Discipline of Students with Disabilities Under IDEA, §504 and the ADA

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Table of Contents

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I. Introduction

When analyzing discipline imposed on disabled children by public schools, the importance of education cannot be overstated. As Chief Justice Warren wrote in *Brown v. Board of Education of Topeka,* 347 U.S. 483, 493 (1953):

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

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Brown was a racial desegregation case under the equal protection clause of the Fourteenth Amendment. The court in *Brown* pronounced that "separate but equal" is inherently unequal. The importance of education in American society is no less applicable to the laws that mandate equal access for the disabled in public education.

II. General Statutory Background

A. IDEA

IDEA is meant to ensure that "all children with disabilities have available to them a free appropriate public education [FAPE]." 20 U.S.C. §1400(d)(1)(A). Public schools must make an "individualized education program" (IEP) for each disabled child. 20 U.S.C. 1414(d). IDEA dictates procedures that public schools must follow when changing the placement of a disabled child because of a violation of a student code of conduct. 20 U.S.C. §1415(k).

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The level of education necessary to provide FAPE has long been defined as a "basic floor of opportunity." *Board* of *Educ. of Hendrick Hudson Cent. Sch. Dist v. Rowley*, 458 U.S. 176, 200-201(1984). FAPE does not require that disabled students be provided with educational opportunity commensurate with non-disabled students. *Id.* at 198-200. *Rowley* continues to be the standard for determining what level of education constitutes FAPE. *J.L. v. Mercer Island School District*, 575 F.3d 1075 (9th Cir. 2009).

The IDEA does not limit or restrict the rights, remedies, or procedures available under the ADA. 20 U.S.C. § 1415(l). Pursuant to this section:

> Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990 [42U.S.C. § 12101 et. seq.], title V of the Rehabilitation Act of 1973 [29 U.S.C § 791 et. seq.], or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under

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> such laws seeking relief that is also available under this subchapter, the procedures under subsection (f) and (g) of the section shall be exhausted to the same extent as would be required had the action been brought under this subchapter.

This provision was enacted by Congress to reaffirm that the ADA and §504 continue to be separate vehicles for ensuring the rights of handicapped children. *Payne v. Peninsula School District*, 653 F.3d 863, 876 (9th Cir. 2011)(en banc)(cert. denied)(Citing *Digre v. Roseville Schs. Indep. Dist. No. 623*, 841 F. 2d 245, 250 (8th Cir. 1988); *see also Mrs. W. v. Tirozzi*, 832 F. 2d 748, 754 (2nd Cir. 1987).)

Section 1415(l) was Congress's explicit rejection of *Smith v. Robinson* 468 U.S. 993 (1984). In *Smith*, the United States Supreme Court held that the "remedies, rights, and procedures" available under the IDEA were the exclusive relief for failure to provide FAPE, so that remedies under §504 were unavailable. *Id.* at 1019.

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B. §504

This section provides that: "no otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. . . ." 29 U.S.C. §794. Regulations promulgated by the Department of Education under §504 include the need for public schools to provide disabled children with FAPE. 34 C.F.R. §104.33.

The FAPE requirement in IDEA and §504 are similar, but not identical. *Mark H. v. Lemahieu*, 513 F. 3d 922 (9th Cir. 2008). Unlike FAPE under IDEA, FAPE under §504 is defined to require a comparison between the manner in which the needs of disabled and non-disabled children are met. *Id.* But, the court in *Mark H.* also goes on to note that the §504 regulations provide that implementing an IEP in accordance with IDEA is one means of meeting the FAPE requirements specified in the §504 regulations [see 34 U.S.C. 104.33(b)(2)].

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This creates a confusing conflict with the §504 regulation specifying that disabled children be educated as adequately as non-disabled children [34 C.F.R §104.33(b)(1)], a requirement not part of the IEP under *Rowley*. *Rowley* explicitly commands that IDEA does not require that disabled students be provided educational opportunity *commensurate* with non-disabled students. *Rowley* at 198-200.

C. ADA

The ADA prohibits discrimination against individuals with disabilities. 42 U.S.C. §12101 *et. seq*. The ADA is a broad based effort to protect the disabled not just from intentional discrimination but also from thoughtlessness, indifference, and benign neglect. *Martin v. PGA Tour, Inc*., 994 F. Supp. 1242, 1247-1248 (D.Or.1998) aff'd *Martin v. PGA Tour, Inc.,* 204 F.3d 994 (9th Cir. 2000).

Title II of the ADA provides: "[N]o qualified individual with a disability shall, by reasons of such

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disability, be excluded from participation or be denied the benefits of the services, programs or activities of a public entity, or be subjected to discrimination by any such public entity." 42 U.S.C. §12132.

