VOLUME 26 NUMBER 9 MAY 1994

FOCUS ON EXCEPTIONAL CHILDREN

Observations on the Legal Process: A Primer for School Systems

Glenn A. Vergason, M. L. Anderegg, and Margaret C. Smith

Some of us, without trying, have been exposed to the legal system in this country. This exposure occurred as we worked to determine whether students were receiving a free and appropriate education (FAPE) in the least restrictive environment (LRE) under the Individuals with Disabilities Education Act (IDEA). Many other professionals will be exposed to complaints from the Office of Civil Rights (OCR) and the Office of Special Education Programs (OSEP) under IDEA. We believe some of these experiences might be helpful to others. First we will share some general observations on what we have seen during our encounters with the legal system. Using these, we will then suggest some considerations to take into account when deciding on a response to legal action against your school system.

GENERAL OBSERVATIONS

Excellence Still Exists

First, we believe we have seen some excellent special education programs and exemplary instruction. Most administrators and teachers need not apologize to anyone for the quality of their programs. We have seen, for example, a social skills curriculum that we believe would enhance the educational experience of *all* children (St. Louis Special School District, 1992). This curriculum has demonstrated its value in forming a foundation on which to build a classroom community where diversity is not restricted to ethnicity, race, or disability. We have no reservations about recommending this to any school system.

While we were working with this system, we saw some of the most realistic and effective examples of inclusion that anyone could hope to see. The school system was being sued for not closing the delivery system to a single setting (general education classes). In spite of the focus of the suit, we saw some of the best examples of inclusive education imaginable without abandoning other service delivery options. Our observations revealed dozens of examples of students who were in inclusive settings, some of them in full-time enrollment, featuring appropriate education in the least restrictive environment.

Glenn Vergason is an emeritus professor of educational psychology and special education at Georgia State University, Atlanta. *M. L. Anderegg* is the executive director of the Cobb Education Consortium at Kennesaw State College, Georgia. *Margaret Smith* is an administrative assistant at Heard County Public Schools in Franklin, Georgia.

We have seen other fine examples of inclusive education, too. We also have seen many consistencies that, we believe, reflect a sign of maturity in the field. Generally, problems of due process, which used to harpoon school systems in cases brought against them, now seem to be less prevalent. In fact, problems with due process were so common in the past that at one point judicial rulings seemed to have replaced good judgment and were concerned primarily with process rather than outcome.

Some Holdouts Against Inclusion

Second, in a programmatic vein, though we have seen some excellent programs of inclusion for students with various mild disabilities, we have been concerned that some other systems continue to refuse to consider including these students. These same systems have been serving students with severe/profound disabilities in general education. Yet, they still choose to serve students with mild disabilities through self-contained special education classes or heavy enrollments in resource programs. We believe that serving students with severe disabilities in general education while serving students with mild disabilities in special classes is morally corrupt. The reasons are self-evident. These placements have more to do with numbers and the recognition that these parents are less likely to sue than with educational considerations.

Sometimes the school systems will tell parents that the state has set up its formulas so the school cannot afford to serve these students in less restrictive environments. These parents say the special education director has told them, "The state has set it up so the system can't earn enough funds to service mild disabilities within general education classes." Most of these arguments are cop-outs, and there are ways of working around this or getting it changed. These remarks also have little to do with what is appropriate under IDEA. Lack of understanding of these situations and failure to take appropriate actions can lead to legal entanglements. Weighted formulas certainly can favor more self-contained programs, but this should not be the primary determinant of a program (Dempsey & Fuchs, 1993).

Further, the recent case *Cordero v. Pennsylvania* (1993) may provide a preventive direction. As a result of this suit, Pennsylvania school systems are required to maintain a registry of those with disabilities and no more than 30 days can elapse before making appropriate placement. Perhaps that is not such a bad practice for us all. This same ruling requires that the state of Pennsylvania must maintain every level of service options.

Imprecision in FAPE and LRE

Third, in heaven or some place, a precise measure surely must exist of what is appropriate and what is the least restrictive environment. So far, we have not found this place, but we note that many parents and some professional advocates believe they have. Note that we refer to these as "professional" advocates. We keep running into nationally known "advocates" who typically have an earned doctorate (though not all do) but only limited experiences with students with disabilities.

Like many other "armchair quarterbacks," they know exactly what *others* should be doing. Despite their never having taught students with disabilities a day in their life, specifically not in the general education classroom, they have a strong commitment to restricting alternatives other than general education classrooms. We doubt they would

FOCUS ON EXCEPTIONAL CHILDREN

ISSN 0015-511X

FOCUS ON EXCEPTIONAL CHILDREN (USPS 203-360) is published monthly except June, July, and August as a service to teachers, special educators, curriculum specialists, administrators, and those concerned with the special education of exceptional children. This publication is annotated and indexed by the ERIC Clearinghouse on Handicapped and Gifted Children for publication in the monthly *Current Index to Journals in Education* (CIJE) and the quarterly index, *Exceptional Children Education Resources* (ECER). It is also available in microfilm from Xerox University Microfilms, Ann Arbor, MI. Subscription rates: Individual, $30 per year; institutions, $40 per year.

Printed in the United States of America. Second class postage is paid at Denver, Colorado. **POSTMASTER:** Send address changes to:

Love Publishing Company
Executive and Editorial Office
1777 South Bellaire Street
Denver, Colorado 80222
Telephone (303) 757-2579

want to be held to their own standard in that setting. Regardless of the issue in a case, however, they skillfully guide the focus to total inclusion.

Some systems have not been exposed to total inclusion, but we have seen a lot of evidence in states where we have worked or with which we are familiar in which professionals are rushing to see who can implement inclusion the fastest. We find that many of these systems think primarily about inclusion for those with mild disabilities. They will be horrified to see how far inclusion has gone in other systems for students with severe and profound disabilities.

At times the legal system listens to these professionals and professional advocates in terms of what and how these same students can learn. Some judges even are taken in by recommendations that students with profound retardation be placed in general education classrooms when their functional abilities are at the toddler level or below. Unfortunately, some public school personnel share these attitudes. The strongest predictor of this attitude seems to be their distance from real, live children.

For example, one recent Alabama case (*Statum v. Birmingham*, 1993) was successful in placing a child with an IQ of 25 full-time in a general education placement. This suit and two prior decisions (*Holland v. Sacramento*, 1992, and *Oberti v. Board of Education of Clementon School District*, 1992) imply that all students should be in general education regardless of the severity of their disability. If these models are followed, schools will begin to face much thornier issues. If you think schools, on the other hand, should not move toward inclusion, think again. From the above cases, the courts clearly are redefining LRE and, in most cases, toward total inclusion.

Circuit court decisions rendered in the 3rd, 5th, and 11th circuits directly affect nine states, and most recently the 9th circuit court in California (*Holland v. Sacramento*). We doubt that any judge will want to issue a contrary ruling because, in all likelihood, that would result in the cases being referred to the U. S. Supreme Court. Some of us would find this highly desirable. We see the need for a decision from a higher court on these cases. We believe the circuit courts have gone far beyond Congress's intention and well past what most professional special educators believe is educationally and psychologically sound. We are due for a definitive ruling.

