

Representing The Special Education Child: A Manual for the Attorney & Advocate

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Ethical considerations

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I. The Need to Know

A. Personal Impact

1. It is likely that you have or will have a child, grandchild, sibling, nephew, or niece who has a disability. Or you may have close friends or neighbors who have a child with a disability. These parents experience intense emotions, from guilt, sadness, helplessness to anger, and frustration as they struggle to raise this child while trying to increase the odds that the child will become an independent, self-sufficient member of society. The laws regarding services for such children are complicated. Friends and family will look to you, the attorney, for guidance.

2. When you are consulted about a special needs child, you will probably feel empathy and an immediate desire to help. Your first impulse may be to write a letter or place a telephone call to a school official. Through these actions, you hope to resolve the problems experienced by the parents and child. If you give in to this impulse, the parents and child may get short-term relief, but the real problems will not be resolved and may be exacerbated. Special education cases can generate as much emotional intensity as a bitterly contested divorce, and are complicated by battles between expert witnesses, as in medical malpractice cases. As an attorney, you must be cautious about assuming that you can resolve these complex problems with a minimum of effort.

3. When you understand the principles in this outline, you will be able to field preliminary special education questions. You will know where to find more detailed answers. You will be able to point parents in the right direction and help the child receive appropriate special education services.

B. Professional Role

1. The attorney must approach the special education case as he or she would approach the bitterly contested divorce with equitable distribution battle that also has elements of a medical malpractice case.

2. The attorney must be aware that he or she will be involved in the case for a short time. When the case is concluded, the matter is closed for you. Yet the impact of the child's disability will continue. The struggle to secure and maintain an appropriate level of special education services will continue, often for years. The parents should learn to deal effectively with school district representatives and should be able to "break bread" with school staff after the present legal issue is concluded.

3. In special education matters, it is crucial that the parents develop a thorough understanding of the nature of the child's disability, the special education laws, and how to measure educational progress (benefit) in special education.

4. To represent these clients effectively, the attorney must understand the nature of the child's disability, effective educational practices, the special education laws, and how educational benefit is measured. In many cases, the most perplexing disabilities are not those that

are easily observed (i.e., deafness, blindness, severe orthopedic impairments, cerebral palsy, or Down Syndrome). Many children have "hidden handicaps," including language learning disabilities and attention deficit disorders (ADD), that are caused by neurological impairments. These "hidden disabilities" can be difficult to identify and remediate.

II. The Presenting Problem

A. Crisis! Emergency!

1. The initial phone call.

The parent's initial telephone call to an attorney is usually precipitated by a crisis or emergency at the school. The crisis may be that the public school says they:

- Will not accept private sector evaluations that identified the youngster as needing special education services; or that they
- Decided that the child's real problem is that the child is not learning disabled but is emotionally disturbed so the school is changing or eliminating the child's placement and program; or they
- Tried everything that can be expected of a school system and it is not their fault that the child will not acquire the necessary skills to become an independent, self-sufficient functioning member of society, despite the intellectual ability to do so; or they
- Will not provide intensive one-on-one services to the young child with autism, but keep the child in restraints all day; or they
- Will provide the same special education services that the child has received for several years, insisting that the child is "really making progress," although the child can barely read and has severe written language problems; or they
- Assert that the child's increasing misbehavior is not related to neurological or educational issues (causal relationship) and insist that the child's acting out or withdrawal problems must be resolved before the child will learn. Suspensions have increased and expulsion may be the next step; or they
- Scheduled a meeting tomorrow, just called the parents today, and the parents do not know whether they should go to the meeting, or whether they should they bring you, because the

school decided to discontinue special education services because:

- The youngster has obtained the maximum benefit from special education, although can barely read, write and/or do arithmetic; or
- The child is not benefiting from the program and doesn't need it anyway; or
- The school system had a financial shortfall and staff have resigned or did not have their contracts renewed so the child is better off not being in special education now; or
- The services the child needs are not available and the parent needs to recognize the school's limitations; or
- The school's new evaluations disclosed that the child's real problem is that the child is not motivated, or the real problems are within the "dysfunctional" family which includes a single parent or a couple with marital problems which is not an educational issue.

2. Immediate action is rarely required.

Although the parent may perceive the situation as a crisis, it is a mistake to act quickly. Ask the parent to gather all documents about the child, file the documents in chronological order, and schedule an appointment with you. Find out when the last IEP meeting was held. Resist the urge to call school officials at this point, despite pressure from the parent.

3. Check the statute of limitations for requesting due process hearings in your jurisdiction.

Depending on your jurisdiction, the statute may be as short as 60 days or as long as two years. In other jurisdictions, limitations are addressed specifically in the state special education regulations.