The ADA specifically applies to public schools. 42 U.S.C. § 12101(a)(3)("discrimination against individuals with disabilities persists in such critical areas as . . . education, ... and access to public services"). Public schools are a "public entity" within the meaning of Title II. 42 U.S.C. §12131(1); *Tennessee v. Lane*, 541 U.S. 509, 524-525(2004)(The historical experience that Title II reflects, includes disability discrimination of public school students). *See also Pace v. Bogalusa City School Board*, 403 F. 3d 272, 292 (5th Cir. 2005)(en banc)(since the ADA has no specific section on education, the general regulations governing accessibility to public buildings also control accessibility to school buildings.)

When enacting the ADA, Congress recognized that:

> individuals with disabilities continually encounter various forms of discrimination,

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> including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities." 42 U.S.C. §12101(a)(5).

As such, Congress tasked the Attorney General with promulgating regulations to implement Title II, applicable to public entities. 42 U.S.C. §12134. Regulations found in 28 C.F.R. §35.130 and 28 C.F.R. §35.164 were the result.

These regulations afford individuals with disabilities equality of opportunity to participate in, or benefit from the aid, benefit or services offered by public entities. They also go on to explain that in providing equality of opportunity the public entity need not take any action that would fundamentally alter a program or result in undue financial burden and administrative

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310-444-1980

expense. These regulations are entitled to substantial deference. *Blum v. Bacon*, 457 U.S. 132, 141 (1982).

III. Differences Between IDEA & ADA

Compliance with the IDEA does not doom all §504/ADA claims as a matter of law. *K.M. v. Tustin Unified School District*, 725 F.3d 1088, 1092 (9th Cir. 2013)("We do not find in either statute an indication that Congress intended the statutes to interact in a mechanical fashion in the schools context, automatically pretermitting any Title II claim where a school's IDEA obligation is satisfied.")

K.M. involved the ADA effective communication regulation found in 28 C.F.R. §35.160. The reasoning employed by the court in *K.M.* would seem equally applicable to the more general regulation requiring equality of opportunity for the disabled found in 28 C.F.R. §34.130.

Rowley's low bar for FAPE, contrasts starkly with the Congressional findings underpinning the ADA to

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310-444-1980

"assure equality of opportunity, [and] full participation" for the disabled (42 U.S.C. § 12101(a)(7)) as well as ensuring them with "the opportunity to compete on an equal basis." 42 U.S.C. §12101(a)(8). The Court in *K.M.* confirmed that, "IDEA does not require schools to 'provide equal educational opportunities' to all students," as does the ADA.

IV. Manifestation Determination and Broader Definition of Disability Under the ADA

A. Manifestation Determination

Discipline of disabled students is covered extensively under IDEA. 20 U.S.C. §1415(k). Under IDEA, absent special circumstances, if the change in a student's placement will exceed 10 days, a determination must be made whether the behavior that gave rise to the violation of the school code of conduct was a manifestation of the child's disability. 20 U.S.C. 1415(k)(1)(C). This is commonly referred to as a manifestation determination.

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310-444-1980

The manifestation determination necessary under 20 U.S.C. §1414(k)(1)(E) requires a finding of whether the conduct in question was a result of the failure to implement the IEP or:

> if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability.

The manifestation determination standard under §504 and the ADA is:

> whether the student's misconduct bears a relationship to his handicapping condition.

S-1 v. Turlington, 635 F.2d 342, 350 (5th Cir. 1981)*(abrogated on other grounds by Honig v. Doe*, 484 U.S. 305, 317 (1988)). Under *Turlington*, the manifestation determination standard only requires that the misconduct "bears a relationship" to the disability, not that it be "caused by", or had a "direct and substantial relationship" to the disability.

Arguably the *Turlington* standard is less restrictive than IDEA's manifestation determination and protects behavior as long as it is merely related to the disability

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rather than having to be caused by, or have direct or substantial relationship to the disability, as with the IDEA. Thus behavior that is not a manifestation of the disability under IDEA may be under §504 and ADA; providing more protection for the disabled student.

B. The Definition of Disability Under the ADA is Broader and More Inclusive than Under IDEA

The ADA has a more inclusive definition of disability than does the IDEA. Consequently, a child may be protected under the ADA even if they are not eligible under IDEA. The protection afforded to disabled students under the ADA would extend to discipline as well.

Disability and eligibility for children under IDEA includes only the following according to 20 U.S.C. §1401(3)(A):

1. Intellectual disabilities,
2. Hearing impairments (including deafness),
3. Speech or language impairments,
4. Visual impairments (including blindness),

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5. Serious emotional disturbance,

6. Orthopedic impairments,

7. Autism,

8. Traumatic brain injury,

9. Other health impairments, or

10. Specific learning disabilities; and

who, by reason thereof, needs special education and related services.

Absent falling into one of these categories and, by reason thereof, needing special education and services, a child is not covered by IDEA.