A recent example of how far we have gone was described in *Time* magazine (Van Viema, 1993) concerning a child who lives each day in imminent danger of death. The child, 12-year-old Corey, has spastic cerebral palsy, seizures, and high-risk progressive scoliosis. The physician and the mother have asked the school system not to administer cardiopulmonary resuscitation (CPR). The physician's note says, "Do not resuscitate if her lungs cease to work," laying at the school's door the necessity for making a medical determination. The school system has attempted to refuse to abide by this request, saying there is too little difference in the child's condition during her seizures to be able to decide which seizures should be treated and which should be left untreated to progress to death.

We also worry about affective issues in these cases as, it seems, the mother does as well. The *Time* article says the mother would like Corey to be removed to the nurse's office "to spare her classmates' feelings" (p. 60). One gets the idea that the child's classmates currently witness these life-threatening seizures frequently.

Does the school have the right to remove the child to the nurse's office only if the girl is in the process of dying? Is it all right for her to have multiple seizures in the classroom? What about the effect on the other children? As we said before, these are thorny issues to be resolved. Much more extensive coverage of this topic can be found in Patrick McKee's (1993) article in *The Special Educator*.

If there is a yardstick or other means of measuring FAPE or LRE, we believe it is derived from a study of the child, the IEP, and the goal for that student in adulthood. These concepts are endorsed in 1992 federal opinions in the form of policy guidelines from Lamar Alexander. The original policy guidance document was written to clarify whether placing a deaf child in a residential school as the least restrictive environment would ever be justified.

The document is emphatic that a residential school can be the least restrictive environment for some deaf students. Although some professionals in the field have generalized this application to all areas of disability as being consistent with IDEA, the generalizability of the document was unclear to us. We wrote to the Office of Special Education of the U. S. Office of Education for a ruling. The ruling came in a letter to Dr. Glenn Vergason dated March 15, 1993, from William L. Smith, Acting Assistant Secretary (Smith, 1993). His letter, even with federal jargonese, makes it clear that this interpretation applies to all disabilities.

Age-Appropriate Versus Developmentally Appropriate

We have observed radical inclusionists pressing for age-appropriate placements that put the students in situations in which they are extremely out of place on every developmental criteria. We worked with one individual who objected to

a child's having a morning and afternoon nap. The child's general health was so fragile that the naps were necessary for him to remain viable. Our inclusionist colleague was livid that a 17-year-old person would take a nap at school even though the records clearly indicated the medical necessity.

For individuals with an age-dominant bent, the obvious solution is that parallel instruction be made available. This concept often requires a personal aide and instruction, which is only tangentially (if that) related to the topic at hand. The instructional objective may be as unrelated as teaching the colors blue and gray while the rest of the class studies the Civil War (McNulty, 1991). Generally, this sort of practice is referred to as *parallel instruction*. Those who have not been exposed to it yet may find the concept unbelievable, but parallel instruction was an integral factor in the Oberti case (*Oberti v. Board of Education of Clementon School District*, 1992).

In the appeal of this decision in 1993, the state of New Jersey said the concept of parallel instruction is morally corrupt and would allow a student with severe retardation to attend the Harvard Law School (19 IDELR 908). Can you imagine Harvard admitting a student with profound retardation? What kind of parallel instruction could prepare this student for a baccalaureate program, much less a juris doctorate? Our questions are not intended to ridicule. Rather, we intend to infuse the placement procedure with some common sense or, at the least, some anticipation of consequences.

Although the example used in the Oberti case seems absurd, we doubt that requests such as these can be far in the future. If parallel instruction can be court-mandated under IDEA, Section 504, and the Americans with Disabilities Act for kindergarten through 12th grade, the next logical step is to require parallel instruction in postsecondary settings. The same might be true of modified grading criteria as well.

Before we assume that rational thought would intervene with the notion that FAPE is restricted to the K–12 arena, one must remember that students with disabilities are assured service to age 21. Most schools will allow continued enrollment until the individual is 22 years old, and multiple transitions are required by law. Would not transition from secondary to postsecondary institutions be as viable a service option as transition to employment? Already some educators in the area of severe and profound disabilities are concerned about the lack of transitional preparation being offered in the elementary and middle schools.

Alberto, Elliott, Taber, Houser, and Andrews (1993) wrote of the need for elementary and middle schools to address "skills directly related to domestic/personal management and community access domains" such as communication, toileting, and the like (p. 5). Logically, these would address the student's needs in developmentally appropriate ways far better than parallel instruction of skills not fundamental to the community-based curriculum of secondary and postsecondary options.

We note also that some schools, too frequently, are placing all students with disabilities in general education. After these placements, community-based education often has been ignored. To abandon community-based education and vocational training is educational and vocational genocide.

We note, too, that community vocational efforts are being thwarted by rulings from the Department of Labor. These rulings already have affected transition and employment training programs in Arizona drastically (Love & Lund, 1993). This latest outcome is highly unfortunate because the inclusion movement in some school systems has diminished the role of the community-based education so essential for adult independence. Just when the field had reached a point at which we were beginning to look at the quality of independence students can have as adults, governmental agencies block that progress.

What Price Social Benefits?

Too often we have observed parents being encouraged or even pushed by advocacy organizations to sue schools for unrealistic and unproductive placements. In these cases placement is based on the premise that, regardless of how severe the disability may be, the student should be in the general classroom with chronological peers for the social benefits.

Recently we observed a child whose IEP *required* 2½ hours of downtime per day for "socialization" with chronological peers. The child's "parallel instruction" consisted of copying laboriously, from a second-grade book on clouds, questions he could not read, much less answer, while his junior high school classmates studied advanced meteorology. The system had acquiesced to placing the student, at the parents' insistence, in accelerated classes in general education with the understanding that academics would be "incidental." This premise, it seems to us, makes as much sense as the notion that standing between two tall people will increase one's height or hanging around with skinny people will decrease one's girth.

Earlier we mentioned Corey's situation of "do not resuscitate," and we also have heard of a case just as instructionally bizarre. A colleague from another state told us of a comatose student who was so medically fragile she was being

treated as an inpatient at a local facility noted for its care of critically and terminally ill children. Every day the student was taken from this facility on a gurney by ambulance and was delivered with life support systems to the local school for age-appropriate experiences. After a day in school, the child was loaded back into the ambulance to be returned to her life on support systems there.

The child died two years after this practice began. To the day she died, her mother believed she soon would wake up completely normal. As ludicrous as this may sound, we can name for you at least a dozen special education professionals who would testify to the appropriateness of this placement. They can and will, with a straight face and in deep earnestness, tell you exactly why this practice constitutes appropriate education. They never discuss the medical risks, the financial folly, the long-term emotional effect on the parents, or the educational appropriateness of the placement. These same individuals can be encountered in state after state, wherever a public forum exists in which to air their views. The capability and culpability of some of these witnesses may even be questionable given their background, experience, and personal agendas or other limitations.

