

58. STUDENT ISSUES: STUDENTS WITH DISABILITIES

Students with disabilities can be divided into two groups of students: those students served under the Individual with Disabilities Education Act (IDEA), 20 U.S.C. § 1401 et seq. (1996), and those students protected by Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 794 (1996), and the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101-12213 (1996). The ADA incorporates the terms and concepts of Section 504 for what constitutes discrimination, as interpreted by the courts, uses Title II and VII of the Civil Rights Act of 1964 for coverage and enforcement, and applies to private sector employers with 15 or more employees. For the purposes of this discussion, students served under IDEA will be called “IDEA students” and students receiving protection by Section 504 and ADA will be called “Section 504 students.”

IDEA originated as a funding statute, where Congress allocated seed money to encourage the development of programs for disabled students. Unfortunately, the funds allocated by Congress have never been more than a minority percentage of the funds spent each year to implement its requirements. Section 504 is a civil rights law, designed to protect disabled students from discrimination because of their disability. Consequently, Section 504 provides no funding for student programming. IDEA is administered by the Department of Education’s Office of Special Education and Related Services (OSERS). Section 504 is administered by the United States Office for Civil Rights (OCR).

IDEA was originally passed as the Education for All Handicapped Children Act in 1975, and has gone through numerous amendments and reauthorizations. It was revised again in November 2004 and styled the Individuals with Disabilities Education Improvement Act. For the sake of clarity, it will continue to be referred to as IDEA in these materials, although it might more correctly be identified as IDEIA at this time. With passage of the Handicapped Child Protection Act of 1986, Pub. L. 99-372, 100 Stat. 796 (1986), which authorized Section 1983 to be used for enforcement, IDEA became as much a civil rights statute as a funding statute. IDEA carries within it six guiding principles which will be discussed more fully in this module. Those six guiding principles are: zero reject; nondiscriminatory testing; parental involvement; free appropriate public education; least restrictive environment; and due process.

Section 504 was added to earlier existing versions of a Rehabilitation Act (going back to 1920) in 1973. Regulations for Section 504 were written after regulations were written for IDEA (or EAHCA, as it was called at that time), and the Section 504 regulations were modeled after the IDEA regulations. Consequently, many regulatory requirements for Section 504 look like the regulatory requirements for IDEA. Over the years, conflict has arisen in interpreting IDEA, between the executive and judicial branches of the federal government. OCR, as executive overseer of Section 504, has interpreted the duty of school districts with regard to Section 504 students to be similar to their duties to IDEA students. The federal courts, however, have taken a more restrictive view of the duty of school districts with regard to Section 504 students. The

court's interpretation has been to apply the concept of "reasonable accommodation," which originates in the employment section of Section 504 regulations, to the provision of services such as those provided by universities and school districts.

Duties

For IDEA, the duty of school districts (passed to them by the state) is to serve the student, aged 3 through 21, with a free, appropriate public education in each disabled student's least restrictive environment. For Section 504, the duty of school districts is to not discriminate because of the student's disability. One way of showing compliance under Section 504 is to operate under compliance with IDEA. As stated above, the executive and judicial branches of government do not entirely agree on what must be done to meet a duty under Section 504. For example, the position of OCR is that schools have the following duties: duty to identify and locate disabled students; duty to notify of their rights and the school district's duties; duty to evaluate prior to placement; duty to provide a free, appropriate public education, regardless of the severity of the disability; duty to create or modify a placement; duty to provide residential placement, if needed; and, duty to create procedural protections. The measure used by the federal courts in addressing the duty of school districts, is to require school districts to make "reasonable accommodations" to the student's disability.

Eligibility Requirements

To be eligible for services under IDEA, the regulations provide:

As used in this part, the term child with a disability means a child evaluated in accordance with 300.530-300.536 as having mental retardation, a hearing impairment including deafness, a speech or language impairment, a visual impairment including blindness, a serious emotional disturbance (hereafter referred to as emotional disturbance), an orthopedic impairment, autism, traumatic brain injury, an other health impairment, a specific learning disability, deaf-blindness, or multiple disabilities and who by reason thereof needs special education and related services. 34 C.F.R. § 300.7(a)(1).

To be eligible for protection under Section 504, the statute and the regulations define a Section 504-protected person as one who

Has a physical or mental impairment which substantially limits one or more major life activities;
Has a record of such an impairment; or
Is regarded as having such an impairment. 29 U.S.C. 706(8)(B) (1994); 34 C.F.R. 104.3(j)(1) (1995).

