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**COMMON MISTAKES AND MISCONCEPTIONS IN SPECIAL EDUCATION**

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**I. INTRODUCTION**

This presentation examines common errors made by school staff in the area of special education and provides advice for correcting them.

**II. NEW CONCILIATION CONFERENCE RULES**

- a. The old statutory rule was that after receiving notice that a parent rejected a proposal for which they were given a prior written notice, a district had a *duty* to offer a conciliation conference within ten days. However, the legislature recently amended the statutory rule. As of August 1, 2019, the parent must now request a conciliation conference.
- b. Specifically, the legislature amended Minnesota Statutes Section 125A.091, subdivision 7, to state:

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A parent must have an *opportunity to request a meeting* with appropriate members of the individualized education program team or meet with appropriate district staff in at least one conciliation conference if the parent objects to any proposal of which the parent receives notice under subdivision 3a. A district must hold a conciliation conference within ten calendar days from the date the district *receives a parent's request for a conciliation conference*. Except as provided in this section, all discussions held during a conciliation conference are confidential and are not admissible in a due process hearing. Within five school days after the final conciliation conference, the district must prepare and provide to the parent a conciliation conference memorandum that describes the district's final proposed offer of service. This memorandum is admissible in evidence in any subsequent proceeding.

- c. MDE has **not** yet amended the rules to reflect the change in statute. Thus, Minnesota Rule 3525.0755 still refers to a district's obligation to hold a conciliation conference within ten days of rejection of a PWN.
- d. The new statute also contains a requirement that a PWN include notice of the right to request a conciliation conference. Specifically, the PWN must: "state that a parent who objects to a proposal or refusal in the prior written notice may: (i) request a conciliation conference under subdivision 7 or another alternative dispute resolution procedure under subdivision 8 or 9; or (ii) identify the specific part of the proposal or refusal the parent objects to and request a meeting with appropriate members of the individualized education program team."

### **III. FAILING TO SEND A PRIOR WRITTEN NOTICE WHEN REQUIRED**

#### **a. How it arises.**

- i. Case manager makes what he considers to be a small change to an IEP, like adding a new accommodation.
- ii. A parent makes a request to change the IEP by adding speech services. The student has never demonstrated a need for speech services. The Case Manager responds to the parent and indicates the student has never demonstrated a need.

#### **b. What's wrong?**

- i. PWN needs to be sent any time a school "[p]roposes to initiate or change the identification, evaluation, or educational placement of the child or the

provision of FAPE to the child; or [r]efuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child.” 34 C.F.R. 300.503(a).

**c. How to fix it.**

- i. Almost any time a change is made to an IEP, the change will relate to the provision of FAPE to the child. The assumption should be that if the IEP is being changed, a PWN needs to be sent.
- ii. If an IEP team is refusing to make a change, it needs to be declined via a PWN.

**IV. SENDING AN INCOMPLETE PWN**

**a. How it arises.**

- i. Teacher copy-and-pastes a PWN that says:

*Description of action proposed or refused:* The IEP Team is proposing changes to the Student’s IEP.

*Why action is proposed or refused:* Student’s IEP was last revised a year ago and is due for a revision.

*Description of evaluation procedure, etc. used as basis for decision:* Evaluation, Progress Reports, Teacher Observations

*Other options considered:* The Team considered not revising the IEP, but determined it needed to make changes.

*Other relevant factors.* None.

**b. What’s wrong?**

- i. The PWN does not provide any useful or meaningful information to the parents regarding any substantive changes to the IEP.

**c. How to fix it.**

- i. Ensure the PWN provides a sufficient explanation of the changes proposed or refused. It does not need to repeat everything in a revised

IEP, but should contain more than boilerplate language that there were changes.

ii. Proposed Revisions:

*Description of action proposed or refused:* The IEP team is proposing revisions to the Student's IEP by updating the annual goals. The Student's reading goal is revised to increase the number of words per minute the Student is expected to read. The Student's social skills goal and services are removed.

