The Five Legal Pitfalls District Leaders Must Avoid This Year

Navigating the shifts in federal and state policies to ensure legal compliance in special education programs

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Thank you for downloading our whitepaper on avoiding legal pitfalls. We hope you find it a useful guide and an asset to your department. This paper is taken from a live transcript of a PresenceLearning webinar authored by Charles Weatherly of the Weatherly Law Firm. Since laws differ by state, it's important that you be tuned into laws and policies in your location and consult an attorney for your specific situations. This document is not intended to be legal advice.

—PresenceLearning

With all the changes going on in our schools today, the changing student population, the growing use of technology, and the increased number of students with special needs, we must be attuned to methods to ensure legal compliance. This coming year represents some changes and special challenges we may be facing. I am going to focus on five areas and changes and on what you need to pay special attention to. We can anticipate shifts in federal and state policies that could affect special educators. The importance of knowing the law and being aware of possible pitfalls will help you to avoid legal action.

—Charles Weatherly

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What do you do to avoid legal tangles related to serving students with autism?

Legal Pitfall #1: Insufficient Training Related to Special Services for Autism

District leaders are striving to keep up with the growing number of methods for improving outcomes for students with autism. Parents and educators are faced with deciding the duration and quantity of interventions needed to achieve success with their students. And IEP teams frequently struggle with the question, is more better? So, what do you do to avoid legal tangles related to serving students with autism? Training is my recommendation to have better answers to these difficult questions and also to reduce your legal exposure.

There are two things to consider about training as you think about avoiding legal challenges related to providing special services for children with autism. First, why should training be provided, and secondly, who are the individuals that should receive training?

Why is autism training needed? As we all are aware from the media, we have a hyperawareness of autism. Look at covers of magazines, at news broadcasts, and search the web. Virtually every type of media has brought our attention to the fact that identification of children with autism has increased significantly over the last decade or so. For example, the other day I was in one of the malls, and there was a sign that said one in a hundred children have been identified as having autism. A recent publication indicated that it could be 1 in 60 children. Regardless of which estimate is correct, these estimates are in front of us everywhere, and this soaring rate of identification has raised questions from many people in the field. What has led to this increased identification and could we perhaps be dealing with over-identification?

There is simply no answer at this point to the question of over-identification. But with the increase in identification, there has been a significant increase in litigation in the area.

From that, and with hyper-awareness, and with interest from families in assuring that they get the best services for their children, there is a significant amount of information available over the web about the disability itself and about various intervention methods. It seems that anyone can become an expert.

The early litigation in this area deals with debates between what was called the discrete trial teaching method, and the TEACCH method originating out of the University of North Carolina. This was back in the late 90s to the early 2000s. Since that time there has been even more discussion about a myriad of interventions. What districts need to do is to focus on research-based interventions while determining training needs. In order to solely focus on research-based interventions it is very important that the district superintendent and the director of special education do an assessment of the level of expertise of staff to determine what training is needed.

Who should receiving training? It has long been my recommendation that districts develop an in-house expert who will attend trainings on a variety of approaches. This individual would attend IEP meetings and be able to address and respond to questions from parents about the district's special education programs, as well as interventions that may be sought by the parent.

As you engage in the process of developing effective programs for children with autism, you should always contact your state department of education to see what guidance, if any, they afford to local districts. At one point, some states were suggesting that ABA (Applied Behavior Analysis) programs would be the route to take. Of course, you must be mindful of the requirement to do what is appropriate for the student.

If you are running into difficulties in this area and you don't feel like you have the requisite in-house training for your staff, then you should consult with outside experts. Look at the literature and determine who is published most in the field and seek their assistance in helping you to train your staff and helping you to develop effective programs for the autistic population.

One of the things I discovered over the years is the need to develop programs for all grade levels. For example, in one district I worked with the autism program was focused on preschool. I remember having a conversation with the director of special education that we have to be conscious of the fact that the preschoolers we are developing this model program for will get older and the district is going to have to be prepared to have programs at all grade levels. I then became a part of the process of working together to make sure that preschool, elementary, and secondary programs were effective for this very unique population.