B. Parent's Response

In the situations described above, the normal response from parents is a big mistake. Feeling angry, helpless and under attack, many parents want a confrontation. They write nasty letters that come back to haunt them. They request special education due process hearings, even though they have no evidence that will prove their case.

Parents of special needs children often experience anger toward their child, each other, and toward school officials. They feel guilty, confused, frustrated, helpless, fearful and remorseful. In many cases, the parents believe that the child has been betrayed by the public school educators. From their perspective, they relied on the assertions and recommendations of the school district "experts," perhaps for years. When they realize that their child has fallen further behind and is worse off, they shoot from the hip, miss their intended target, and damage themselves and their child in the process.

C. Attorney's Response

1. Structure the initial interview.

Require the parent to provide you with a complete copy of the child's special education file, organized in strict chronological order, oldest document on top, most recent on the bottom. The parent should provide you with copies (not originals) of all reports, evaluations, IEPs, notices, and correspondence that are included in the child's special education file.

NOTE: If the parents do not have a copy of the child's special education file, it is a judgment call as to whether or not they should secure the file before meeting with you.

- a. Review all documents and reports before face-to-face contact with the parents.
- b. Help the parents understand the gray issues in the law, the hazards of litigation, and that cases are rarely settled unless prepared for trial. The attorney may want to get involved before the facts are clear and out on the table. **Query:** Do you call the insurance adjuster to demand or force a settlement immediately after the initial consultation with the personal injury client?
- c. The child's file and the facts of the case are usually disorganized and hard to understand. Parents need to realize that although they may believe that the school system committed various legal violations, their case needs to be simplified and presented in an organized, cohesive manner.

2. Defuse and depolarize emotions.

By the time parents contact an attorney, the matter is polarized. Emotions are running high. Parents and school officials are blaming each other for the child's difficulties. It is essential for parents to join the educational advocacy organizations related to disabilities. When they join these organizations, they will receive informational newsletters from these organizations. They should attend conferences of these groups when possible. Parents should enhance their understanding of the child's disability by reading books on the subject.

The parents' emotional response is related to feelings of guilt, loneliness, isolation, and fear of the unknown about their child's future. When they join organizations and become educated, the parent becomes "empowered." At this point, they can often initiate a more constructive approach to securing improved educational services for the child. Ask the parent to find information that may be useful in educating you.

3. Secure all documents from all sources.

Send a global release form to all public and private sector individuals and agencies that have generated any reports and/or evaluations on the youngster.

4. Organize the documents.

Have the parent use a pencil to date the first page of each document in the lower righthand corner, then file all documents in chronological order, oldest on top, most recent on the bottom. Do not write or use a highlighter on the documents. The parents can put notes on documents with "Post-it" notes. If the parent has a computer with a word processing or spreadsheet program, have them develop a list of documents.

Sample Document List

Date	Author	Type	Significance
7/16/01	Katz	Psychological Evaluation	Private sector eval. WISC-III IQ above avg. WJ-R: 3 years behind in reading, and writing.
8/23/01	Central Elementary	IEP	Placed in resource program; progress measured as 80% on teacher made tests and observations.
5/14/03	Wilton	Educational Evaluation	Private sector eval including WJ-R, TOWL, K-ABC: no gain in reading and writing

6/6/03	Central Elementary	Report Card	skills (percentile ranks dropped). B's in Reading, + Writing. Promoted to next grade..
9/10/03	Lordi	Psychiatric Evaluation	Severely depressed. Anti-depressant meds increased. MD rec psychiatric hospital
10/14/03	Barton	Educational Evaluation	WRAT & WIAT; child illiterate; requires direct instruction.
11/5/03	Stein	Discharge Summary	Severe depression from school failure, poor academic skills; needs remediation.

These activities allow the parent to DO SOMETHING that will help their child's case, while also reducing their sense of powerlessness. These activities (organizing the file, developing lists of documents) help the parent gain a clearer understanding of the child's problems and needs. Taking action keeps the parents from focusing on their emotional reactions. As they organize, they begin to focus on issues, not emotions.

5. Understand legal and factual issues in special education disputes

The legal issues in special education cases are usually related to procedural matters, i.e. whether the child is eligible for services, the nature of the handicapping/disabling condition, timelines violations, inadequate notice about the school's refusal to provide services, or failure to implement the child's IEP.

Factual issues are usually related to Individualized Education Programs (IEPs), the quality of services, "default" by the public school, reimbursement for a private placement or private therapy, discipline, or whether the child has benefited or regressed educationally in a special education program.