*Why action is proposed or refused:* The Student's reading goal is revised to reflect the progress the Student has made on his prior goal. The Student's social skills goal and services are proposed to be removed because the Student achieved his goal and no longer demonstrates a need for social skills services.

*Description of evaluation procedure, etc. used as basis for decision:* Evaluation, Progress Reports, Teacher Observations, Parent Reports

*Other options considered:* The Team considered continuing the Student's social skills programming, but determined he no longer demonstrated a need.

*Other relevant factors:* None.

**V. FAILING TO PROPOSE IEP SERVICES BECAUSE A PARENT INDICATES THEY DO NOT WANT THEM**

**a. How it arises.**

- i. IEP Meeting is going well. The parents are agreeable and everyone seems to be on the same page about the student's needs. In a discussion about service minutes, the parents mention that their child is really excelling with his outside OT, so they ask the Case Manager not to include OT services at school.
- ii. In discussing whether a student is eligible for special transportation, the team agrees that the student has needs and would qualify. The parents say they intend to transport the student anyway, so the Case Manager checks "no" for whether the student is eligible for special transportation.

**b. What's wrong?**

- i. A school has the responsibility to propose FAPE regardless of whether the parents will agree to the services proposed. While staff may have an initial inclination to draft an IEP they know the parents will agree to, if there is a later dispute, the school could be liable for failing to propose FAPE.

**c. How to fix it.**

- i. Schools should propose an IEP that includes all services necessary for the student to receive FAPE, regardless of whether they expect the parent to agree to the IEP. If the parent rejects the initial IEP, then the team can remove the service that is objected to while preserving a record that the team proposed FAPE.

**VI. MAKING CHANGES TO AN IEP SOLELY BECAUSE A PARENT ASKED**

**a. How it arises.**

- i. Parent approaches the Case Manager and says "I really don't like that my kid is missing art class to attend social skills. I don't want him to attend social skills any more." Case Manager says "ok" and student stops attending social skills.

**b. What's wrong?**

- i. Any substantive changes to the IEP should be considered by the team and documented in an IEP with a PWN. Failure to do so results in services being provided that are not in compliance with the IEP.

**c. How to fix it.**

- i. If the change is relatively minor and the school members of the team agree, the change can be documented in an amendment to the IEP. The Amended IEP should be sent to parents with a PWN.
- ii. If the change is more extensive, the school members of the team should consider whether a meeting is necessary to consider the request. If changes are made, they should be documented in the IEP and in a PWN. If the team determines the change is not necessary, it should send a PWN denying the change.

## VII. MAKING AN ESY DETERMINATION WITHOUT CONSIDERING DATA

### a. How it arises.

- i. As the IEP Team gets to the end of its scheduled meeting time and is trying to cover all its bases, it gets to the question of ESY. Case Manager says “she doesn’t need summer school” and the Team moves on.
- ii. IEP Team meeting in January gets to the ESY question and decides the student didn’t show regression over Winter Break and is therefore ineligible.

### b. What’s wrong?

- i. The IEP Team needs to make an individualized determination and consider all three potential categories for ESY eligibility based on data about the student.
- ii. It is insufficient to consider that a student is “generally doing well” without specifically considering eligibility. *See* Minn. R. 3525.0755.

### c. How to fix it.

- i. Ensure staff are properly trained to consider the eligibility criteria for ESY pursuant to Minnesota Rule 3525.0755. This includes independently considering whether the student exhibits difficulty with regression/recoupment, self-sufficiency, or unique circumstances warranting ESY services. *In re Complaint Brought on Behalf of Student and All Students in the Functional Skills Program at Halverson Elementary School, Ind. Sch. Dist. No. 241, A17-0085* (Minn. App. Oct. 2, 2017).
- ii. The IEP Team must consider the following factors (where they are relevant): “the pupil’s progress and maintenance of skills during the regular school year; the pupil’s degree of impairment; the pupil’s rate of progress; the pupil’s behavioral or physical problems; the availability of alternative resources; the pupil’s ability and need to interact with nondisabled peers; the areas of the pupil’s curriculum which need continuous attention; or the pupil’s vocational needs.” Minn. R. 3525.0755, subp. 5.

