Special Education 101: Steering Clear of Common Mistakes and Troublespots

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Every Child Counts Symposium

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Mistake No. 1

Making an Unclear Offer of Placement
(or not making an Offer at All!)
No Offer of Placement -- Remember Union v. Smith:

- Put it in writing!
- The failure to write it down can be costly!
Make Sure the Offer is *Specific & Written*

**Worst Case Scenario:**
- 12-year-old Student with traumatic brain injury
- District’s offer in a newly designed program was too “sketchy” and impossible for parents to analyze and consider
- SEHO ordered placement in NPS, reimbursement for one parent to live near student, mileage reimbursement and hotel reimbursement

Richmond Elem./Lassen County Office of Education
SN03-01129 and SN03-01332 (SEHO 2003)
Make Sure the Offer is *Specific & Written*

- Administrator’s role to ensure that an offer of placement is made.

- If District staff members cannot agree, the administrator should:
  - Take a break;
  - Continue the IEP team meeting;
  - Attempt to bring the team to a consensus.
  - In the end...make an offer.
Make Sure the Offer is *Specific & Written*

**Best Practices!**

- Don’t offer services you can’t deliver or implement
- Make sure temporary services are temporary
- Don’t make compensatory education part of the program and services
- Rewrite the offer in the Comments if you don’t have enough space on Program/Services page
PRACTICE POINTER: Making the Offer

Where to make it:

- The best place to do it is at the IEP meeting and on the IEP
- May be finalized or clarified in a letter to parents (San Francisco USD (SEHO 2004))
Choose One!

- The district has the burden of choosing a **SINGLE** offer of placement
- As educators, the district has a responsibility of sharing its expertise with the family
Don’t Do This:

- Don’t fail to put the offer in writing because parents have stated that they will not agree to that placement (*Union v. Smith* (9th Cir. 1994))

- Don’t discuss multiple placements, but fail to specify the placement being offered in writing (*Mill Valley v. Eastin* (C.D. Cal. 1999))
Don’t Do This:

- Don’t offer multiple placements if only one is FAPE (Glendale v. Almasi (C.D. Cal. 2000))

- Don’t offer a type of placement (i.e., an SDC) and allow the parent to select a school site (San Francisco USD (SEHO 2003))

- Don’t discuss multiple placements at an IEP and then tell the parents to choose one (Poway USD (OAH 2006))
Mistake No. 2

Incorrect Manifestation Determinations
Manifestation Determinations

- Legal Review
  - Required within 10 school days after proposed removal that would be change of placement
  - MD decisions reached by team consensus; Parent who disagrees may seek due process
  - Behavior is manifestation of disability if:
    - Caused by, or had direct and substantial relation to, Student’s disability; OR
    - Was direct result of failure to implement IEP

(34 C.F.R. 300.530(e))
Manifestation Determinations

Legal Review (cont’d)

- If behavior is manifestation of disability
  - Conduct FBA/Implement BIP
  - Return Student to placement from which he/she was removed, unless agreement otherwise

- If behavior is not manifestation of disability
  - Subject to same sanctions as nondisabled students
  - Must continue to receive FAPE

(34 C.F.R. § 300.530(c)-(d); 34 C.F.R. § 300.532(c))
Who Conducts the MD?

- MD is conducted by “relevant members of IEP team,” including Parent
- Technically, law creates separate MD team
- Practically, meetings to conduct MDs are essentially IEP meetings
- If “essential member” of IEP team doesn’t participate or misses meeting, IDEA violation occurs

(34 C.F.R. § 300.530(e)(1); Student v. Fresno USD (OAH 2012) No. 2012020842)
Practice Pointers

- Consider assembling entire IEP team for MD review since team will be required to convene in any event regardless of results
- Convening full team initially avoids scheduling another meeting
Information to Be Reviewed

- MD team must review “all relevant information in Student’s file, including IEP, teacher observations, and any relevant information provided by Parents”
- District is required to obtain records for transfer students
- Consider possible existence of other disabilities

(34 C.F.R. § 300.530; 34 C.F.R. § 300.323(g); Student v. Fresno USD (OAH 2012) No. 2012020842)
Practice Pointers

- Don’t rush the MD process even if issue seems clear-cut
- Rely on team member expertise about characteristics of Student’s disability
- Identify behavior patterns consistent with prior evaluations and data
- Consider info from private evaluations
Documenting the MD

- At minimum, it is essential to document the following:
  - When the team convened
  - Who was present (and whether Parents attended)
  - What conduct was at issue
  - What decision was made
  - What information was used