6. Understand the facts so you can identify and target specific factual issues.

a. You must have a working knowledge about the nature of the disability, "effective practices" about how the child should be educated, and an understanding of the objective, standardized tests and measurements that are used to evaluate progress and regression.

b. In most cases, the private sector professional who is involved with the child (often a psychologist or educational

diagnostician) can initiate your education in this area.

III. Prepare for a Special Education Due Process Hearing

A. Hazards of Litigation

The parent needs to know that the best course is to prepare for litigation in hopes of settlement. In some cases, parents want to extract the pound of flesh to which they feel entitled. They believe that the facts and law are completely on their side. I explain that the Hearing Officer may have an unconscious identification with, or reaction against, the parent, school system or attorney. Because of mannerisms, personality style, dress and/or appearance, the Hearing Officer may be reminded of a mother, father, brother, sibling, spouse, or child with whom they had a close relationship. I explain that this association may be negative or positive. The parent may remind the Hearing Officer of a person who successfully sued him or her years earlier.

Parents need to understand that some Hearing Officers view their role as a "gatekeeper" and protector of tax dollars. Sometimes, the Hearing Officer will have a child, grandchild, or neighbor who is similar to your client. In these cases, the Hearing Officer may empathize with the parents and understand the importance of an appropriate special education. These hidden factors often affect the outcome of cases.

As Gerry Spence says, perceptions of the facts and perceptions of the law are more important than the facts and law. Our perceptions of a fact, evaluation, or case will differ. Parents must understand that to litigate is to roll the dice.

B. Analyze Issues

1. Clean single issue; default.

At first glance, a case may appear to have a single issue (i.e., tuition assistance, failure to identify the child as handicapped, the child's need for extended school year (ESY) services). In fact, most cases are multiple issues cases and need to be simplified into easy to understand cases.

Establish evidence of the public school's "default" by showing that the child has fallen further behind the peer group while in special education. This is the norm in public school special education programs. You accomplish this through your expert who will analyze individualized and/or standardized testing and chart out the child's test scores over time.

2. Multiple issues.

Most cases are more complex. You may have the failure of the public school to properly evaluate the child in prior years and breach of procedural rules. The child may be entitled to compensatory education which can include special education services that extend beyond the child's twenty-second birthday. Had the public school not violated the "Child Find Mandate" (34 C.F.R. 300.128), the child would have been identified sooner, received special education services sooner, made progress, and not required services now.

3. Develop a Simple Theme

Develop a clear, simple theme of the case. You build on this theme. It is crucial to structure your theme so the Hearing Officer or ALJ wants to rule for you. Provide this person with evidence and law that makes the person want to give you a favorable decision.

C. Evaluate Applicable Legal Principles

1. Obtain copies of the State and Federal Regulations and State and Federal Statutes.

- a. Individuals with Disabilities Education Act (IDEA) 20 U.S.C. 1400-1485
- b. Code of Federal Regulations 34 C.F.R. Part 300 Appendix A
- c. Your state special education regulations.
- d. Other publications from your state Department of Education and the state Protection and

Advocacy Office in regard to the rights of parents and special education children.

2. Review special education legal publications.

Read the primary cases in your Court of Appeals, the U. S. District Court cases from your state, and your state court cases. In addition to the Wrightslaw site, use versuslaw.com and FindLaw.com to help you find the primary cases in your circuit.

a. Wrightslaw: Special Education Law by Peter W. D. Wright and Pamela Darr Wright (ISBN: 1-892320-03-7) is available from Harbor House Law Press at (800) LAW IDEA, and from Amazon.com, Barnes and Noble, and other bookstores.

Wrightslaw: Special Education Law contains the full text of the Individuals with Disabilities Education Act of 1997, the IDEA regulations, Section 504 of the Rehabilitation Act, the Family Educational Records and Privacy Act, and U. S. Supreme Court decisions in special education cases.

b. Special Education Law and Litigation Treatise by Mark C. Weber (ISBN: 0-934753-64-4), available from the Wrightslaw Bookstore at <http://www.wrightslaw.com>. This book is an excellent resource.

c. The leading legal reporter is the Individuals with Disabilities Education Law Report (IDELR), available from LRP Publications. Call LRP at 800-341-7874 and ask for information about their special education publications and request a sample CD-ROM.

3. Review special education caselaw.

Below is a list of cases that triggered passage of Public Law 94-142 and cases from the U. S. Supreme Court. Citations are in chronological order. For an overview, read from the most recent case back in time. This will help you assess the trends and evolution of the law and predict changes in caselaw. These cases are a minimal listing. Current cases and leading cases in specific areas are at the Wrightslaw web site.