## VIII. LISTING VAGUE ACCOMMODATIONS

### a. How it arises.

- i. Tests and assignments will be shortened as necessary.
- ii. Student may access resource room.

### b. What's wrong?

- i. Vague accommodations leave ambiguity regarding how they should be provided and implemented.

### c. How to fix it.

- i. Accommodations must be specific enough for someone outside the IEP meeting to understand what they mean.
  1. "As needed" is typically not specific enough because a teacher trying to implement the accommodation in a classroom won't know when the student needs something to be shortened.
  2. Better alternatives: "Multiple choice tests with more than 30 questions will be shortened to no more than 20 questions. The classroom teacher will identify which questions the student is required to complete." "On routine math practice worksheets, student will only be required to complete the odd-numbered problems." "For a writing assignment requiring essay-style answers, student will be required to write no more than one paragraph for each answer."
- ii. Accommodations should specify the circumstances in which they apply. That the student can access the resource room does not tell the reader when or why the student can or should do so.
  1. Better alternatives: "Student may choose to perform classwork in the resource room when feeling overwhelmed in the classroom environment." "Classroom teacher will ask Student if she would prefer to work in the resource room during worktime."

## **IX. DRAFTING GOALS AND OBJECTIVES THAT ARE NOT MEASUREABLE**

### **a. How it arises.**

- i. Goal states: Student will improve her ability to remain on task and work independently in the classroom.

### **b. What's wrong?**

- i. The goal does not provide any measureable outcome. We do not know the student's current level of performance or what is reasonable to expect the student to accomplish within the next year.

### **c. How to fix it.**

- i. Revise to state: Student will improve her ability to remain on task and work independently in the classroom from a current level of 0% to remaining on task and working independently in the classroom 20% of the time as measured by classroom teacher and Case Manager observation.

## **X. FAILING TO TRACK MEASUREABLE GOALS AND OBJECTIVES USING MEASUREMENTS**

### **a. How it arises.**

- i. Teacher corrected the errors from the previous section and has a measureable goal. The Progress Report states "Student is improving on her ability to remain on task and work in the classroom."

### **b. What's wrong?**

- i. To show progress on a measureable goal, data must be tracked using the measurements and data specified in the goal. Phrases like "doing well," "improving," "working toward," etc. are generally not helpful in determining progress because they don't explain what the student has accomplished.
- ii. Similarly, we sometimes see progress reports where the data reported is similar to, but not exactly, the goal or objective that is being reported. For example, if an objective is for a student to stay on task for ten minutes with two or fewer adult prompts, the following does not provide meaningful information as to how often the student is able to meet the

objective: “sometimes Student can stay on task for ten minutes with no prompts and other times Student requires multiple prompts.”

**c. How to fix it.**

- i. Track and report data using the language of the goal or objective. Service providers should be trained to track data using measurements rather than relying on generalities about the student’s behavior.

**XI. DRAFTING GOALS AND OBJECTIVES THAT REQUIRE THE PARENT OR SOMEONE ELSE TO PERFORM OR TRACK**

**a. How it arises.**

- i. Parent expresses concern that their child does not spend time with friends outside of school and wants a goal to address this behavior. The goal states: Student will spend time with a friend outside of school at least four times per semester.

**b. What’s wrong?**

- i. Many parts of this goal are outside the school’s control. Where will the student and friend spend time? What about transportation? What if time is arranged, but the student or friend is sick at the last minute? How will the case manager know it occurred?

