WHAT REGULAR EDUCATION FOLKS SHOULD KNOW ABOUT SPECIAL EDUCATION AND SECTION 504

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I. A LITTLE HISTORY LESSON

A. §504 of the Rehabilitation Act of 1973: Be Nice & Play Fair

In 1973 when the Rehabilitation Act was passed, little was being done on a federal level to encourage participation and equal access by the disabled to federally funded programs. While largely geared toward providing job opportunities and training to disabled adults, the Act also addressed, though very discreetly, the failure of the public schools to educate disabled students. The single paragraph we now refer to as §504 of the Rehabilitation Act provided that

> "No otherwise qualified individual with a disability in the United States, as defined in section 706(8) of this title, shall, solely by reason of her or his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service...."
> —29 U.S.C. § 794(a) (1973).

In §504, the focus is on non-discrimination. As applied to the schools, the language broadly prohibits the denial of public education participation, or enjoyment of the benefits offered by public school programs because of a child's disability. To encourage compliance, Congress did not create an additional source of federal funding, but instead, conditioned future receipt of federal funds on the district's compliance with the new requirements.

The failure of §504 to solve the problem of educating disabled populations is hardly surprising. To expect massive change and fairly expensive programs from an unfunded mandate is Congressional cock-eyed optimism at its best. Likewise, it is extremely unclear from this simple paragraph *what* Congress expected the schools to do. If the schools were intended to create special programs and unique educational placements for children, the broad anti-discrimination language hardly conveys that notion. It was not until the regulations were promulgated under §504, some six or seven years later, that the full picture of what was expected emerged. Two years after passage of the Rehabilitation Act of 1973, its failure was obvious, and the need for additional motivation to educate disabled children was again addressed. The result of this second effort was the EHA, the precursor to today's Individuals With Disabilities Education Act (IDEA).

B. IDEA/Special Education– Membership has its Privileges

In its introduction to the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §1400, et. seq.), the federal law governing special education, Congress made clear its desire to provide educational funding for children suffering from severe disabilities to ensure that they receive an appropriate public education.

Congress estimated that more than half of the roughly eight million children with disabilities in the United States [in 1976] were not receiving "appropriate educational services which would enable them to have full equality of opportunity." The special educational needs of these children were not being met. 20 U.S.C. §1400(b)(1)-(3). Congress found that one million children with disabilities in the United States were "excluded entirely from the public school system and will not go through the educational process with their peers." Others attend the public schools and participate but are denied "a successful educational experience" because their disabilities go undetected. 20 U.S.C. §1400(b)(4)-(5).

Congress recognized that adequately trained teachers existed, and diagnostic and instructional advances made educating disabled children possible, but that the lack of funding available to states and local schools prevented success. Faced with the absence of adequate educational services in the public schools, "families are forced to find services outside the public school system, often at great distance from their residence and at their own expense." 20 U.S.C. §1400(b)(6)-(8).

In the IDEA (and its predecessors) Congress provided some of the necessary funding as long as states agreed to implement fairly strict procedural protections designed to empower parents to serve as champions for their disabled children. Not all disabled children will qualify as having one of the disabilities which give rise to IDEA eligibility. But once eligible, the child has access to a unique educational program designed to meets her needs. The program is created utilizing a wide range of special education and related services in a continuum of settings. The child's parents are endowed with considerable rights to notice and consent, are consensus members on ARD committees, and have the ability to appeal decisions of the ARD committee with which they disagree.

In short, Congress provided some of the funding through the IDEA to ensure that students with the most severe disabilities receive, at no cost to the parent, the services the student requires in order to achieve educational benefit. It is quite clear from the eligibility criteria that some disabled students will not qualify under the IDEA.

C. The Americans With Disabilities Act (ADA)

The ADA was passed in 1990, and seems to pick up where the Rehabilitation Act left off. Borrowing from the §504 definition of disabled person, and using the familiar three-pronged approach to eligibility (has a physical or mental impairment, a record of an impairment, or is regarded as having an impairment), the ADA applied those standards to most private sector businesses, and sought to eliminate barriers to disabled access in buildings, transportation, and

communication. To a large degree, the passage of the ADA supplants the employment provisions of §504, reinforces the accessibility requirements of §504 with more specific regulations, but does little to change a District's obligations to provide educational services to its disabled students.

