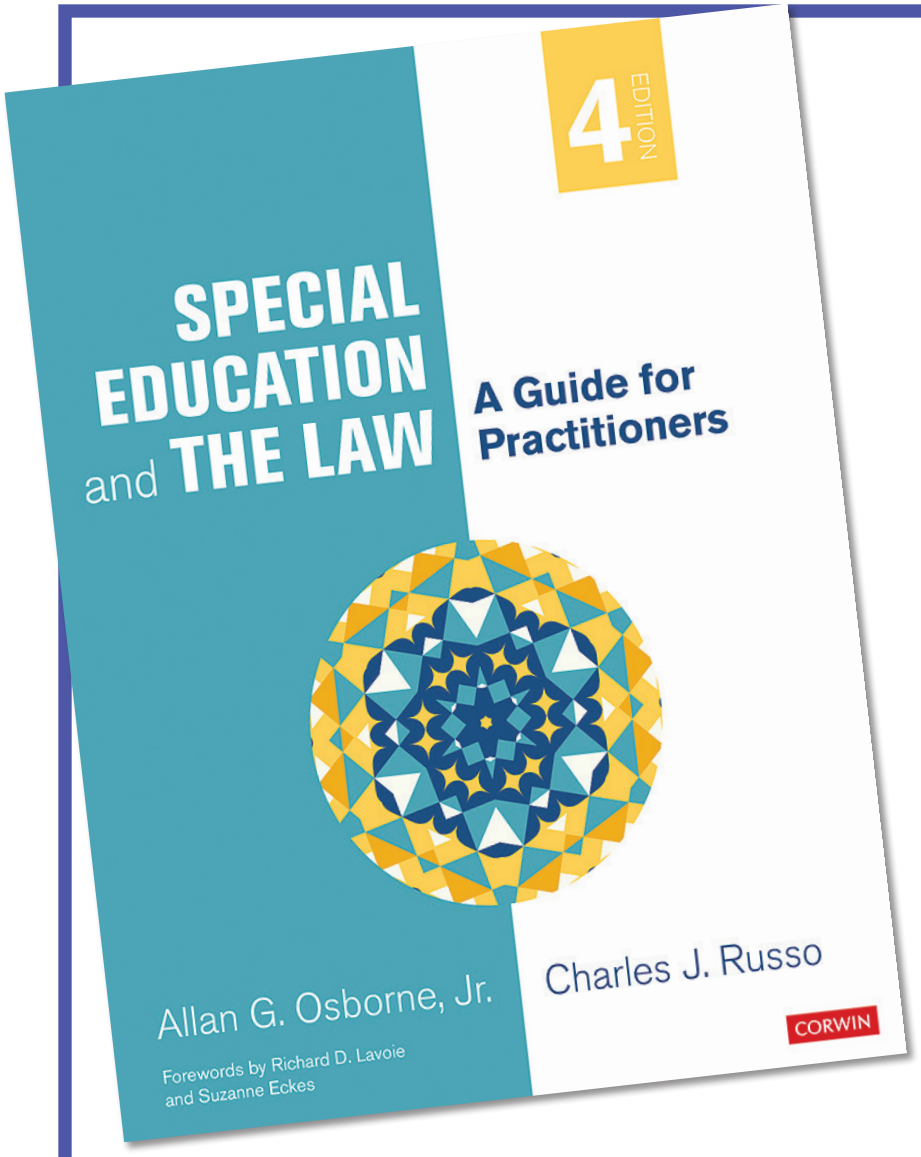

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CORWIN

Chapter 10

CONFLICT MANAGEMENT

IDEA Compliance

Key Updates

Recommended strategies for reducing conflict in special education

Guidance on the role of teacher recruitment and retention in preventative law

Updated recommendations for selecting an attorney for special education litigation

As this book demonstrates, a major part of the Individuals with Disabilities Education Act (IDEA)[1] is designed to ensure that school officials comply with its provisions, thereby requiring educators to provide a significant array of substantive and procedural rights to students with disabilities and their parents. At the same time, when Congress adopted the IDEA, it designed procedural due process provisions to serve as a vehicle to resolve disputes over the delivery of the free appropriate public educations (FAPEs) it guarantees students with disabilities.[2]

The IDEA's due process mechanisms are the most elaborate system Congress ever enacted to resolve disputes between parents and school officials. Unfortunately, although Congress envisioned parents and educators working together in developing individualized education programs (IEPs) for students with disabilities, there are times when the parties simply do not agree. Aware of the reality that parents and school officials may differ about what is best for children, Congress recognized the need to include dispute resolution processes in the IDEA.

