

Hot Topics in Special Education: *From Basic Principles to New Developments*

Presented by

atchao@dwmlaw.com

Amy K. Tchao, Esq.

Presented at the

**Tri-State ASBO Conference
May 17, 2012
Holiday Inn by the Bay
Portland, Maine**

DrummondWoodsum

Maine • New
Hampshire

84 Marginal Way, Suite
600
Portland, Maine 04101-
2480

207-772-1941
www.dwmlaw.com

www.school-law.com

Copyright 2012 Drummond Woodsum. All rights are expressly reserved.

Hot Topics in Special Education: From Basic Principles to New Developments

Amy K. Tchao, Esq.

I. Introduction

- A. Why does the world of special education matter to school business managers?
- B. Some practical considerations

II. The times, they are a changing

- A. Removal of disabled students before special education
- B. And now, the world of special education – the IDEA and *Board of Education v. Rowley*

III. The Duty to Educate disabled students in the regular classroom

- A. *The standard:* If the student can get a satisfactory education in the regular classroom with supports, school has a duty to program for him in that setting.
- B. *Two exceptions:* (i) If the student's behaviors will significantly impair the learning of others, even with supports, then the student may be educated in a more restrictive setting; or (ii) if the student presents a substantial risk of injury to himself or others, even with supports, then he may be moved to a more restrictive setting.
- C. **Supports** are the key. The importance of supplementary aids and services, classroom accommodations.

NOTES

1. Examples: consultation, extended time for work, shortened homework assignments, oral tests, preferential seating, copies of classroom notes, additional adult assistance in the classroom, behavioral intervention plans

IV. Team-ordered accommodations are mini federal mandates for the school

- A. Once ordered by the IEP Team the accommodation has to be done.
- B. Intentionally not following through on IEP Team-ordered accommodations or services is like intentionally violating a federal law.
 1. Don't do it.
 2. Define legal exposure for the school; denial of FAPE: expensive placements; attorney fees.
- C. This is all true even with "stupid" Team orders.
- D. The importance of considering Team orders carefully.
 1. The "necessity" standard for determining when to order accommodations.
 2. All accommodations are helpful. The IEP Team must order only those that are necessary.
- E. The Team decision-making process.
 1. Decision-making is by consensus, not

NOTES

vote.

2. Consensus is a coming together of the whole group.
3. Absent consensus, the decision is made by the person with authority to commit school resources at that meeting.

V. Important Thoughts about IEPs and Special Ed Hearings

A. Special ed hearings are about forensics.

Once a case reaches the lawyer's desk, it can take on a life of its own. Look at lessons learned from special ed rulings that should inform best practices going forward

B. Special Ed Law 101 – what you need to know to understand about what drives most hearings.

1. Special ed hearings are high stakes cases – the remedies awarded to families can be significant.
2. You have a FAPE obligation. If you fail to meet it, families can obtain big ticket **remedies**.
 - a. Reimbursement for unilateral private school placements made by families
 - b. Compensatory education costs
 - c. Attorneys' fees
 - d. But not tort-like money damages

NOTES

e. And not educational trust funds.

i. *See* Surry Sch. Comm. (D. Me. 2011) (on appeal to 1st Circuit).

These cases can result in costs to the school well in excess of six figures!

C. The statute of limitations

1. The statute of limitations for special ed claims can become a very important factor in resolving special ed due process hearing requests. School districts understandably may be reluctant to take a case all the way through a hearing unless the file looks “clean” going back as many years as the statute of limitations allows
2. Parents may apply the “kitchen sink” approach to a hearing – going as far back in time as possible trying to uncover any blemish in the file from every school year.
 - The more school years there are to fight about, the more likely it is that you’ll find a blemish – and sometimes things have happened so far in the past that you have no staff left to testify.
 - The length of the statute of limitations in most circumstances will limit the time that can be put at issue in hearing
 - 2 year statute of limitations in Maine, New Hampshire and Vermont

NOTES

- There are 2 exceptions to IDEA's statute of limitations:
 - "affirmative misrepresentation" made by school to parent
 - School district "withheld information"

D. Your IEPs need to be as strong as possible, to be ready for a hearing.

1. Make "Reasonable Calculations" about the goals for the student

- No goals are a guaranteed outcome.
- They are simply a reasonable calculation. The IEP is judged at the time it is developed, based on whether your calculations are reasonable.
- You should not be faulted if a child comes up short, as long as you then try to improve the next time around.
- Be polite, but honest, in developing goals.

2. The student's progress in the current IEP must be measurable and data-driven.

- Data-based present levels of performance are a must.
- IEP goals must begin with a data-driven starting point, which in turn is

NOTES

drawn from the present level of performance

3. Compare your current IEP with last year's IEP and next year's draft IEP. IEPs from one year to the next must talk to each other!

- Present levels of performance in each IEP should rely on common standards of measurement from one year to the next.
- Goals in last year's IEP should include a concrete measurement of where the student finished, regardless of whether that concrete measure actually reached the child's goal.
- Goals in the same area in next year's IEP should pick up where the child finished on those goals in last year's IEP. The finishing point becomes next year's present level and starting point. The same is true in next year's draft IEP.
- Goals over time should be using the same measuring stick for progress, regardless of the concrete finishing point you are seeking.

4. Demonstrate Performance Over Time

NOTES

- VI. Bullying, Restraint and Special Education:
Managing the Intersection of Complicated Laws**
- A. State Anti-Bullying Laws.
 - 1. 46 states now have anti-bullying laws.
 - 2. Maine and New Hampshire are recent examples.
 - B. Don't forget federal anti-discrimination laws and the Department of Education Office for Civil Rights (OCR).
 - 1. Dear Colleague Letter on Harassment and Bullying (October 26, 2010)
 - 2. The ADA and Section 504
 - C. Bullying and Harassment under the IDEA
 - D. Restraint and Seclusion
 - 1. National trends: US DOE Secretary Arne Duncan releases a "Resource Document" discouraging the use of physical restraint and seclusion (May 15, 2012).
 - 2. Some deadly examples of restraint and seclusion in schools – most involving students with disabilities.
 - 3. Emphasis on importance of preventive measures, positive alternatives, staff training.
 - 4. Maine and New Hampshire's new laws governing restraint and seclusion.