Didactic training is, of course, lecture-type, overview training. I think it is very important that you include it, and that any staff that might be working with this population be part of it. Even maintenance staff may have interactions in the hallway with children with autism and need to have some training as to how they should react under different circumstances.

A number of cases we have litigated over the years have involved the issue of whether or not we should be dealing with parentally-sought, private clinically-based speech-language services versus the current recommended approach of services of speech-language integrated within the classroom or school setting. Thus far, the clinical model has not been very successful while the integrative school model has.

How many times have you heard about students who are reluctant to receive special education services because they have to go to that "special room?"

Legal Pitfall #2: Insensitivity to Bullying and Harassment

Special needs students are easy targets for bullying and harassment. How many times have you heard about students who are reluctant to receive special education services because they have to go to that "special room?" As an administrator there are reasons to be more concerned about special needs students given their social and emotional issues. Let's explore why and ways you can be on guard for potential legal issues.

Bullying and harassment is a topic that has been subject to heightened scrutiny over the last five years, certainly by the media and within the school environment. In identifying the insensitivity to bullying and harassment as a potential pitfall, I often refer to the phrase I sometimes hear being used, "Boys will be boys." Without that being any gender characterization, the notion is that bullying and harassment has existed forever, regardless of the environment, and that children will grow out of it.

That notion certainly has changed over the last several years with technology. Younger adolescents, particularly pre-adolescents, have embraced social networking sites like Facebook, Twitter, and MySpace to a significant degree and this has created an environment for cyberbullying.

The converse side to the problems created by the cyberbullying through social networks and through mobile phones is that schools want their students to have mobile devices such as iPads at school. In fact, there is a new school in Florida, and I'm sure they exist in other places, where every student in the elementary school will have an iPad and all the textbooks and curricular materials will be on the student's iPads. If that does occur, the question becomes, how are you going to regulate how the iPads are used?

Unfortunately, there are no clear answers to that question at this point. But there is a heightened awareness of the risks of abuse, not only among parents and students, but also among teachers, coaches, and administrators—all individuals who have contact with students in the school environment.

I think it's important to note that although there can be bullying and harassment relating to special needs children (being bullied or actually bullying) we need to be thinking at this point about the entire population as well. Whether or not students have special needs it is a significant issue that has to be addressed.

Most of us know of the tragic incident of the Rutgers University student being videoed by his roommate and then having the video disseminated over social media with a result of suicide of the student who had been filmed. This is one example of issues that are extremely difficult. That's why it is absolutely essential that school districts are aware of the bullying and harassment and the need for training. District staff need to be trained to recognize bullying and harassment, trained to recognize precursors of bullying and harassment, and trained in how to recognize the victims. As you know, victims are often reluctant to come forward because they are concerned that the bullying and harassment will only heighten over a period of time.

Bullying and harassment certainly exists at school and bullying and harassment may be observable by staff, but you may also have to deal with issues of cyberbullying that occur after school and over weekends. What if something gets sent out on Saturday or Sunday, then bullying begins on Monday? You should certainly check with your local counsel as to the laws in your area, but generally speaking, there is a belief that anything that occurs off school grounds and then bleeds onto the campus may not be immune from being addressed by the schools.

Now what do we do about privacy? It makes one wonder if there is such thing as privacy because confidentiality is something that is so easy to compromise in our technology-rich (and getting richer by the day) environment. What do you do for privacy challenges related to bullying and harassment? You need to look at the policies in your state. Virtually every state has a bullying and/or harassment policy, which generally details the investigations that need to be employed, the need for written reports and what has been at the outcome of the bullying investigative process.

Even if there is a state guideline, you need to use that just as a guideline and from that point you develop your own bullying policy and process. When we talk about best practices, we are talking about training, we are talking about doing research, and we are talking about becoming aware of what strategies work to deal with bullying and harassment. They are in development now and they should, and hopefully will, improve over time. Also, there must be an effort to ensure that such activities are not discriminatory under state or federal antidiscrimination laws.