This book provides information about many of the thousands of cases that have been filed since the IDEA was enacted. These suits involved numerous aspects of the IDEA and its regulations over the delivery of FAPEs. Although there has been a recent decrease in the litigation, it is unlikely to vanish in the near future.

Special education administrators have been heard to lament that it often seems as though they must have law degrees to carry out their positions successfully. Passing the bar is certainly not a prerequisite for assuming leadership positions in education, yet the reality remains that the process of providing special education to students with disabilities is very much a legal one. Successful special education practitioners must therefore be knowledgeable about the law and understand how the legal system operates. The educators who are most successful are those who proactively manage the legal system rather than respond by allowing it to manage their activities. Inasmuch as the goal of this chapter is to provide information about how and when to access the legal system, it does not end with specific recommendations apart from this narrative discussion. Instead, the chapter rounds out by offering suggestions for educational leaders

to use when selecting attorneys to represent the interests of their boards in disputes with parents over the delivery of special education services.

Preventative Law

The best way to deal with legal challenges is to prevent them from occurring, a practice known as preventative law. The purpose of preventative law is to increase educators' awareness of the dimensions of education law.[3] Even so, in recent years school boards have been forced to budget increased amounts of money for legal fees—funds that most would agree are better spent on educational programs. This is true in special education, where litigation has increased faster than in any other area related to schools.[4] In addition to paying their own legal fees, as discussed in Chapter 8, boards may have to reimburse parents who prevail in litigation for their attorney fees.

Aware of the need to avoid unnecessary litigation, many school officials have demonstrated an interest in preventative law. The goals of preventative law are to resolve disputes before they result in litigation and put school systems in favorable positions when parents initiate lawsuits.

Aware of the need to avoid unnecessary litigation, many school officials have demonstrated an interest in preventative law. The goals of preventative law are to resolve disputes before they result in litigation and to put school systems in favorable positions when parents initiate lawsuits. In order to be most effective, educators must practice preventative law daily by seeking permanent solutions to situations giving rise to conflict in schools. Generally, it is less expensive to enact policies and procedures proactively rather than mount what essentially are reactive or after-the-fact defenses in potentially protracted, and costly, litigation.

The first step in a program of preventative law is for school leaders and special education practitioners, including teachers, aides, and providers of related services, to be knowledgeable about the legal issues in special education. Reading this book and others like it should provide educators with a basic knowledge of the issues and the results of previous litigation. However, the law is constantly evolving as new cases that can alter its status are decided daily. Previous chapters cited examples of how these changes have occurred. Thus, school officials must take affirmative steps to stay abreast of legal developments.

Today numerous sources of information exist about issues and developments in education law. The Education Law Association (ELA), a nonadvocacy group, publishes *The Yearbook of Education Law*, often simply called *The Yearbook*, which includes a chapter on special education law. ELA also publishes a monthly newsletter, *ELA Notes*, and a reporter, *School Law Reporter*, as well as monographs to provide up-to-date information on school law. In the interests of full disclosure, we would like to point out that we are both past presidents of ELA. In addition, we have both worked on *The Yearbook*: Allan G. Osborne has written the chapter on students with disabilities in *The Yearbook* since 1990, and Charles J. Russo became editor of *The Yearbook* in 1995 and was a chapter author before becoming editor.

Many special education and general education journals frequently contain articles on legal issues, especially those involving special education. Professional and academic organizations such as the Council for Exceptional Children, the National School Boards Association and its state affiliates, the American Association of School Administrators, the American Educational Research Association, the Association of School Business Officials International, the National Association of Elementary School Principals, the National Association of Secondary School Principals, and ELA generally include sessions at their annual conventions that address legal issues in special education. In addition, the colleges or schools of education in many institutions of higher education offer courses on school law and/or the law of special education that can serve as excellent resources for educators.

Workshops on special education law should be part of every school system's professional development program.[5] In providing such ongoing professional development for staff, school officials should consider having their board's attorneys join in the presentations so they can provide up-to-date legal perspectives. Additional helpful resources are found on this text's companion website (https://resources.corwin.com/SPEDandthelaw4e): Online Resource A lists the websites of all fifty state (or commonwealth) departments of special education; Online Resource B provides a list of helpful special education websites along with brief descriptions of what they contain; Online Resource C is a list of legal search engines; Online Resource D lists U.S. Supreme Court, federal courts, and federal government websites; and Online Resource E provides edited versions of actual court cases, which can be used to teach key concepts.

