Top 5 Ways to Avoid Litigation

The reality is that we are living in an increasingly litigious society and school districts will continue to be sued. In looking back at our collective experience in school law, however, we have come up with a "top 5" list of suggestions which, if heeded, may assist school districts in avoiding or minimizing litigation. This is important not only because of the time and financial costs incurred by school districts, but because educational personnel and parents must continue to work together beyond the life of a court case - at least until the student graduates or turns 21.

**Suggestion 1. Avoid the "Land of Yes"**

For many years, under New Jersey law and the New Jersey Administrative Code, school districts have provided programs and services for students in need of special education and related services - above and beyond what may be required under the Federal Individuals with Disabilities Education Act ("IDEA"). As a result, in many school districts, families seeking special education programs have grown accustomed to obtaining any and all relief they seek. Then, if a district denies a request in such an environment, litigation usually ensues. Although school districts have, as a necessity, begun to more carefully allocate resources, we often run into school districts that have difficulty doing so because they have become the "Land of Yes."
In an effort to accommodate parent requests, build trust and maintain an amicable working relationship, districts often consider agreeing to a request for classification, the delivery of a particular service or a particular service provider. By doing so, the district creates a sense of entitlement among parents and students. Where it is appropriate to later declassify the student or reduce the amount of services being provided, or when it becomes necessary to change personnel assignments - districts invite litigation. To protect itself, the Child Study Team ("CST") should be careful in initially classifying children and in developing programs. Parents should be told of the district's obligation to provide a program in the least restrictive environment and that its goal is to foster independence and achieve success in the mainstream setting. Parents should also be reminded that the district retains control over personnel assignments. Districts can certainly accommodate parent requests to the extent possible, as long as they are careful to inform parents that the IEP is a working document and that there are no assurances that their preferences will always be met.

**Suggestion 2. Do Not Commit to a Particular Methodology**

Often, CSTs are asked by parents to provide services to a student using a particular methodology. The law in this area is clear: Parents do not enjoy the right of dictating methodology - that decision remains with the school district.

There are two recent case examples:

- **Blackmon v. Springfield R-XII Sch. Dist.**, 198 F.3d 648, 658 (8th Cir. 1999). In this case, the Court held that the IDEA does not require a school district to provide a child with the specific educational program or placement that her parents prefer; and

- **Tucker v. Calloway County Bd. of Education**, 136 F.3d 495 (6th Cir. 1998). In this case, the Court reminded litigants that courts must focus primarily on the school district's proposed placement and not on the alternative that the family prefers.

In short, school districts should remind themselves that, with respect to this choice, they are coming into court from a position of strength.

For example, if parents request Orton Gillingham as opposed to the Wilson reading program - or Applied Behavioral Analysis (ABA) therapy as opposed to the Greenspan approach - the district should not feel compelled to align itself with one particular methodology based on choice of parents. In fact, this alignment only restricts the repertoire of instructional methods available to instructors - they need to be flexible and move from one methodology to another depending on what seems to work for an individual student.

**Suggestion 3. Educate District Personnel on Litigation**
Once a due process request is filed, it is difficult to prepare for litigation when CST members are unfamiliar with the litigation process or the specific procedures in the Office of Administrative Law or Federal Court. By familiarizing CST members with the process in advance, districts will be better able to prepare for unavoidable litigation and educate personnel as to the paper trail required to be successful.

This problem can be remedied by time; as the district becomes more involved in litigation, district personnel will become more familiar with the process and feel more comfortable. But we believe that members of the CST (and teachers that may be appearing as witnesses) should be as comfortable with the process as possible from the beginning. School districts can easily provide informational sessions to members of the CST on the mechanics of appearing in court.

More importantly, as attorneys always remind their clients - get everything in writing. Once members of the CST are familiar with the litigation process and how Board attorneys prepare and present the school district’s case, they will appreciate the need to create evidence by being meticulous about documenting developments in the student’s educational experience. When the school district does end up in court, it will then have witnesses that are comfortable and prepared, and the evidence it needs to meet its burden of proof.

**Suggestion 4. Discipline: Foster Cooperation between Administrators & the CST**

The special education laws have a host of restrictions on how discipline is imposed on classified students. The critical number among these restrictions is 10: if a classified student is removed from his or her educational program for more than 10 consecutive school days or if the student is subjected to a series of removals that constitute a pattern because they cumulate to more than 10 school days in a school year - a change in placement occurs.

Even where a student is removed from his or her educational placement for 10 school days or fewer, the principal - at the time of removal - must forward written notification of the removal and a description of the reasons for the removal to the case manager. This notification allows the district to keep track of the total number of days the student has been removed in the school year, and to revisit this total with each new suspension. In addition, it fosters communication between the administration and special education personnel.

Where there is a removal that constitutes a change in placement, this communication between administrators and special education personnel becomes critical because the removal triggers several requirements. For example:

1. An IEP meeting must be convened within 10 business days after first removing the student;
2. If a functional behavioral assessment of the student has not already been conducted and a behavioral intervention plan implemented:
(a) the IEP team must review the existing data, develop an assessment plan and conduct an assessment (if additional data is needed); (b) after completing the assessment, the IEP team must conduct another IEP meeting to develop appropriate behavior interventions.

If the student already has a behavioral intervention plan, the IEP team must review the plan and its implementation and modify the plan and its implementation as needed; and

3. (3) When the district contemplates an action that results in a change in placement, the IEP team (and other qualified personnel) must immediately, but in no case later than 10 school days after the decision to remove the student is made, conduct a manifestation determination to review the relationship between the student’s disability and the behavior.

Therefore, school districts that do not foster communication between administrators and special education personnel run the risk of having administrators take disciplinary action against a classified student without proper notification to the CST. And without timely notification, the CST may not meet statutory deadlines. The CST has a very short time to take a number of actions - every day is critical.

In order to ensure that notification is provided to the CST, we have prepared for several of our clients an interoffice Discipline Review Form that contains the information the CST needs to proceed. We also encourage school districts to schedule periodic meetings between administrators and special education personnel to ensure that the lines of communication remain open.

**Suggestion 5. Need to Separate between Home v. School Environments**

When parents begin experiencing behavioral problems with their children at home, they often request formal social skills and behavior modification programs in school. These can be appropriate supplemental services intended to address and either foster or extinguish a certain behavior. Problems may arise, however, if school districts implement these programs without first asking whether the behaviors being exhibited at home are also being exhibited in the school setting. Skipping this inquiry may introduce the school district into a student's home and lead the school district to assume responsibility beyond the scope of education.

Boards of education need not provide services to address student behavior which is degenerating only at home. In 1996 in a case called *P.G. v. Linwood Board of Education*, an ALJ stated that, where a student continues to make progress at school but his or her behavior is degenerating at home:

> No contradiction inheres in this; rather it reflects [the student]'s response to these distinct environments ... [The parent's] portrayal of the home scene is dire and no doubt the entire family is under great strain. Yet, the IDEA is not a comprehensive tool for the resolution of problems engendered by disabled children. It does not ask what is good for the family unit, nor does it assure [the student] the best available placement for her needs. It obliges [the board of education] to supply an educational placement in which [the student] can progress. This itself
is no small task …


Therefore, with respect to behavioral problems, school districts must be careful to draw the line between school and home - it is not the place of the school district to go into the home and resolve family issues. In order that the CST can recognize this distinction, school districts (especially classroom teachers) must be careful to monitor and record student behavior and development in the school setting and note the effect, if any, of behavior on the student’s educational performance.

A more appropriate response may be to guide parents to other resources that may offer support.

Practice:

School Law