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By LEONA E. FILIS

NAVIGATING THE FIGHT FOR LEGAL RIGHTS OF STUDENTS WITH DISABILITIES

Utilizing Section 504, IDEA, and Special Education

The United States Centers for Disease Control and Prevention (“CDC”) published a report in 2016 estimating that one in 68 school-aged children has autism spectrum disorder.¹ The CDC has also identified that one in 323 children has Cerebral Palsy, which is the most common childhood motor disability.²

For children with these and other disabilities, many parents rely on their school districts to assess and accommodate students. The Texas Education Agency is responsible for overseeing districts and their ability to accom-

modate their students. However, parents have been alerted to a terrifying trend by investigative reporting: “Over a decade ago, Texas officials arbitrarily decided what percentage of students should get special education services—8.5 percent—and since then they have forced school districts to comply by strictly auditing those serving too many kids.”³ With a cap in place for members of the student population to receive special education services, what happened to the students who were prevented from receiving necessary services? Most parents and education advocates were left with few options, including (1) no special education services in school, (2) limited accommodations, or (3) removal from public school for private school or homeschool. For students with disabilities, their legal rights in local public schools can stem from two federal sources, Section 504 and IDEA.

A. Section 504

Section 504 of the Rehabilitation Act of 1973, as amended, is first and foremost a federal civil rights law, with the goal to stop discrimination against people with disabilities: “No otherwise qualified individual with a disability in the United States... shall, solely by reason of his or her identity, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity” that receives federal funds.⁴

The definition of a disability has been broadened under amended Section 504 to pertain to “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.”⁵ “Substantially limits” is defined at the local education agency level, providing broad discretion to school districts to determine if a student’s impairment is at a level to allow for eligibility of services.

The Section 504 definition of disabil-

ity, when applied in the realm of public education, protects students without regard to students' grades. Moreover, nonacademic activities such as field trips, band programs, afterschool and summer programs, and graduation are all included in the evaluation of a school's Section 504 compliance.

To effectuate the goal of protecting children with disabilities, schools are mandated each year to locate and identify all children with disabilities who are between the ages of three and 21 in their district. This "Child Find" mandate under Section 504 applies to all children who reside within a state, including children who attend private schools and public schools, highly mobile children, migrant children, homeless children, and children who are wards of the state.⁶

Once a school has located in its district a child that is suspected of having a disability and potentially needing Section 504 services, public schools must provide a proper evaluation to determine the child's eligibility for such services.⁷ The evaluation committee is charged with considering information from a variety of sources, including medical diagnoses, school-based data, teacher recommendations, and aptitude tests. Although the information provided by a physician is significant, the committee determines the weight of the information given the child's circumstances. An illness must be the cause of the substantial limitation, as defined by the school district. Assuming the committee determines the student is eligible for Section 504 services, the school district has a duty to provide an "appropriate education," which is defined as "the provision of regular or special education and related aids and services that... are designed to meet the individual educational needs..." of the disabled persons "as adequately as the needs of" non-disabled persons "are met."⁸ Thus, proving discrimination under Section 504 requires a comparison of the education of students with

and without disabilities.

With a Section 504 plan, schools are not mandated to invite parents of qualifying students to meetings that evaluate special services options. Section 504 accommodations can be included in a plan that is prepared solely by the general education teacher and special education teacher. Schools have much flexibility to create content for the Section 504 plan, with broad descriptions of accommodations, supports and services. A Section 504 plan should include the designation of the provider of the supports and services and include the staff member of the school or district who will confirm the proper implementation of the Section 504 plan.

Advocates for students' rights can initiate a dialogue with the school once a dispute arises concerning the Section 504 plan. Mediation or alternative dispute resolution are available to parents and their children's advocates when communication with the school fails to resolve a dispute. In the event further action is needed, parents can request an impartial hearing, keeping the dispute at a local level. In an escalation of the dispute, a written complaint may be required. The U.S. Department of Education enforces Section 504 through its Office for Civil Rights ("OCR"), aiming to ensure students receive an appropriate education in public schools. Once the OCR receives complaints from parents, the OCR will investigate and examine the procedures of the school. One option offered from OCR to resolve a complaint is "Early Complaint

Resolution" to bring the parties together to discuss a possible resolution.