In 1954, the U. S. Supreme Court issued the landmark civil rights decision in *Brown v. Board of Education*, 347 U.S. 483 (1954). In *Brown*, school children from four states argued that segregated public schools were inherently unequal and deprived them from equal protection of the laws. The Supreme Court found that African-American children had a right to equal educational opportunities and that segregated schools "have no place in the field of public education." After the decision in *Brown*, parents of children with disabilities brought lawsuits against school districts for excluding or

segregating children with disabilities. The parents argued that by excluding these children, schools were discriminating against the children because of their disabilities. (Wrightslaw: Special Education Law, page 8)

During the early 1970s, two cases were catalysts for special education law.

Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania (P.A.R.C.), 334 F. Supp. 1257 (E.D. Pa. 1971) and 343 F. Supp. 279 (E.D. Pa. 1972)

Mills v. Board of Education of District of Columbia, 348 F. Supp. 866 (D. D.C. 1972)

P.A.R.C. dealt with the exclusion of mentally retarded children from public schools. Mills involved the practice of suspending, expelling and excluding "exceptional" children from the District of Columbia public schools.

In May, 1972, legislation was introduced in Congress after several:

. . . landmark court cases established in law the right to education for all handicapped children . . . In 1954, the Supreme Court of the United States (in Brown v. Board of Education) established the principle that all children be guaranteed equal educational opportunity. The Court stated "In these days, it is doubtful any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity . . . is a right which must be made available to all on equal terms. (Wrightslaw: Special Education Law, page 9)

U. S. Supreme Court Decisions

Board of Education v. Rowley, 458 U.S. 176 (1982)

Town of Burlington v. Department of Education for the Commonwealth of Massachusetts, 471 U. S. 359 (1985).

Honig v. Doe, 484 U.S. 305 (1988)

Florence County School District Four v. Shannon Carter, 510 U. S. 7, (1993).

Cedar Rapids v. Garret F., ___U.S.___
(1999)

4. NICHY Briefing Papers

The National Information Center for Children and Youth with Disabilities offers dozens of free publications that you can order or download from their website at <http://www.nichcy.org/> (Phone: 800-695-0285)

5. Understand the history and purpose of the special education law.

In 1997, the Individuals with Disabilities Education Act was amended. (Note: New 2004 amendments are located at the www.wrightslaw.com website.) Section 1400 includes the history, findings and purpose of the Individuals with Disabilities Education Act and is the key to understanding the special education statute. If you are unsure about the purpose or intent of a code section in the statute or regulation, go back and re-read Section 1400, especially 1400(d), to understand the statute in context.

The amended IDEA emphasizes accountability and improved results. The law stresses the need to use "proven methods of teaching and learning" based on "replicable research." These terms are important. Children with disabilities should "be involved in and progress in the general curriculum" to the maximum extent possible and should be tested on state and district standardized tests. The amended statute says:

(c) Findings -

(1) Disability is a natural part of the human experience and in no way diminishes the right of individuals to participate in or contribute to society. Improving educational results for children with disabilities is an essential element of our national policy of ensuring equality

of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities.

(4) However, the implementation of this Act has been impeded by low expectations, and an insufficient focus on applying replicable research on proven methods of teaching and learning for children with disabilities.

(5) Over 20 years of research and experience has demonstrated that the education of children with disabilities can be made more effective by-

(A) having high expectations for such children and ensuring their access in the general curriculum to the maximum extent possible;

(B) strengthening the role of parents and ensuring that families of such children have meaningful opportunities to participate in the education of their children at school and at home;

(C) coordinating this Act with other local, educational service agency, State, and Federal school improvement efforts in order to ensure that such children benefit from such efforts and that special education can become a service for such children rather than a place where they are sent;

(D) providing appropriate special education and related services and aids and supports in the regular classroom to such children, whenever appropriate;

(E) supporting high-quality, intensive professional development for all personnel who work with such children in order to ensure that they have the skills and knowledge necessary to enable them-

(i) to meet developmental goals and, to the maximum extent possible, those challenging expectations that have been established for all children; and

(ii) to be prepared to lead productive, independent, adult lives, to the maximum extent possible;

(F) providing incentives for whole-school approaches and pre-referral intervention to reduce the need to label children as disabled in order to address their learning needs . . .