Working with Parents

Litigation frequently arises out of misunderstandings or small differences of opinion between parties. Much costly and time-consuming litigation can be avoided if educators keep lines of communication open with parents and are willing to reach compromises when disagreements occur. When parents reject proposed special education placements and/or IEPs for their children, school officials should make every attempt possible to evaluate their reasons for doing so. Parental rejections may be due to misunderstandings over what proposals entail or disagreements with only minor aspects of IEPs. If educators do not communicate, or are unwilling to compromise, then litigation is likely to follow.

One of the most important aspects of the communication process for school officials, especially with parents, is to be active listeners. When parents present counterproposals or make additional demands, educators must listen and give serious thought to what they hear.

One of the most important aspects of the communication process for school officials, especially with parents, is to be active listeners. When parents present counterproposals or make additional demands, educators must listen and give serious thought to what they hear. In the spirit of compromise, school officials should be prepared to make some concessions. If educators cannot meet parental demands, they should take great care in explaining why parental proposals cannot or should not be implemented as they wish.

Another common source of litigation, in addition to conflicts with parents, is the failure of school personnel to implement federal and state laws, regulations, and policies as well as local school board policies. Put another way, although school boards typically have adopted appropriate and legally correct policies and procedures, their employees sometimes fail to implement them properly in all situations. This means that it is crucial for educational leaders to prepare new and continuing employees by providing ongoing professional development activities to ensure that staff members are aware of all policies and procedures as well as the importance of following these requirements.

As illustrated in Table 10.1, at least three strategies can help educators to minimize conflict with parents.[6] First, educators should keep parents informed and offer their support by providing parents with information about the disabilities of their children. This includes directing parents to their central office personnel, to local support groups that can better help them to understand the disabilities of their children, and to useful websites such as those identified in the resources on the companion website.

Second, educators should recognize that insofar as parents are part of the solution, not part of the problem, it is important to work with them in the best interest of their children with disabilities. Sadly, some school officials view the parents of special education, and other, students as potential troublemakers rather than as valuable partners who can help address the needs of their children. Educators should keep in mind that because, unlike parents, they are temporary in the lives of the children they serve, they must work together with parents in the process of designing IEPs that best suit the needs of students with disabilities.

Table 10.1 • Strategies for Minimizing Conflict in Special Education

Strategy	Steps
Keep parents informed	• Provide parents with information about disabilities • Offer parent support groups • Deliver workshops and seminars • Grant access to resources
Recognize value of parental involvement	• Work with parents, not against them • Solicit information from parents • Keep lines of communication open • Make sincere efforts to understand parental concerns
Follow the law	• Offer professional development on legal issues • Conduct legal audits of policies, procedures, and practices • Frequently consult with school board attorneys on issues

Third, educators must follow the law. Litigation in special education can be contentious and expensive because prevailing parents can recover attorney fees. Because of this, one of the most important steps for school officials to take in the realm of preventative law is to conduct periodic legal audits focusing on board policies, procedures, and practices to ensure that they are legally correct. Insofar as the status of the law is constantly evolving, it is important to complete legal audits at least every two years but preferably annually. School board attorneys, especially those who focus on special education, acting as part of teams with directors of special education and other central office personnel, should work together in conducting audits.

Teacher Recruitment and Retention

The IDEA requires school boards to "take measurable steps to recruit, hire, train, and retain highly qualified school personnel to provide special education and related services"[7] for students with disabilities. It should be obvious that having highly qualified teachers is essential in terms of quality outcomes for students, but it may also help to prevent legal conflicts. Many of the cases discussed in this book alleging a denial of FAPEs arose out of parental dissatisfaction with the progress made by their children.

Special education teachers need many skills not required of general education teachers. For example, in addition to having subject matter and pedagogical knowledge, special education teachers must be well-versed in testing and diagnostic techniques, specialized methodology, and behavioral strategies. Acquiring the specialized knowledge and skills required for licensure often requires additional training and degrees.

> Having teachers who are not properly prepared to implement the specialized techniques required for successful student outcomes in special education is more likely to lead to dissatisfied parents and ultimately more disputes over the provision of FAPEs.

Many jurisdictions report difficulties recruiting and retaining qualified special education teachers,[8] with the result that the critical shortage in this area[9] has resulted in far too many underprepared teachers[10] and paraeducators[11] in special education positions as states have sought to rely on emergency certification to help resolve the shortages.[12] Having teachers who are not properly prepared to implement the

specialized techniques necessary for successful student outcomes in special education is more likely to lead to dissatisfied parents and ultimately more disputes over the provision of FAPEs.

