

Everything about Special Ed that You Think you know (but you don't!)



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What's the Plan?

- How the Law Took Over Education
- Implementation Issues for GenEd staff
- IEP Meeting Basics for GenEd staff

How the Law took over Education

Children,
let's settle this
like adults.



The Early Day of Public Education

- Colonial days: private schooling was the norm
- Thomas Jefferson called for a system of public schooling for 20 young boys who could not afford private schooling
- He advocated this plan by saying that it would enable them to “rake from the rubbish” 20 promising students

Horace Mann

- In the 19th century, public education became compulsory
- Education was viewed as a moral enterprise
- Horace Mann called for school board members to be “sentinels” who should ensure that every teacher is “clothes in garments of virtue”

We Diversify

- In the late 19th and early 20th century, America became considerably more diverse in ethnicity, religion, language and culture
- Most of the newcomers crowded into the public schools
- Some groups set up their own school system
- Very little law applied to public schools
- “Where there is trust, there is little need for law and regulations” – Jim Walsh

Mid-20th Century: Times Change

- 1954: Brown v. Board of Education
- 1955: Rosa Parks boards the bus
- 1957: Mrs. Gump enrolls Forrest in school



Mid-20th Century: Times Change

- 1964: Congress enacts the Civil Rights Act
- 1969: Tinker v. Des Moines
- 1972: Congress enacts Title IX
- 1973: Congress enacts Section 504 of the Rehabilitation Act
- 1974: Congress enacts FERPA
- 1975: Goss v. Lopez
- 1975: Congress enacts precursor to IDEA
- 1985: New Jersey v. TLO

Law's Strengths and Weaknesses

- Law is good at answering big questions
 - Does the public school have to serve everyone?
 - Should students be granted constitutional protections at schools?
 - Should teachers be protected against arbitrary action by boards of education?

Law's Strengths and Weaknesses

- Law is bad at answering small questions
 - When can school staff discuss a special education student without the parents being present?
 - How should schools respond to students being unkind to one another?
 - What should a teacher be allowed to say in his/her Facebook page?

What We Need is Balance

- System based ENTIRELY on trust will facilitate abuse of that trust.
 - It will work well for some but not for all
 - Will inevitably be in-groups and out-groups
- System based ENTIRELY on law will be ineffective
 - Paralysis
 - Conflict
 - Bureaucracy
 - Resources spent on legal disputes not students

What We Need is Balance

- We are not going back to the “good old days”
- Nor should we
- Trust will not govern automatically – it must be earned. We must show ourselves to be trustworthy
- We must cultivate virtue in the profession
- We must restore the idea that education is a MORAL ENTERPRISE

It starts with YOU

- But if you want to cultivate virtue in the kids, you have to demonstrate it yourself
- We must all be “clothed in garments of virtue”



Special Ed Litigation Trends

- IDEA is the 4th most litigated federal law in U.S.
- Virtually every case that goes to court now alleges violations of IDEA, 504/ADA, and often constitutional provisions.
- Increase in litigation alleging “abuse” or “neglect” by staff or bullying by students.
- Since parents can get reimbursed for educational expenses, and attorney’s fees, stakes are often high.

IEP Meeting Basics

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"Listen, we appreciate the euphemisms, but you can just say it - he's a pain in the butt."