Note that the definition of IDEA has two parts: eligibility under one of a dozen disability labels and the need for special education and related services. In comparison, eligibility for protection under Section 504 does not require a showing of a need for services. The student only needs to have, have a record of, or be regarded as having, a physical or mental impairment which substantially limits one or more major life activities. Major life activities includes functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. 34 C.F.R. § 104.3(j)(2)(ii). IDEA students are usually all protected by Section 504; but, Section 504 students are not all eligible for IDEA services.

Differences Between IDEA and Section 504 in Evaluations

Besides the differences in eligibility requirements for IDEA and Section 504, other important distinctions must be underscored, especially in the area of evaluations. At initial evaluation, IDEA requires that parents provide "informed consent" for the evaluation, while Section 504 only requires that the parents be given notice of the evaluation. Parental consent is not required to conduct an evaluation under Section 504. IDEA requires a comprehensive evaluation, while Section 504 only requires that school officials address "areas of concern." IDEA requires written notice prior to changing placement; Section 504 only requires that notice of the program change, and parental consent is not required. The school district has to pay for independent evaluations; Section 504 only requires that school officials consider the information presented in all evaluations. To make a significant change in placement under IDEA, the student need not receive a comprehensive evaluation; however an evaluation that addresses "areas of concern" is required to change a placement for a Section 504 student.

Zero Reject

IDEA provides a duty to serve eligible disabled students, regardless of the severity of the disability, and regardless whether eligible disabled students have been suspended or expelled from school. (see Pub. L. 105-17, § 612 (a)(1)(A).) The affirmative duty to serve translates to "zero reject," that is, under no circumstances can the school argue that it does not have to serve an IDEA-eligible student. Regulatory language implementing Section 504 includes similar sweeping statements, but the statutory duty not to discriminate refers to an "otherwise qualified" disabled individual (29 U.S.C § 794 (a) (1996)). This signals that not all disabled students are protected by Section 504, only otherwise qualified ones. Case law interpreting Section 504 links the concepts of "otherwise qualified" and "reasonable accommodation," so that if the accommodation is not reasonable, the disabled person is therefore not otherwise qualified. The duty to serve is not the same thing as the duty not to discriminate, and the school district's responsibilities under Section 504 are not as extensive as its

responsibilities under IDEA.

Free Appropriate Public Education

States are required by IDEA to ensure that all children with disabilities are provided a free appropriate public education, which is designed to meet the unique needs of each child and includes special education and related services. 20 U.S.C. § 1401(a)(16-17) (1996). The leading case defining “appropriate education” under IDEA is Board of Education of Hendrick Hudson Central School District v. Rowley, 458 U.S. 176 (1982). In Rowley, the court held that an appropriate education is one that is reasonably calculated to confer educational benefit and grow the child educationally from year-to-year. It is not necessary that the school district maximize the opportunities or provide the very best education available. The school must only provide an education that confers educational benefit and grows the child from year-to-year. Since Rowley, the courts are obligated not to insert their own views into what is an appropriate education. Instead, the court must ask two questions. The first question is, did the school comply with the procedures under IDEA? The second question is, did the school develop an IEP through the procedures that is reasonably calculated to enable the child to receive educational benefit? Obviously, failure to follow procedures would make any program (no matter how good it is, how expensive it is, or how much benefit it can deliver) measured under this standard inappropriate at the outset.

Individualized Educational Program

The Individualized Educational Program (IEP) is constructed by a team that includes: a representative of the local educational agency; the student’s special education teacher; the student’s general education teacher; the student’s parent or guardian; the student, when appropriate (required for constructing a transitional IEP); a person who can interpret instructional implications of the evaluation results; related services personnel; a representative of the agency providing transitional services, when constructing a transitional IEP; and, other persons at the discretion of the parent or the local education agency. 34 C.F.R. § 300.344 (1996).

The contents of an IEP must include: the present levels of the student’s educational performance; measurable annual goals, including benchmarks for short-term instructional objectives; special education, related services, supplemental aids, and services to be provided; program modifications; extent to which the student will not participate with students without disabilities in general education; modifications in administration of state- or district-wide assessments; projected dates of initiation of services and anticipated duration of services; a statement of needed transition services focusing on an appropriate course of study, if the student is age 14; a statement of needed transition services, if the student is age 16; and, a statement of how the student’s progress will be measured and reported to the parents. 34 C.F.R. § 300.346

(1996).