Under the ADA, disability means:

> (A) a physical or mental impairment that substantially limits one or more *major life activities* of such individual;
>
> (B) a record of such impairment; or
>
> (C) being regarded as having such an impairment.

42 U.S.C. 12102(1).

Major life activities are broadly defined to include:

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caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, reading, concentrating, thinking, communicating, and working. 42. U.S.C. §12102(2)(A).

Major life activities also include major bodily functions like the immune system, normal cell growth, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive function. 42 U.S.C. §12102(2)(B).

Therefore, a child that is not disabled and eligible for special education under IDEA, may still be protected under the ADA. Consequently, discipline imposed because of behavior that bears a relationship to the child's disability may violate the ADA regardless of IDEA eligibility.

V. Damages

A. Damages Generally Not Available Under IDEA

As a general rule damages are not available under IDEA. *A.W. v. Jersey City Public Schools, 486 F.3d 791*

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(3rd Cir. 2007); Witte v. Clark County School District, 1197 F.3d 1271, 1275 (9th Cir. 1999); *Blanchard v. Morton Sch. Dist.*, 509 F.3d 935, 938 (9th Cir. 2007). A more recent case from the Ninth Circuit also makes clear that there is no private right in IDEA to nominal damages. *Oman v. Portland Public Schools*, 679 F.3d 1162 (9th Cir. 2012)(In charter school context court extended judicial deference to educational institutions academic decisions in ADA and §504 claims.)

B. Damages May Be Available Under §504 & the ADA

Damages require intent or deliberate indifference. *Mark H. v. Hamamoto*, 620 F.3d 1090 (9th Cir. 2010). *Mark H.* defines this as:

1. Knowledge that a harm to a federally protected right is substantially likely; and

2. Failure to act on that likelihood.

Failure to act can include failure to investigate whether requested services were a reasonable accommodation.

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Reasonable accommodation under §504 includes a duty to gather sufficient information from the disabled individual and qualified experts as needed to determine what accommodations are necessary.

The deliberate indifference standard has been applied to claims for damages under Title II of the ADA. *Duvall v. County of Kitsap*, 260 F.3d 1124 (9th Cir. 2001); *Delano-Pyle v. Victoria County*, 302 F.3d 567 (5th Cir. 2002). Other circuits use a similar standard sometimes referred to as "bad faith" or "gross misjudgment." *Stewart v. Waco Independent School District*, 711 F.3d. 513, 523 (5th Cir. 2013); *Monahan v. State of Nebraska*, 687 F.2d 1164 (8th Cir. 1982).

C. State Law Claims for Damages

Many states also have disability discrimination laws. For example in California the Unruh Act (Civil Code §51 *et. seq.*) precludes disability discrimination. A violation of the ADA is a, per se, violation of the Unruh Act. Civil Code §51(f); *Lentini v. Calif. Ctr. for the Arts*,

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370 F.3d 837, 847 (9th Cir. 2004). Moreover, intentional discrimination is not necessary to establish an entitlement to damages under the Unruh Act. *Munson v. Del Taco, Inc.* (2009) 46 Cal. 4th 661.

The Unruh Act provides for statutory damages of up to three times actual damages or no less than $4,000 for each violation and recovery of attorney's fees. Civil Code Section 52(a).

Most states have laws that limit liability and require either a pre-lawsuit claim or impose caps on damages. State immunity does not bar damages under the ADA or §504. *Tennessee v. Lane*, 541 U.S. 509(2004). California's tort claims requirements do not preclude federal civil rights actions under the ADA. *See Williams v. Horvath*, 16 Cal. 3d 834, 840-842 (1976)(California's Tort Claims Act does not bar federal civil rights claims.).

A claim, however, generally needs to be filed in California to recover Unruh Act damages. Gov't Code §910 et. seq. An exception is when damages are just

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ancillary to declaratory or injunctive relief. *Gatto v. County of Sonoma*, 98 Cal. App. 4th 744 (2002).

V. Exhaustion of Administrative Remedies

Exhaustion of administrative remedies is necessary when seeking relief under ADA or §504 that is also available under IDEA. 20 U.S.C. §1415(l); *Payne v. Peninsula School District*, 653 F.3d 863 (9th Cir. 2011)(en banc)(cert. denied); *Kutasi v. Las Virgenes Unified Sch. Dist.*, 494 F.3d 1162 (9th Cir. 2007).

VI. Collateral Estoppel

Issue and claim preclusion may be applied to short circuit redundant §504 and ADA claims. *Pace v. Bogalusa City School Board*, 403 F.3d 272, 290-297 (5th Cir. 2005)(en banc); *Indep. Sch. Dist. No. 283 v. S.D.*, 88 F.3d 556,562 (8th Cir 1996).

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