D. So how do all these laws combine in the schools?

The IDEA or special education serves the needs of the most severely disabled students through a procedurally complex framework and substantial parental rights. For students with less-severe disabilities, Section 504 requires that educational needs are met as adequately as the needs of nondisabled students. Section 504 likewise provides nondiscrimination protection to both Section 504 students and those qualifying under the IDEA. The requirements of the ADA with respect to students are, with few exceptions, met by a school's compliance with 504.

II. Common Ground to both 504 & IDEA

While the IDEA and Section 504 have different eligibility standards, procedural safeguards and approaches to serving disabled students, they also share some common ground. The following sections describe some of the more important elements of federal disabilities laws in the schools. *These sections were not designed to provide an exhaustive or detailed outline of the two laws, but to serve as a primer for regular education personnel.*

A. Disability is key to eligibility: The Problem of Over-identification

In both its regulations and enforcement activities, the U.S. Department of Education repeatedly warns that schools must exercise great care in identifying students as 504 or IDEA eligible, so that students are not misclassified. **Of particular concern are students with no disabilities who because of other factors (such as poor English skills or lack of previous educational opportunity) may be incorrectly classified as disabled.** After all, classroom difficulty can arise from a variety of factors, such as a death or divorce of a parent, poor nutrition, student apathy, etc. While none of those causes is a disability, the resulting performance problems can be misinterpreted as evidence of disability if districts are not careful in referral and evaluation.

Limited English Proficiency is not a disability. Limited English proficiency means that the child does not understand and/or speak the English language. It does not mean that the child has a language impairment, which would be evident even in his native tongue. Children recently arrived from Lithuania, for example, are generally perfectly capable of language—but probably not the English language. They do not have a language *impairment* problem, but rather a language *proficiency* problem. Of course, children from Lithuania are not immune from legitimate language impairments, such as articulation problems or aphasia. Limited proficiency alone, however, is not a disability. It may substantially limit learning, but it is not considered a physical or mental impairment. Because children with limited English proficiency (who are otherwise nondisabled) do not have a physical or mental impairment in language production in general, they are not considered disabled under §504 or special education.

The legitimate educational needs of LEP students are met by schools' Bilingual and English as a Second Language (ESL) programs, which are not disability related. **OCR is keenly sensitive to over-identification of LEP kids as disabled.** It has conducted a number of district-wide compliance reviews (especially in South Texas) to determine if a district's disability evaluation process under IDEA and §504 is efficient at "filtering out" the effects of limited English proficiency in the assessment process. If those conducting the evaluation are not aware of the assessment problems presented by LEP students, the tendency will be to over-identify LEP students as disabled, when actually, the issue is that the assessment process is not adequately taking into account the effect of limited English proficiency.

B. Schools have the duty to child-find

Under both laws, school districts are required to identify and locate eligible disabled students who are not currently receiving a free appropriate public education. This duty is met through billboards, public service messages on television and radio, pamphlets in supermarkets, doctor's offices, churches, etc. A related duty is to identify students within the public school population who might be eligible for 504 and special education and refer and evaluate those students. Federal law requires districts to be pro-active. The school cannot simply sit back and wait for the parents of eligible students to come forward and request services. Regular classroom teachers can greatly assist in this duty by learning how to identify disabled students in the classroom and by referring those students to 504 or special education when appropriate.

C. Committees make educational decisions for eligible students

For both IDEA and Section 504, the federal government, either through Congress or the Department of Education, has determined that decisions about eligibility and services for disabled students are too important to be given to one person. As a result, whether a student is eligible for a particular program (504 or IDEA) and what that child gets at school because of eligibility are decisions to be made by the appropriately constituted committee, as outlined by federal law.