**c. How to fix it.**

- i. If the student demonstrates a need for a goal along these lines, the IEP Team should consider how it can help the student develop the skills necessary to facilitate spending time with friends outside of school. For example, does the student need to role play inviting a peer over? Can the student practice the skills by asking a peer to play at recess, sit together at lunch, or work together during study hall?
- ii. Because school staff can observe and track the behavior that occurs in a school setting, there is no need to rely on (potentially unreliable) parent or student reports about what occurred.

## **XII. FAILING TO PROPOSE A MEDICAL EVALUATION**

### **a. How it arises.**

- i. Parent insists that her child has an ADHD diagnosis that must be considered as part of an evaluation. After repeated requests, the Parent has not provided documentation of the diagnosis. Although staff observe many behaviors that could be indicative of ADHD, the team concludes the student is not eligible because there is no diagnosis.

### **b. What's wrong?**

- i. A school district has the responsibility to conduct a “full and individual” evaluation after a school district identifies a student as potentially having a disability. 20 U.S.C. § 1414(a)(1)(A). This includes a requirement that districts provide medical services for *diagnostic or evaluation* purposes. 34 C.F.R. § 300.34(a).
- ii. “A student must be evaluated in all areas of suspected disability.” Minn. R. 3525.2710, subp. 3(C)(4). A student may be eligible for special education if they have documentation of a medically diagnosed chronic or acute health condition and the health condition affects a student’s ability to “complete educational tasks within routine timelines as documented by three or more” of the following examples: excessive absenteeism; specialized health care procedures during the school day; medications that adversely affect learning; limited physical strength; limited endurance; heightened or diminished alertness; impaired ability to organize materials; and impaired ability to follow directions or initiate and complete tasks. Minn. R. 3525.1335.

### **c. How to fix it.**

- i. A school district must arrange for a medical evaluation when necessary for an evaluation. *Independent School District No. 413, Marshall v. H.M.J.*, 2015 WL 4744505 (D. Minn. Aug. 11, 2015).
- ii. School districts need to recognize situations where a medical evaluation may be a necessary component of a comprehensive special education evaluation. A medical evaluation may not be necessary if the parents provide documentation of a diagnosis from a licensed physician within the previous twelve months. If parents do not provide that information and a

medical condition is suspected, a school district must propose a medical assessment as part of a comprehensive evaluation.

- iii. Practically, schools can offer to pay for the parent to take the student to the student's regular medical provider, contract with a medical provider to conduct an examination and provide the results to the school team, or inform the parent about free clinics at which the student could receive a diagnosis.

### **XIII. IMPROPERLY RESPONDING TO AN IEE REQUEST**

#### **a. How it arises.**

- i. A parent inquires about having an IEE performed. Trying to be helpful, the case manager asks the parent what they think is wrong and proposes a new school evaluation to address the parent's concerns.
- ii. District grants a parent's request for an IEE and drafts an evaluation plan for the IEE, including a requirement that the IEE be completed within thirty school days.

#### **b. What's wrong?**

- i. Upon receiving a request for an IEE, a district must either provide the IEE at public expense or file for a due process hearing to defend the district's evaluation. 34 C.F.R. § 300.502(b). The district does not have an option to redo or supplement its own evaluation in response to a parental request for an IEE.
- ii. There are very few requirements that a district can impose on an IEE. A district can impose reasonable limits on cost, including distance, but most allow the parent an opportunity to demonstrate that unique circumstances justify exceeding the district's requirements. A district cannot limit the IEE to areas in an evaluation plan or require that it be completed within a particular timeline. The IEE must be completed by an examiner who meets the district's criteria and can complete the evaluation on a timeline that is acceptable to the parent. The parent and examiner are responsible for scheduling.

**c. How to fix it.**

- i. Districts should train staff so that any request for an IEE is immediately transmitted to an individual (Director/ Assistant Director/ Coordinator) who can respond to the request with information on obtaining an IEE.
- ii. District responses to requests for IEEs should ensure that parents understand their responsibilities with respect to arranging for having an IEE completed.