One of the main reasons former special education teachers cite for having left the profession is the workload and burnout.[13] Special education personnel frequently have caseloads that afford them little time for adequate preparation. On top of this, the paperwork demands associated with special education can be very time-consuming.[14] In fact, some former teachers have cited the stress of the job and having been assaulted by students as reasons for leaving.[15]

School boards have used various techniques to recruit and retain quality teachers, including hiring bonuses,[16] mentoring programs, and providing more supportive environments; state officials have developed similar programs, such as tuition waivers for students wishing to become special education teachers.[17] Boards should also develop retention policies to keep special education and, of course, other teachers.[18] While recruitment and retention efforts are important for special education teachers, boards should also consider making financial assistance available for continuing education so teachers can gain the specialized knowledge they need, offering quality professional development opportunities, finding ways to lighten the paperwork burden, and providing support and protection for teachers who deal with difficult students.[19]

Dispute Resolution

Unfortunately, despite the best efforts of school officials to prevent it, litigation is a fact of life in today's school systems. Honest disagreements over what constitutes FAPEs are all but certain to occur between parents and special educators. Insofar as parents, for their own reasons, sometimes make demands or have unrealistic expectations that school officials cannot, and may not be required to, meet, compromise is not always possible. Further, sometimes litigation ensues because school board personnel make errors.

As described in Chapter 7, the IDEA contains a sophisticated system for dispute resolution. Rather than reiterate here the key points from Chapter 7, this section outlines steps that school officials should take when parents threaten to initiate or do initiate legal action.

Resolution Conference

When parents file a formal complaint about the education of their child with disabilities, the IDEA calls for a resolution session to take place within fifteen days.[20] These conferences are designed to discuss parental complaints and all pertinent facts so that the disagreements can be resolved. In addition to the parents, relevant members of the IEP team should attend resolution sessions. School board attorneys may not attend resolution sessions unless the parents bring their attorneys along. Unlike mediation, which is voluntary, resolution sessions can only be bypassed if both parties either agree to waive them or proceed directly to mediation.

Because many disputes result from misunderstandings or unclear communication, resolution conferences provide one more opportunity to understand and address parental concerns in a nonadversarial context.

School officials would be wise to take advantage of resolution conferences and should not agree to waive these sessions unless it is clear that parents will not attend these meetings. Many disputes result from misunderstandings or unclear communication, and resolution conferences provide one more opportunity to understand and address parental concerns in a nonadversarial context. As an added benefit, as with mediation, this process is far less costly than a hearing.

Resolution conferences provide opportunities for upper-level officials, such as directors of special education, to become involved in the process of finding solutions to issues raised by parents. Insofar as administrators above the building level are often not involved in developing contested IEPs, they remain unaware of parental concerns until complaints are filed.

There are two benefits to having district-level administrators present at resolution sessions. First, because these administrators may have broader views of issues in light of their varied experiences, they can bring fresh perspectives to disputes. Second, because these administrators frequently have more authority to commit the resources of their school systems, they are able to offer options that IEP teams might not otherwise have considered. Consequently, it is often possible to resolve complaints simply by including persons with greater decision-making authority because they bring something new to the table.

Mediation

Sometimes communications between school officials and parents break down, making it difficult for the parties to work out their disagreements. Because mediation can be helpful in situations such as these, the IDEA directs states and educational officials to offer mediation services at no cost to parents prior to scheduling due process hearings. Mediation is a viable alternative for the resolution of disputed IEPs, but it cannot be used to deny or delay parental rights to a formal due process hearing. In fact, parents cannot be compelled to enter into mediation if they prefer to go straight to a due process hearing.

> The parties involved in special education disputes may engage the services of impartial mediators who can attempt to bring them together through negotiation.

The parties involved in special education disputes may engage the services of impartial mediators who can attempt to bring them together through negotiation. Moreover, a variety of states have provisions in their own special education laws for formal mediation processes prior to litigation; also, the IDEA requires state officials to maintain lists of trained, impartial mediators.[21] Successful mediation depends on the willingness of school officials to compromise. Education officials must evaluate any reasonable proposals that are presented by either parents or mediators and be prepared to offer specific counterproposals.