The most important thing for superintendents to remember is that the IEP team has control of the IDEA student's program, not the superintendent or the board of education. The IEP team is granted authority directly by Congress to make decisions about the IDEA student's program, including placement and supplemental services.

Least Restrictive Environment

IDEA requires that a full complement of placement options be available for all IDEA students in every school district. Among those placement options, in order of least restrictive to most restrictive, are: regular classrooms, resource (part-time special education) classroom; self-contained special education classroom; day school; residential school; hospitalization; and homebound. Note that homebound is the most restrictive placement possible.

There is a bias in favor of serving students in the regular setting, as reflected in regulations:

To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and that . . . (the) removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 34 C.F.R. § 300.550(b)(1) (1996).

Consequent to this bias favoring placement in a lesser restrictive environment, there is a requirement for school personnel to demonstrate, as part of the IEP process, that the student is unable to be educated in the regular educational environment even with the use of supplementary aids and services, prior to making a decision to place a student in a more restrictive placement. It is important to recognize that, wherever a student is now placed, there is a presumption in favor of that placement. Any decision to move the student to a more-restrictive or less-restrictive environment would require that the IEP team rebut the presumption favoring the current placement with data supporting the new placement.

It should be noted that it is not a requirement the student be served in *the* least restrictive environment; the student must be served in *the student's* least restrictive environment.

Parental Involvement

A central feature of IDEA is the requirement of parental involvement throughout the process. Written parental consent is required for evaluating a student suspected of requiring services under IDEA. Parents are required to be part of the IEP team. If the parents disagree with the other members of the IEP, either side may initiate due process procedures. While due process is being pursued, the student stays put in the student's then-current placement.

Non-Discriminatory Testing

Before a student can be placed in an IDEA program, a comprehensive, multi-factored evaluation must be performed by a multidisciplinary team. No criterion by itself can be used to determine an eligibility or placement decision. Testing must address all the areas of the student's suspected disability, using assessment methods that are valid and reliable for their intended purpose. The tests must not discriminate on the basis of race or culture, and must be administered in the student's native language. The student's program must be reviewed annually, and a full comprehensive assessment must be accomplished every three years.

Due Process

Due process in IDEA situations is generally viewed by school officials to apply to the adversarial hearing process that is required to resolve disputes between parents and the school, but due process goes much further. By statute, due process procedural safeguards include:

- (1) An opportunity for parents to examine their child's records;
- (2) Procedures to protect the rights of the child whenever the parents of the child are not known, the agency cannot, after reasonable efforts, locate the parents, or the child is a ward of the State, including the assignment of an individual to act as a surrogate for the parents;
- (3) Written, prior notice before an education agency proposes (or refuses) to initiate or change the child's identification, evaluation, educational placement, or provision of a free appropriate public education;
- (4) Procedures to assure that the notice in 3, above, is in the parent's native language;
- (5) An opportunity for mediation;
- (6) An opportunity for any party to present a complaint with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child;
- (7) Procedures that require either party, or the attorney representing a party, to provide confidential due process complaint notice;

- (8) An opportunity for parents to obtain an independent educational evaluation of their child;
 - (9) An opportunity for parents to present complaints and to have an impartial due process hearing;
 - (10) A state review procedure (either one- or two-level) if the hearing is conducted by a local or intermediate level agency;
 - (11) A right to appeal the final administrative hearing decision in state or federal court; and
 - (12) A right to attorneys fees if the parent is the prevailing party.
- IDEIA Sec. 615, 20 U.S.C. § 1415 (2004).

Administrative procedures must be exhausted before either party can take the dispute to federal district court.

Discipline

Perhaps the most problematic area of concern in dealing with students with disabilities is in meting out discipline. It is clear that students with disabilities, both those protected by Section 504 and those served under IDEA, are not exempt from reasonable disciplinary rules and consequences. Court cases can be found to support the use of time out, detention, assignment to a screened area in the classroom, corporal punishment, and the withdrawal of privileges as means of punishment. The greatest area of concern is the use of transfer, suspension, or expulsion as a disciplinary technique, because all have the potential of interrupting the program of an IDEA student, in violation of the “zero reject” guarantee of IDEA.