One example of such an extremist view came in an exchange between David Rostetter and an Alabama administrator. The administrator asked Dr. Rostetter if a child could be found with such severe disabilities as to justify placement outside general education. Rostetter's reply was, "Yes, if he is dead." When someone in the front row responded incredulously, Dr. Rostetter jokingly said, "That would be the easiest group to include."[1]

The Price of Being Educationally Sound

What is politically correct is not necessarily educationally sound. That the concept of total inclusion for all children is politically correct is well-documented (Ysseldyke, Thurlow, Algozzine, & Nathan, 1993). Whether it is educationally sound for all students is another matter. For the moment, the group for whom litigation has been the most successful seems to be individuals with disabilities in the moderate to profound range who are around 6 years of age.

This conclusion is exemplified by cases such as *Christi Greer v. Rome* (1991) and *Statum v. Birmingham* (1993). If one looks at litigation and consults special education administrators and teachers, most admit that parents of students with disabilities in middle and high schools are *not* standing in line for full inclusion. Nevertheless, failing to move toward more inclusive schools can cost a system both money and grief. We have written at length against the wholesale movement of students with disabilities to general education. We still believe that placements formulated by cookie-cutter policy are unconscionable. Despite the potential for misplacement of some students, we celebrate the reality that, on an individual basis, inclusive general education can be the decision of choice for many students.

As we think of total inclusion, specifically as it relates to parents of older students and the reduced likelihood that they will request such placements, we think of *Daniel R. R. v. El Paso* (1989). In that case the parents sued on behalf of their child, who was in the first grade. We do not know the long-term outcome of this placement, but systems such as Birmingham (*Statum v. Birmingham*) and others may want to bide their time for more realistic placements and programming to occur in future years.

We are only too familiar with the Christi Greer case in Georgia, in which the court placed the child full-time in general education with only speech services available from special education. Now, nearly 3 years later, Christi is in the third grade and spends three periods a day in the resource room receiving instruction from special education. We see the present placement and programming for this child as far more realistic than the previous general education placement her parents sought and "won."

Recently we had the opportunity to work with the Parkway School System and the St. Louis Special School District (1992). We were extremely pleased with their efforts toward inclusion, especially for students with mild disabilities. The programs were as effective as we ever could conceive. This, however, did not mean they had embraced total inclusion for those with more severe disabilities. We saw a variety of different placements, some of total inclusion, all addressing the student's individual needs—sensitive and responsive to changes in the student's progress.

Though we have referred in passing to cost, let us not fail to address that issue. Cost has become more of an issue in litigation than it was even 5 years ago, and well it should be of great concern. Let's say parents are encouraged to bring a suit against a school system. Their lawyer lists 10 or 12 professional expert observers who fly in from all over the country to work on the case. No matter how carefully assessment choices are made or how precise the procedures are, some observers will testify that they are not appropriate. Still others will talk

[1]Verbal comments in an administrators' meeting called by the Alabama State Department of Education at the University of Alabama. Dr. David Rostetter attended the meeting as a consultant involved in rewriting the Alabama State Plan.

about least restrictive environment, defining LRE as geography. Finally, some will emphasize the adequacy of transition services. Sometimes they go so far as to expect an ecological study of each child's neighborhood and family, saying that, if the child were in a general classroom setting, all that information would be a matter of course. In truth, ecological studies seldom, if ever, are undertaken in general education.

In defending itself, the school system believes it must match these 10 or 12 expert witnesses with its own. If you follow this thinking to its conclusion, along with a trial preceded by all of these individuals and entrusted parties giving depositions, the costs may be enormous. That is long before the cost of educating the child within the parameters of the court's final decision is included. In our view, a great deal of money is being expended for which we see no improvement in the education of children. Regardless of the eventual outcome of the case, when a case is filed against a system, it has no way to avoid mounting a defense.

The above scenario reflects our experiences in the *Merry et al. v. Parkway et al.* (1988) suit. We hesitate to try to figure the costs in this case, but we believe they easily could be between $1 million and $2 million, combining plaintiff's and defendant's expenses. Cost continues to be an issue in placement as well, but not as much as schools might prefer.

In the case of *Christi Greer v. Rome* (1991), the three-pronged test included cost as one consideration. The decision recently was referred to in the *Statum v. Birmingham* (1993) case. The judge implied that education in general education settings with adequate support services probably would not be any more expensive than a self-contained special education program. This inference was made despite the lack of published data on inclusive settings to compare against the data from self-contained settings. Cost also was not given much weight in the recent decision in the 9th circuit court. (*Sacramento School District v. Holland*, 1994).

We are sure that most promoters of total inclusion expect those support services to be available, but not all educators are that philanthropic. Pat Cooper, a former Superintendent of Schools in Louisiana, made no bones about why he supported inclusion in his district. Dr. Cooper may have thought he was speaking to general education administrators as he assured the mixed audience that inclusion would solve some of their financial woes.[2]

He said, "You have always been able to use your special education teachers and Title I teachers in the regular classrooms. All you have to do is make sure that the children with disabilities in that (special education or Title 1) teacher's caseload show up some time during the day in the classroom where you have assigned her. No one can say a word about her helping those (other) kids who are at risk for failure but don't qualify for special programs, and those are the kids whose scores on standardized tests are going to bring down the (School) Board's wrath on you."

Clearly, Dr. Cooper's assessment of the value of inclusion addressed a far different need from that avowed by most inclusionists. Interestingly enough, this competition for resources was not reported (at a level of statistical significance) in either of three national samples several years ago (Anderegg, 1989; Garrison, 1990; Smith, 1990). Those samples included general education and special education teachers and administrators, as well as support personnel, and totaled more than 2,000 responses.

Through a Glass Dimly, For Now

We anticipate a day will come when the judgment of best professional practice will be made with the omnipotence that hindsight affords us all. We are so bold as to suggest that, before that time, we will live to see reverse suits brought against school systems for these questionable placements. The credibility of special education will be diminished because of thoughtless geographic inclusion, but not inclusive, placements, from which students exit lacking preparation for life and employment. These placements will earn the backlash Kauffman predicted (Kauffman & Hallahan, 1990).

Some of the backlash was reflected in an issue of *U. S. News and World Report*. That nine-page coverage, entitled "Separate But Not Equal: How Special Education Programs Are Cheating Our Children and Costing Taxpayers Billions Each Year" (1993), compared special education to the segregation practiced against other minorities and generally indicted special education as lacking effectiveness.

Examples of suits brought against school systems seeking redress for the ineffectiveness of instruction already exist. Some of these address ineffective special education instruction and are brought under both IDEA and Section 504. The more alarming ones involve students after they have passed the service age limit of 21 years. In the case of *Corores v. Portsmouth School District* (1991), a 22-year-old woman with cerebral palsy, severe retardation, and blindness sued the school system for not providing her with a free and appropriate education. We know of three other litigants who also won the right to compensatory education after age 21:

[2]Comments made at Brunswick Inclusion Conference, "Inclusion Planning for Success," Brunswick, GA, October 7–8, 1993.

Lester H. v. Carroll (1989); *Murphy v. Timberlane Regional School District* (1993); and *Pihl v. Massachusetts Department of Education* (1993). Pihl was 27 years old when his case was decided.

Although these cases address deficits in a special education setting, they open the door to similar charges in general education settings. If a parent becomes convinced that the general education experience did not afford appropriate education, the groundwork has been laid. We expect to see these suits increase in the future whenever placements are made en masse in general education. Those suing may be the same parents who pushed the hardest for total inclusion.

