321 Ed. Law Rep. 623

West's Education Law Reporter
November 5, 2015

Education Law Into Practice
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IS A 504 PLAN REQUIRED (OR PERMITTED) IN THE WAKE OF REVOCATION OF AN IEP? [a1]

One of the practically and legally significant issues that has arisen in recent years at the intersection of the Individuals with Disabilities Education Act (IDEA) with Section 504 of the Rehabilitation Act (§ 504) and the Americans with Disabilities Act (ADA) [1] is whether a school district, in the wake of the parent's written revocation of an IEP, must (or may) provide the child with a 504 plan? This brief article will provide a chronological overview of the pertinent legal authority, including a 1996 Office for Civil Rights (OCR) policy interpretation and the 2008 amendments to the IDEA regulations, to arrive at a current answer to this question.

1996 OCR Policy Letter

The first relevant agency or court authority was a 1996 policy letter from the administrative agency, within the U.S. Department of Education, responsible for § 504 and the ADA within the K–12 student context of this issue. In a brief analysis in *Letter to McKethan*, OCR opined that the parent effectively relinquished the right under § 504 upon revoking the corresponding authority under the IDEA. [2] The reason is that because the § 504 regulation for free appropriate public education (FAPE) makes clear that implementation of an IEP under the IDEA is one means of compliance, [3] "by rejecting the services developed under the IDEA, the parent would essentially be rejecting what would be offered under Section 504." [4]

However, this policy letter did not settle the matter. The reasons included not only the limited authority of agency interpretations in the context of judicial decision–making [5] and the early date of this policy letter, ***624** but also the wording of McKethan's question, which referred to an "IEP under Section 504" rather than a 504 plan. [6]

2008 Amendment to IDEA Regulations

The next pertinent legal development was a December 2008 amendment to the IDEA regulations that required school districts to cease special education services to a child with an IEP upon a parent's written notice of revocation of consent. [7] Although requiring prior written notice in response to the parent's revocation, the amended regulation also clarified that the district would no longer be able to seek an override of the parent's decision via a due process hearing. [8]

Recent Case Law

Subsequently, federal district courts in various jurisdictions addressed this overall issue, each with a particular factual variation, in a series of decisions in each consecutive year starting in 2012. All but one are "unreported," [9] i.e., not officially published. [10]

In the first case, which arose in Missouri, the parents revoked consent under the IDEA but requested FAPE under § 504, and the district refused to provide any additional services or accommodations. [11] In an unpublished decision, a federal district court in Missouri summarily denied the parents' claim under § 504 on two independent grounds, with the first being the parents' failure to exhaust available administrative remedies, i.e., an impartial hearing. [12] Alternatively, the court substantively ruled that the "the Plaintiffs' revocation of services under IDEA was tantamount to revocation under § 504 and the ADA." [13] In reaching this conclusion on the merits, the court specifically found Letter to McKethan to be persuasive. [14]

***625** The second case arose in Colorado based on this factual sequence: (1) the parents revoked their consent for their child's IEP, (2) the parents requested a 504 plan, (3) the district convened a § 504 meeting and, after agreeing that the child was eligible, offered a 504 plan that consisted of the same services of the IEP, and (4) the parents rejected it. In a published decision for the parents' § 504/ADA suit, the federal district court in Colorado summarily ruled in favor of the district based on "the unique factual setting of this case." [15] In deciding in favor of the district, the court distinguished Letter to McKethan [16] and found the unpublished Missouri case to be "unhelpful." [17] The distinguishing factor appeared to be the district's added step of convening a § 504 meeting that resulted in a proposal of FAPE in accordance with the aforementioned [18] § 504 regulation. More specifically, after a relatively careful analysis of the respective requirements of the IDEA and Section 504, the court rejected the automatic, waiver approach of the Missouri case [19] but found that the district's added step in this case fulfilled the relevant requirements of § 504. [20]

Third, in an unpublished decision the following year a federal district court in Hawaii addressed another factual variation of the overall issue. [21] In this case, after the parents revoked IEP services under the IDEA, the district convened a § 504 meeting that resulted in a 504 plan that provided "certain special education services, including 1:1 instruction." [22] However, the court opinion does not report (1) whether the parents' consented to the 504 plan and (2) the extent of these services in comparison to those under the IDEA. [23] ***626** Instead, the court granted the district's motion for summary judgment for the parents' claim that the 504 plan did not meet the substantive standard under § 504, because "the [parents] have not provided any declarations, affidavits, or other evidence showing the alleged deficiencies with the § 504 plan." [24]