(d) Purposes - The purposes of this title are-

(1)

(A) to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living;

(B) to ensure that the rights of children with disabilities and parents of such children are protected; and

(C) to assist States, localities, educational service agencies, and Federal agencies to provide for the education of all children with disabilities;

(2) to assist States in the implementation of a statewide, comprehensive, coordinated, multidisciplinary, interagency system of early intervention services for infants and toddlers with disabilities and their families;

(3) to ensure that educators and parents have the necessary tools to improve educational results for children with disabilities by supporting systemic-change activities; coordinated research and personnel preparation; coordinated technical assistance, dissemination, and support; and technology development and media services; and

(4) to assess, and ensure the effectiveness of, efforts to educate children with disabilities. (Wrightslaw: Special Education Law, pages 19-24)

D. Evaluate Existing Evidence, Decide Whether Additional Evaluations Are Needed

1. Analyze the IEPs.

Were IEPs completed regularly and used as a roadmap to guide the child's special education program? Did the IEPs include present levels of performance and ways to measure the child's progress or lack of progress?

- a. Are the IEP objectives capable of independent verification using standardized data? Are the IEP objectives "evaluated" by teachers using "teacher made" tests? Is the wolf guarding the chicken house?
- b. Do the IEPs comply with Appendix A of 34 C.F.R., Part 300?

2. Current private sector evaluations

Your private sector evaluations should use test data to analyze the child's progress or lack of progress and should spell out exactly what the child needs and why.

- a. Who is the first psychologist or educational diagnostician who evaluated the child? Is this person available? Is this person willing to re-evaluate the child?
- b. Does your private sector evaluation use statistics to prove that the child has not been properly educated? Does this evaluation include charts and diagrams of the child's progress or lack of progress? What else is needed to prove the case? Is the current testing sufficiently comprehensive to flush out the nature of the child's disability and the necessary remediation?

3. Meet with private sector experts.

Is the private sector expert willing to be involved? Is the expert willing to testify? Get the experts recommendations and suggestions regarding evidence and evaluation issues. Ask the expert to educate you about the child's test scores using the bell curve, percentile rank and deviation IQ charts.

E. Chart Test Data and Educational History

1. Compare Percentile Ranks and Standard Scores on IQ and Achievement Tests

Compare the standard scores and percentile rank scores on the IQ and achievement tests and subtests. Have the child's test scores improved or declined during the time the child was in special education?

NOTE: You must understand statistics, including standard deviations, standard scores, percentile rank, and grade and age equivalent scores. When you understand these scoring methods, you can interpret the educational and psychological tests that are administered to your clients.

2. Use school's testing to prove your case.

Read our article "Understanding Tests and Measurements for the Parent and Advocate" at http://www.wrightslaw.com/advoc/articles/tests_measurements.html or read Chapters 10 and 11 in Wrightslaw: From Emotions to Advocacy - The Special Education Survival Guide.

F. In Tuition Assistance and ABA/DTT/Lovaas Cases, Evaluate Child's Progress in Present Program

- 1. Your expert(s) has observed the public school and private programs. Your expert should be familiar with all exhibits.**
- 2. The evaluations and reports from your expert should incorporate the child's educational history and test results, and should discuss what progress, if any, the child has made and whether this progress is sufficient.**

G. Request Relief Desired From School System

1. Send letter requesting relief.

You or your client must prepare a detailed letter to the director of special education in which you outline the issues, including the facts and evidence that support your case. This letter is a quasi "opening statement" and should relate to the theme of your case. Your request must be clear. Give the basis for your request and the legal authority that justifies your position. Be persuasive and polite. If a stranger read your letter, the stranger should understand the legal issues and want to provide the requested relief. In many cases, the author of the letter will be the parents and the letter becomes an exhibit. (See our articles about how to write letters at the Wrightslaw website)

2. Attach recent evaluations and documents to the relief letter.

You are simply forwarding the recommendations of your experts. Don't let yourself or your clients be lightning rods. Because the school probably feels hostile toward your parents, the school may summarily reject anything requested or suggested by the parents.

3. Don't give all legal theories; leave some rabbits in the hat to use at trial.

If you find clear breaches of procedure, alteration of documents, you may want to hold this information back until cross-examination.

a. Give the school district an opportunity to settle without losing face. Make your case an exception to the general rule because. . . (that may include your failure to do something or provide something.) Don't corner them unless you leave a back door slightly ajar (an oversight, of course).

b. Don't attack the school district directly. Frame the issue so that your child's handicap is unique or severe. You understand that the school's program for many children who have similar handicaps may be appropriate. Unfortunately, your client has so many handicapping conditions or such severe problems that the child cannot be educated in the usual special education program.