Interestingly enough, at least one of the litigants in the Larry P. case (*Larry P. v. Riles*, 1984), after getting a general education placement, sued a second time to get the child labeled as disabled. As a teenager, Larry P. was a member of a class action regarding overrepresentation of minorities in special education. The result was placement in general education. In his early 20s, however, he asked for classification as having mental retardation so he would qualify for rehabilitation services.

As the escalation of extreme cases of inclusion continues, we have to wonder how parents can be thus driven. Do they really believe a fifth-grade classroom is an appropriate placement for a child who functions on less than a 2-year-old level? We do not yet know how to quantify this, but we suspect the parents involved in the more convoluted placements may be denying their child's disability. They may not have gone through the natural and healthy grieving needed to adjust to the situation (Anderegg, Vergason, & Smith, 1992; Daniels-Mohring & Lambie, 1993).

We have written about our work with parents of children who have disabilities and how they can get stuck in one of the levels of grief that Kubler-Ross (1969) described. These parents are vulnerable while in the confronting and adapting phases of the grief cycle Kubler-Ross discussed, but they gain incredible resources as they function in the adapting segment. In that stage, they begin to make long-range plans based on realistic assessments and provision for meeting every family members' needs (Anderegg, Vergason, & Smith, 1992). In that mode they are capable, energetic, and effective advocates.

Despite all the evidence in the literature on grief over unfulfilled expectations, some of our colleagues are offended by the idea that these parents need to grieve at all. They reject totally the notion of the legitimacy of grieving as a way to incorporate the unexpected into daily life. Maybe they (a) do not understand degrees of grief, (b) confuse grief with depression or rejection, or (c) find it more politically correct to ignore reality and hope that, when you open your eyes, things will have changed to your liking.

FIGHT OR FLIGHT? STRATEGIES FOR PRACTICE

In deciding the system's response to a parent's or an advocate's legal action, certain principles might guide our actions in a more productive direction. These are discussed in the remainder of this article.

Mediate

Whenever possible, mediate. Adversarial relationships should be avoided stringently. Although mediation is doomed in some people's eyes, this is no excuse for not pursuing diligently a mediation of the differences. Your efforts in that regard will be viewed favorably if the case gets to trial, and pre-trial settlement may be possible. You may have to agree to disagree even as you develop acceptable alternatives that provide win/win solutions.

We recommend *Getting Past No* (Ury, 1991) and *Getting to Yes* (Fisher & Ury, 1991) as two excellent resources for studying successful negotiation strategies. These books describe strategies that have been used in negotiating contracts and disputes between labor and management and even between countries. Certainly these issues are equally as heated and as polarized as any meetings that school system personnel ever have with parents. Yet the authors offer many examples of conflict resolution by applying certain principles and practices of mediation.

Concentrated study and mastery of these techniques will result in parents' feeling more positively toward the schools, with a greater likelihood of a placement facilitative for all. We have seen win/win solutions such as these authors describe. In fact, these principles have proven to be so successful that we know of systems in which all special education personnel and school principals have received this training. One of the foremost groups nationally is the Justice Center of Atlanta (Dobbs, Primm, & Primm, 1991). This group probably has trained and worked with more states and school systems than any other.

When the relationship between the school system and parents resists negotiation, we suggest trying a change of personnel. This is not intended to place blame. A change may be called for simply to provide an exploration and estimation of the extent to which the confrontation reflects their mutual

past history. A newcomer to the situation may be able to facilitate communication.

In one situation with which we are familiar, a parent had become increasingly adversarial, and a civil suit was under way. The school system appointed a new person to work with the parent, and soon all the litigation was dropped, even over the objections of the advocacy group. The new person had no past history of disagreement with the parent and was able to communicate clearly with the parents and acquaint them with the child's program and progress. Mediation was the key, but the child was the focus.

Communicate

In heading off complaints, the primary protection is in communication. Even though most good teachers are compulsive journal writers or daily diary keepers, many need to be encouraged to keep useful notes. Instead of limiting their notes to the number of bodily functions or behaviors performed each day, they should link their entries to the long-term goals of children's IEPs. Those linkages can be invaluable during an investigation of complaints.

The most frequent and flagrant breakdown in communication seems to start with the teacher's not recognizing the importance of sharing information with others. For example, in one instance a parent mentioned to the teacher her objection to the fact that a classroom for children with profound disabilities did not have its own bathroom. The class used the bathroom in the hall, which was shared with several other classrooms. The parent objected because the bathroom being used was the girls' bathroom. The teacher was a female, and the student was a male.

The teacher failed to communicate with the principal, the special education director, or the superintendent. The parent brought the matter directly to the attention of the Board of Education, which, without investigation, ordered that a toilet be installed in the classroom within the week. The only way to do that was to take out the shower, which was badly needed to clean up students who had soiled themselves and to teach self-help skills. The classroom got a toilet *fixture* but lost its opportunity to get what was really needed. With very little communication the results could have been a complete bath with handicap access provisions. A golden opportunity was turned to dross.

We have discovered that the Early Complaint Resolution procedure with OCR can be extremely helpful to the school system. Fundamental to that process is that all of the system's agents have to remember that everyone has a right to have their complaint heard. And, even if the complaint is not justified, the process is necessary for those instances in which the complaint not only is valid but also should be heard to protect a child's rights. If the system's personnel can approach the situation with that premise, both communication and resolution will be facilitated.

One special education director we know has a unique perspective for prevention. When any hint surfaces of a possibility of a civil rights complaint involving child abuse, she immediately calls the local child protection agency to investigate it. Her theory is, "You have to accept the fact that there are some sick people out there who will abuse children, given the chance. Statistically, some of those people are bound to wind up in education. If there is only smoke (in the allegations), the agency will absolve you. If there is fire (actual abuse), you need to be the one who spotted it." She continues, "You have to trust that the system works and be able to speak up and give it that chance." Her experiences with effective communication have served both the system and the students well.

When communicating with divorced parents of a child with a disability, a situation of equal magnitude arises. Under IDEA (20 U.S.C. Section 1415), the legal rights of noncustodial parents must be guarded as carefully as the custodial parent's rights. In *The Special Educator,* Ruesch (1994) wrote that parents, under state divorce and family laws, do not lose their parental rights simply because they do not have physical custody of the child. Ruesch cited *Doe v. Arnig* (1987), in which parents' right to participate in the child's educational planning is considered a basic right, even in the event of a divorce, as long as there is no specific court order to the contrary. That decision noted that the continuing financial responsibility for the child's educational experiences made notification especially pressing upon the school system.

Although Ruesch admitted that the law is not crystal clear on this point, what is clear is the right of both parents to be notified of IEP issues, and to have confidentiality protection and access to relevant records. School personnel can feel safe in proceeding with the custodial parent's approval of placement only after the noncustodial parent has been given the opportunity to participate.

The really sticky part can come in learning from the custodial parent how to reach the other parent. That is where strong communication skills are needed. When school personnel realize they are dealing with a single parent or a stepparent or surrogate, the records must include a notification address for the absent parent. Despite the delicacy of the topic, the subject of full notification must be addressed. When the absent parent's whereabouts are unknown, a strong safety

net, such as written documentation from the custodial parent, should suffice. Even in the best of situations, communication is the key to resolving this sensitive issue.

