

Chapter Summary

This chapter reviewed disability law and its application in schools, including the IDEA, § 504, the ADA and the rights of students and employees under these Acts. After reading this chapter, please consider the following points in review and for further thought and discussion:

I. Review Points:

- 1) Based on legal theories rooted in *Brown*, advocates for children with disabilities successfully argued that these children were being unconstitutionally excluded from public schools through a systematic denial of equal protection and due process rights.
- 2) In the *PARC* and *Mills* cases in 1972 federal courts held that children with disabilities must have access to a free public education and that they should be placed in regular classrooms when possible or in special classes when necessary.
- 3) In 1975 Congress passed P.L. 94-142 creating a system of special education with significant new substantive rights and procedural protections for children with disabilities.
- 4) Although case law plays an important role in interpreting and clarifying disability laws, the law in this area is largely defined by federal statutes and regulations. These principally include the IDEA, § 504, and the ADA.
- 5) Eligibility under the IDEA is based on a two-part test:
 - 1) Whether the child has an IDEA eligible disability; and
 - 2) Whether the child needs special education and related services because of that IDEA eligible disability.
- 6) The IDEA's "child find" provision creates an affirmative duty for school officials to identify children with disabilities. Children may be identified for IDEA testing through mass screenings of all children, or through referrals from parents, school personnel, medical personnel, or other persons.
- 7) Parental consent is not required for mass screening tests administered to all children. Before individual evaluations for IDEA eligibility may be conducted, however, school officials generally must obtain parental consent.
- 8) Children eligible for IDEA services have a right to a "free appropriate public education" (FAPE), related services, and due process protections.
- 9) Concerning what constitutes an "appropriate" education under special education laws, in *Rowley* the Court conclude that "the 'basic floor of opportunity' provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child." The Court held that FAPE requirements are met by "providing personalized instruction with sufficient support services to permit the child to

benefit educationally from that instruction. Such instruction and services must be provided at public expense, must meet the State's educational standards, must approximate the grade levels used in the State's regular education, and must comport with the child's IEP. In addition, the IEP, and therefore the personalized instruction, should be formulated in accordance with the requirements of the Act and, if the child is being educated in the regular classrooms of the public education system, should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.”

10) The test for determining if extended school year services are required is an assessment of:

- 1) Whether the child would experience a significant regression in the absence of extended year services; and
- 2) Whether sufficient educational recoupment would occur in a reasonable time when regular year services were resumed.

11) The Individualized Education Program (IEP) is the basic plan for providing special education and related services under the IDEA.

12) Children with disabilities must be placed in the Least Restrictive Environment (LRE) appropriate for the child.

13) Related services are those supportive services necessary for an IDEA eligible child to benefit from special education. Under the *Tatro* test, health services must be provided as related services if:

- 1) The supportive services are necessary for the child to benefit from special education; and
- 2) The services are not excluded as medical services that would require the services of a physician for other than diagnostic or evaluation purposes.

14) Notice and hearing rights are provided throughout the special education process, from initial consideration of eligibility through completion of the special education program or a determination of ineligibility.

15) The “stay put” provision requires that during the pendency of any change in placement proceedings, unless school officials and parents otherwise agree, the child shall remain in the then-current educational placement.

16) A disciplinary removal that constitutes a change in placement triggers IDEA due process protections, requiring the IEP Team and other qualified personnel to conduct a review to determine whether the problem behavior is a manifestation of a disability.

17) If the behavior is not a manifestation of a disability, school officials may discipline the student in the same manner that other student's would be disciplined. Any removal for more than 10 consecutive school days, however, constitutes a change in placement and triggers the

procedural protections of the IDEA. If the behavior is a manifestation of the child's disability, the IEP Team must implement a behavioral intervention plan.

18) Discipline procedures under the IDEA may be among the most significant and the most confusing provisions for many educators and lawyers. Accordingly, the following summary of incrementally severe disciplinary options under the IDEA is provided:

Behavior Management Strategies: To attempt to modify problem behavior school officials may utilize a variety of behavior and conflict management strategies including student carrels, time-outs, detention, restrictions in privileges, etc. As long as IEP services are provided, and there is no change in placement, school officials may unilaterally implement these behavior management strategies.