Most recently, in another unpublished decision, a federal district court in Florida faced another variation of the basic theme. [25] Here, for her child with an IEP for hearing impairment, the sequence of events was as follows: (1) the parent revoked consent under the IDEA and requested specific services and accommodations under § 504; (2) the district relied on *Letter to McKethan* to place the child in general education; and, in doing so, (3) the district provided the child with a portable amplification device, which was notably less than what the parent requested. [26] The court issued summary judgment on the pertinent claim [27] in the district's favor on two alternative grounds. One basis was the exhaustion doctrine. [28] For the alternative basis on the merits, the court recognized but found unnecessary to resolve the issue of whether IDEA revocation terminates the right to FAPE under § 504 [29] and, if not, the application of the related differential standard for FAPE under § 504. [30] Instead, the substantive basis was the failure of the parent to show, ***627** at least on a prima facie basis, intentional discrimination, [31] which implicates the alternative standards of deliberate indifference, gross misjudgment, or bad faith. [32]

Conclusion

The interplay between the IDEA and § 504/ADA in the wake of a revocation of consent for services under the IDEA is not clearly settled due to the limited level of the case law and its varying interpretations that is in part due to factual differences. Thus, if the parents effectuate revocation of IDEA services, whether the district is required (or even permitted) to provide a 504 plan currently merits an "it depends" answer rather than dogmatic reliance on *Letter to McKethan*. The contingent factors are several, with none of them being exclusively controlling.

The major initial factor is whether the parents have consented to such services.[33] If not, such as if either the parents first requested such services but upon request for a written request declined to sign an informed consent form or the district sought to continue support services for the child as an end run around the parents' perceived irrational decision, the provision of a 504 plan is more questionable.[34]

The second factor is the jurisdiction. The state where the case arises is significant in terms of not only whether any of the four court decisions to date[35] is of particularly applicable weight but also whether, for purposes of exhaustion,[36] the IDEA hearing officers have jurisdiction for § 504 claims.[37]

The third factor is the substantive standard for FAPE under § 504. Although the common conception that the scope of FAPE is limited to accommodations is clearly incorrect,[38] this substantive standard is subject to varying judicial interpretations.[39] Thus, deciding whether to provide a 504 ***628** plan depends in part on the specific contours of its contents, thus triggering this factor.

The fourth factor consists of practical considerations. For example, if the 504 plan includes special education, per the revoked IEP and the § 504 scope/standard for FAPE, is that provision likely to cause difficulty in terms of funding[40] and/or other IDEA students?[41]

The final factor, which largely provides overriding latitude to school districts is the prevailing judicial standard for violations of § 504 and the ADA—intentional discrimination.[42] However, this district–friendly standard is of no avail if the parents utilize the alternate avenue of filing a complaint with OCR under § 504's investigative process, which is oriented to procedural rather than substantive compliance.[43]

In sum, there is no easy or automatic answer to this question, which is one of the perplexing intersections of the IDEA and § 504. Rather, subject to much more conclusive case law, the district's course of action warrants a careful and good faith consideration of the factual situation and the applicable case law.

Footnotes

a1 *Education Law Into Practice* is a special section of the EDUCATION LAW REPORTER sponsored by the Education Law Association. The views expressed are those of the author and do not necessarily reflect the views of the publisher or the Education Law Association. Cite as 321 Ed.Law Rep. [623] (November 5, 2015).

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1 For an annotated analysis, with citations, of three statutory frameworks, including their respective regulations and illustrative court and agency interpretations, see Perry A. Zirkel, *A Comprehensive Comparison of the IDEA and Section 504/ADA*, 282 Ed. Law Rep. 767 (2012).

2 *Letter to McKethan*, 25 IDELR 295 (OCR 1996).

3 104 C.F.R. § 104.33(b)(2) (2013).

4 *Letter to McKethan*, 25 IDELR at 296.

5 For the analogous situation under the IDEA, see Perry A. Zirkel, *Do OSEP Policy Letters Have Legal Weight?*, 171 Ed.Law Rep. 391 (2003).

6 *Letter to McKethan*, 25 IDELR at 295. This term is ambiguous in light of the specific terminology under the IDEA in comparison to the corresponding openness under § 504, regardless of whether the child is covered under both the IDEA and § 504 or only § 504. *See*, *e.g.*, Perry A. Zirkel, *Does Section 504 Require a Section 504 Plan for Each Eligible Non–IDEA Student?*, 40 J.L. & EDUC. 407 (2011).

7 73 Fed. Reg. 73,006 et seq. (Dec. 1, 2008) (amending 34 C.F.R. § 300.300(b)(4)).

8 34 C.F.R. § 300.300(b)(4)(i)–(ii).

9 *Kimble v. Douglas Cnty. Sch. Dist. RE–1*, 925 F.Supp.2d 1176, 1183, 295 Ed.Law Rep. 637 (D. Colo. 2013).