Those of you in the school setting must be constantly aware of the requirements of FERPA (Federal Education Right to Privacy Act), the investigative reports, and the witness statements. Outcomes frequently contain personally identifiable information. They can be redacted, but you have to be careful and there are significant limitations on their disclosure, so I urge significant caution. For instance, there was a case in which a counselor in the northeast had disclosed a child's diagnosis as schizophrenia, and the counselor individually and the school district were sued and the suit was allowed to go forward to recover a million dollars in damages, so this is not only important in terms of serving children, but it is important in terms of the impact on students and on staff.

"What is the relationship between procedural violations of IDEA, such as notices and participants in IEP content and the substitute requirements of the provision of a free appropriate public education?"

Legal Pitfall #3: Procedural Violations With IDEA

As educators, we naturally focus on what we do: the quality of the interventions and programs for our students. We've done a good job on those, as there are many research-based practices that we rely on. Districts have done a good job of getting the proper training for new instructional programs and integrating proven interventions. The potential pitfall is not so much for *what* we do, but it is really procedural or *how* we go about it: following prescribed rules and policies, having the right meetings at the right times, covering all the bases, and keeping very good records. We need to make sure we have dotted the i's and crossed the t's.

When considering compliance with the requirements of IDEA, the question is often asked, "What is the relationship between procedural violations of IDEA—such as notices and participants in IEP development—and the substantive requirements of the provision of a free appropriate public education?" The legal standard for FAPE comes from the Supreme Court decision for the Hendrick Hudson NY Board of Education vs. Rowley in 1982. That standard was whether the IEP was developed through the procedures of the Education for All Handicapped Children Act [later replaced by the Individuals with Disabilities Act or IDEA] and secondly, was the IEP developed through the Act's procedures reasonably calculated to afford the student the opportunity to receive educational benefit.

Some circuits applying the Rowley standard have applied a "meaningful educational benefit" standard and some of the circuits have applied an "educational benefit" standard. You should consult your local counsel to determine which standard applies within your district.

The discussion around the Supreme Court standard and the significance of procedural violations was addressed in the IDEA reauthorization of 2004, following a number of years of litigation and disagreement among circuit courts of appeals about whether or not a procedural violation alone can be viewed as the denial of FAPE.

The direction to hearing officers and reviewing courts where procedures are at issue is that when first you make a decision based on substantive FAPE, does the procedural violation impede the child's right to free appropriate public education? Does the violation significantly impede parental participation regarding the development of an IEP and the provision of FAPE for the student? Has there been a deprivation of educational benefit to the student?

Though we have been given some guidance subsequent to that, including some of the decisions of the 9th Circuit Court of Appeals, we still tend to place a lot of emphasis on procedural compliance. Though the substance of FAPE is obviously significant—having good programs and having quality staff—I would be mindful of whether or not there has been strict procedural compliance.

Just think about what may be occurring in your district at this moment in time. Virtually all of the decisions being made at IEP meetings and being made by staff in setting up IEP meetings are legal decisions. Any of the decisions could be argued as procedural violations of the [Individuals with Disabilities] Act that impact the decision of FAPE.

The many opportunities for procedural violation reinforce the notion of providing effective training to your staff. In the process of IEP development and the provision of FAPE and the development of appropriate programs, as in all areas, you need to consult with your state department to see if they have guidance. Even if there is guidance from your state, I recommend that your district develop its own IEP guide. Incorporate the suggestions from your state, but make your district's IEP guide something useful within your district. The next step of that process, of course, is to train your staff on IEP development.

It's a good idea to create a checklist of the various procedural requirements to make certain that you can say that notice was sent in a timely fashion, that the time and place of the IEP meeting was reasonably convenient to all parties, etc. It's much like pilots: every time they embark on a new flight they go through their book and they check off to make certain that all systems are working. You should do the same in the development of an IEP.

Obviously, you want to use best practices in meeting the needs of individual students so be sure your staff is trained on the specific disabilities and that you are developing programs to meet the needs of individual students. Virtually all courts have rejected the notion that there is any concept of one-size-fits-all under IDEA and there are constant reminders that the 'I' in IEP stands for *individualized*.