Collaborate

If you are being sued, you should seek help immediately and support the efforts of the attorney you choose. One old adage says, "He who is his own lawyer has a fool for a client." Further, you must recognize that (a) this area of school law is highly specialized, and (b) similar cases have been litigated in other states. Look carefully at the established expertise of your system's attorney before engaging him or her in making decisions about your response to a suit. Many systems retain attorneys to deal with routine school matters, but their expertise is not in special education law.

Choosing an attorney who is seasoned in IDEA litigation often makes a significant difference. Advocacy groups rarely use lawyers who have not litigated similar cases successfully in other states. Employing an inexperienced lawyer is like sending a neophyte against an experienced gladiator.

We have seen all sorts of extremes. Board of Education lawyers who realized they were not prepared in this area of the law have taken on associates with the necessary background to litigate IDEA suits. At the other extreme, we have seen situations in which, within 10 minutes of meeting the lawyer, it was clear that the school's lawyer had never heard of IDEA, FAPE, LRE, or IEPs. This lawyer actually may be far more comfortable in real estate law but, nevertheless, is determined to try the case. School personnel sometimes think that because they are paying this person, they must try to teach him or her what an attorney needs to know about school law. That is a mistake!

Once you have engaged an experienced special education attorney, the two of you should collaborate to investigate the strengths and weaknesses of previous cases. No one except your attorney should be able to convince you that you will lose your case because a plaintiff in another state just won an "almost identical" case. Your attorney will want to learn why that school system really lost.

For example, a case tried where the state has assumed a "maximum benefit" standard will be decided differently from one in a state where the "reasonable expectation of benefit" is the standard. Under IDEA, the reasonable expectation of benefit is the rule, but some states still do expect "maximum benefit."

In the Rowley case (*Board of Education Hendrick Hudson Central School District v. Rowley*, 1982), a deaf child was making satisfactory progress in the general education setting without a translator. The state had not expanded the "reasonable expectation" standard of IDEA so, although the parents sought a maximum benefit from education, the judge ruled that the standard had been met. Included in that decision is a healthy discussion of the difference between the two standards. Had the case been heard in another state where state law requires the maximum benefit standard (such as Michigan), the decision could have been very different. In examining the previous case record, the lawyer will read the judge's decision carefully, and so should you. You both may find that the case was lost on errors, not on issues pertinent to your case.

You may be able to make substantive suggestions. No attorney understands special education instruction and curriculum like a special educator. We can be a real asset to the lawyer in interpreting what the child can do under what conditions. Nevertheless, we must be able to explain these to the court, as discussed later.

To fail to collaborate with your attorney in preparation of the case is rather like the lady who was treated unsuccessfully for several months for a personal malady. In questioning her about her treatment, a friend learned that the lady had failed to describe a single symptom she was experiencing because "I was too embarrassed to tell him that!" If we fail to trust our lawyers enough to work with them in preparing the case, we will be as far from a remedy as the lady we described was from a cure.

You will have to clarify every event or factor that played a part in your system's decisions. We recommend that you work with your lawyer toward a clear understanding of how you developed every aspect of the instructional setting and curriculum. In law, attorneys are taught never to ask a question in a deposition or trial to which they do not already know the answer. Unfortunately, not all lawyers follow this little rule.

To help your lawyer, you may have to suggest a line of questioning and tell him or her how you probably would respond as well. This will assure that even the most complex technical aspects of the case are clarified to the judge and jury. You must be candid with your attorney in identifying the most damaging question that could be asked of you. Where we see this being done, the testimony has been much more effective and thorough. People can get a sinking feeling, after testifying at a hearing, deposition, or trial, when they come to realize that they or the lawyer lost the case because they were not asked the right questions, some areas were missed completely, or the questions elicited answers that hurt your defense without improving your program.

Your professional networking also can be invaluable to your attorney. Once he or she has identified for you the charges you will have to defend, your professional contacts can help you learn who the most respected experts in that area are. Also, they can assist you in discovering who is doing research in the areas under question, using the latest and strongest data collection instruments available. These data should be passed on to your attorney as the basis for your case.

All too often a school system selects witnesses on the basis of easy access rather than choosing those who have kept current and whose understanding of the law and instruction offers precision. Sometimes the lawyer will decide not to use a witness in the trial because of his or her poor showing in the deposition. At times we have seen the school system's case left without an expert witness to testify.

Your attorney's expertise is in the points of law and legal procedures. He or she does not know, nor can you expect him or her to master, the special education field. Your responsibility is to support the lawyer with whatever knowledge-based, discipline-oriented data are needed and then to develop the means by which these data can be entered into the court record. In researching who is working in this area, you should look for experts who will tell you what your critical needs are rather than tell you what you want to hear. Any expert you hire who will wear a muzzle will hurt your case. Your opponents in testimony may elicit what the expert fails to tell you before you go to court.

Remediate

After your expert observers describe for you the problems they find, you must be willing to do something about them. Consider this example. The expert observer you have hired informs your school system that a certain teacher's aide lacks sufficient training to be effective. That aide is assigned to a student with severe disabilities in a general education setting, and the success of that placement largely depends on the aide's effectiveness. If you fail to correct the situation once it is clearly identified, the deficit will have shown up already in depositions when you go to court months later. The months elapsing between depositions that reveal the problem and the trial in which your failure to act is exposed will exacerbate the problem.

What should you do in such an instance? Once a weakness has been discovered, whether by your expert observers or by the plaintiffs, you should take immediate steps toward correcting it. In the example given, if you provide the training needed and monitor the aide's progress, the court will favorably receive your prompt response. If, by the trial date, you have corrected enough of the problems prompting the suit, the case may well be settled out of court. Admittedly, some lawyers will try to make you admit you made the changes only because of the litigation. Most courts, however, are more concerned with remedy, considering it representative of a good faith effort and indicative of future commitment.

Document

We recommend "shadowing" the plaintiff's expert observers wherever they go in the system with your own observers. This prevents the former from being able to provide unanticipated testimony that may prove surprising or even damaging. If your observer scripts all exchanges, using a behavior observation form, these data will provide essential documentation. We employed that technique successfully in the St. Louis case (*Merry et al. v. Parkway et al.*, 1988). Shadowing affords your side an observer who records not only the child's behavior but also the behavior of the plaintiff's observers.

In another case our recommendation of shadowing was ignored. Therefore, we could neither document the plaintiff's testimony nor refute it for the school system. Shadowing allows your side an observer who, not only records the child's behavior but also the behavior of the plaintiff's observers. In the *Statum* case the four aides who served the special class for those with severe disabilities decided they did not want to have Anna Statum in their classroom or to deal with the parent. When the plaintiff's observers visited the class, they systematically set out to make it appear that this class was no place for Anna. If the system had allowed shadowing of the plaintiff's witnesses, this could have been discovered early and documentation could have been provided revealing or offsetting their behavior.