There are many advantages to trying mediation before proceeding to a due process hearing. The costs involved and the time spent on due process hearings certainly justify the effort to mediate and avoid the hearing stage. Perhaps most important, mediation can salvage the working relationship between parents and school officials because they are not supposed to be adversarial. Unfortunately, because due process hearings can be adversarial, they do little to foster positive working relationships between parents and school officials.

Preparing for Hearings

The best efforts of school officials notwithstanding, sometimes due process hearings are inevitable. If school officials have complied with all of the IDEA's provisions in making their placement decisions, they need not fear due process hearings. Even so, there is simply no substitute for proper preparation prior to hearings.

> Preparation for hearings must begin long before it is apparent that they will take place.

Preparation for hearings must begin long before it is apparent that they will take place. The key to success in due process hearings is for school officials to have all of the documentation handy to demonstrate

their compliance with applicable laws, policies, and procedures. Documentation in this regard includes, but is certainly not limited to, notice letters sent to parents, signed consent forms, IEPs, any and all other forms of written communication between the parties, and notes detailing telephone calls or other oral communications.

It is impossible to create proper documentation after the fact if it does not exist. Accordingly, educational leaders should treat all special education situations as if they may culminate in hearings. In other words, school officials should begin documentation on the day they receive requests for services or referrals for evaluations. Simply stated, special education personnel should be trained to make the documentation process part of the routine of providing special education services.

Generally, the special education administrators in school systems, typically with the title of director of special education, are responsible for representing school boards at hearings. Insofar as these administrators usually become directly involved in cases only after problems have developed, they may be unfamiliar with the histories of the children involved. The first task for such officials, then, is to gather all pertinent information. At the same time, administrators must become familiar with all aspects and details of cases, since the decisions that need to be made throughout the hearing process require thorough knowledge of the students.

In preparing for hearings, keep in mind that the requirements and qualifications for hearing officers vary from one state to the next. In some states, such as Ohio,[22] hearing officers must be attorneys knowledgeable of special education. On the other hand, in states such as North Carolina,[23] hearing officers need not be attorneys and are typically faculty members from local colleges or universities who are versed in special education procedures. It would be a mistake to assume that hearing officers have detailed knowledge of a school system's programs or other available options. For this reason, school officials must inform hearing officers about the positive aspects of their proposals as well as weaknesses in the parents' position.

An important piece of evidence that school officials must supply at hearings is proof they complied with all relevant due process procedures. If officials cannot provide this evidence, or have not complied with the procedures, they should acknowledge their errors. Although not all procedural errors are fatal to cases, evasiveness or intentional covering up of procedural errors can be very damaging to school boards because this can weaken their credibility.

During hearings it is important for the representatives of school boards to make complete presentations of the facts. It may be helpful to use visual aids such as charts, diagrams, and/or other graphic presentations to clarify points made during the oral argument or cross-examination of expert witnesses. Careful advanced preparation of these materials is necessary.

Those who testify or present evidence on behalf of school systems must be well prepared. This means not only that witnesses should be familiar with the information about which they are to provide testimony but also that they should be prepared by being given sample questions of the type that they are likely to face at hearings. Although it is difficult to know in advance exactly what line of questioning the opposition may employ during cross-examination, board attorneys should be able to prepare witnesses adequately for what to expect when they testify.

The task of school officials during hearings is to show that their proposed programs provide students with FAPEs. According to the IDEA, once educators have demonstrated that they have offered FAPEs, there is no need to examine alternative proposals. Even so, prudent school officials should be prepared to show why they believe that the programs favored by the parents are unnecessary. Many school boards have succeeded in due process hearings by showing that the programs favored by the parents were inadequate.

It is imperative to keep in mind the importance of having school officials and their attorneys working together because their communication is an important ingredient to success. The next section reviews factors to consider when choosing an attorney.

Selecting an Attorney

The party in the right in special education litigation is not automatically the victor. As in any legal contest, the party that presents the better case has the greater chance of prevailing. Therefore, having qualified attorneys may make all the difference between success and failure at due process hearings and/or in litigation. Consequently, one cannot overemphasize the necessity of having skilled attorneys in special education suits. Figure 10.1 outlines the qualifications school boards should look for in selecting an attorney for special education litigation.

As an area of law, special education has become increasingly important due to the volume of litigation that has occurred since the IDEA was first enacted in 1975.

As an area of law, special education has become increasingly important due to the volume of litigation that has occurred since the IDEA was enacted in 1975. School officials must be aware that the law of special education has become so specialized that they cannot rely solely on their regular attorneys to defend them in litigation on the rights of students with disabilities. Put another way, as qualified as school board attorneys are to handle most legal affairs, many may lack the specialized knowledge required to litigate special education cases adequately. To this end, school boards should consider retaining separate attorneys to handle their special education litigation.

