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Education Law in Public Policy

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Introduction

An important component of education law is the Office for Civil Rights (OCR) is to eliminate discrimination on the basis of disability against students with disabilities. OCR receives numerous complaints and inquiries in the area of elementary and secondary education involving Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794 (Section 504). Most of these concern identification of students who are protected by Section 504 and the means to obtain an appropriate education for such students. Section 504 is a federal law designed to protect the rights of individuals with disabilities in programs and activities that receive Federal financial assistance from the U.S. Department of Education (ED).

Section 504 provides: "No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance" OCR enforces Section 504 in programs and activities that receive Federal financial assistance from ED. Recipients of this Federal financial assistance include public school districts, institutions of higher education, and other state and local education agencies. The regulations implementing Section 504 in the context of educational institutions appear at 34 C.F.R. Part 104 (Oberman, 2016).

The Section 504 regulations require a school district to provide a "free appropriate public education" (FAPE) to each qualified student with a disability who is in the school district's jurisdiction, regardless of the nature or severity of the disability. Under Section 504, FAPE consists of the provision of regular or special education and related aids and services designed to meet the student's individual educational needs as adequately as the needs of nondisabled students are met. Free Appropriate Public Education (FAPE) is an educational right of children with disabilities in the United States that is guaranteed by the Rehabilitation Act of 1973 and the Individuals with Disabilities Education Act (IDEA).

Legal Standards

Section 504 of the *Rehabilitation Act of 1973* protects the rights of individuals with disabilities in programs and activities that receive federal financial assistance, including federal funds. Section 504 provides that: "No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . ."¹

The U.S. Department of Education (ED) enforces Section 504 in programs and activities that receive funds from ED. Recipients of these funds include public school districts, institutions of higher education, and other state and local education agencies. ED has published a regulation implementing Section 504 (34 C.F.R. Part 104) and maintains an Office for Civil Rights (OCR), with 12 enforcement offices and a headquarters office in Washington, D.C., to enforce Section 504 and other civil rights laws that pertain to recipients of funds.²

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district's jurisdiction, regardless of the nature or severity of the person's disability. This pamphlet answers the following questions about FAPE according to Section 504 (US Department of Education).

Free Appropriate Public Education (FAPE)

All qualified persons with disabilities within the jurisdiction of a school district are entitled to a free appropriate public education. The ED Section 504 regulation defines a person with a disability as "any person who: (i) has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment."

For elementary and secondary education programs, a qualified person with a disability is a person with a disability who is:

of an age during which it is mandatory under state law to provide such services to persons with disabilities;

of an age during which persons without disabilities are provided such services; or

entitled to receive a free appropriate public education under the *Individuals with Disabilities Education Act (IDEA)*. (*IDEA* is discussed later in the pamphlet.)

In general, all school-age children who are individuals with disabilities as defined by Section 504 and *IDEA* are entitled to FAPE.

An appropriate education may comprise education in regular classes, education in regular classes with the use of related aids and services, or special education and related services in separate classrooms for all or portions of the school day. Special education may include specially designed instruction in classrooms, at home, or in private or public institutions, and may be accompanied by related services such as speech therapy, occupational and physical therapy, psychological counseling, and medical diagnostic services necessary to the child's education.

At the elementary and secondary school level, determining whether a child is a qualified disabled student under Section 504 begins with the evaluation process. Section 504 requires the use of evaluation procedures that ensure that children are not misclassified, unnecessarily labeled as having a disability, or incorrectly placed, based on inappropriate selection, administration, or interpretation of evaluation materials.

Recipient school districts must establish standards and procedures for initial evaluations and periodic re-evaluations of students who need or are believed to need special education and/or related services because of disability. The Section 504 regulatory provision at 34 C.F.R. 104.35(b) requires school districts to individually evaluate a student before classifying the student as having a disability or providing the student with special education. Tests used for this purpose must be selected and administered so as best to ensure that the test results accurately reflect the student's aptitude or achievement or other

factor being measured rather than reflect the student's disability, except where those are the factors being measured. Section 504 also requires that tests and other evaluation materials include those tailored to evaluate the specific areas of educational need and not merely those designed to provide a single intelligence quotient. The tests and other evaluation materials must be validated for the specific purpose for which they are used and appropriately administered by trained personnel.

At the elementary and secondary education level, the amount of information required is determined by the multi-disciplinary committee gathered to evaluate the student. The committee should include persons knowledgeable about the student, the meaning of the evaluation data, and the placement options. The committee members must determine if they have enough information to make a knowledgeable decision as to whether or not the student has a disability. The Section 504 regulatory provision at 34 C.F.R. 104.35(c) requires that school districts draw from a variety of sources in the evaluation process so that the possibility of error is minimized. The information obtained from all such sources must be documented and all significant factors related to the student's learning process must be considered. These sources and factors may include aptitude and achievement tests, teacher recommendations, physical condition, social and cultural background, and adaptive behavior. In evaluating a student suspected of having a disability, it is unacceptable to rely on presumptions and stereotypes regarding persons with disabilities or classes of such persons. Compliance with the IDEA regarding the group of persons present when an evaluation or placement decision is made is satisfactory under Section 504.

