

SECTION 10

Staying in Compliance

Staying in Compliance

Maintaining compliance with state and federal statutes and regulations is one of the most important tasks of a special education director. The cost in staff time and morale as well as in fiscal resources can be considerable when faced with a compliance complaint. This section is designed to give you proactive strategies to help you stay in compliance. It begins with a list of the items most often found non-compliant by the State Department of Education in district reviews. Following the list of non-compliant items are tips and advice from four legal sources on how to avoid non-compliance. Following the advice of these legal experts should increase substantially your chances of staying in compliance. Many legal questions hinge on the interpretation of law, and attorneys sometimes disagree due to a difference in interpretation. If faced with a legal challenge, it is always recommended to carefully consider the advice and direction of the attorney representing your school's position in the case. See also Section 8, SELPA Support.

Source: California Department of Education

Following is a list of frequently non-compliant items. The items have been identified statewide over the last several years as systemically non-compliant in most districts reviewed. These items include:

- **Missed timelines**
 - Triennial re-evaluation
 - Annual IEP
 - IEP within 60 days of parental consent of Assessment Plan

- **Missing or inadequate IEP contents**
 - How parents will be informed of student progress
 - Participation in Statewide Achievement Tests
 - Program modifications and supports for school personnel
 - Projected dates for initiating services

- **IEP Team**
 - No general education teacher (preschool and K-12)
If members were excused by the IEP team, the excusal must be in writing with parent agreement.

- **Failure to implement the IEP**
 - Willful and intentional violations of the IDEA can lead to the possibilities of personal liability.

Source: Lozano Smith (permission to use granted)

Lauri A. LaFoe, from Lozano Smith presented "Common Pitfalls and Snags in the IEP Process" at an ACSA Spring Conference, May, 2008. Excerpts from her presentation follow.

- **Offer of more than one placement option**

If a district makes an offer of more than one placement option, it may be a denial of FAPE. Both offered placements must provide FAPE. Therefore, if the district needs to go to a due process hearing, district must defend both placement offers. The best course of action is to offer only one placement at an IEP meeting.

- **Making no offer of placement**

Often an IEP team will hold off on making a placement offer so parents can go observe one or more possible placements. The problem in this situation is that 1) timelines may pass; 2) another IEP team meeting may not be scheduled in a timely manner. The parents file for due process and the district has no offer of FAPE to defend.

Tip: Don't leave the IEP Team meeting without a clear offer on the table.

Tip: Parents' unwillingness to accept a proposed offer is never a reason to fail to make a formal written offer. Send a letter after the IEP to clarify the offer.

Tip: Review the offer with the parent to make sure it is readable and understandable and ask parents if they have any questions. If they don't understand what the district is offering, be willing to adjust the language and fill in the blanks. Give parents a contact phone number to call if they have questions.

➤ **Giving in to parent wishes**

Often IEP teams agree to parent demands in an IEP so as to avoid conflict. This may provide a short term solution but it can also result in additional requests for more services that may not be appropriate for the student or amount to FAPE. For example, don't place a student in RSP if the team feels a SDC is FAPE for the student.

Tip: Always ask if the placement is appropriate to address student's needs.

Tip: Document discussion re: placement options discussed, noting parent participation.

➤ **Failing to assess in all areas of need and/or address all areas of need**

The assessment plan should address all areas of suspected disability and the assessment needs to cover these areas. Be sure to have a goal for every identified need. If a child is performing at state standards, a goal does not need to be written. If the assessment report indicates that the student has difficulty in handwriting, then the IEP needs to address this skill through a goal in that area or offer accommodations. If report indicates that student is having difficulty attending school, then the student may need an attendance goal.

Tip: Keep a running list of all areas of need identified and make sure that all areas of need have been addressed in the IEP.

Tip: Look at the signed assessment plan to see if parents added notes.

➤ **Offering related services as a "range"**

Avoid "as needed" or "up to 60 minutes"—the range should be zero. The offer must be clear, i.e. Speech and Language services, 2 times per week for 30 minutes each session, 1 session individually, 1 session group in the speech room at XYZ School. Do not use number of sessions per year.

Tip: Be clear and concise.

➤ **Failure to properly identify the Placement/Services**

Placement should be clear and concise. If you list more than one school, you have more than one offer!

Don't leave loose ends such as: "Speech therapist will decide...", "IEP team will determine", "Behavior consultant will develop", "To be determined after ESY".

Tip: Decisions regarding a student's placement and services are made by the IEP team. Don't leave the table without making those decisions and incorporating them into one clear and concise written offer of placement and services.

➤ **Not considering parent input**

The team must consider any private assessments at some point during the meeting. Always consider parent input. Invite private school staff to attend the IEP meeting if the student attends private school.

Tip: Document that you have considered parent input in the IEP notes.

➤ **Failure to make a clear ESY offer**

ESY services, like all other placement and services offered to a student must be written in clear language. District is liable if there is not a clear offer for any programs that student receives during ESY.

Tip: Clearly spell out the ESY offer of placement and services and don't just check a box. Make sure offer is made early enough in the year to ensure adequate time for resolution to be sought and obtained, should parent disagree with offer, prior to commencement of ESY.