Mandatory Participants

34 CFR 300.321 (a)

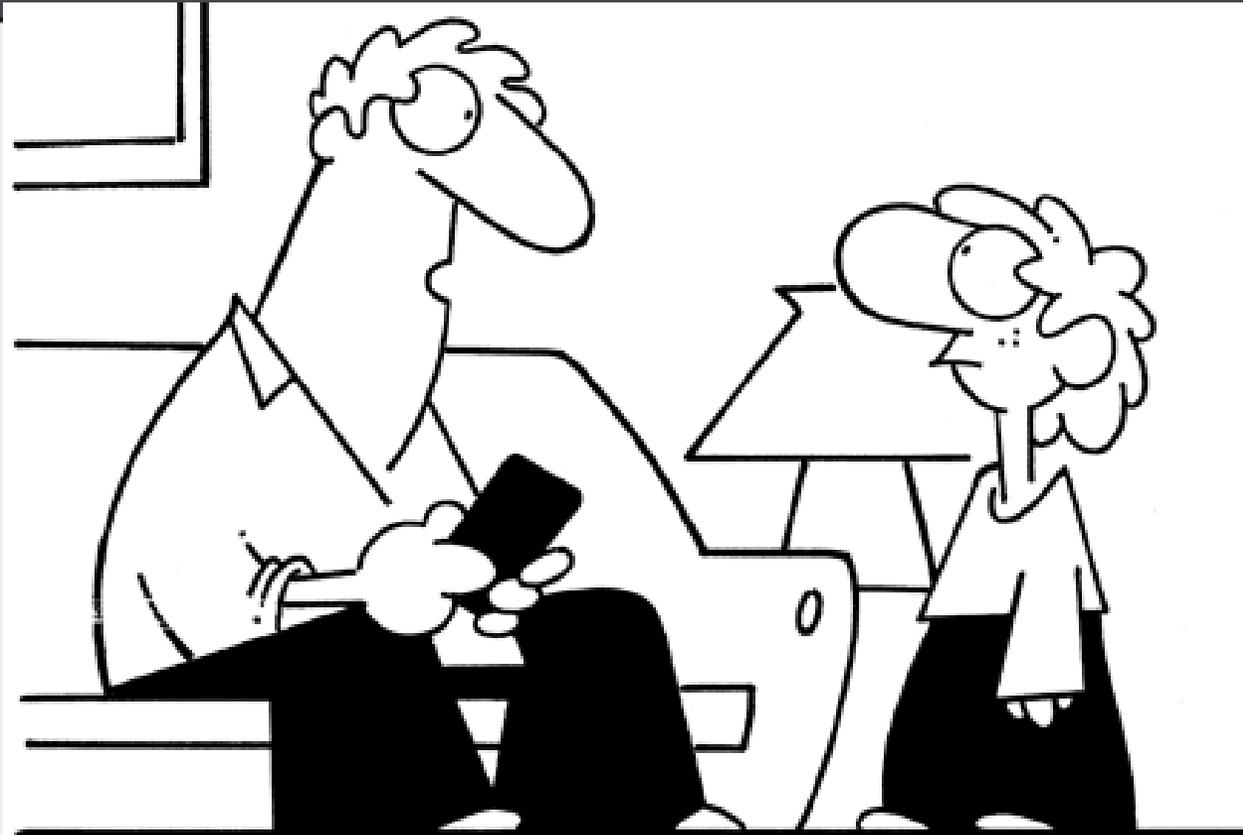
- Parents
- Regular education teacher
- Special education teacher
- Representative of the public agency
- Individual who can interpret the evaluation results
- Other individuals who have knowledge or expertise (at parents'/LEA's discretion)
- Whenever appropriate, the child with a disability.

Parents

definition in 34 CFR 300.30

- Definition of parent under 34 CFR 300.30:
 - biological or adoptive parent of a child
 - foster parent
 - individual acting in the place of a biological or adoptive parent (including a grandparent, stepparent, or other relative) with whom the child lives
 - **Not the State even if the child is a ward of the State**

Parent Participation Decisions



“Son, I’d like us to spend more quality time together. Would you accept me as a Facebook friend and let me follow you on Twitter?”

Parent Participation Decisions

- *Doug C. v. Hawaii Dep't of Ed.*, 720 F.3d 1038 (9th Cir. 2013)
 - Request to reschedule due to illness not refusal to attend
 - Need to conduct annual review doesn't justify excluding parents
- *Toledo Sch. Dist. v. Horen*, 55 IDELR 102 (N.D. Ohio 2010)
 - Asking to reschedule is not refusing to attend
 - Schedule of large team doesn't justify excluding parents
- *T.S. v. Jerry D. Weast*, 54 IDELR 249 (D. Md. 2010)
 - Repeated rescheduling can constitute refusal to attend
- *B.H. v. Joliet Sch. Dist.*, 54 IDELR 121 (N.D. Ill. 2010)
 - School not required to schedule meetings after hours

Regular education teacher

34 CFR 300.321(a)(2)

- “Not less than one regular education teacher of the child (if the child is, or may be, participating in the regular education environment)”
- *R.G. v. New York City Dept. of Ed.*, 62 IDELR 84 (E.D.N.Y. 2013)
 - “...inclusion of a general education teacher . . . would not necessarily have led to the formulation of a different IEP. . . . But the teacher would have had the opportunity to provide his or her views about F.G.’s needs and to persuade the other members to consider a general education placement . . .

Excusing IEP Team Members

34 CFR 300.321(e)

- Team member may be excused if:
 - Parent and public agency agree, in writing, that the attendance of the member is not necessary because the member's area not being modified or discussed
 - Parent and public agency agree, in writing that member can be excused AND the member submits, in writing to the parent and the IEP Team, input into the development of the IEP prior to the meeting
- Includes excusal in whole or in part

Team Members Leaving Early

- *Charlotte County Sch. Dist., 114 LRP 22660*
(SEA FLA. 2013)
 - Regular education teachers left early
 - Parents not informed and did not consent in writing
 - SEA issued finding on non-compliance

Implementation Issues



“To get what you want, first create a list of compelling and meaningful goals. Next, draft a dynamic plan of action, then follow through with consistent maximum effort. If that doesn’t work, just cry and point.”