Sometimes teachers' behaviors are different when they are being observed simply because they are intimidated by the observers or the procedure. You should not let professional advocates intimidate you or your personnel into violating best professional practice or making questionable placements. Systematic classroom data collection (even simple checksheet tallies) is preferable to worksheets to augment the documentation of test results. A school psychologist expressed his frustration at the tendency to follow parental preferences while ignoring test data. He said, "All it takes to overturn the data (from standardized tests) is a boarding pass on Delta and a differing opinion."

The only defense is longitudinal data collection and thorough documentation, preferably shared with parents at regular (weekly or monthly) intervals. Providing ongoing data collection may seem daunting, but it is far easier than defending educational practice without documentation. Teachers and staff members alike should be encouraged to keep the kind of daily diaries we referred to earlier. A proactive stance assumes, "If it wasn't written down, it never happened."

At some time the other side may claim it requested data that you never supplied, so you also should document whenever you supply information to anyone. In a case at Memphis (*United States of America v. Tennessee*, 1993), the U. S. government made the State of Tennessee look bad in court by denying that the state ever furnished it with documents. The implication that documents were withheld purposefully is lethal in court. As simple a procedure as a detailed cover memo stating what documents were requested, by whom, and when, and indicating enclosure of the documents, can help. Of equal value is to keep telephone messages recorded with date, time, caller, and message, initialed by the person who took the message. When the call is returned, the date, time, and substance of the conversation should be recorded.

Controlling the review of cumulative data is wise. Review of records should be supervised by a member of your staff who remains in the room with the records and the observer at all times. That staff member should record time-in and time-out for each observer and have observers sign for each record they examine.

Pragmatically speaking, when dealing with procedural due process, only one missing document from a file can put your system in an indefensible position. For example, if the permission to test or notification of IEP meetings is missing, this defect in procedural documentation would be extremely damaging in court. When dealing with legal issues, the first three rules should be document, document, and document. All else pales by comparison.

Calculate

Before proceeding, you should count all the costs. Acquiescing to parent demands may seem cheaper than going to court, but that decision should not be made without weighing the long-term costs against the short-term gains. Suppose, for example, parents want a piece of equipment for their child, which really is unjustified and costs $3,600. You should weigh carefully what unrealistic expectations will be incurred by that acquisition and define the situation to your Board—and not simply by telling the Board that the equipment costs $3,600 and litigation will cost $30,000. If you do, you can expect the Board to take what it perceives to be the cheaper route. Instead, make the Board aware of the hidden costs incumbent in using placebos. Your system most assuredly will pay now or later. If the Board agrees to purchase the equipment to forestall litigation and the use of that equipment is ill advised, the school system may pay both now and later.

If the parents have the idea that a single piece of equipment will be the panacea for their child and it turns out to be a placebo instead, the system and the student both lose. When systems agree to magic bullets (and some do), all they accomplish is to change the calendar and the scenery of the ultimate payback. Providing parents with longitudinal data on the child and alternatives from which your state's level of benefit (reasonable expectation or maximum) can be expected to result will make your task easier.

The same dangers reside in the system's being the first to try every new technique. The stories emerging from some of the widescale uses of facilitative communication, for example, are nightmares. One parent has spent more than $100,000 in legal fees to defend himself against unfounded allegations of child abuse. The family has suffered immeasurable damage. The facilitator and the school system now are being sued (Viadero, 1993), all because a system jumped on a bandwagon without sufficient data from which to calculate the long-term costs.

Contemplate

People would be wise to learn from others' experiences. You should seek out, for your attorney, professionals who have been involved in other cases. They may have knowledge of expert witnesses whom the plaintiffs used previously. Once the plaintiffs announce who their witnesses are, you should examine their vitae, looking for gaps or frequent changes of position. This includes the appropriateness of their background, how they got their current position, and how they were selected for this case.

Many expert witnesses have skeletons in their closets, and their advocacy is tainted by hidden agendas. Two noted inclusionists, for example, were writing in avid defense of special classes just a few short years ago. Think how it would look to a court if witnesses who say "put everyone in general education classrooms" have defended, in print, the virtues of one of the more restrictive environments they now deplore (Stainback & Stainback, 1975).

It also pays to ask if they have links to political appointees, past or present, who have made programmatic placement

decisions the "in" thing and how many politically correct projects they have had funded. Also, do they currently have federal projects (OSEP) either in progress or under consideration? Your sources within the profession can gather this kind of information far easier than your attorney can.

Once they have reached the point of coming on site, you should watch closely for compliance with court guidelines in how they are to examine student records or observe the situation in contention. Your lawyer may have to contact the court to prevent violations of procedures that have been negotiated with the judge. In one situation the plaintiffs were taping teacher conferences secretly without the teachers' knowledge. We had to take actions to stop this because the court already had forbidden such taping.

In our experience, advocacy groups and their expert observers are not beyond pushing the limits on observations or reviews of student records. In St. Louis we constantly had to remind them of the court parameters. Several of their observers wanted to remain in classrooms far longer than the court had approved. They even tried to violate the rights of other students by slipping into classrooms where other parents had not given permission to observe. In fairness, a few of these witnesses had driven straight from the airport to the schools without being apprised by the attorneys on the protocols. Others (we described earlier) knew and sought to violate them anyway.

You should review with your attorney the curriculum vitae of all expert observers and witnesses and contemplate the kinds of assumptions one who is naive to the field might make in looking at those vitae. For example, the attorney has to understand that a degree in psychology is not a prerequisite for a good witness on the education of individuals with disabilities. Also, a person who has experience with students with autism is not an authority on students with mental retardation or general education. Your lawyer may not realize which are juried journals in the field of special education and which are not. A witness with inadequate publication in juried journals should be questioned about his or her qualifications as an expert witness in the case.

You should not hesitate to write a list of questions for your lawyer to ask the plaintiff's expert witnesses. Many expert witnesses have a background in psychology or fields other than education, so questions about educational methodology or assessment are entirely appropriate.

We recall one case in which a witness probably was not used because a weakness of that nature had been exposed. This professional, at a regional college, professed to be an authority in the assessment and education of individuals with severe and profound mental retardation. Her deposition revealed that she was not familiar with one of the most widely used assessment instruments. Furthermore, the summer program she ran did not include the elements of an inclusive school that had been described previously. Had the attorney not been "prepped" on what questions to ask, her testimony would have been highly damaging. A little contemplation, coupled with the advanced preparation growing from it, prevented a travesty.

Investigate

Litigious advocates must be investigated. Sometimes professional witnesses have agendas that are unknown but that can be beneficial, if revealed, in the defense of school system programs. We are reminded of an observer we once opposed. His advocacy could be traced to earlier incidents when his own child had difficulty in another school system.

Checking the background of advocates can pay massive dividends for your system. You can call around or look up delegates from their states when you attend conferences of the Council for Exceptional Children or similar meetings. Colleagues might have information that will help you and your lawyer understand your opposition.

Their writings should be checked. At the very least, their claims should be spot-checked. If they seem especially prolific, it wouldn't hurt to read carefully what they have written that relates to the kind of students with whom they have worked. The extent of their research should be verified. Despite professional ethics, some researchers do publish the same findings as original research in more than one journal.

Among your own network of colleagues, you may discover someone who has worked with these witnesses in the past. Questions about their productivity and funding should be open-ended. One of our favorites is, "What should I know about this person that nothing on his or her vita would prepare me to ask?" Investigating witnesses can be interesting to you and extremely helpful to your attorney.