Obtaining Parental Consent: If more serious measures are necessary school officials may first obtain parental consent for needed changes in placement or for other appropriate behavior management strategies. If parental consent is obtained, the IDEA limitations on disciplinary actions are generally not triggered.

Unilateral 10 School Day Removal: Provided their actions are not discriminatory school officials may unilaterally remove an IDEA eligible student for up to 10 consecutive school days for violating a code of student conduct. No services are required, and no manifestation determination is necessary.

Subsequent 10 School Day or Less Removals: The 1999 IDEA regulations clarified that there is no absolute limit on the total number of days per year that a student may be removed for separate incidents of misconduct, so long as no single removal exceeds 10 consecutive school days and there is no pattern of removals. Factors considered in determining whether there is a pattern of removals include the length of each removal; the total amount of time the child is removed; and the proximity of the removals to one another. However, school officials must provide services to the extent necessary to allow the child to make progress toward meeting IEP goals and participate in the general curriculum, although in a different setting. School officials determine which services are needed in consultation with at least one of the child's teachers. Manifestation determinations are only required when a child is subjected to a disciplinary change of placement.

Long-Term Suspensions and Expulsions: IDEA eligible students may be long-term suspended or expelled for a violation of a code of student conduct that is not a manifestation of the student's disability. Any removal beyond 10 consecutive school days, however, constitutes a change in placement, triggering IDEA due process protections. Further, school officials must continue to provide a FAPE to these students. For removals beyond 10 consecutive school days, the child's IEP team determines what services are necessary to provide a FAPE.

45 School Day Removals for Weapons, Drugs, or Inflicting Serious Bodily Injury: School officials may unilaterally remove a student to an alternative educational placement for up to 45 school days for possession of weapons, drugs, or inflicting serious bodily injury.

45 School Day Removals for Dangerousness: School officials may ask a hearing officer to remove a potentially dangerous student to an alternative educational placement for up to 45 school days by presenting evidence that “maintaining the current placement of such child is substantially likely to result in injury to the child or to others.” Additional 45 school day extensions may be repeated as necessary to prevent a dangerous placement.

Court Ordered Remedies: In the event that the above options fail to provide appropriate remedies, school officials may obtain a court order for a removal or change of placement of a student that presents a serious danger to him or herself or others in the school.

Reporting Crimes: School officials may report students suspected of committing crimes to law enforcement agents, who have a duty to enforce criminal laws, and are not bound by IDEA limitations. Neither law enforcement agents nor judges are bound by the provisions of the IDEA. The State must continue to provide a FAPE to eligible incarcerated students.

19) Transition services facilitate the child’s transition from school to post-school activities and may include instruction, related services, community experiences, and the development of employment and adult living skills.

20) Special education services terminate upon graduation with a regular high school diploma or age ineligibility.

21) A cost-based defense under the IDEA requires school officials to establish that:

- 1) The school has provided a proper continuum of placements;
- 2) The child in question would not experience a total denial of educational opportunity because of the failure to provide the expensive service; and
- 3) Other special education students may be denied a FAPE because of excessive expenditures on one child.

22) Section 504 prohibits discrimination against any person who has a physical or mental disability which substantially limits one or more major life activities; has a record of disability; or is regarded as having a disability.

23) Section 504 requires non-discrimination and reasonable accommodations.

24) Individuals must be otherwise qualified and fundamental alterations of programs are not required.

25) An accommodation is not reasonable, and therefore not required, if it would result in unreasonable costs, administrative burdens, or health or safety risks.

26) Persons may be excluded from activities if participation creates serious health or safety dangers and no reasonable accommodation would effectively mitigate these dangers.

27) Medical exclusions must be based on medical data and medical opinions, and not mere speculation or irrational phobias.

28) The ADA extended protections similar to § 504 protections to many areas of the private sector.