10 *See*, *e.g.*, Joseph L. Gerken, *A Librarian's Guide to Unpublished Judicial Opinions*, 96 L. LIBR. J. 475 (2004).

11 *Lamkin v. Lone Jack C–6 Sch. Dist.*, 58 IDELR ¶ 197 (W.D. Mo. 2012).

12 The basis was the IDEA's exhaustion requirement, which applies to § 504 or other claims where the relief is also available under the IDEA. 20 U.S.C. § 1415(l) (2013).

13 *Lamkin v. Lone Jack C–6 Sch. Dist.*, 58 IDELR ¶ 197, at *1110. The court made clear that this alternative ground was an "independent reason." *Id.*

14 *Id.*:
The Plaintiffs argue that *Letter of McKethan* should not be followed, but have failed to cite any judicial or administrative decision that calls it into doubt. In contrast, the Defendants note that administrative decisions have cited and relied upon it. *Westfield Bd. of Education*, 102 LRP 11929 (Nov. 28, 1998), at p. 7 (citing *McKethan* for the proposition that "it is impermissible for the student's parents to refuse to accept the IDEA services as specified in the IEP and require the district to develop an[ ] IEP under § 504").

15 *Kimble v. Douglas Cnty. Sch. Dist. RE–1*, 925 F.Supp.2d 1176, 295 Ed.Law Rep. 637 (D. Colo. 2013).

16 *Id.* at 1184: "Plaintiffs do not seek to 'compel the district to develop an IEP under Section 504,' but rather request a Section 504 plan."

17 *Id.* at 1183–84: "The Court finds the *Lamkin* decision unhelpful, as its primary focus was on the plaintiffs' failure to exhaust administrative remedies, and its reliance on *Letter to McKethan* was an alternative basis for its holding and did not consider the larger statutory and regulatory context."

18 *See supra* note 3 and accompanying text.

19 *Id.* at 1184: "[T]the Court is not persuaded that a parent's rejection of an IEP, developed under the IDEA, automatically rejects any plan that could be developed under the less–restrictive Section 504 requirements.... Insofar as Defendant relies on Plaintiffs' waiver of their rights under one statute (IDEA) to insulate itself from liability under another (Section 504 or the ADA), Defendant misapprehends the law."

20 *Id.* at 1184–85: "Because the statutory [sic] language of Section 504 permits a school district to meet its obligations under that statute by implementing an IEP, the Court cannot find that Defendant's attempt to implement the IEP it developed violated its obligations to provide [the child] with a FAPE under Section 504 and the ADA [footnote omitted]. Because Defendant convened a Section 504 meeting and its committee proposed a 504 plan, once Plaintiffs refused to accept it, Plaintiffs cannot hold Defendant liable for failing to provide accommodations that they rejected as part of the 504 plan." In using this approach,

the court avoided the alternative and not clearly settled issue of whether the § 504 requires consent for FAPE services (e.g., Letter to Zirkel, 22 IDELR 667 (OCR 1995)) and its consequent thorny application. If the answer to the unsettled issue is yes, then the parents' refusal to provide such consent would seem to defeat their § 504/ADA claim, unless they could show the proposed plan failed to meet the differential substantive standard for FAPE under § 504 and that this failure was the basis for their refusal.

21 *Jason E. v. Dep't of Educ., State of Hawaii*, 64 IDELR ¶ 211 (D. Haw. 2014).

22 *Id.* at *1101.

23 Moreover, the court provided only peripheral attention to the Colorado case and failed to mention the Missouri decision. *Id.* at *1106 n.18.

24 *Id.* at *1104 (further explaining that "Plaintiffs have not created a genuine issue of material fact regarding their claim that Defendants violated § 504 by failing to design and implement an education plan or program that provides student a FAPE").

25 *D.F. v. Leon Cnty. Sch. Bd.*, 65 IDELR ¶ 134 (N.D. Fla. 2015).

26 The reason for this auxiliary aid was, according to the court, that "[t]he School Board recognized, though, that it was obligated to provide the same accommodations for D.F.'s hearing disability as would be provided any other student with a hearing disability." *Id.* at *704. The legal basis for this reason was not at all clear. An earlier decision in this case, which denied the district's motion for dismissal and which rejected the automatic waiver theory but which did not mention this fact, suggested a possible but not particularly clear explanation:
The school district cannot be required to provide the [hearing–related] technology based solely on the statutory requirement to provide a free appropriate public education—under the IDEA and perhaps even under the [§ 504]—but the school district can be required to provide the technology based on another provision of law, including, if applicable, [§ 504] or the ADA.
D.F. v. Leon Cnty. Sch. Bd., 62 IDELR ¶ 167 (M.D. Fla. 2014), at *878.