If pursuing a lawsuit, to establish a violation of Section 504, plaintiffs must demonstrate that (1) the student is dis-

abled as defined by Section 504; (2) the student is "otherwise qualified" to participate in school activities; (3) the school or school board receives federal financial assistance; and (4) the student was excluded from participation in, denied the benefits of, or subject to discrimination at the school. In addition, to be liable, defendants "must know or be reasonably expected to know of" the student's disability, though plaintiffs "need not establish that there has been an intent to discriminate in order to prevail under § 504."¹⁰

Regulations under Section 504 extend to provide non-discrimination protection at college. Section 504 regulations are to be

complied with by universities and colleges that receive federal funding. Additional federal education protections are available through special education.

B. IDEA

The Individuals with Disabilities Education Act ("IDEA") is a federal special education law for children with disabilities. IDEA defines the term "child with a disability" and includes the following categories of disability: autism, deaf-blindness, deafness, developmental delay, emotional disturbance, hearing impairment, intellectual disability, multiple disabilities, orthopedic impairment, other health impairment,

“For children with these and other disabilities, many parents rely on their school districts to assess and accommodate students. The Texas Education Agency is responsible for overseeing districts and their ability to accommodate their students.”

specific learning disability, speech or language impairment, and traumatic brain injury.¹¹ A medical diagnosis is not the sole determinative factor for eligibility for special education services. The student's educational performance also must be adversely affected due to the disability.

As with Section 504, IDEA utilizes the "Child Find" mandate to require schools to locate, identify and evaluate all children with disabilities from birth through age 21. Evaluation of eligibility for special education services must be comprehensive and fully evaluate any child who may need special education services "in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities."¹² Parents may choose to take the initiative of having their child assessed by a professional outside of the school system to perform an independent educational evaluation.

A "Dear Colleague" letter from the U.S. Department of Education's Office of Special Education and Rehabilitative Services acknowledges that under IDEA all students are entitled to a "free appropriate public education" ("FAPE") and emphasizes that special education is to be "designed to meet the child's unique needs" and "prepare the child for further education, employment, and independent living," citing 20 U.S.C. §1400(d)(1)(A).¹³ This is to be accomplished by an Individualized Education Program ("IEP").

Although the states' educational agencies set the standard of what is appropriate under FAPE, the Supreme Court recently ruled that states cannot set low standards for school districts that yield little to no educational progress as reflected in students' IEPs. In *Endrew F. v. Douglas County School District RE-1*, the Court noted that student Endrew F. was diagnosed with autism spectrum disorder at age 2, "a neurode-

velopmental disorder generally marked by impaired social and communication skills, engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences."¹⁴ The autism spectrum diagnosis qualified Endrew F. to receive special education services. The years following the initiation of the IEP, Endrew F.'s parents were dissatisfied with the public school's inability to provide a new IEP with different measurable goals from any of the prior IEPs. Frustration escalated due to the lack of satisfactory results from the school district, and Endrew F.'s parents withdrew him from school. Endrew was placed in a private school that specializes in educating children with autism. There Endrew F. received superior education services that yielded significant improvement for Endrew F. Due to the apparent failures of the school district, year after year, to provide an appropriate public education for Endrew F., his parents filed a lawsuit against the school district. The Supreme Court noted that an IEP is unique for the circumstances of the child for whom it was created. The standard for the student's educational program must be appropriately ambitious in light of his circumstances, not merely *de minimis* progress from year to year. Based on *Endrew F.*, a school must offer an IEP "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances."¹⁵

In the event parents of a child receiving special education services have a dispute with the school, the initial recommendation is to request a meeting. In Texas, the IEP team is also called the Admission, Review and Dismissal (ARD) committee. It is mandatory that parents of the student are included as part of the IEP Team, as well as at least one general education teacher, at least one special education teacher, a representative of the local education

agency, an individual who can interpret the evaluation results, a guest of the parents, and if appropriate, the student. Parents can dispute the proposed content for the IEP and request time to review the IEP prior to signing, and set a new meeting. To maximize negotiations for goals and accommodations in the proposed IEP, options include having the IEP meeting with a trained facilitator or attending a mediation. Escalation measures for IEP disputes include filing a notice with the school district and filing an administrative complaint with the state's education agency.