The ARD Committee: The IDEA regulations require identification, evaluation and placement of students in special education be accomplished by a committee– a multi-disciplinary team usually composed of a variety of educators and the parent. (*See* 19 TEX ADMIN. CODE §89.1050). In Texas, we call these teams Admission, Review, and Dismissal (ARD) Committees. Specifically, the ARD Committee must include the child's parents, a regular education teacher if the student is or may participate in regular education classes, the child's special education teacher, a representative of the public agency (with power to supervise the provision of services), a diagnostician, other individuals at the discretion of the parent or school, and, if appropriate, the child.

The Section 504 Committee is responsible for 504 evaluation and placement. Unlike the IDEA, 504 does not dictate the titles or people who must be members of the Committee. Instead, the regulations require that the 504 Committee is a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options.

§104.35(c)(3). The parents are not required members of the Committee [although best practice dictates that they have involvement in the evaluation and placement process, and receive the notices required by the procedural protection provision.] There is no maximum number of members, and the regulations provide no guidance on the level of knowledge required.

Since both laws require committees to make educational decisions for disabled students, the direct result is that with reference to the disabled student, the classroom teacher has less discretion. While the laws clearly encourage the teacher to provide input to the committee about student services, it is the committee, and not the child's teacher, that decides what accommodations will be required and for example, whether the TEKS will be modified for a special education student.

D. IEP's & 504 Plans: REQUIRED MODIFICATION

Committees create the plans. For students eligible under either Section 504 or the IDEA, the appropriate committee will put in place a written plan that lists and coordinates the modifications and other services required for the student. In special education, the plan is an **IEP (short for Individualized Educational Plan)**. There is no standard name for the **504 plan.** Some districts refer to them as 504 Accommodation plans, 504 Plans, etc. While the IEP is far more complex than the 504 plan, again, some similarities exist. Both plans are not created until the appropriate committee has looked at evaluation data to identify the student's needs. **Input from classroom teachers should always be part of the evaluation.** Both plans then attempt to meet those needs in an appropriate way, and in a location that maximizes the student's involvement with nondisabled peers.

Teachers implement the plans. Eligible disabled students served in the regular classroom depend on the regular education teacher to implement the required modifications. This means that Content Mastery centers should not be viewed as the setting that implements the modifications that should be provided in the classroom setting. Every modification listed in the IEP must be implemented consistently, unless otherwise indicated. If a student appears to not need a certain modification, the appropriate committee should be informed, but the teacher may not stop implementing the modification.

What can happen if a regular teacher fails or refuses to implement a modification? Typically, nothing good. A failure (or worse, a refusal) to implement modifications can result in (1) district exposure to litigation by the parent under the IDEA for failure to implement the IEP, (2) an investigation and required corrective action at the hands of the U.S. Department of Education's Office for Civil Rights (OCR), and (3) possible personal liability for the teacher in cases of outright refusal to implement modifications. In the *Doe v. Withers* case from West Virginia, a teacher was found personally liable for a $15,000 verdict resulting from his refusal to implement accommodations for an LD student in a history class. Finally, failure or refusal to implement modifications can and should be reflected on the teacher's appraisal.

When the modification is in the form of behavior management, the impact of a failure to implement is more complex. Should the disabled student exhibit behaviors that are recurring

or significantly impact upon education and do not seem to be diminishing under the regular education discipline management plan, they need to be addressed in a Behavior Management Plan under 504 (BMP) or Behavior Intervention Plan (BIP) under the IDEA. Once in place, the behavior plan must be followed to avoid violation of federal law. Failure to have a BMP in place where one is required may also prevent the school from moving the student to a more restrictive setting because the District will be unable to demonstrate that the student could not be served in the regular education classroom with modifications because behavioral modification (the BMP or BIP) was never properly attempted. **The failure to implement could also scuttle a long-term removal to AEP or an expulsion** ***(see discipline discussion below).***

E. Least Restrictive Environment (LRE)

Both IDEA and 504 mandate that whenever possible, disabled children should be educated in the regular classrooms. As a practical matter, Section 504 students should almost always be served in the regular classroom. **If a regular classroom placement is not possible, then the disabled student must be educated in the setting that provides the maximum opportunities for interaction with non-disabled peers**. This is called the Least Restrictive Environment (LRE) mandate, and it has received tremendous attention in the past few years. The attention is due to a growing perception among many educational experts that pull-out special programs and segregated settings do not adequately prepare disabled children for their post-school experiences. Recent federal court cases have reflected this emerging philosophy, and inclusion advocacy, headed by groups such as Advocacy, Inc. and ARC-Texas, has become increasingly aggressive and litigious. The best avenue to prevent LRE litigation is to allow disabled children, no matter how disabled, at least a chance in the regular classroom before concluding that the child cannot be served there.