27 The parent also included claims of retaliation under § 504/ADA and the IDEA. *D.F. v. Leon Cnty. Sch. Bd.*, 65 IDELR ¶ 134, at *704.

28 The basis was the same as in the Missouri case. *See supra* note 12. However, in this case the parent had filed for an impartial hearing under the IDEA, and the hearing officer had dismissed the § 504 and ADA claims based on lack of jurisdiction. *Id.* The court did not acknowledge this action, which arguably amounted to exhaustion.

29 *Id.* at *707 (identifying the opposite results between the Colorado decision and the Missouri decision along with the "nonbinding guidance" of the *Letter to McKethan*). However, clarifying its introductory reference to the letter being "only partly correct" (*id.* at *704), the court, in its subsequent rejection of the parent's separate claim of retaliation, concluded that this letter "falls short of a full and correct analysis of the relationship between the IDEA and the Rehabilitation Act" due to (1) their differential standards for FAPE, and (2) the IDEA exhaustion provision's non–limitation of such substantive differences. *Id.* at *707.

30 *Id.* at *705 ("a school district must provide services that provide not just 'some educational benefit,' but services 'that are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met....' ") (citing 34 C.F.R. § 104.33(b)(1) and *Mark H. v. Lemahieu*, 513 F.3d 922, 933, 229 Ed.Law Rep. 53 (9th Cir. 2008)).

31 *Id.* at *707.

32 *Id.* at *706–07 (citing, e.g., *C.L. v. Scarsdale Union Free Sch. Dist.*, 744 F.3d 826, 302 Ed.Law Rep. 539 (2d Cir. 2014); *S.H. v. Lower Merion Sch. Dist.*, 729 F.3d 248, 297 Ed.Law Rep. 58 (3d Cir. 2013); *D.A. v. Houston Indep. Sch. Dist.*, 629 F.3d 450, 264 Ed.Law Rep. 50 (5th Cir. 2010); *T.W. v. Wilson Sch. Bd.*, 610 F.3d 588, 258 Ed.Law Rep. 481 (11th Cir. 2010)).

33 Another threshold factor is whether the child is eligible under § 504, which is largely easy to determine but which is not automatic according to *Ellenberg v. New Mexico Military Institute*, 572 F.3d 815, 246 Ed.Law Rep. 713 (10th Cir. 2009).

34 The consent requirement for services and the override via an impartial hearing, as compared with the corresponding issues for evaluation, is slim. *See*, *e.g.*, OCR, Protecting Students with Disabilities: Frequently Asked Questions About Section 504 and the Education of Children with Disabilities (2013), http://www2.ed.gov/about/offices/list/ocr/504faq.html (items 41–43).

35 *See supra* notes 11–32 and accompanying text.

36 *See supra* note 28.

37 *See*, *e.g.*, Perry A. Zirkel, *Impartial Hearings for Public School Students under Section 504: A State–by–State Survey*, 279 Ed. Law Rep. 1 (2012).

38 34 C.F.R. § 104.33(b)(10) (2013) (defining FAPE under § 504 as regular or special education and related aids and services).

39 One standard is the one that is in the § 504 regulations and that OCR opines to be controlling. See *supra* note 30. However, the courts have also used other alternatives. *Compare Mark H. v. Hamamoto*, 620 F.3d 1090, 1101–02, 261 Ed.Law Rep. 48 (9th Cir. 2010) (commensurate opportunity plus deliberate indifference), *with Molly L. v. Lower Merion Sch. Dist.*, 194 F. Supp. 2d 422, 428, 164 Ed.Law Rep. 108 (E.D. Pa. 2002) (reasonable accommodation).

40 Unlike the IDEA, § 504 is a civil rights act, thus not providing any federal (or corresponding state) funding. *See* Zirkel, *supra* note 1, at 769. Moreover, the IDEA rules with regard to the use of IDEA funds (34 C.F.R. §§ 300.202(b)(1)(i) and 300.208(a)(1)) may cause auditing problems if the costs of this special education are not exclusively local monies.

41 Depending on the local culture, providing a 504 plan with comparable services to a child in the wake of parental revocation of an IEP may cause a ripple effect on other parents seeking to escape their perception of stigma attached to IDEA identification and services.

42 *See supra* notes 31–32 and accompanying text.

43 34 C.F.R §§ 104.61 and 100.7(b)–(e) (2013). For an overview of this alternative and the other formal dispute resolution avenues under the IDEA and § 504, see, e.g., Perry A. Zirkel & Brooke L. McGuire, *A Roadmap to Legal Dispute Resolution for Parents of Students with Disabilities*, 23 J. SPECIAL EDUC. LEADERSHIP 100 (2010).

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