On the other hand, many boards retain the services of large law firms that focus on education law and that typically have attorneys on staff who devote significant portions, if not all, of their practices to the law of special education. Under these circumstances, school officials may need to look no farther than their present firms for special education counsel.

If school boards are not represented by large firms with special education divisions or lack their own counsel on staff, as is common in larger school systems, officials should locate and retain separate attorneys for special education litigation. These attorneys must be well versed in education law in general as well as in special education law and have experience in administrative hearing procedures because most litigation emerges out of these hearings. Further, attorneys should be familiar with educational issues and practices such as evaluation methods, teaching techniques, and various placement options. Naturally, experienced and talented attorneys cost more. There simply is no substitute for knowledge and experience.

In order to locate qualified attorneys to handle special education suits, school officials should solicit referrals from other knowledgeable parties. Because the persons representing school boards in special education litigation may need to confer with the regular attorneys that boards retain, the boards'

Figure 10.1 • Recommendations for Selecting an Attorney for Special Education Litigation

Attorneys representing school boards in litigation with parents of special education students should have the following qualifications:
• Knowledge of education law in general
• Specialized knowledge of the IDEA, its regulations, and state special education statutes as demonstrated by membership in appropriate professional associations focused on the law of special education
• Experience with administrative hearings
• Experience in special education litigation
• Knowledge of special education programs and services

attorneys would be a logical starting point. At the same time, board attorneys may have ready lists of qualified special education attorneys. Special education administrators from other districts can also serve as good sources of referrals. Finally, the national or state school board associations, in addition to county or state bar associations, should be able to provide lists of attorneys who specialize in special education litigation.

School boards should identify, and retain, attorneys long before they are needed. The point at which boards are under the pressure of litigation over special education disputes is not the proper time to begin looking for qualified attorneys. It is better to retain, and form relationships with, attorneys well before litigation is pending than to wait until conflicts arise. By adopting a proactive approach, school officials should be able to take the time necessary to make sure the attorneys they hire are the right lawyers for the jobs.

Hiring attorneys, regardless of whether they are generalists or specialists in special education, is much like choosing professionals to fill any open positions in school systems.

Hiring attorneys, regardless of whether they are generalists or specialists in special education, is much like choosing professionals to fill any open positions in school systems. Educational leaders should first focus on the needs of their districts and consider, as many boards already do, putting out requests for proposals, sometimes referred to simply as RFPs, for attorneys who are interested in, and meet the qualifications for, the jobs at hand.[24] Once attorneys have submitted their applications, officials should examine their credentials, seek references from friends and colleagues in other systems that have used the lawyers under consideration, and interview the candidates that appear most qualified. Clearly, selecting attorneys is as important as filling any top-level administrative position in school districts. The process should not be taken lightly.

Conclusion

There is a saying in sports that the best defense is a good offense. The same can be said of special education litigation except that, unlike in sports, it is best to prevent a confrontation by engaging in preventative law.

The best way to avoid litigation is to always be prepared for such an eventuality. School officials can reduce their risk of suits by making sure that all employees are well aware of the law and know and follow proper procedures. Employees who know and understand the law should be less likely to make legal errors. This is especially true in the field of special education where procedure plays such an important role in the delivery of services to children.

When inevitable conflicts do arise, they do not automatically mean that litigation must follow because many disagreements can be resolved through increased communications between the parties. Parents and school officials can clear up misunderstandings and negotiate compromises. The parties can also rely on formal mediation processes or prehearing resolution conferences to help settle disputes if communication between them breaks down.

Finally, when litigation is inevitable, school officials must not despair. If school employees have followed proper procedures and made placement decisions in good faith, then boards should have little cause for concern. Nevertheless, when entering the legal arena, school officials must come prepared by being able to defend their actions and recommendations while justifying all of their placement decisions. Thus, qualified attorneys may be the greatest assets that school boards have when faced with the threat of litigation over providing special education to students with disabilities.

Questions for Discussion

1. Why might parents be reluctant to participate in resolution sessions or mediations? What steps can school personnel take to convince parents that resolution sessions or mediation are worthwhile endeavors?
2. Some school administrators consider it wise to view every special education situation as though it could eventually end up in litigation. Is this a sensible approach? Why?
3. What would you do as an administrator who works collaboratively with parents to increase the likelihood that disputes over the placements of their children will not result in litigation?