Evaluate

This is a good opportunity to evaluate your programs and practices. Even good systems drift at times into practices that may not be the soundest. For this reason, it is a good idea to have systematic evaluations of your assessment practices, programming, class enrollments, and instruction regardless of whether you are facing litigation. Sometimes the absence of adequate materials, laboratories, and computers that are avail-

able for general education students can be the basis for lawsuits (*J. G. by Mrs. G. v. Board of Education of Rochester City School District*, 1993).

Even after monitoring, you can find ways to improve your assessment practices. Observations also may find large numbers of students with periods of nonengagement in instruction. Skill and instructional inventories should be done in general education as well as in special education. Even though these evaluations may be by-products of litigation, the actual information is helpful to any system.

Whether you are doing this for prevention or in preparation for a trial, we suggest that you look at your own system adversarially. Think as the opposition thinks. Try to visualize what the opponents may use to make you or your system look bad. Try to reframe everything you see in its worst light. Then seek ways to resolve the problem.

We will give you a few examples of what we have seen. First, we already have mentioned time on task, or engagement. This is an all too frequent means of demonstrating that the child is not receiving an appropriate education. The implication is that, in general education, because the teachers teach and interact with the whole group most of the time, the child actually would be getting more instructional time in that setting.

Although educators know that just being in the classroom is not the same as paying attention, some jurists and juries can be misled. It is true especially if the plaintiff's witnesses have collected data on time on task or engagement. We have seen advocates make claims of inadequate or inappropriate reinforcement. They also may claim inadequacy of IEP goals or the number of goals. They will claim that teachers do not record data systematically and often make a "big case" if data are not recorded daily.

Your worst nightmare will come to life if you are accused of having recorded instruction on days that were weekends or holidays. Errors such as these are more likely when the teacher does not teach daily, as with a speech and language pathologist or an itinerant specialist. You cannot imagine what a scene can be made in court as an attorney requires you to read the dates of service. He or she will hand you a calendar and ask you to look up the day of the week on which a particular date falls. These are just a few ideas. Your imagination is your only limitation in identifying problem areas as you try to pick apart your system.

As distasteful and costly as litigation may be, some prevention and fine-tuning of procedures can be a valuable outcome. Regardless of the dislike one may have for litigation, most programs are improved as a result of the processes involved. Actually, we do not know of a case in which improvement did not occur. We hope, though, that we can obtain similar results without expending educational funds, time, and efforts toward resolving litigation. One way is to engage a consultant to come in periodically and make a preventive evaluation. This evaluation may prevent a parent or advocate from vetoing any consideration of your special program. In a recent example (Vargo & Vargo, 1993), parents visited a special class for those with severe disabilities. The class was housed in a school that was a special school completely away from nondisabled students. Strike one!

"Where is the alphabet?" they asked. Strike two!

Just a few years ago we would have discounted such an expectation, saying that no child who has an IQ of 50 really learns to read. Now parents want students with the most severe disabilities to be exposed to everything that is age-appropriate. We do not say you have to agree.

The next questions were: "Where is the American flag?" and "Where are the bulletin boards?" Strikes three and four!

Then, "Where do the children go to eat lunch?" Strike five! We could go on and on.

In the Tennessee case (*U.S.A. v. Tennessee*, 1993) the plaintiffs looked for age-appropriate materials, stimulating bulletin boards, and well structured class schedules, as well as many of the points we mentioned earlier. The observers discovered instructional toys that are used appropriately with normally developing young children. Although the students with disabilities in Tennessee were developmentally at the same level, the materials were damaging in court because they were not age-appropriate. Needless to say, inappropriate materials or lack of materials should be discovered and corrected. Many adversarial advocates, with or without permission, will check your closets and cabinets! Even though these elements may make you uncomfortable, your office is a less expensive setting to hear your deficits revealed than the courts are.

Educate

The importance of preparing personnel for their participation in the litigation process should not be overlooked. School personnel often are unacquainted with, and fearful of, the legal process. Once a case reaches the trial preparation stage, the opposing side will want to observe the child, special education program, records, and sometimes general education classes as well. In our experience, even the best of teachers and aides can clam up and fail to reinforce students or to intercede with appropriate discipline. They need to have a preview of the observation process before it begins.

We have seen staffs that are well trained in what to expect and how to respond, but the preponderance of our experience is that educators are poor matches for lawyers and many advocates even though the teachers' pedagogy is strong. Teachers, and even some superintendents and administrators, often respond poorly in depositions and in court testimony. Because definite steps can be taken to prevent this situation, it behooves us to anticipate the worst and prepare for it.

Even the most skillful teacher may not be able to explain the program or give a rationale for why given procedures are done in a certain way. Teacher preparation programs seem to be so successful in segmenting theory from methods that teachers later have difficulty synthesizing the two. For example, they may know the rules for using learning strategies. They may even know how to teach those rules and still fail to understand how those rules connect to learning theory. Their testimony then leaves the impression that none of the theories of cognition, metacognition, and metamemory are connected to their methods. Teachers who can explain in court what they do and why they do it may have inestimable value to your case. Educating or reviewing your teachers every few years in the theoretical underpinnings of your program may well be worth the time and effort. Such a course will not be the most popular staff development you offer, but it will reap dividends in the long run.

Anticipate

Following the adage that the best defense is an offense, you and your lawyer should anticipate problems before a due process or other legal action begins. While you are working on improving the specificity of behavior observations, for example, you should keep in mind that *anything*, written or unwritten, can come back to haunt you.

Almost everything is discoverable by the other side. "Discoverable" is legalese meaning anything they ask for, they get (documents, etc.). Notes written to take home to the parent, comments within the cumulative file, notes from the teacher to the principal, memos to the superintendent, even a conversation overheard in a teachers' lounge—all are discoverable.

If you must write something for documentation, it must be written objectively, specifically recording relevant behavior. If you wonder about the objectivity of a description, you might have a naive reader reenact the incident using only your description. If this person succeeds, without prompts, in reproducing what you were trying to describe, you have done well.

When telling other teachers something they need to know when working with the child, you should be certain that only the people who need the information will hear it from your lips. A good rule of thumb is not to say or write anything you would not want to defend in court.

When you or the teachers go to give a deposition, the plaintiffs can request every shred of information they think they can use against you, even lesson plans. If a teacher or supervisor was asked to observe a child, the notes he or she made or wrote to the supervisor are discoverable. We cannot emphasize enough that, although data and communications can be a tremendous asset, those same data and communications also can be used against you in court. In the Tennessee case (*U.S.A. v. Tennessee*, 1993), the plaintiffs produced a letter the expert in psychology had written to a colleague 7 years earlier. As you record needed information, anticipate. Ask yourself what it might look like 7 years from now.

Your people also need to know that anything they take to a deposition or trial is discoverable. If you consult your notes, the other side will ask the court to see your notes, which they then study or copy, or both, before the legal action continues. Therefore, you should take as little written information as is possible to a deposition or trial. What you take should be only information that you cannot remember, such as enrollments in programs by months, a comprehensive curriculum guide, policies and procedures for community-based education, and the like.