H. If Relief Denied, Request a Due Process Hearing

If the school district denies your request, you may request a special education due process hearing. Carefully read your state's regulations about due process hearings, timelines, and required notice from you or the parent to the school district. The Hearing Officer or Administrative Law Judge should be appointed within a specific number of days from the request for a hearing. Unless the timelines are extended, a final decision is required within 45 days. (34 CFR § 300.511)

1. Pre-trial Preparations

a. Keep witnesses informed. Your witnesses should be advised about developments in the case and should receive copies of all correspondence, preliminary briefs, caselaw developments, etc.

b. Develop exhibit list immediately. Arrange for numbering and copying exhibits, and delivery of the exhibits to your witnesses, opposing counsel and the Hearing Officer.

c. Initial meeting with parents and witnesses. Bring witnesses and parents together for a meeting. Explain

issues, instill fear, and motivate witnesses to read and become knowledgeable about the exhibits and caselaw.

d. Witness preparation. Schedule at least two more meetings with witnesses regarding details of evidence, issues, preparation for direct and cross-examination. Role play direct and cross-examination with parents and expert witnesses.

e. Child as a witness. Decide whether the child should be present for all or a part of hearing and whether child should or should not testify.

f. Master list of questions and outline. During interviews and meetings with witnesses, develop a master list of questions to ask your witnesses and witnesses for the school board. Prepare a preliminary outline for possible opening and closing arguments.

g. Develop a simple theme. Use a simple theme to make your case easy to understand.

h. Witness order.

Because first impressions are important, I prefer to go first. Going first gives me better control over the speed and tempo and calling of witnesses. I request that witnesses be excluded.

i. Open with strong witness who had involvement with child several years ago.

ii. You usually have the expert witnesses (educational diagnostician, psychologist, private school special ed teacher or administrator, neurologist, speech/language pathologist, etc.) testify in chronological order of their involvement with the youngster. I usually have my first expert provide background, then jump forward in time to the most recent evaluation, then go back and provide history and information about their earlier evaluations.

iii. Consider using a lay witness who has observed positive changes in the child after the youngster began receiving services in the private program.

iv. Last expert witness. Your last expert witness should be a strong, organized individual who can testify about the child's present status and do clean up.

v. Close with parent and maybe child. Remember to save some strong evidence for rebuttal.

vi. Five day rule. Your exhibit list, exhibits, and list of witnesses is due five administrative working days before the hearing. (34 CFR 300.509) As part of your witness list, include a statement to the effect that you "reserve the right to call any of the school board witnesses that are on their list of proposed witnesses." This language allows you to call the party representative as an adverse witness.

In some states, Hearing Officers do not receive exhibits until the day of the hearing. In other states, Hearing Officers receive exhibits in advance. I like to provide exhibits ten days or more in advance. When the Hearing Officer or Administrative Law Judge reads our exhibits ahead of time, this may create a favorable first impression. The school board attorney will often decide to supplement our exhibits with a few additional documents, and not take time to become fully prepared.

2. Due Process Hearing

a. Order of presentation v. burden of proof.

Order of presentation and burden of proof are different concepts. In special education law, the first to proceed does not necessarily have the burden of proof. Decide whether the school district or the parents will proceed first. When you go first, you can structure the trial and put the district on the defensive. When you go second, you can counter-punch by moving for summary judgment without calling witnesses. The other side took their best shot and put on their evidence which was insufficient so, as a matter of law, you should prevail. When you make this motion, assume that you will be overruled. This gives you an opportunity to present your closing argument early and point out the flaws in their case.

b. Move to exclude witnesses.

Your witnesses are better prepared so they will not contradict one another if they do not hear other testimony. Parents and a representative of school board are allowed to remain in the hearing.

c. First witness.

I usually call my best expert as my first witness. If you go first, you can consider calling the school board representative as your first (adverse) witness to flush out why they believe their proposed program is appropriate. This maneuver can be dangerous because the witness is being called as yours so you need to have evidence that is contrary to the witness.

d. Direct examination: Child's witnesses

i. Identify witnesses, their educational and professional background, and their expertise in matters similar to the case at hand.

ii. Have your witnesses explain their involvement with the child prior to testing, the tests they administered and why, the results obtained, and the basis for their recommendations.

iii. Have your witnesses discuss the opposition's exhibits and the child's progress or lack of progress in prior years and why. Have your witnesses explain why the public school's last, present and/or proposed IEP is or was not appropriate for the child, and may have caused damage.

iv. Close with a strong point about the importance of an appropriate program and the nature of the educational gains that can be expected or have been achieved.

e. Cross-examination: Child's witnesses.

i. When your witness is being cross-examined, listen carefully for any points that need to be cleared up during re-direct examination.

ii. Client comments. Your client may want to talk to you during the examination, interrupting your train of thought and concentration. Do not allow this. Give your client a pad and pen so they can write notes to you about the testimony.