Under IDEA, parents who allege school district violations of law can address their disputes at a due process hearing. IDEA has a two-year statute of limitations to file such disputes, from the date the dispute was known. The school district does not reimburse parents for attorney fees unless the parent wins the case.

C. Additional Protections for Texas Special Education Students

Parents of students receiving special education services, or a trustee or staff member, have the right to request, in writing, the installation of video surveillance equipment in self-contained classrooms or other special education settings.¹⁶ "Cameras in the classroom" legislation is designed to prevent situations of abuse of special education students who may not be able to inform their parents of abuse suffered at school. The inspiration for this Texas legislation is due, in part, to a parent of a former student in Keller Independent School District in the special education program. According to evidence presented in the lawsuit, the student suffered a broken thumb, dislocated knee, and skull contusions, on separate occasions, while he was on the school campus, but due to his disability, he could not verbalize details of his abuse.¹⁷ This protection measure, offered to students receiving special education services,

will not be provided on campus without a proper request.


D. Are these Regulations in Jeopardy?

In response to Presidential Executive Order 13777, "Enforcing the Regulatory Reform Agenda," the U.S. Department of Education has begun the process of evaluating which of its regulations may be appropriate for repeal, replacement, or revision due to factors such as causing job elimination, being outdated or ineffective, or imposing costs that exceeds benefits.¹⁸ One could argue that Congress has stated that the protections provided to children through IDEA (in 1983) shall not be lessened "except to the extent that such regulation reflects the clear and unequivocal intent of Congress in legislation."¹⁹

E. Where Does Texas Education Rank?

Where does Texas rank in meeting the IDEA standards of the U.S. Department of Education's Office of Special

Education and Rehabilitative Services? According to the "2017 Determination Letters on State Implementation of IDEA," Texas's status for IDEA Part B—which serves students from ages three to 21—is "Needs Assistance." A state receiving a "Needs Assistance" determination for two or more consecutive years is subject to the Department taking an enforcement action against the state. For IDEA Part C, which is focused on schools serving infants and toddlers up to age two, Texas's status is "Meets Requirements."²⁰

With a growing number of students requiring accommodations and possibly special education services, Texas must meet the federal standards as set out in Section 504 and IDEA. It is up to parents, advocates, and attorneys to ensure that the most vulnerable of our student population have their rights protected to ensure a successful educational career. 

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Endnotes

1. <https://www.cdc.gov/ncbddd/autism/data.html>.
2. <https://www.cdc.gov/ncbddd/cp/data.html>.
3. Brian M. Rosenthal, *Denied: How Texas keeps tens of thousands of children out of special education*, HOUSTON CHRONICLE, Sept. 10, 2016.
4. 29 U.S.C. § 794(a) (2016).
5. 34 C.F.R. § 104.3(j)(1).
6. 20 U.S.C. § 1412(a)(3) (2016).
7. 34 C.F.R. § 104.35 (2017).
8. 34 C.F.R. § 104.33(b) (2017).
9. *Nathanson v. Med. Coll. of Pa.*, 926 F.2d 1368, 1380-81 (3d Cir. 1991); 34 C.F.R. §§ 104.4(a), (b).
10. *Nathanson*, 926 F.2d at 1381, 1384; see also *Alexander v. Choate*, 469 U.S. 287, 296-97 (1985).
11. IDEA 2004 Regulations, 34 C.F.R. § 300.8 (2016).
12. 34 C.F.R. § 300.304(c)(4) (2017).
13. <https://www2.ed.gov/policy/speced/guid/idea/memosdelttrs/guidance-on-fape-11-17-2015.pdf>.
14. *Andrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988, 996 (2017).
15. *Id.* at 999.
16. Tex. Educ. Code Ann. § 29.022; 19 Tex. Admin. Code Ann. § 103.1301.
17. *Rideau vs. Keller Indep. Sch. Dist.*, 819 F.3d 155, 158 (5th Cir. 2016).
18. 82 Fed. Reg. 12285 (Feb. 27, 2017).
19. 20 U.S.C. § 1406(b)(2) (2005).
20. <https://www2.ed.gov/fund/data/report/idea/idea-factsheet-determinations-2017.pdf>.

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