School districts may use the same process to evaluate the needs of students under Section 504 as they use to evaluate the needs of students under the IDEA. If school districts choose to adopt a separate process for evaluating the needs of students under Section 504, they must follow the requirements for evaluation specified in the Section 504 regulatory provision at 34 C.F.R. 104.35. As of January 1, 2009, school districts, in determining whether a student has a physical or mental impairment that substantially limits that student in a major life activity, must *not* consider the ameliorating effects of any mitigating measures that student is using. This is a change from prior law. Before January 1, 2009, school districts had to consider a student's use of mitigating measures in determining whether that student had a physical or mental impairment that substantially limited that student in a major life activity. In the Amendments Act (see FAQ 1), however, Congress specified that the ameliorative effects of mitigating measures must not be considered in determining if a person is an individual with a disability.

Congress did not define the term "mitigating measures" but rather provided a non-exhaustive list of "mitigating measures." The mitigating measures are as follows: medication; medical supplies, equipment or appliances; low-vision devices (which do not include ordinary eyeglasses or contact lenses); prosthetics (including limbs and devices); hearing aids and cochlear implants or other implantable hearing devices; mobility devices; oxygen therapy equipment and supplies; use of assistive technology; reasonable accommodations or auxiliary aids or services; and learned behavioral or adaptive neurological modifications.

Congress created one exception to the mitigating measures analysis. The ameliorative effects of the mitigating measures of ordinary eyeglasses or contact lenses shall be

considered in determining if an impairment substantially limits a major life activity. “Ordinary eyeglasses or contact lenses” are lenses that are intended to fully correct visual acuity or eliminate refractive error, whereas “low-vision devices” (listed above) are devices that magnify, enhance, or otherwise augment a visual image (Osborne, 2010).

Students with Disabilities

To be appropriate, education programs for students with disabilities must be designed to meet their individual needs to the same extent that the needs of nondisabled students are met. An appropriate education may include regular or special education and related aids and services to accommodate the unique needs of individuals with disabilities. One way to ensure that programs meet individual needs is through the development of an individualized education program (IEP) for each student with a disability. IEPs are required for students participating in the special education programs of recipients of funding under the *IDEA*.

The quality of education services provided to students with disabilities must equal the quality of services provided to nondisabled students. Teachers of students with disabilities must be trained in the instruction of individuals with disabilities. Facilities must be comparable, and appropriate materials and equipment must be available. Students with disabilities may not be excluded from participating in nonacademic services and extracurricular activities on the basis of disability. Persons with disabilities must be provided an opportunity to participate in nonacademic services that is equal to that provided to persons without disabilities. These services may include physical education and recreational athletics, transportation, health services, recreational activities, special interest groups or clubs sponsored by the school, and referrals to agencies that provide assistance to persons with disabilities and employment of students.

State and Federal Laws Regarding Parental Participation

Public elementary and secondary schools must employ procedural safeguards regarding the identification, evaluation, or educational placement of persons who, because of disability, need or are believed to need special instruction or related services. Parents must be told about these procedures. In addition, parents or guardians must be notified of any evaluation or placement actions, and must be allowed to examine the student’s records. The due process procedures must allow the parents or guardians of students in elementary and secondary schools to challenge evaluation and placement procedures and decisions.

If parents or guardians disagree with the school’s decisions, they must be afforded an impartial hearing, with an opportunity for their participation and for representation by counsel. A review procedure also must be available to parents or guardians who disagree with the hearing decision.

Compensatory Education Claims

Successful compensatory education claims typically arise when local educational agencies (LEAs) fail to provide FAPE in one of four ways:

1. Violation of Child Find provisions – no services

The IDEA imposes an affirmative obligation on LEAs to identify and educate students with disabilities living within their boundaries. This “child find” requirement mandates school LEAs to determine which students are eligible to receive FAPE pursuant to the IDEA and to provide appropriate IEPs to those students. This obligation exists whether or not the student attends public school.

2. Failure to offer an appropriate IEP – the wrong services

Most special education litigation focuses on the appropriateness of the IEP offered by LEAs to special education students. Even when an LEA has identified a student and offered the student an IEP, the student is still denied FAPE if the IEP is inappropriate. A plethora of cases have developed the analysis used to determine whether a student has received FAPE. In the United States Court of Appeals for the Third Circuit (the federal court governing federal law in Pennsylvania, New Jersey, Delaware and the Virgin Islands), an IEP confers FAPE if it is calculated to provide a meaningful educational benefit at the time it is offered.

