AVOIDING LITIGATION 101:
Hot Topics & Pitfalls for New Special Education Directors

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Why We’re Here

• Being a special education director for a school district is a difficult job.

• Navigating legal issues related to special education can make the job even harder.

• We’re here to discuss some common legal issues which frequently arise in the special education context.

• We will focus on pragmatic approaches to specific difficult problems through a series of hypothetical scenarios.
Agenda

- Brief overview IDEA and Chapter 392-172A WAC
- IEP Team Membership, including parental participation, and attorneys at IEP team meetings
- How to process a request for an Independent Educational Evaluation
- The importance of maintaining and producing student records
- Rules governing restraint and isolation of students with disabilities
- Citizen Complaints vs. Due Process Hearings vs. Lawsuits
- Questions
The IDEA is a federal law which governs how public school districts provide special education and related services to students with disabilities.

Regulations developed by the U.S. Department of Education help states implement the IDEA.

Washington has a set of regulations that parallel IDEA regulations.

These regulations can be found in Chapter 392-172A of the Washington Administrative Code (WAC).
Who receives special education and related services under the IDEA?

IDEA

Section 504 and the ADA

All Students
What is the role of PARENTS on an IEP team?
<table>
<thead>
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<th>Member of the IEP Team</th>
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<tr>
<td>Parent(s) of the Student</td>
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<td>At least one general education teacher of the student</td>
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<td>At least one special education teacher of the student</td>
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<td>District representative</td>
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<td>Evaluation interpreter</td>
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<td>“Other individuals who have knowledge or special expertise regarding the student”</td>
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<td>Student (when appropriate)</td>
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Parents are Equal Members of the IEP Team

Districts frequently run into trouble by convening improperly constituted IEP team meetings.

While the parents may consent to meeting without another required team member, it is crucial that the parents be involved in the meeting.
Tips to Ensure Parental Participation

- Provide timely and adequate notice of an IEP team meeting
- Include the purpose, time, and location of the meeting, as well as who will be attending
- Schedule the meeting at a mutually agreed time and place
  - Be reasonable and expect the same from parents
  - You are not required to honor every parental scheduling request
Tips to Ensure Parental Participation

While a face-to-face meeting is preferred, if neither parent can attend, a telephone or video conference is permitted.

Arrange for an interpreter for parents with deafness or whose native language is other than English.

You may convene an IEP team meeting without the parents but ONLY AFTER MAKING A CONCERTED EFFORT TO CONVINCE THE PARENTS TO ATTEND. I.e., A parent-less IEP team meeting is an absolute last resort.
May a Parent Record an IEP Team Meeting?

Washington has a “two-party consent” law, which requires all participants in a communication to consent to its recording.

However, if the parents claim that recording is necessary to understand the meeting or meaningfully participate, the IDEA may override Washington law.

When in doubt, ask an attorney for advice.
What about Attorneys at an IEP Team Meeting?

• The U.S. Department of Education strongly discourages attorneys from attending IEP meetings.

• However, nothing in the law prohibits parents from bringing an attorney to a meeting.

• Generally, a school district will not invite its attorney unless the Parents plan to bring their attorney.

• Parents may request that an IEP meeting be rescheduled if a district invites its attorney without giving advance notice to the Parents.
A first-grader named Miguel receives specially designed instruction and related services related to autism. Spanish is Miguel’s parents’ native language. They can speak and understand English, but sometimes have difficulty understanding English—especially jargon.

After engaging in new self-harming behaviors in the general education classroom on Tuesday, Miguel’s parents email you—the new special ed director—demanding an “emergency IEP meeting” by Friday of that week. They are afraid Miguel will continue to engage in the new behaviors and may injure himself. The Parents are also concerned that Miguel’s special ed teacher might not be implementing his IEP correctly. As such, they also indicate that they would like to bring their lawyer to the meeting.

**WHAT DO YOU DO?**
A month after meeting with Miguel’s parents and their lawyer, you have another meeting planned to follow up on Miguel’s progress. All required IEP team members have agreed to attend. The parents have both agreed to attend and have not mentioned bringing their lawyer.

However, on the day of the meeting, the parents show up with their lawyer and demand the meeting proceed even though the District does not have its lawyer present.

WHAT NOW?
HOW TO PROCESS IEE REQUESTS
What is an Independent Educational Evaluation? (WAC 392-172A-05005)

If parents disagrees with your district’s evaluation of their student, they can request an Independent Educational Evaluation (IEE) at public expense.