Inclusion is not about "dumping" kids in regular classes; it is about providing the support services to both teacher and student that may be necessary for the child to succeed in the regular classroom, including aides, team teachers, modifications, behavior plans, assistive technology, peer tutors, etc. **Although some of inclusion thinking is debatable, one issue is clear: there are too many children in resource and self-contained classes that could be served in regular classes with some effort, training, and planning.** The trend towards more inclusive programming is creating increased emphasis on modifications in the regular classroom setting. Regular teachers are being asked to be more creative, efficient, and consistent in implementing modifications that will allow for successful placement in regular classes.

F. Discipline of disabled students is different

Because of the possibility that a student's disability may cause the behavior giving rise to a long-term (more than 10-day) AEP placement or expulsion, long-term removals, as well as short term removals that total ten days in a school year, trigger extra protection for 504 and special education students. **Prior to a disciplinary removal that will last more than ten days (or prior to the eleventh day of a series of smaller removals during the school year), the ARD Committee for the IDEA student or the 504 Committee for the Section 504 student must meet to conduct a manifestation determination.** During this evaluation meeting, the committee

will first determine whether the child's IEP/504 Plan was appropriate and whether it was appropriately implemented. If the IEP/504 Plan was inappropriate, or was fine as written but was not followed, no long term disciplinary change of placement is possible. Likewise, if the student had already accumulated ten days of short term removal over the course of the school year, an eleventh day cannot happen this time. Instead, the Committee should focus on making the student's program appropriate and getting the plan implemented.

If the student's IEP/504 Plan was appropriate as written and as carried out, the next step of the manifestation is to determine whether the behavior is related to disability. For this step, the committee looks at the evaluation data to determine whether and how the disability impacts the student's behavior, examines the events surrounding the alleged misconduct and determines whether this instance of the behavior arose from disability.

If the behavior is unrelated to either inappropriate placement or disability, the student is subject to the same discipline as a regular education student. Note, however, that for special education students, FAPE must continue even in the event of expulsion. For 504 students, educational services are only necessary if the school provides services to similarly situated (disciplined) regular education students.

G. Parent Rights

The parents of disabled students are granted rights under federal law in addition to those rights enjoyed by the parents of regular education students. As you might expect, the rights of special education parents are numerous and significant.

The IDEA envisions a system whereby schools and parents work jointly in the planning and development of the IEP. Parents are consensus members of the ARD– equal participants in the ARD committee process under the law. Parents are entitled to notice of their rights, prior notice of meetings, and the right to inspect records. Parents can refuse consent to evaluation, can demand independent evaluations at the district's expense, and can demand ARD meetings be scheduled to discuss concerns. When the parent disagrees with the ARD Committee, the parent can seek a due process hearing (an often complex piece of litigation that can spawn appeals to federal court), can file complaints at TEA or OCR, or request mediation. While complaint resolution is not necessarily expensive, it is time-consuming, and can result in an obligation to provide additional services to the student. **The rights of parents under Section 504 are more limited.** Parents are not required members of 504 committees, but are entitled to prior notice of 504 meetings and post-meeting notice of what occurred. Should parents disagree with the identification, evaluation or placement of their 504-eligible student, they are able to complain to OCR, sue the district, or request a due process hearing.

Finally, like the parents of all students, parents of disabled students are entitled to confidentiality of educational records. The Family Educational Rights and Privacy Act prevents disclosure of personally identifiable information about students to unauthorized individuals and groups without parental consent.