3 Failure to implement an appropriate IEP – right services, no delivery

After the LEA identifies and evaluates a student and develops an appropriate IEP, the LEA must actually follow that IEP. An appropriate IEP is not, in and of itself, FAPE. The IEP specifies what *should be* provided. Deviation in actual practice often gives rise to denial of FAPE and entitlement to a compensatory education award.

4. Inappropriate implementation of an appropriate IEP – right services, wrong delivery

LEAs must provide the right services *in the right way*. It is possible for students to receive the correct services under an appropriate IEP and still be denied FAPE. For instance, an LEA could offer a dyslexic student an IEP for an appropriate reading program for an appropriate number of hours per week. The LEA could then actually provide the reading program for those hours.

The right to compensatory education accrues when the LEA knew or should have known the student was not receiving an appropriate education. *M.C. v. Central Regional School District*, 81 F.3d 389, 397 (3d. Cir. 1996); *Gregory R. v. Penn Delco School District*, 262 F.Supp.2d 488 (E.D.Pa.003) (Osborne, 2010).

Internet Law in Education

Internet Law, which may be classified under as a subgenre of ‘Cyber Law’ and ‘Computer Law’, is considered by many to be one of the most recently-developed legal

fields as a result of the ongoing advent of computer-based technology. This type of technology relies heavily on the Internet and online activity, and as a result, regulations and oversight of this type of activity has been expressed in the spectrum of Internet Law. Internet Law is a fairly expansive legal field that consists of a variety of avenues and jurisdictions, including the ethical and moral use of the Internet for lawful and legal purposes.

Within the scope of Internet Law, circumstances in which additional fields of legality and those latent within Internet Law overlap is not uncommon; the following legal fields most-commonly exist in tandem with Internet Law regulations:

Internet Law – within the scope of Computer and Cyber Law – may be identified as a form of criminal activity that is facilitated through the usage of electronic, network, and technologically-based communication systems that rely on the Internet as a means of online communication; Internet Law can range from lawful Internet usage to the regulation of electronic correspondence. Within the scope of Internet Law, a computer virus is a program created to infiltrate a computer terminal belonging to another individual with the intent to cause damage, harm, and destruction of virtual property.

Spyware are computer programs facilitating the unlawful collection of data, allowing individuals the illicit access to the personal and private information belonging to another individual.

Phishing is a criminal act of fraud involves the illegal and unlawful attempt of to attain restricted, unauthorized, and privileged information through means of fraudulent and communicative requests.

Spam is defined as a digitally-based criminal instrument, which involves the unsolicited transmission of electronic communication with intent of committing fraud.

Internet Law prohibits the use of Bit Torrent technology, Peer-to-Peer network file sharing, and any other means of the unlawful, unauthorized transmission of digital, copyrighted media and intellectual property. Internet Law defines traditional fire-sharing programs as means in which complete digital media files are circulated through digital transmission. Internet Law defines Bit Torrent and Peer-to-Peer file sharing as the collective, segmented transmission of digital media through its servers (Oberman, 2016).

Summary

The Section 504 regulatory provision at 34 C.F.R. 104.35(b) requires school districts to individually evaluate a student before classifying the student as having a disability or providing the student with special education. Tests used for this purpose must be selected and administered so as best to ensure that the test results accurately reflect the student's aptitude or achievement or other factor being measured rather than reflect the student's disability, except where those are the factors being measured. Section 504 also requires that tests and other evaluation materials include those tailored to evaluate the specific areas of educational need and not merely those designed to provide a single intelligence quotient.

At the elementary and secondary education level, the amount of information required is determined by the multi-disciplinary committee gathered to evaluate the student. The committee members must determine if they have enough information to make a

knowledgeable decision as to whether or not the student has a disability. In evaluating a student suspected of having a disability, it is unacceptable to rely on presumptions and stereotypes regarding persons with disabilities or classes of such persons. Compliance with the IDEA (Individuals with Disabilities Education Act) regarding the group of persons present when an evaluation or placement decision is made is satisfactory under Section 504. If school districts choose to adopt a separate process for evaluating the needs of students under Section 504, they must follow the requirements for evaluation specified in the Section 504 regulatory provision at 34 C.F.R. 104.35.

Internet Law in education is considered by many to be one of the most recently-developed legal fields as a result of the ongoing advent of computer-based technology. This type of technology relies heavily on the Internet and online activity, and as a result, regulations and oversight of this type of activity has been expressed in the spectrum of Internet Law. Internet Law in education is an extensive legal field that consists of a variety of avenues and jurisdictions, including the ethical and moral use of the Internet for lawful and legal purposes.

References

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US Department of Education. Office for Civil Rights. Protecting Students With Disabilities. <http://www2.ed.gov/about/offices/list/ocr/504faq.html>