Essentially, this means that the parents want a private professional to evaluate the student, and they want your district to pay for it, or reimburse them for money they spent on an IEE.
If Parents Request an IEE . . .

You may ask the parents why they object to your district’s evaluation

BUT, they are not required to give you an answer

I.e., you may not have all the information you’d like to make an informed decision.
Within 15 days of receiving the IEE request, you must either:

1. Grant the request and ensure that the IEE is provided without “unnecessary delay,”

OR

2. Initiate a due process hearing with OSPI to defend the district’s evaluation.
If you AGREE to the IEE request . . .

The IEE must be conducted subject to your district’s criteria, including:

| Location of the evaluation | Qualifications of the examiner | Fees |

However, parents must have an opportunity to demonstrate that unique circumstances justify a waiver of these criteria.
If you DENY the IEE request . . .

- You must file a due process hearing request with OSPI to show that your district’s evaluation was appropriate.
- “Appropriate” usually means that the evaluation was comprehensive, non-discriminatory, and otherwise complied with the IDEA’s requirements.
- Participate in a formal due process hearing in front of an administrative law judge to show that your district’s evaluation was appropriate.
Factors to consider

- Due process hearings are expensive and require a lot of time.
- How comprehensive will the IEE be? Will it require more than one evaluator?
- Is it easier and/or cheaper to grant the request in order to move forward?
- How confident are you with the district’s evaluation?
- Is this the first time the parents have requested an IEE?
- What is best for the STUDENT?
Consider the Results of an IEE

Regardless of who pays for the IEE (district or parents), the results of the IEE must be considered by the district in any decision made with respect to the provision of FAPE to the student.

However, your obligation to consider does not mean you have to accept the IEE’s recommendations.

A district has no obligation to completely substitute an IEE for its own evaluation.
Brooke is in seventh grade and has had an extensive IEP since she was in kindergarten due to an orthopedic impairment. The district just completed her triennial reevaluation and the parents did not disagree with the findings at the evaluation meeting. In fact, Brooke’s parents have never disagreed with the results of the district’s evaluations.

Recently, several other parents of students with special needs have requested IEEs. One dad in particular has labelled himself an “advocate” and has actively encouraged Brooke’s parents to request an IEE to “see what they can get.”

About a year later, without warning, Brooke’s parents send you an email stating that they would like the district to pay for an IEE.

WHAT DO YOU DO?
Hypothetical

Let’s assume that you agreed to fund an IEE for Brooke. To be as comprehensive as possible, this IEE will require no less than four separate individuals to conduct evaluations in all areas of Brooke’s potential need.

The IEE is getting expensive. Also, due to the limited availability of the evaluators, the IEE has taken five months to complete. Brooke’s parents are growing restless. They want the IEE “DONE NOW” and demand that the district pay for each of the four evaluators to present their findings by phone at Brooke’s next IEP meeting.

WHAT NOW?
MAINTAINING & PRODUCING STUDENT RECORDS
What are “Education Records”? 

• The IDEA gives parents of special ed students the opportunity to inspect and review any education records relating to their children that are collected, maintained, or used by the district.

• The Family Education Rights & Privacy Act (FERPA), in turn, defines education records as being:
  • Directly related to a student; and
  • Maintained by an educational agency or institution by a person acting for the agency or institution.
Education Records include . . .

- “Any information recorded in any way”
- IEPs (including drafts)
- Evaluation reports
- Discipline records
- Attendance records
- Report cards
- Videos and photographs
- Etc.
What about Progress Reports?

• They are education records
• The IDEA requires that an IEP describe:
  • how the district will measure the student’s progress toward meeting annual goals; and
  • when periodic progress reports are provided
• Districts sometimes run into trouble when parents ask for evidence of a student’s progress (or lack thereof) and the district has nothing to show
What to do when a parent requests records

Within 45 days of the request . . .

Identify responsive records that relate to the student

Redact any other students’ personally identifiable information contained in the records

Permit the parent to “inspect and review” the records during school business hours

Or make copies of the records and provide to the parent

The district may charge fees for copies (except for IEPs)
What do when a parent’s ATTORNEY requests student records

- Contact your district’s attorney
- Ensure that the parent has authorized release of the records to the attorney
- Identify whether the request is for records under FERPA and the IDEA, or more generally for “public records”
Education records relating to a student are not public records, and FERPA prohibits school districts from releasing student records to the public.