NOTE: Because your parents are well-prepared about the legal and factual issues and have a good understanding of the documents, you may be able to use them as assistants during the trial process. During the school board's direct examination of their witnesses, have your client write the questions they want you to ask these witnesses, and the expected answer.

The parents should also write the questions they want you to ask them on rebuttal, and the expected answer.

iii. "Green light questions." Train your witnesses to recognize that when asked a question that begins with the "5 W's + H + E," they can hit a home run on cross-examination.

iv. Body language and eye contact. On direct, your witnesses should look at you when you ask questions and ALWAYS look at the Hearing Officer or ALJ when they answer. When asked questions on cross, your witnesses should NEVER look directly at the school board attorney. They should visually concentrate on a spot on the wall midway between the school board attorney and the Hearing Officer/ALJ. On cross-examination, attorneys often control witnesses by voice inflection, body language, facial expressions, and their eyes. If your witness avoids eye contact, you may see opposing counsel get flustered.

f. Direct-examination: School board witnesses

Listen carefully to their testimony. School witnesses often bring notes that they refer to and often parrot the same theme. Their "theme" is to blame the parent and/or the child for the child's failure to have a "successful" educational experience. They may assert that the child's performance is the best that can be expected. Your witnesses will have addressed this issue on direct. While the opposition's witness is testifying, develop your list of questions to ask on cross and decide where in the sequence you should ask these questions.

g. Cross-examination: school board witnesses

i. Cross-examination of school witnesses is often the most important part of the trial. With help from your experts, you can usually use the school's evidence and testimony to build and win your case. If a witness refers to notes or documents during testimony on direct, obtain these notes. You will have to decide whether it is more advantageous to secure the notes at the beginning, or to wait until you are midstream in cross.

ii. Prepare draft questions before the hearing. Ask your expert witnesses to

provide you with a list of questions that should be asked. Your experts should be familiar with the school testing, and should educate you about the strengths and weaknesses of the tests. Educational tests often do not measure what they purport to measure but measure the impact of the child's disability. Copy portions of the test manuals that may be helpful.

iii. Know every evaluation, report and test in detail. Chart out the earlier administrations of specific tests given by the opposition's witnesses. Know dates and scores. Ask your expert to educate you about the discrepancies between tests. Understand the concepts of "between test" variability and "within test" variability. Understand the bell curve, deviation IQ, norm reference v. criterion reference tests, item analysis, and what different subtests measure.

iv. Log in favorable points. If you establish a favorable point or admission, log it into your notes. Do not return to this on cross. Save this for your closing argument. If you have been very successful on cross, it may be appropriate to end early which will not allow the witness to regroup and recover. Make sure your client understands this is an option you may exercise.

v. Be aware of the emotions each witness generates within the Hearing Officer. Is the Hearing Officer a "rescuer" who comes to the aid of a witness who is being chewed up on cross? Is the Hearing Officer annoyed by the expert who has an answer to every question and is never in doubt? When you read the Hearing Officer, you will know when to move in and attack the witness and when to show kindness for the poor witness who (you will later prove) means well, but just doesn't have it together.

Never try to humiliate or embarrass a witness, even if the witness may hurt your case. Example: "You altered the IEP, then

lied about it because you are a liar and perjurer?" or "You altered the IEP then lied about it because, under the circumstances, you thought this was the right thing to do?"

vi. Save damaging questions to the end.

vii: Close on an upbeat note. Use a trilogy that parallels your theme. One, two, three, bang!

viii. Attend seminars about the learned science of cross-examination by Larry Pozner and Roger Dodd. Pozner and Dodd say, "Great trial lawyers 'testify' at every trial through carefully crafted leading questions." Order *Cross-Examination: Science and Techniques* by Larry Pozner and Roger Dodd (ISBN: 1-55834-071-8, published by The Michie Company and available at the Wrightslaw website) and their video series "How to Dominate a Courtroom on Cross Exam" (available from Roger Dodd at 912-242-4470).

ix. On cross, never ask *who, what, why, when, where, how, or explain*. Use their witnesses to make your case and tell your story.

x. Avoid "structure bait" and "new bait" offered by witnesses. (see Pozner and Dodd)

xi. Avoid "Isn't it true that . . ." or ". . . isn't that true?" Understand the concepts of "primacy" and "recency" and their use in cross-examination. (See Pozner and Dodd)

xii. Use trilogies. "The use of trilogies?which are borrowed from literature and history?is a keystone to the cross-examiner's ability to build drama and to make more memorable the cross-examination." (Pozner and Dodd, page 473)

I. Closing Argument

During the pre-trial hearing, determine whether the Hearing Officer prefers oral closing argument or a written brief after the transcript is completed.