Rules to Live By:

1. LISTEN - parents need to feel heard
2. RESPOND - answer phone calls and emails promptly, even if only to buy time.
3. FOLLOW THROUGH - Do what you say you'll do, and you will build trust.
4. FOCUS - remember the child; make him or her always the focus. Responses should always relate to the child's needs.
5. SELL YOUR PROGRAMS - Private programs have good marketing. Show your pride in the public programs and explain them to parents.

6. PLAN, PLAN AND THEN PLAN - Plan your meetings. Prepare draft goals and objectives. Prepare an agenda for your meetings. If assessment reports are completed, provide them to the parents so they have an opportunity to read them and think of questions. A district is not required to provide such a copy so many days before IEP Meeting. If completed, however, and parent requests a copy of report before IEP meeting, then their request falls under the 5 day rule.
7. DOCUMENT, DOCUMENT AND THEN DOCUMENT - Avoid misunderstandings. Create a clear record of what transpired because memories do fade. Keeps everyone on the same page. Tapes are student records. Emails are student records if maintained by school district. Seek advice from your attorney if needed to determine which e-mails are considered records.

Notices and prior written notice (PWN)

- If not handing out Procedural Safeguards, note when they were last given to parent.
 1. Required upon initial referrals or parental request for evaluation
 2. Required upon filing of complaint
 3. Required upon request by parent
- If, at the end of the IEP team meeting, there is a disagreement between district and parent/s, parent/s should be provided with PWN. PWN is a description of the action proposed or refused by the district, an explanation of why the district proposes or refuses to take the action and a description of each evaluation procedure, assessment, record, or report the district used as a basis for the proposed or refused action, a statement that the parents have protection under the procedural safeguards, sources for parents to contact to obtain assistance in understanding the law, a description of the other options considered by the IEP team and the reason why those options were rejected and a description of the factors that are relevant to the agency's proposal or refusal. This PWN can be done in the IEP through notes; however, if one element is missing, a new PWN must be written. A district must provide within 5 days; however, district is advised to provide report (if available) prior to meeting to facilitate discussion.

Source: Best Best & Krieger

Jack Clark, from Best Best and Krieger, presented "Navigating Difficult IEP Team Meetings: Approach the Data Honestly" at an ACSA Symposium, January, 2009. Excerpts from his presentation follow.

Start with preparation.

Make sure all staff members have data they need to make contributions.

Assessments and data should lead the way.

Regularly check with parents and parent representatives during IEP (meaningful parent participation).

Take care to make one clear and complete offer which includes clear goals and objectives.

Source: Julie Weatherly - LRP

Practical Tips for Staying Out of Due Process

1. Don't engage in action that appears to be a predetermination of placement or action that appears to deny parental input into decision-making.
2. Don't make educational recommendations/decisions based upon the availability of services.
3. Don't make educational recommendations/decisions based upon cost.
4. Don't fail to notify parents of their right to challenge IEP recommendations.
5. Don't make recommendations/decisions based upon inadequate evaluations.
6. Don't respond inappropriately to requests for an Independent Educational Evaluation (IEE).
7. Don't make vague/generalized recommendations regarding least restrictive environment (LRE).

8. Don't be overly specific and include unnecessary details or "promises" in IEPs.
9. Don't fail to address the issue of extended school year (ESY) services.
10. Don't fail to have required school staff at meetings.
11. Don't fail to allow for participation of persons brought by parents.
12. Don't inappropriately refuse to allow tape recording or videotaping of IEP.
13. Don't set out/offer services or amount of services without clarity in IEP.
14. Don't fail to address transition activities and provide summary of performance.
15. Don't refuse to "consider" independent evaluative information brought in by parents.
16. Don't fail to address behavioral strategies/interventions as part of the IEP.

Action to Avoid Outside of the IEP Process

1. Don't make unilateral changes in placement through the use of suspension or other removal from the current placement.
2. Don't diagnose medical conditions/suggest medication without the credentials for doing so.
3. Don't fail to follow time guidelines/requirements and don't create artificial barriers for timely completion of tasks.
4. Don't refuse to identify, evaluate or change the educational placement of a child without the required prior written notice.
5. Don't create unnecessary educational records, especially those that may contain inappropriate material.
6. Don't refuse to implement the IEP - willful and intentional violations of the IDEA can lead to the possibilities of personal liability.

Source: Walsh, Anderson, Brown, Aldridge & Gallegos

From: Predetermination vs. Preparation - The Compliant Path to IEP Planning April 14, 2011 LRP Audio Conference presented by Paula Maddox Roalson, Esq.

When preparing documentation of the meeting or the prior written notice of the decisions reached, use language that clearly reflects the efforts of the school district in this regard. Examples:

- "The team discussed _____ possible placements and the pros and cons of each."
- "The chair asked the parents what alternatives they would like the team to consider."
- "The team agreed to _____ in response to parental input."
- "The parent said _____ and in response, the team decided _____."

Only the IEP team can make decisions regarding the IEP. Using statements such as the "school decided to _____" can result in a finding of predetermination. Thus, avoid oral/written statements such as:

- "The school has developed the IEP and is presenting it to the parents today." Consider instead, "The purpose of the team meeting is to develop the student's IEP."
- "This meeting is to change the student's placement from _____ to _____." Consider instead, "Today, the team will consider the student's placement in the LRE, considering a continuum of placement alternatives."
- "The district rejects the report of the independent evaluator." Consider instead, "The team has reviewed and considered the IEE report and determined no changes to the IEP are needed," or "the team has adopted the following recommendations made by the outside evaluator..."