However, parents’ lawyers frequently ask for public records relating to a student pursuant to Washington’s Public Records Act (Chapter 42.56 RCW) – especially when preparing for an IEP meeting, mediation, or due process hearing.

The definition of public records is much broader than education records and includes emails, internal memos, and generally ANY “writing containing information relating to the conduct of government . . .”
What to do when you receive a public records request

Again, not a bad idea to contact the district’s lawyer

Consult with whomever in your district handles such requests

Gather records which are responsive to the request
* This may involve an extensive search for emails *

Redact any information exempt from disclosure, including other students’ personally identifiable information or communications between district attorneys and employees

Unlike FERPA, there is no hard deadline for producing public records. You just have to give an estimate to the requestor within five business days of receiving the request.
Why is it important to maintain & produce records?

• Cultivate trust and transparency with parents regarding their child’s education
• Demonstrate procedural compliance with the IDEA
• Comply with the basic rules of FERPA
• Create a paper trail to serve as evidence at a due process hearing
• Respond to any audit or compliance review conducted by OSPI, U.S. Department of Education, etc.
• Comply with the Public Records Act and protect your district from any related legal liability
Alex is a tenth grader who receives speech therapy due to a speech impairment. During the first few years of Alex’s education, the district did not have a special education director and Alex’s progress toward their annual goals was not consistently documented.

Unfortunately, Alex’s parents have long disagreed with the district about the severity of the Alex’s impairment as well as with the special education and related services provided by the district.

Alex’s parents have been threatening to file a due process hearing request and have recently hired a lawyer. That lawyer now makes the following request:

“Provide Alex’s entire educational record, including but not limited to special education file, cumulative file, evaluation reports, IEP meeting notes, documentation of speech services provided, and emails referencing Alex. Produce these records within ten days.”

WHAT DO YOU DO?
Hypothetical

One day after the lawyer requests Alex’s records, and before you have a chance to respond to the request, the lawyer files a due process hearing request on behalf of the parents alleging multiple procedural violations of the IDEA.

• Do the parents still have a right to inspect and review Alex’s records?

• Does the due process request affect when the records are due?

• What if the lawyer wants to use the records as evidence at the hearing?
ISOLATION & RESTRAINT

What is it and is it ever permissible?
What is Isolation & Restraint?
(RCW 28A.600.485)

**Isolation:**
- Restricting a student alone within a room or any other form of enclosure, from which the student may not leave
- Does not include a student’s voluntary use of a quiet space for self-calming, or temporary removal of a student from her or his regular instructional area as a positive behavioral intervention

**Restraint:**
- Physical intervention or force used to control a student, including use of a restraint device to restrict a student’s freedom of movement
- Does not include appropriate use of prescribed medical, orthopedic, or therapeutic device
What does the IDEA require?

Although questions about Isolation & Restraint frequently arise in the context of special education, the IDEA does not expressly address the topic.

However, use of Isolation & Restraint has the potential to violate the IDEA and commonly comes up in special education due process hearings, citizen complaints, and lawsuits.

Washington regulations govern when and how Isolation & Restraint may be used by school district employees.
Conditions under Washington law

• Any use of isolation, restraint, and/or restraint devices shall be used only when a student’s behavior poses an imminent likelihood of serious harm. WAC 392-172A-02110.

• Restraint or isolation must be closely monitored to prevent harm to the student, and must be discontinued as soon as the likelihood of serious harm has dissipated. RCW 28A.600.485.

• An IEP must not include the use of restraint or isolation as a planned behavior intervention unless a student’s individual needs require more specific advanced educational planning and the student’s parent or guardian agrees.
Isolation Specifics
(WAC 392-172A-02110)

- Must be discontinued as soon as the likelihood of harm has dissipated
- Enclosure must be ventilated, lighted, and temperature controlled from inside or outside for purposes of human occupancy
- Enclosure must permit continuous visual monitoring of student from outside the enclosure
- An adult responsible for supervising the student shall remain in visual or auditory range of the student at all times
- Either the student must be capable of releasing him or herself from the enclosure, or the student must continuously remain within view of an adult responsible for supervising the student
- Any staff member or other adults using isolation must be trained and certified by a qualified provider in the use of isolation, or otherwise available in the case of an emergency
Restraint Specifics (WAC 392-172A-02110)

