

CROSSING THE LINES: IDEA AND 504

MCASE
September 17, 2018

Fundamental Concept from the Past – IDEA and 504 are Distinct

1. Dual eligibility does not mean that the school must provide an IDEA student with a Section 504 plan in addition to an IEP. *Protecting Students with Disabilities*, 67 IDELR 189 (OCR 2015).
2. Parents may not reject an IEP and then demand a Section 504 plan. *Letter to McKethan*, 25 IDELR 295 (OCR 1996).
3. Parents may not use Section 504 to obtain accommodations that IEP team has rejected. *Lamkin v. Lone Jack C-6 School District*, 58 IDELR 197 (W.D. Mo. 2012).

New Concepts to Embrace – IDEA and 504 May Overlap

1. Courts have rejected *Letter to McKethan* and *Lamkin*, albeit in dicta:
 - a. *Kimble v. Douglas Co. Sch. Dist. RE-1*, 60 IDELR 221 (D.Colo. 2013)
 - b. *D.F. v. Leon County Sch. Bd.*, 62 IDELR 167 (N.D. Fla. 2014)
2. Other Decisions
 - c. *Northampton Area Sch. Dist.*, 63 IDELR 89 (SEA PA 2014)
 - d. *Fry v. Napoleon*, 69 IDELR 116 (U.S. 2017)
3. Montana has long recognized the right of a parent to bring a discrimination claim related to the provision of services under IDEA so long as the gravamen of the complaint is not based on FAPE or the IDEA. *Great Falls Public Schools v. Johnson*, 305 Mont. 200, 26 P.3rd 734 (2001).

Areas of Overlap

1. Service Animals

Under the ADA, “generally a public entity shall modify its policies, practices, or procedures to permit the use of a service animal by an individual with a disability.” 35 CFR 35.136(a). In *Bakersfield City Sch. Dist.*, 50 IDELR 169 (OCR 2008), OCR found that a school district violated Section 504 and ADA Title II by unilaterally denying a service animal for the student based on the health and safety of others.

In *Alboniga v. School Bd. of Broward County*, 65 IDELR 7 (S.D. Fla. 2015), a 6-year-old with multiple disabilities served through an IEP wanted to bring a service dog to school. The school refused to provide extra assistance to take the dog outside and required the parent to obtain additional vaccinations and liability insurance. The parents sued, alleging ADA violations, and won. Court found that the failure to provide an employee to assist the child with the dog’s routine care amounted to a failure to accommodate. In addition, the Court rejected the school’s contention that it wasn’t necessary because the teachers could detect and address the student’s seizures.

2. Effective Communication

Under the ADA, a school district must “ensure that communications with applicants, participants, members of the public, and companions with disabilities are as effective as communications with others.” 28 CFR 35.160(a)(1). In determining what type of auxiliary aid and service is necessary, a school “shall give primary consideration to the requests of the individual with disabilities” or student’s family in an educational context. 28 CFR 35.160(b)(2). A district need not “take any action that is can demonstrate would result in a fundamental alteration in the nature of a service, program or activity or in undue financial and administrative burdens.” 28 CFR 35.164

In *K.M. v. Tustin Unified Sch. Dist.*, 61 IDELR 182 (9th Cir. 2013), cert. denied, 114 LRP 9688, 134 S. Ct. 1493 (2014), student with hearing impairments requested Communication Access Real-time Translation (CART) services from the school. The school said no because it was not required for FAPE. The parents requested due process, and the hearing officer and District Court ruled in favor of the school, finding that there was no denial of FAPE under the IDEA, so no violation of Title II of the ADA. The 9th Circuit overruled, finding that compliance with IDEA standards does not necessarily satisfy the ADA.

What is a communication disability? Hearing impairment, visual impairment, processing errors...

Pollack and Quiron v. Regional Sch. Unit 75, 69 IDELR 271 (D. Me. 2017) – Student with autism parents’ request to allow a student to use a body camera at school to allow the parents to review announcements and other information students are expected to convey to parents, and assist the student in telling parents about his day. The court said NO – the District is not required to ensure that the student’s communication with parents outside of school was effective, and the request was not reasonable (violated peer privacy, CBA issues, etc.)

3. Extracurricular Activities

Section 504 requires school districts to provide nonacademic and extracurricular services and activities in “such a manner as is necessary to afford students with disabilities an equal opportunity for participation in such services and activities.” These activities may include “physical and recreational athletics, recreational activities, special interest groups or clubs...” 34 CFR 104.37(a); see also, 28 CFR 35.130(a)(1).

Schools DO NOT have to provide accommodations if the accommodation would create an undue burden or fundamentally alter the program. OCR has been clear it does not believe an undue burden defense would work for an extracurricular program. *See, Dear Colleague Letter*, 60 IDELR 167 (OCR 2013). Fundamental alteration is an issue if the accommodation changes an essential aspect of the activity, or gives the student with a disability an unfair advantage. This same Dear Colleague Letter also made clear that the school may “require a level of skill or ability of a student in order for that student to participate in a selective or competitive program or activity, so long as the selection or competition criteria are not discriminatory.”

Class v. Towson Univ., 52 NDLR 55 (4th Cir. 2015).

Raytown (MO) C-2 Sch. Dist., 53 IDELR 239 (OCR 2009).

4. Abuse Claims

J.M. v. Francis Howell Sch. Dist., 69 IDELR 146 (8th Cir. 2017)

K.G. v. Sargent Bluff-Lufton Cmty. Sch. Dist., 69 IDELR 216 (N.D. Iowa 2017)