II. Principles to Practice Tips

1) *Close Calls between the IDEA and § 504*: To be eligible under the IDEA a student must meet minimum IDEA qualifications. In close cases, however, erring on the side of the IDEA may be prudent if it assures that the child will receive needed services, avoids contentious and expensive battles with parents, and forecloses future claims for compensatory damages.

2) *Developing Positive Parental Relationships and Cooperation*: The IDEA tends to be an advocacy driven, adversarial system. Parents that demand the most under the IDEA often get the most. Further, the system for resolving disputes under the IDEA is adversarial and litigation oriented, often aggravating rather than resolving tensions between parents and school officials. Litigation can make ongoing working relationships difficult and drain away resources that are needed to support education. It's easier to build strong relationships than to fix broken ones. Developing a relationship of mutual trust and cooperation with parents early in the IDEA process can be invaluable in effectively meeting the needs of the IDEA eligible children without undue conflict or expense. Not all relationships will be positive and functional. But with appropriate efforts at building positive working relationships less of them have to be negative and dysfunctional.

3) *Dealing with a Truly Dangerous Student*: In cases where parents refuse to cooperate with an appropriate change of placement and their child poses a genuine danger, safety must remain the first priority. School officials must take prompt, appropriate, and lawful action to assure safety. Allowing a known danger to persist could lead to consequences far more serious than a due process hearing with parents over the LRE for their child, including tragic injury, death, and resulting tort suits. A truly dangerous student cannot be allowed to cause self-injury or injury to others when the danger was known and the injuries could have been prevented. The IDEA does not require this result, and tort and criminal laws will not allow it.

4) *Promoting a Culture of Respect and Inclusion*: Children with disabilities are frequently misunderstood and dehumanized, becoming the targets of cruel bullying and abuse. Promoting a positive culture of respect, kindness, understanding, and inclusion in the school can help to reduce the frequency and severity of bullying and abuse of children with disabilities. Through leadership and educational efforts, school officials can help students to see special education students as friends and colleagues, and disabilities as a natural part of the human condition. With the development of mutual understanding and respect, special education students can become valued friends and not just the targets of misguided bullying and abuse.

III. Questions for Discussion: Please consider these questions and be prepared to discuss:

1) *Assessing the Personal Impacts of Special Education:* P.L. 94-142 was passed in 1975. How has special education changed the lives of children with disabilities, parents, educators, non-disabled students, and the community?

2) *Costs, Benefits, and Greater Efficacy:* What are the benefits of the IDEA, and what are the costs? What remains to be done to help children with disabilities and to improve the effectiveness and efficiency of special education?

3) *IDEA Discipline Policies:* Do IDEA discipline policies strike a fair balance between the rights of special education students and the rights of everyone else?

4) *Open Forum:* What other related issues or current events would you like to discuss?

IV. Suggested Activities:

1) Many very famous and successful persons have been challenged by disabilities. Nonetheless, they succeeded in spite of, or sometimes even because of their disability, when they were able to focus their special talents in a positive direction. Among those said to have been challenged by disabilities are: Moses, Sir Isaac Newton, and Thomas Jefferson (speech impairments); Leonardo Da Vinci, Albert Einstein, and Thomas Edison (dyslexia); Alexander the Great and Theodore Roosevelt (epilepsy); Michelangelo, General “Stonewall” Jackson, Sir Winston Churchill, and Howie Mandel (obsessive compulsive disorder); Stephen Hawking (cerebral palsy); Abraham Lincoln (mood disorder); Ludwig Van Beethoven (deafness); The Greek poet Homer and Stevie Wonder (blindness); Wolfgang Amadeus Mozart (hyperactivity, mood disorder, and possible Tourette’s syndrome). Learn more about how throughout human history persons with disabilities have overcome personal challenges to achieve personal greatness and contribute to the progress of humanity. Share this knowledge to inspire children with disabilities to future success of their own.

2) Discuss ways to make your school more inclusive and welcoming to persons with disabilities. Identify positive ways of reaching out to persons with disabilities in your community to let them know that they are welcomed and valued members of the school community.

3) Learn more about how to prevent bullying of children with disabilities. Create a plan for what you could do to make your school culture more supportive for children with disabilities and to better protect these children from abuse.