- Must be discontinued as soon as likelihood of serious harm has dissipated
- Shall not interfere with the student’s breathing
- Any staff member or adults using a restraint must be trained and certified by a qualified provider or use of restraints, or otherwise available in the case of an emergency when trained personnel are not immediately available
- Restraint device: Either the student must be capable of releasing him or herself or the student must continuously remain within view of an adult responsible for supervising the student
Following the release of a student from restraint or isolation, the district must:

- Review the incident with the student and parent to address the behavior that precipitated the restraint/isolation and the appropriateness of the response
- Review the incident with the staff member who administered the restraint/isolation to discuss whether proper procedures were followed and what training or support the staff member needs to help the student avoid similar incidents
Any school employee, resource officer, or school security officer who uses isolation or restraint during school-sponsored instruction or activities must inform the building administrator as soon as possible, and within two business days submit a report of the incident to the district office, which includes:

- Date and time of incident
- Name and title of individual who administered the restraint/isolation
- Description of activity that led to restraint/isolation
- Type of restraint or isolation used, including the duration
- Whether the student or staff was physically injured during the incident and any medical care provided
- Any recommendations re: nature or amount of resources available to the student and staff members in order to avoid similar incidents
Follow-Up for Principal and District (RCW 28A.600.485)

The principal (or designee) must make a reasonable effort to verbally inform the student’s parents within 24 hours of the incident, and must send written notification as soon as practical, but no later than five business days after the restraint/isolation occurred.

By Jan. 1 of each year, the district must summarize written reports of restraint/isolation and submit the summaries to OSPI. The summaries must include the number of individual incidents, the number of students involved, the number of injuries of students and staff, and the types of restraint or isolation used.
Marta is a third-grader with a rare neurological disorder, ADHD, and OCD. She frequently becomes over-stimulated and escalated in class and has voluntarily gone to a “quiet room” in the past.

One day, Marta’s behavior escalates to the point at which she slaps a classmate, spits on her teacher, and climbs on a desk, refusing to come down. Staff attempt several positive behavioral interventions and supports to no avail.

Is this an appropriate time to use restraint or isolation?

What would you recommend that the teacher do?
Caleb is a kindergarten student with autism. In order to ensure that Caleb receives FAPE, the district transports him to and from a private academy every day in a district-owned van.

Caleb frequently gets bored and likes to move around the van during the drive. As such, he is required to sit in a specialized harness as a safety measure while the van is moving.

One afternoon, Caleb slips out of his harness, lunges into the front seat, and tries to open the passenger door. The driver stops the van, helps Caleb back into his harness, and tightens the straps to ensure he will not slip out again. Caleb is able to breathe easily but his freedom of movement is restricted, and he becomes extremely upset and cries on the remaining 15 minutes of the drive.

Caleb is still upset when his father picks him up and tells his father that the driver “hurt him.”

**Did the driver do the right thing?**

**What would you recommend?**
COMPLAINTS & LEGAL ACTIONS
In general

Individuals and organizations have a variety of legal tools at their disposal to challenge actions or inactions by a school district, which they believe violate the IDEA, including:

• Citizen Complaint to OSPI
• Due Process Hearing Request
• Civil lawsuit (when a party disagrees with a decision resolving a due process complaint)
What is a Citizen Complaint?
(WAC 392-172A-05025 et seq.)

Written statement to OSPI alleging that a special education rule or law has been violated

Any individual or organization may file a Citizen Complaint

OSPI can only investigate allegations that occurred within the past year

The complainant need only describe what they think the district is, or is not, doing. I.e., they don’t need to cite a specific law.
Citizen Complaint Process

OSPI reviews the Citizen Complaint and documents provided by the complainant to determine whether a violation of the IDEA has been alleged.

If appropriate issues are identified, OSPI will investigate.

The district must submit a written response with evidence, and the complainant may choose to reply.

OSPI will review the documentation of both parties and will issue a written decision no later than 60 days after receiving the complaint.
What if OSPI finds a violation?

If OSPI finds violations of the IDEA, it can order student-specific and/or district-specific remedies in its written decision.