1. Oral Argument.

If you have an oral closing argument, you and your client should record specific verbatim testimony to use in closing. Compare the facts in your case to the facts of other similar decisions. In some cases, it is appropriate to provide the Hearing Officer with these decisions early. In other cases, it is appropriate to provide the cases at closing. Depending on your trial strategy, you may provide the landmark cases before the Hearing. At closing, you can provide additional cases that are directly on point.

2. Written Argument.

Some Hearing Officers prefer written closing argument. In these cases, it is important that the transcript be prepared so you can quote directly from it. You prepare the Written Closing Argument as your later record/index in the event of appeal. Remember your theme. Don't allow yourself to get sidetracked or bogged down in minute detail. Remember your theme, tell your client's story, and structure the case so the finder of fact wants to rule for your clients.

Ethics

Advocacy, Emotions and Dependency: Ethical dilemmas and unconscious traps.

As with divorce cases, it is easy to identify with your client. If you lose your objectivity, you also lose your tactical and strategic abilities and may become a liability to the case.

Ryan K., et. al. v. Puyallup School Districts, 35 F. 3d 1396, 21 IDELR 664, (9th Cir. 1994)

This case involved the discipline of a youngster with Tourette's Syndrome and an attention deficit disorder. The District Court and the Ninth Circuit discussed the "counterproductive stance taken by (the parents') attorney" by his insistence that "they leave the (IEP) meeting with him at once."

Giangrasso v. Kittatinny Regional High School Board of Education, et. al., 865 F. Supp 1133, (D. NJ 1994)

The parent's attorney was assessed \$100,000.00 in sanctions because of misconduct and Rule 11 violations. The District Court found that the attorney's misconduct cost the school district and other defendants approximately \$132,500.00.

Closing Comments

Cases are not settled because an attorney writes a letter to the school district. Favorable settlements require hard work and preparation.

Parents must assume that they will have to request a due process hearing. They must assume that before their hearing is held, a law is passed that prevents parents from testifying. There will be a hearing and they cannot testify.

When parents take this mental step, they begin to prepare. How can they prove their points independently? They learn to write things down and develop a paper trail. They get experts involved who can testify on the child's behalf.

When the attorney dots all i's, cross all t's, and prepares the exhibit book long before the five day rule, you are preparing for trial. When you prepare for trial, you increase the odds that the case will not go to trial and you will have a favorable settlement.

About the Authors

Peter Wright was born and raised in Washington, D.C. In third grade, he was diagnosed with strephosymbolia ("word blindness") and hyperkinesia. For two years, he received Orton-Gillingham tutoring from Diana Hanbury King.

Pete attended Randolph-Macon College in Ashland Virginia where he majored in psychology. He worked in juvenile training schools as a house parent and counselor and later as a juvenile probation officer. Pete graduated from T. C. Williams Law School at the University of Richmond in 1977.

Pete serves on the boards of several organizations, including the Professional Advisory Board of the Learning Disabilities Association of America (LDAA) and the Council of Parent Attorneys and Advocates (COPPA). He is a member of the American Bar Association, American Trial Lawyers Association, and Virginia Trial Lawyers Association.

Pete represented Shannon Carter before the U. S. Supreme Court in *Florence County School District Four v Shannon Carter*. Pete is involved in cases around the country and consults with parents in other countries about educational problems.

Pamela Wright is a psychotherapist who has worked with children and families for more than 30 years.

Her training and experience in clinical psychology and clinical social work give her a unique perspective on parent-child-school dynamics, problems, and solutions. She has seen clients in mental health centers, family guidance and psychiatric clinics, correctional institutions, hospitals, and schools.

Pam earned undergraduate and graduate degrees in Psychology from East Carolina University. She worked for ten years as a clinical psychologist in North Carolina before returning to graduate school.

In 1985, she earned a master's degree in clinical social work from Virginia Commonwealth University, graduating summa cum laude. Her academic honors include Who's Who in American Colleges and Universities.

Pam designed the Wrightslaw web site at <http://www.wrightslaw.com/> and publishes The Special Ed Advocate newsletter.

Pete and Pam speak at conferences around the country on special education advocacy issues.

Pete and Pam co-authored Wrightslaw: Special Education Law, Wrightslaw: From Emotions to Advocacy - The Special Education Survival Guide and Wrightslaw: No Child Left Behind.

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