- Failure to document can lead to due process order requiring MD be repeated

(In re: Student with a Disability (SEA NY 2011) 57 IDELR 59)
Practice Pointers

- Also, keep the following records of the MD process:
  - All contacts with parents to schedule meeting
  - All questions asked and answered concerning relationship between misconduct and disability
  - All documents that were reviewed
MD During IAES
Student v. William S. Hart Union High School Dist. (OAH 2016)

Facts:

- 14-year-old boy with autism
- While receiving speech services, Student grabbed his speech pathologist’s head by her hair and slammed her head onto wood tabletop
- Pathologist was diagnosed with concussion, leading to memory problems and delayed thought-organization
- District placed Student in 45-day IAES (home study), but did not hold manifestation determination
MD During IAES
Student v. William S. Hart Union High School Dist. (OAH 2016)

Decision:
- ALJ supported District’s unilateral removal to an IAES, finding that Student inflicted serious bodily injury
  - Pathologist suffered “protracted impairment of the function of a bodily member, organ, or mental faculty”
- District violated IDEA by failing to conduct manifestation determination
  - “Erroneous” understanding of law
  - District significantly impeded Parents’ right to meaningfully participate in Student’s educational program

( Student v. William S. Hart Union High School Dist. (OAH 2016) Case No. 2016020807)
Returning Student to Placement

- Law doesn’t set timeline for how quickly Student must be returned to placement from which he/she was removed if conduct was manifestation of disability.

- But: Cases have held that failure to return Student to current placement “the same day” of the determination violates Student’s procedural rights.

(Student v. Bellflower USD (OAH 2013) Nos. 2012060009 and 2012060628) [District waited one week before returning Student]
Practice Pointers

- All individuals involved in MD review should be familiar with IDEA rules concerning returning Student to previous placement if behavior is manifestation of disability
- Leaving Student in disciplinary setting, even for a short time, can deny FAPE
Mistake No. 3

No Transition Plan
When Transition Plans Are Required:

- School to post-school
- NPS or SDC to general education
- When needed – e.g., Part C to Part B, school year to year-round.
And also:

- Student moves from one track to another within the same school *(Buckeye Union ESD (SEHO 2002))*

- Student moves from middle to high school *(Torrance USD (OAH 2006))*
Transition Issues

- Failure to provide a transition plan from high school to post school entitled student to an award of compensatory education, even though the student successfully obtained a high school diploma before the due process hearing.

Mistake No. 4

Missing Important Assessment Information
Assessments – Legal Overview

- Numerous IDEA and state requirements for comprehensive eligibility assessments
- Must assess all areas of suspected disability
- No single measure or assessment can be sole criterion for determining eligibility
- Review existing data, including information from parent and classroom observations

(34 C.F.R. § 300.304(b)(1); Ed. Code, § 56320)
Assessment Errors – Examples

Capistrano Unified School Dist. (OAH 2013)
- District conducted assessment at RTC when classes were not in session
- Classroom observation would have resulted in different placement recommendation

Timothy O. v. Paso Robles USD (9th Cir. 2016)
- District improperly relied on informal 30-40 minute observation to determine Student did not have autism
Avoiding Assessment Mistakes

- Student must be assessed regardless of subjective views about likely outcome
- Observation in multiple settings can yield valuable assessment information
- Plan ahead to ensure student will be comfortable enough to complete testing
- Ensure students provide input about their needs when they are capable of doing so
Avoiding Assessment Mistakes

- Seek parents’ input from beginning of assessment process
- Consider all independent assessments presented by parents
- Do not rely solely on assessments conducted by other districts or independent assessors
- Good assessment information is foundation for “connect the dots” approach
Mistake No. 5

Problem with Goals
Goals – Legal Overview

- Must be measurable, designed to meet educational needs and enable involvement/progress in gen ed curriculum
- Describe what student can reasonably be expected to accomplish within 12 months
- Amount and type of goals depends on student’s identified needs

(34 C.F.R. § 300.320; Ed. Code, § 5634571; Letter to Butler (OSERS 1988) 213 IDELR 118; Student v. Bellflower Unified School Dist. (OAH 2014) Case No. 2014040078)
Goals Errors – Examples

Parlier Unified School Dist. (OAH 2016)

- Behavior goal was immeasurable because it did not define terms
- Social skills goal was immeasurable because it contained no baseline and lacked clarity

Glendora Unified School Dist. (OAH 2007)

- Single goal of passing classes with “C” grade or better was vague and did not address needs
Avoiding Goals Mistakes

- Baselines are starting point for annual goals; they should relate specifically to each goal.