It should be noted that virtually all of the early cases involving suspension and expulsion of IDEA students were brought under both Section 504 and IDEA, because students in those cases were both IDEA and Section 504 students. From those cases developed the requirement of conducting a “manifestation determination” or “relationship test,” which involves an inquiry into whether the behavior which may warrant suspension or expulsion under the school’s conduct code is related to (or is a manifestation of) the student’s disability. The “manifestation determination” or “relationship test” is actually a Section 504 concept, because it is designed to assure that the student is not being punished (and thus discriminated against) because of the student’s disability. The “manifestation determination” was written into the 1997 Amendments to IDEA and carried forward in its reauthorization as IDEIA 2004, and that is the most important reason that it must be done. By statute, the manifestation determination must be accomplished prior to punishing in a way that might interrupt the student’s educational program. If the student’s behavior is a manifestation of the student’s disability, then the student may not be expelled or removed for a long term. If the student’s behavior is not a manifestation of the student’s disability, then expulsion processes may be begun, but it should be noted that regardless of the outcome of the “manifestation determination” the student still must be served according to the student’s

IEP.

IDEA students may be suspended for no more than ten days. The best interpretation of the 10-day rule is that the school administration has only ten days per school year to use in meting out suspensions. (This interpretation results from an OCR policy letter, not a source from OSERS.) Consequently, school officials are advised to use suspensions judiciously.

At any time that behavior of the IDEA student becomes a problem, the IEP team should accomplish a functional behavior assessment (FBA) of the student, as well as a behavior intervention plan (BIP). These are required when it is found that the behavior was a manifestation of the disability. (Section §615(k)(1)(F)(i) of IDEIA.)

Press releases after reauthorization of IDEA in November 2004 promised that discipline of students receiving special education and related services would be easier. That may or not may be true. The following paragraphs describe changes in the law related to discipline.

Section §615(k)(1)(A) of IDEIA requires a case-by-case determination of any unique circumstances to order a change of placement for a child with a disability who violates the student conduct code.

Section §615(k)(1)(B) of IDEIA gives school personnel authority to remove a child with a disability who violates the student conduct code from their current placement to an appropriate interim alternative setting, another setting, or suspension, for not more than 10 school days (to the extent such alternatives are applied to children without disabilities.)

Section §615(k)(1)(C) of IDEIA provides:

If school personnel seek to order a change in placement that would exceed 10 school days and the behavior that gave rise to the violation of the school code is determined not to be a manifestation of the child's disability pursuant to subparagraph (E), the relevant disciplinary procedures applicable to children without disabilities may be applied to the child in the same manner and for the same duration in which the procedures would be applied to children without disabilities, except as provided in section 612(a)(1) although it may be provided in an interim alternative educational setting.

Additionally, Section §615(k)(1)(G) provides:

School personnel may remove a student to an interim alternative educational setting for not more than 45 school days without regard to whether the behavior is determined to be a manifestation of the child's disability, in cases where a child--

(i) carries or possesses a weapon to or at school, on school premises, or

to or at a school function under the jurisdiction of a State or local educational agency;

`(ii) knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance, while at school, on school premises, or at a school function under the jurisdiction of a State or local educational agency; or

`(iii) has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function under the jurisdiction of a State or local educational agency.

On the surface, it would appear that the reauthorization of IDEA (IDEIA) gives school officials more latitude in using disciplinary transfers as a tool for special education students who violate the school's conduct code. There are two very important limitations, however:

1. Section §615 (k)(2) requires that the interim alternative educational setting in the two options above (subparagraphs (C) and (G)) must be determined by the IEP Team.

2. Section 615 §(k)(1)(D) requires that the child continue to receive educational services, as provided in section 612(a)(1), so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP; and receive, as appropriate, a functional behavioral assessment, behavioral intervention services and modifications, that are designed to address the behavior violation so that it does not recur.

Previous to the reauthorization, a school official could unilaterally (without involvement of the IEP team) transfer students who violate firearm or drug aspects of the conduct code to an alternative setting for 45 days. While dangerousness supplies a third rationale for transferring to an alternative setting, the school official apparently must now go to the IEP team for concurrence in moving a student to the alternative setting for up to 45 days in all three situations.

A further caveat is provided by the second limitation listed above. It is difficult enough to provide a free, appropriate public education when there is a wide range of placement options available. It may not be possible to provide required services in a limited setting such as an interim alternative educational setting, thus making it more difficult for the school to demonstrate that it is providing a free, appropriate public education.