**XIV. ISSUING BLANKET RESPONSES**

**a. How it arises.**

- i. A parent makes an objectively ridiculous request—like their third-grader with EBD needs music therapy because he really enjoys music. A member of the IEP Team says “we would never provide music therapy in school.”
- ii. A student is eligible for services under both the ASD and OHD criteria. A parent questions why ASD is primary and OHD secondary rather than the other way around. A staff member responds “you want your child eligible under ASD so we can place him in the ASD classroom—otherwise, he’ll be with a bunch of kids with ADHD.”
- iii. A parent makes a request that a school administrator thinks is ridiculous—like their tenth grader who has a 3.8 g.p.a. and was recently diagnosed with depression and should be evaluated for special education. The administrator responds “we don’t evaluate students with depression—if we did, half the school would have IEPs! Besides, your child doesn’t need special education because her grades are fine.”

**b. What’s wrong?**

- i. While it is unlikely that a school would need to provide music therapy because there are other ways to address a student’s needs, this response suggests staff are unwilling to consider individual circumstances to make an individualized determination of a child’s needs.
- ii. Students must be provided services based on their individual needs rather than labels. This may mean that a student who is eligible under one category is grouped with students primarily identified as having a

different disability for certain services. For example, a student with ASD may learn about self-regulation alongside student who are eligible for EBD services because both have the same needs.

- iii. While it is likely true that a school does not need to evaluate every student with a mental health diagnosis, an individual administrator should not make that determination based on one conversation with a parent. Having good grades does not, by itself, mean a student is not eligible for services.

**c. How to fix it.**

- i. Staff should be trained not to respond with blanket statements, no matter how extreme the request.
- ii. Staff should understand that needs drive services.
- iii. The administrator should refer the request to whoever is responsible for making the determination and, if an evaluation is not appropriate, the school should deny the request via prior written notice.

## **XV. INCORRECTLY RESPONDING TO REQUESTS FOR TRANSPORTATION**

**a. How it arises.**

- i. A student with a physical disability is eligible for special transportation because she requires a lift bus to transport her wheelchair. She is open-enrolled and the Team agrees to transport her only from the border of the district to school.

**b. What's wrong?**

- i. Based on recent MDE decisions and court cases, a student who requires door-to-door special transportation in order to receive FAPE must receive the necessary transportation even if the student does not reside within the district or within the attendance area for the school. *This decision is on appeal so there is potential the outcome may change.*

**c. How to fix it.**

- i. Provide transportation for students who require it, even if the student resides outside the district

## **XVI. IGNORING REQUESTS FOR ACCOMMODATIONS IN AFTER-SCHOOL ACADEMIC PROGRAMS**

### **a. How it arises.**

- i. Parents of a student with an IEP that includes a 1:1 paraprofessional to assist with behavioral regulation ask for a 1:1 paraprofessional in an after-school childcare program. The childcare program does not include an educational component. The IEP Team says it can't provide that because it is after the school day.

### **b. What's wrong?**

- i. Each IEP must include "a statement of the special education and related services and supplementary aids and services" that will be provided to a student in order to allow them to "participate in extracurricular and other nonacademic activities." 20 U.S.C. 1414(d)(1)(a)(i)(VI). Minnesota courts have adopted an expansive interpretation of this phrase. *Indep. Sch. Dist. No. 12, Centennial v. Minnesota Dept. of Educ.*, 788 N.W.2d 907 (Minn. 2010).

### **c. How to fix it.**

- i. If a district decides to allow the IEP team to make decisions about the student's participation in childcare programs, the *Centennial* case provides the appropriate framework for the team to consider:
  1. The team must consider whether the extracurricular and nonacademic activity is "appropriate" for the particular student; and
  2. If the activity is "appropriate" for the student, the team must consider which supplementary aids and services are "appropriate" and "necessary" to allow the student an equal opportunity to participate in the activity.