- Formula for drafting measurable goal:
  
  By when . . . (Typically one year or later)
  When given . . . (Name the task)
  Student . . . (Use his/her name)
  Will do what . . . (Target behavior or skill)
  At what level of proficiency . . . (e.g., with 80 percent accuracy)
  At what frequency . . . (e.g., in four out of five trials)
  As measured by what . . . (e.g., teacher observations, data, etc.)
Avoiding Goals Mistakes

Consider these items when drafting goals:

- What skill is the goal written for?
- What is student able to do at the time the goal is written (baseline)?
- When is the student expected to achieve the goal?
- What are the conditions for achieving the goal?
- What are the mastery criteria for achieving the goal?
- Who will implement the goal?
- How is the goal measured?

Remember the “stranger test”
Goals and Objectives

Review Last Year’s Goals:

- If the student has made little or no progress...take another approach

- A goal that is completely unchanged begs for scrutiny

- Do not reuse last year’s goals
Mistake No. 6

Failing to Address Behavior
Behavior – Legal Overview

- Positive behavior interventions/supports when behavior impedes learning of student/others
- FBAs and BIPs must be used proactively if team determines they would be appropriate
- IEP teams should consider “continuum” of options in addressing student's behavior

(34 C.F.R. § 300.324; Ed. Code, §§ 56520, 56521.2)
Behavior Errors – Examples

Twin Rivers Unified School Dist. (OAH 2014)
- District failed to implement behavior goal during home instruction
- Teacher not trained to provide interventions

Dehesa School Dist. (OAH 2017)
- Charter addressed Student’s behavior with various punitive measures
- Testimony that positive behavior interventions would diminish effectiveness of Montessori
Avoiding Behavior Mistakes

- Prioritizing instructional approach at expense of addressing behavior is not an option

- Behavior interventions should emphasize “positive” behavioral supports and strategies

- If interventions are needed, consider interim services until assessments are completed

- Conduct FBA if behavior impedes learning and is not readily explainable
Avoiding Behavior Mistakes

- Staff training is essential to ensure effective, compliant and consistent BIP implementation.

- Placement designed to address problem behavior may be insufficient by itself to provide FAPE, absent behavior goals or BIP.

- Include all IEP team members in any discussion about student’s behavior.
Mistake No. 7

Failing to Fully Implement IEP
IEP Implementation – Legal Overview

- Required components must be implemented as soon as possible following meeting
- All persons responsible for implementation must have access to IEP and be informed of specific responsibilities
- "Material failure" (more than minor discrepancy) in implementing IEP denies FAPE

(34 C.F.R. § 300.323(c); Ed. Code, § 56043.71; Van Duyn v. Baker School Dist. 5J (9th Cir. 2007) 502 F.3d 811)
IEP Implementation Errors – Examples

Temecula Valley Unified School Dist. (OAH 2015)
- Teacher refused to implement reading program called for by IEP
- Failure to implement was material

Castro Valley Unified School Dist. (OAH 2016)
- Teacher who coordinated implementation of Student’s IEP went out on leave
- District found no adequate replacement
Avoiding IEP Implementation Mistakes

- If interruption in services occurs:
  Make sure services are resumed as soon as possible
  Closely monitor student during gap
  Provide additional services if necessary to compensate for lapse

- Provide copy of IEP to all those responsible for its implementation

- Follow up periodically to make sure IEP is being faithfully implemented
Avoiding IEP Implementation Mistakes

- Hold staff meeting one to two weeks after IEP is developed to get report on what is or what is not being properly implemented.
- Stay in touch with parents and be prepared to address their implementation questions.
- Inform staff of potential consequences of IEP implementation failures.
Mistake No. 8

Extended School Year Services...

㿠️ Not Specified  🌟 Not Enough  🌼 Not Offered
Don’t Just Check the ESY Services Box

- Discuss ESY services at the IEP and include an explanation of ESY services in the written offer
ESY Services

- Often, ESY services are an afterthought, just a box to check on a long IEP form...
- Extended year services need to be discussed and specified
ESY Services

- When is ESY necessary?
  - Recoupment/Regression

- One size does not fit all!