Remedies will vary depending on the facts of the complaint and the violations found by OSPI in the investigative process.
Your role in the Citizen Complaint process

- Contact and work with the district’s attorney if necessary
- Review and analyze the complaint
- Determine whether the allegations have merit
- Help draft a response to the complaint
- Gather documents to support the district’s position and submit to OSPI
- If OSPI finds a violation, help implement any necessary corrective measures
- Keep superintendent up to date
What is a Due Process Hearing?
(WAC 392-172A-05080 et seq.)

Formal, legal proceeding conducted by an administrative law judge (ALJ)

Parents and districts have a right to present and question witnesses, and to submit or challenged documents regarding the issues

A written request for a due process hearing is made by a parent or district relating to issues about the identification, evaluation, placement, or provision of FAPE to a student

Requests must be made within—and allege violations that occurred not more than—two years before the date the complaining party knew or should have known about the violations
What happens before a due process hearing?

Either a parent or district files a complaint with OSPI

OSPI then routes to the Office of Administrative Hearings, which assigns an ALJ to hear the case

The responding party—usually the school district—must file a response to the complaint within ten days which specifically addresses the issues raised in the complaint.
What is a “Resolution Session”? 

When a parent files a due process hearing request, the district must hold a resolution session within 15 days of the request (or 7 days if it involves student discipline) to try to resolve the dispute.

A resolution session must include a district representative who has decision-making authority—usually a special education director.

However, a resolution session need not happen if the parent and district agree to waive it or engage in mediation.

The district may NOT bring an attorney to the resolution session unless the parent is accompanied by an attorney.
What about Mediation?

Mediation is always available to the parties to resolve a dispute and avoid going to hearing.

Mediation is voluntary and provided by OSPI at no cost to either party.

Discussions which occur during mediation remain confidential and may not be used as evidence at the hearing.

If the parties resolve their dispute in mediation, they must execute a legally binding agreement.
What happens at the hearing?

If pre-hearing resolution efforts are unsuccessful, the parties proceed to the due process hearing, where they present testimony and question witnesses.

The ALJ will take all witness testimony, evidence, and briefs under advisement to reach a final decision, which is due to the parties 45 days after the hearing timeframe begins, unless an extension is requested by either party and granted by the ALJ.
What if the due process hearing involves student discipline?

- Because student discipline sometimes removes students from the educational environment, hearings involving disciplinary issues are expedited
- The hearing must happen within 20 school days from the date the complaint is filed
- The ALJ must issue a decision within 10 school days after the last date of the hearing
- During this time, the student must stay in an “interim alternative educational setting” until one of the following happens:
  - The ALJ issues a decision
  - The disciplinary time period expires, or
  - The parties agree to something else
Your role in the Due Process Hearing process

- Receive and analyze the due process hearing request
- Help draft a response
- Participate in the resolution session or mediation. Again, you may be the required “district representative” in these situations.
- Gather evidence to be presented at the hearing
- Potentially testify at the hearing
- If the ALJ finds for the parents on any issue, help implement any related remedy ordered by the ALJ
- Keep superintendent up to date
Can a party file a lawsuit?

Yes. While the ALJ’s decision is the final order in the Office of Administrative Hearings, any party who disagrees with the ALJ’S decision may bring a civil action (i.e., lawsuit) in a state or federal court.

The party bringing the action has 90 days from the date of the ALJ’s decision to file suit.

The court may award reasonable attorneys’ fees to the party who prevails in court.
Parents of an eleventh grader with a developmental delay retained a lawyer and filed a due process hearing request. The request alleges violations of the IDEA and demands: 150 hours of compensatory education, 1:1 para for the student, $6,000 to pay for the student’s summer camp and $12,000 in attorney’s fees.

You feel strongly that the district has provided FAPE to the student and has implemented the student’s IEP with fidelity. Further, everyone except for the parents on the IEP team believe that a 1:1 para would not be the student’s least restrictive environment. However, there is a lack of evidence to refute some of the parents’ specific claims, which may hurt the district’s case at hearing.

The parties agreed to waive the resolution session, preferring to mediate instead.
After six hours of mediation, the parents have given up their demand for a 1:1 para. They are also open to $10,000 in attorneys’ fees and have reduced their summer camp demand to $5,000. However, they continue to demand 150 hours of compensatory education. This is their final offer and are ready to walk away.

You have been authorized to offer a maximum lump sum of $20,000. The six-day hearing begins in two weeks and will require extensive time and resources to prepare.

WHAT DO YOU DO?
Questions?