anything about the OSAP reporting, which is the accountability purpose. I got a bit of, from what I've seen as of the date of our recording. May 5th, there wasn't anything from the feds that was giving us guidance on what we were supposed to do. So, I'm extrapolating from you that it doesn't matter the purpose of assessment, whether it's eligibility or whether it's accountability, we have to look at the federal intent and then see what is possible given the current circumstances?

Pat Radel: Yeah. I'm going to say, I think any time you as a parent are making a claim that eligibility has been denied or delayed, be it for a reason other than student need, there's going to be a pretty high bar that the school is going to have to cross, in my opinion, in order to sustain that decision. So, I don't again. You can't ever predict how litigation is going to turn out for sure, but I would think that a hearing officer or a judge is going to have a hard time sustaining a decision for a student who, otherwise, seem to qualify as a student with a disability solely because one part of one assessment wasn't

able to be completed because of the pandemic. I think in that situation, the district would be required to show that this assessment was essential, and doing it in this way was essential, and that the students' needs or eligibility under the definition of disability could not appropriately be assessed without that one part of one test. I think that would be a very hard bar or threshold to cross in virtually every circumstance.

Kristie:

Yeah. So, that's really helpful, Pat, because I can help those who are listening. For accountability, we have particular assessment tools that states have adopted to comply with their state improvement plan. So, that's that same idea though we all say, "Well, we picked the ABC test, and the ABC test is really hard to do virtually, so we can't do accountability." That would be a problem. We should say, "What are the feds asking? The OSAP is asking us to show progress towards three broad outcomes, getting your wants and needs met, positive social relationships and acquisition of knowledge and skills." One could argue you could do that in a hundred different ways, and in many states we are doing it in a hundred different ways. So, just because the one tool that we've adopted in our state, if we can use that one, great. If we have to adapt that one, okay, and if we had to do something different, we probably should.

Pat Radel:

Right. Yeah. It'll be an open question as to what level of oversight the federal government is interested or willing to engage in under the current circumstances, but it is hard to see given. Again, for better or for worse, it leaves us in a bit of an uncertain situation, but all of the guidance from the department of education is, flexibility, flexibility, flexibility, and openness to alternative methods. It's hard to see how a school system or state that was trying to use that flexibility and could set forth a chain of reasoning that showed what it was doing as an alternative wasn't ad hoc, but was an effort to obtain the desired information or assessment through alternative means. It's hard to see how you would find yourself in difficulty, if that was the effort you had been making.

Kristie:

It's so helpful. Okay. So, I'm going to begin to wrap us up because I usually keep you for hours. Is there anything else that when you were preparing for this latest round of my questions that I didn't prompt you to answer?

Pat Radel:

No. I think that we've pretty much covered it. Again, I would be very interested, from both a parent and a school side provider, in looking at what resources do parents need. I am really worried about that. We always see achievement gap between students with disabilities



who have stable family structures, or parents who have capacity and bandwidth in terms of skills and behavior management and technology and time to facilitate and follow up and be a real active partner in that child's education. That's now exponentially magnified. Because it's not just a matter of staying on top of or following up on and maintaining that homeschool consistency, now it may be a matter of, is the student actually participating in their education?

There are parents that are saying to themselves every day, "What's coming home from school isn't helpful, it's not modified, it's not accessible," or "What's coming home is good. I'm getting the Zoom link, I'm getting the materials, but I cannot get my child to sit in a tent." We can't just sit and let that be. We need to be saying as parents, "Look, I can't get my son or daughter to sit at the computer and attend. I need strategies, I need support, I need some mechanism to do this."

Likewise, if you're a school system, and the student with a disability, with challenging behavior, hasn't logged on in three days, four days, I think it's on you to be more proactive in documenting efforts to offer support to the family. Again, it's easy for me to say, I don't have easy solutions. I understand these are complicated issues, but we need to at least be making the effort.

Kristie:

Yeah. Yeah. I'm thinking of several families and I immediately think about the teachers who are working nonstop to try to support these families as well. So, I just see it both ways, and it's easier to look at it and say, "Let's find an answer." But then when I try to think, "Well, what would I offer as the answer?" I get a little stumped myself. So, I just want to acknowledge that. For the most part people are just doing the best they can, but we've got to keep trying because there's a bunch of places where that gap is widening.

Pat Radel:

Yeah and recognizing there are no easy answers. Sometimes, there might not be any answer, but we're not going to get answers unless we're asking the questions. Also, looking in the right place. We can work all we want, and the teacher can work really hard and come up with very creative, engaging lessons, and modify, and accessing all different kinds of learners, but if no one has thought to give the parent a set of strategies for how to bring the student to the tablet and open up Zoom and participate, that all the work that the teacher did is going to be for naught, and the students is going to suffer. So, I think we need to be thinking more about how parents can be more active participants in the process and more skilled



participants in the process. And that, I think, is advice on both ends of the spectrum. I think parents need to be empowered to say, "I need help." It's your part of your responsibility as a school, is to be in dialogue with me about what that help might look like.

Kristie: That's what I'm so excited about in your next blog! I can't wait! So, tell people. I'll put it in the show notes for sure, but just tell us how we can find your blog and remind us what your next post is.

Pat Radel: Sure. So, there'll be two ways to find the blog. The blog itself, the website is the name of my law firm, which is getnicklivingston.com/blog. Now, that's to take you to the blog, or if you want to friend me on Facebook, it's just under my name, [Patrick Radel](#). You can friend me on Facebook and I'll be posting blog posts. I'll be sharing them as links on Facebook.

Kristie: I'll re-share them too. So, if anybody follows me, I've subscribed, and I'll know when the new one is out. Plus, I'm always bugging Pat. Yeah. Okay. Fabulous! I'll put all those links in the show notes so people can find them. Just so forever grateful for you, Pat! I still owe you a long list of something. So, I'll be thinking of what that can be.

Pat Radel: No, thanks for all your great work and I'm honored to participate in your podcast. Thanks for all you do!

Kristie: Thank you!