- Be specific about the type of ESY services and their duration.
ESY Services

- Districts are not required to make an ESY offer at a student’s annual IEP
- Decisions regarding ESY may be made at addendum IEP meetings held closer to summer break, so long as the reason for doing so is child-centered
- BUT--Districts should act with caution; waiting to add ESY services can be risky
Mistake No. 9

Not Ensuring Parent Participation
Practice Pointer

Communicate in a manner that your grandmother could understand!
Parental Participation

Problem:
- What if parents will not attend an IEP meeting?
- Or the District has held multiple IEP meetings and has been unable to make its offer?
Parental Participation

Review:

- Parent or guardian must be notified of the IEP meeting early enough to ensure an opportunity to attend
- IEP meeting must be scheduled at a mutually agreed upon time and place
Parental Participation

- If the parent of guardian cannot attend, the district must use other methods to ensure parent or guardian’s participation, including individual or conference telephone calls.

- Document efforts to obtain parent participation
  - IEP invitations
  - Phone calls home
  - Notes sent home
  - Visits made to parents at home or work

(Ed. Code § 56341.5)
Parental Participation

“Parental participation in prior IEP meetings, or parental receipt of a copy of a district-created offer for parents’ subsequent approval, is not an adequate substitute for lack of participation in the creation of the offer itself”

Parental participation must be “meaningful”

Shapiro v. Paradise Valley School District  (9th Cir. 2003)
Parental Participation

- If consensus on development of an IEP is not possible, the District still has duty “to formulate the plan to the best of its ability in accordance with information developed at prior IEP meetings [with parents’ input], but must afford parents a due process hearing regarding that plan.”

Ms. S. v. Vashon Island School District (9th Cir. 2003)
Parental Participation

Best Practices!

- When it’s time to make the offer, make the offer
- Document! Document! Document! All attempts to provide parents an opportunity to attend or otherwise participate in an IEP meeting
- After holding an IEP meeting without parents, send them the IEP with a copy of their Parent Rights
- Offer to convene another meeting to review it
Including the Parent

Consider room arrangements

- Closed circle or rectangular table encourages eye contact
- Seating arrangements may suggest participant roles
- Seating arrangements can influence flow of conversation
- Ensure parents have most direct contact with the chairperson/facilitator and most familiar staff members
Including the Parent

- Ensure all meeting participants are present and **on-time**
- Set the tone of collaboration at the beginning
- Gain agreement on the agenda and ground rules
Including the Parent

- Early in the meeting, actively solicit the parent concerns for the educational program for his/her child
- Assist the parent in formulating the issue and/or their interest, not necessarily the solution
- At the end of the meeting, check to make sure parent issues have been addressed
Mistake No. 10

Not Following Simple Ground Rules
Simple Ground Rules

- Develop Ground Rules
- Prepare Agendas
- Take Breaks
- Agree to Disagree
- Assign a Facilitator
- Finish!
Develop Ground Rules

- Post them
- Get agreement
- Enforce them
Prepare An Agenda

- Time limits?
- Allow for additions
- Follow it
Take Breaks

- When tensions are escalating
- When you need to confer in private
Agree to Disagree

- Don’t get stuck on a point of disagreement
- Move on!
Assign a Facilitator

Someone to:
- Run the meeting
- Introduce the agenda and keep things moving
- Address parent concerns
- Enforce the ground rules calmly
- Focus the discussion on the student’s needs
- NOT the person filling out the forms!
Unofficial Roles
During the Meeting

- Enforce privacy/no interruptions rule
- Ensure you have the necessary forms and technology (computers or phones)
- Identify and respect time constraints
- Identify next steps and then follow through
Follow Appropriate Timelines

Student referred for Special Education Assessment

- Develop Assessment Plan within **15 calendar days** of receiving referral
- Parents have **15 calendar days** to consent to the assessment plan
- The District must convene an IEP team meeting within **60 calendar days** of receiving consent to the assessment plan
- The District must convene an IEP team meeting within **30 calendar days** of Parent’s request to review the IEP
Don’t Forget!
Accommodations and Modifications

Accommodations:

- Changes instructions or student output
- Minimize impact of disability
- Do not fundamentally alter or lower standards or course expectations
- Must be listed in IEP if necessary for FAPE and state and district assessments
Don’t Forget!
Accommodations and Modifications

**Modifications:**
- Adjustments in instruction or student output
- Minimize impact of disability
- Fundamentally alter or lower standards and expectations of course
- IEP must reflect modifications
- Parents must consent
Stay the Course
And Always Remember…

- Listen
- Respond
- Follow through
- Document
- Finish
CELEBRATE SUCCESS

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