In a recent case we saw an interesting example of anticipation worthy of O. Henry. The plaintiff's attorneys examined the three notebooks brought into the courtroom by the education expert witness for the defendant. In this case all the materials had been selected carefully for use in the trial. None could be injurious to the school system but, if brought up in court, could damage the plaintiff's case. These materials included research documenting the defendant's position, copies of decisions in other LRE and FAPE cases, and other similar information.

When the plaintiffs demand to see your information, either in the deposition or in trial, it usually has an effect on your witnesses. These requests by the plaintiffs can be intimidating. If you have done your homework as we have suggested, you have nothing to fear. Most of what we have related here falls under the category of education. As educators, we have not been trained to think in legalese. We were trained to provide appropriate educational programming. It behooves us to anticipate potential legal actions by thinking in legal terms and by attending to the constraints on behavior it implies.

CONCLUSIONS

In summary, regardless of how well developed and implemented your educational programs are, and regardless of how well you follow due process procedures, you probably will be involved eventually in a suit. Some people find it profitable to engage others in suing rather than reasoning over their differences, and some people are just frustrated enough to follow that advice. As long as these two groups continue to have a symbiotic relationship, lawsuits will arise. As repugnant as it is to meet them in court, however, it should not be a foregone conclusion that the decision will be rendered against well documented, thoughtful, child-centered placements and programs.

School systems are not helpless in the face of a suit. They can and should take a proactive stance. They should mediate, communicate, collaborate, remediate, document, calculate, contemplate, investigate, evaluate, educate, and anticipate. None of these suggestions offers the glitz and glamour of televised litigation but, combined, they do support success.

REFERENCES

Alberto, P., Elliott, N., Taber, T., Houser, E., & Andrews, P. (1993). Vocational content for students with moderate and severe disabilities in elementary and middle school grades. *Focus on Exceptional Children*, *25*, 1–12.

Anderegg, M. L. (1989). *Regular educators' responses to three key issues of the regular education initiative: An investigation of regular educators' experiences*. Unpublished dissertation, Georgia State University, Atlanta.

Anderegg, M. L., Vergason, G. A., & Smith, M. C. (1992). A visual representation of the grief cycle for use by teachers with families of children with disabilities. *Remedial & Special Education*, *13*(2), 17–23.

Board of Education Hendrick Hudson Central School District v. Rowley, 458 US 176, 102 S. Ct. 3034, 73 (L.Ed. 2d 690, 1982).

Christi Greer v. Rome City School District, 18 IDELR 412, 19 IDELR 100 (11th Cir., 1991, 1992).

Corores v. Portsmouth School District, 18 IDERL 461 (DNH, 1991).

Cordero v. Pennsylvania Department of Education, 19 IDELR 623 (M. D. Pa., 1993).

Daniel R. R. v. El Paso, 874 F. 2d 1036 (5th Cir. 1989).

Daniels-Mohring, D., & Lambie, R. (1993). Dysfunctional families of the student with special needs. *Focus on Exceptional Children*, *25*(5), 1–11.

Dempsey, S., & Fuchs, D. (1993). "Flat" versus "weighted" formulas: A longitudinal analysis of state-wide special education funding practices. *Exceptional Children*, *59*, 433–443.

Dobbs, R. F., Primm, E. B., & Primm, B. (1991). Mediation: A common sense approach for resolving conflicts in education. *Focus on Exceptional Children*, *24*(2), 1–11.

Doe v. Arnig, 651 F. Supp. 424, 37 Educ. L.R. (D. Mass. 1987).

Fisher, R., & Ury, W. (1991). *Getting to yes: Negotiating agreements without giving in*. New York: Penguin.

Garrison, G. W. (1990). *Special education practitioners' responses to three underlying assumptions of the regular education initiative*. Unpublished dissertation, Georgia State University, Atlanta.

Holland v. Sacramento City Unified School District, 18 IDELR 761, 786 F. Supp. 874 (E.D. CA, 1992).

J. G. by Mrs. G. v. Board of Education of Rochester City School District, 20 IDELR 663 (W.D.N.Y. 1993).

Kauffman, J. M., & Hallahan, D. P. (1990, October 24). The politics of special education "backlash." *Education Week*, *25*, 27.

Kubler-Ross, E. (1969). *On death and dying*. New York: Macmillan.

Larry P. v. Riles, 343 F. Supp. 306; aff'd. 502 F. 2d 963, 495 F. Supp. 926, aff'd. 502 F. 2d 693 (9th Cir., 1984).

Lester H. v. Carroll, 16 ELHR 10 (E. D. PA, 1989).

Love, L., & Lund, K. (1993). Labor laws at odds with transition programs. *Counterpoint*, *14*(2), 11–12.

McKee, P. (1993). Do not resuscitate order poses tough issue in Maine. *Special Educator*, *9*(7), 102–103.

McNulty, B. (1991). Speech to meeting of the Georgia Administrators of Special Education, March 1991, Decatur, GA.

Merry et al. v. Parkway School District et al., No. 88–2189–C–7 (U. S. Dist. MO, 1988).

Murphy v. Timberlane Regional School District, 19 IDELR 846 (D. N. H., 1993).

Oberti v. Board of Education of Clementon School District, 19 IDELR 423 (original) and (appeal) 19 IDELR 908 (1993) (D. N. J., 1992).

Pihl v. Massachusetts Department of Education, 20 IDELR 668 (1st Cir., 1993.

Ruesch, G. (1994, February 8). Questions and answers. *Special Educator*, *9*(12), 180.

Sacramento School District v. Holland, 20 IDELR 812 (9th Cir., 1994)

Separate but not equal: How special education programs are cheating our children and costing taxpayers billions each year. (1993, December 13). *U. S. News and World Report,* pp. 46–60.

Smith, M. C. (1990). *Reaction to proposed educational reform: An examination of principals' and special education administrators' responses to assumptions of the regular education initiative*. Unpublished dissertation, Georgia State University, Atlanta.

St. Louis Special School District. (1992). *A social skills curriculum*. St. Louis: St. Louis Special School District.

Stainback, W., & Stainback, S. (1975). A defense of the concept of the special class. *Education & Training of the Mentally Retarded*, *10*(3), 91–93.

Statum v. Birmingham City School System, CV–92–P2054–F (N. U. S. Dist. AL, 1993).

United States of America v. Tennessee, CA–20–2062 HA (U. S. Dist. W. TN, 1993).

Ury, W. (1991). *Getting past no: Negotiating with difficult people*. New York: Penguin.

Van Viema, D. (1993). Education and death. *Time*, October 11, 1993, p. 60.

Vargo, R., & Vargo, J. (1993). Parents: A "typical" classroom is the only choice. *Counterpoint*, *13*(1), 5.

Viadero, D. (1993, November 17). Facilitated communication under new scrutiny. *Education Week*, *13*(11), 1, 9.

Ysseldyke, J., Thurlow, M. L., Algozzine, B., & Nathan, J. (1993). Open enrollment and students with disabilities: Issues, concerns, fears and anticipated benefits. *Exceptional Children*, *59*, 390–401.

FOCUS ON EXCEPTIONAL CHILDREN

INDEX • Volume 26

Author Index

Chronological Index of Titles