A final recommendation is that you have a person within your district who has had significant training in procedural compliance and is available to keep an eye out to see that your staff is developing IEPs appropriately. This person should be looking over IEPs randomly to determine whether or not they appear to be procedurally compliant. Unfortunately, state-focused monitoring often does not disclose procedural violations that are often discrete and this can be a method by which you could avoid legal difficulties in the future.

Legal Pitfall #4: Inflexible Implementation of RTI

Response to Intervention (RTI) is now in various stages of implementation across the country. Some states are pretty strict in terms of how RTI should be implemented. There is a rigid, inflexible process of putting students through interventions at each tier and waiting for results. But sometimes we need to lean on our professional judgment as to what is best for student.

I think it is important to make the observation that inflexible implementation of anything can be a problem, including RTI. This legal pitfall is not in any way a criticism of RTI (response to intervention) as a concept. The concept of response to intervention is actually an older concept. Section 504 of the Rehabilitation Act and IDEA have long required that there is a process for some form of pre-referral intervention in relation to what is known as the "Child Find" process. The acronyms SST (student support teams) or CST (child support teams) used within your district was, effectively, that pre-referral process. What has happened with RTI over the last few years is that we have Child Find (or child identification) on steroids.

My advice is to be careful that RTI is done in a way that allows flexibility. The RTI concept was part of the 2004 amendments, and was intended to address and require that general education provide services to students who are suspected of having a disability before they are formally referred for evaluation. It has been interpreted by some as a mandate that RTI be used in all instances, when in fact these mandates can operate in disregard of the true meaning and intent of IDEA.

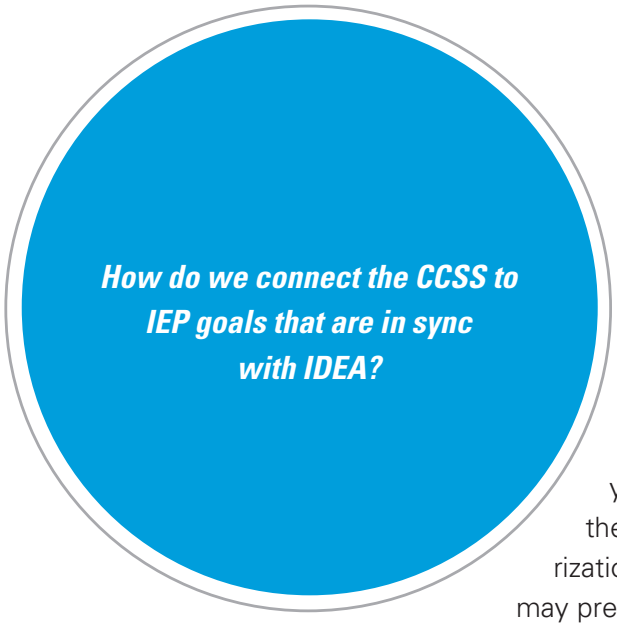
How do you restore a balance and avoid legal surprises? There are a number of suggestions that I make. Obviously, knowing your state's policies is very important. For example, California continues the significant discrepancy formula for identifying children with learning disabilities.

Some of you may be aware that the LDA, Learning Disabilities Association, very much wants relief from the RTI provisions and a restoration of the approaches that were used prior to 2004 and more use of the significant discrepancy formula. RTI followed No Child Left Behind and a lot of the fervent discussions and battles about what were the appropriate reading methods almost took on the form of religiosity. Anything that is a mandate to do the same thing with every child is very contrary to the very purpose of IDEA to be child-centric and individualized.

So as a consequence, you do need to make a good and timely choice for referrals and that is often at odds with RTI procedures as they are applied in some districts and in some states. Regardless, it is still important to have in place good, effective pre-referral systems that will allow you to assist in identifying children who may in fact have a disability, regardless of what the RTI process may be disclosing.