Informing Teachers of IEP

34 CFR 300.323(d)(1)/Rule 51 007.02C

- The child's IEP must be "accessible" to each teacher, related services provider, or any other service provider responsible for its implementation.
- In re Student with a Disability, 111 LRP 8947 (SEA Montana 2011)
 - School failed to show that teachers received copies of the IEP they were responsible for implementing

ALL STAFF MUST follow IEP

- IEP is staff's "safe harbor"
- District liable for failure to follow:
 - Due Process
 - OCR Complaint
 - Rule 51 Complaint
- Personal Liability
 - Doe v. Withers, (WV. 1993)
 - PPC claim



"Just out of curiosity, who do you punish on weekends?"

Letter to Fox, 211 IDELR 26 (OSEP 1978)

- NEA went to US DOL with questions: E.g.
 - What procedure should the teacher follow when he or she disagrees with the contents of the IEP and/or the placement of a handicapped child?
 - Does the teacher have the right to call for an IEP meeting?
 - Can a teacher refuse the placement of a handicapped child into his or her classroom?
- US DOL:
 - Teacher has no right to refuse to implement IEP
 - Teacher has no right to refuse placement in his/her classroom
 - Schools expected to discipline teachers who don't comply

Letter to Anonymous, 17 IDELR 391 (OSERS 1990)

- Collective bargaining agreement
 - set maximum caseloads for speech pathologists
 - Gave teachers to right to refuse to serve kids “unsafe”
- OSERS: CBA cannot excuse failure to implement IEP
 - Where the IEP team determines that a particular child with a disability requires speech services or other special education or related services in order to receive FAPE, that service must be provided to the child in an amount that is appropriate to the specific service and sufficient to address the child's identified educational needs, regardless of any contrary provisions of a collective bargaining agreement that may affect the availability of needed personnel.

MS v. Utah Sch. for the Deaf and Blind, 64 IDELR 11 (D. Utah 2014)

- IEP called for FM Transmitter
- Teacher long-time veteran
 - Said FM transmitter did not help student
 - Actually harmed student's ability to localize sounds
 - Teacher discontinued use of FM transmitter
- Court: "the . . . classroom teacher [is required] to implement the components, even the ones that the teacher may not agree with or care to implement"

A Few Things NOT to Say in an IEP Meeting



**"We need something for his verbal incontinence.
He has a blather control problem."**

**All of our
students
must...**



Refusal to Individualize

- Victoria Ind. Sch. Dist., (Tex. 2010)
 - Student with fetal alcohol syndrome
 - Gen Ed Teacher E-mailed Parent
 - Parent privately placed
- Unified Sch. Dist. No. 259 (Ks. 1999)
 - Student with dyslexia
 - Attended magnet school
 - Teacher told parent she had done every thing she could for student

Instead Say Things Like:

- We believe this will be successful for your child
- We have had success with this approach with similar children
- This approach meets your child's individual needs

**That will cost a ton.
Our school just
can't afford it.**



Cost doesn't matter

- Modoc County (CA) Office of Educ. (OCR 1996)
 - Parents wanted adaptive PE
 - School could find cert.
 - Private consultant too expensive
 - Waiver for teacher provisionally cert
 - \$40,000.00 per year vs. \$1200.00

Instead Say Things Like:

- We believe your child can make academic progress without _____
- We believe the program we've designed for your child will meet your child's individual need
- Can you provide us with more information about this?

**We only have to
provide you a Ford,
not a Cadillac.**



Just because it's true doesn't
mean you say it



"After extensive X-rays and blood tests, we've confirmed what we already suspected-- you're not big-boned, you're fat."

Instead Say Things Like:

- We believe this will provide Sally with a great deal of education benefit
- We are excited to see the progress Sally will make with the plan

**This won't take
much time, we've
already got the IEP
drafted and all you
have to do is sign.**



Pre-determination

- W.A. v. Patterson Joint Univ. Sch. Dist. (E.D. Cal. 2011)
 - “Predetermination can be a two way street.”
- M.C.E. v. Board of Ed. of Fredrick Co. (D. Md. 2011)
 - “open mind, not blank mind”
- Mark M. v. Hawaii (Hawaii 2011)
 - School refused to consider data

Instead Say Things Like:

- We have drafted this for your input
- Are there any changes you would like us to make
- Mark document “draft” on every page
- Keep notes of edits

Questions?

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