For example, a friend of mine I had worked with for many years had moved to another state. Her child had been tested and was shown to have a significant reading disability. My friend called me and begged me for advice about what she should do to address this. She asked for a referral and to get an evaluation, and the district refused because they said they had to complete the RTI process before they could make a referral. My response to that was, no they cannot do that. I arranged an evaluation on short notice with one of the top people in the field of learning and reading disabilities who identified a significant reading disability with this child. That evaluation was taken back to the district and ultimately the district agreed that the child had a learning disability and a reading disability and developed an IEP. The problem with was the refusal of the district to do an evaluation until they had gone through the full RTI tier process. That is a violation of IDEA.

The Federal DOE Office of Special Education Programs, OSEP, issued a letter several years ago making it very clear that the RTI process was never intended to preclude a district from making a referral or doing evaluations in circumstances when there is suspicion that a child has a disability. The message is that RTI can be a very significant and important intervention for a lot of children, but must contain within it a level of flexibility and individualization.



Legal Pitfall #5: The 'Black Hole' of IDEA Reauthorization

We are all aware of the ongoing delays and stalls in the reauthorization of IDEA. Because last year was an election year, there was a heightened sense of expectation that there would be movement but it now appears that reauthorization could be delayed until 2014 or later. New regulations may present challenges and opportunities. And, as you know, we are in the midst of the shift to Common Core State Standards [CCSS]. How do we connect the CCSS to IEP goals that are in sync with IDEA?

Avoiding this 'black hole' pitfall means you need to be aware of reauthorization and effectively participate in the process so you can anticipate issues that need to be addressed. When I say reauthorization, from a legal perspective, IDEA is a federally funded statute.

Federally funded statutes are supposed to be reauthorized every three years. With IDEA we have had three major reauthorizations: 1990, 1997, and 2004. We are long overdue.

The reauthorization of IDEA is also occurring at the same time as the reauthorization of ESEA, part of which included No Child Left Behind. NCLB was the Bush administration's attempt at improving outcomes by focusing almost completely on test scores with the goal of all children performing at the same level by 2014 [a deadline which has now been extended]. There has now been a shift to the approach of improving outcomes based on the Common Core State Standards. 45 states have adopted the Common Core Standards. This is an effort not to focus on test scores alone, but also on developing the skills of our students in key areas of reading, mathematics, language, writing, and to prepare students to participate in either secondary school or whatever that post-school outcome might be. It is likely that the Common Core Standards will be addressed as part of IDEA, as was NCLB to a limited extent.

There is also significant amount of discussion in Washington right now about federal intervention in many of the areas that are of concern to parents and educators such as the issue of seclusion and restraints. Many states have their own legislation standards on seclusion and restraints. Similarly there has been discussion about bullying and harassment. Nearly all states have a policy on bullying and harassment. The question often becomes, is this a federal prerogative or is this something that should be left to the states?

So, with all this going on, how do you assist in this process instead of feeling like you are in a black hole? I paint this as a black hole because the system of reauthorization is far from perfect. Whether you are a special education administrator, whether you are special education services provider, or whether you are a teacher, you need to be aware of the position your state or your national professional association is taking on issues. The LDA [Learning Disabilities Association of America], for example, has published a lengthy position paper on changes they would like to see as part of the reauthorization (http://www.ldaamerica.org/legislative/pubs/LDA-IDEA-Reauthorization-Policy-Platform.asp). As you know, children with learning disabilities constitute the majority of identified students with disabilities. So just be aware of what is being presented as a change. Provide your input to that change. And, more importantly provide data that supports any concerns and recommendations that you have. My experience has been that schools have been very slow in expressing their concerns and providing information and that needs to change. The National School Boards Association (NSBA) is actively involved in this process, as are many other associations, so it is critical that you stay in touch and make your feelings known so that your concerns can be considered at this level.

About SPED Ahead

SPED Ahead is a forum for school administrators and special education specialists to learn about new ideas and promising practices that help exceptional students achieve. With a series of free interactive online events and related multimedia web-based resources, SPED Ahead explores answers to tough questions and shapes effective leadership strategies for addressing special needs students' challenges for literacy skills, scholastic achievement and peer relationships.

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