MTA Division of Legal Services

SPECIAL EDUCATION AND SPECIAL EDUCATOR LIABILITY

Questions & Answers

Which laws govern educator liability in special education?

Three overlapping federal laws may create individual liability for failure to comply with special education requirements: (1) the *Individuals with Disabilities Education Act of 2004* (IDEA), 20 U.S.C. § 1400, *et seq*., (the federal special education law); (2) the *Americans with Disabilities Act* (ADA); and (3) Section 504 of the *Rehabilitation Act of 1973* (Section 504).

How do the ADA, Section 504 and the IDEA relate to each other?

Both Title II of the ADA and Section 504 prohibit discrimination against students in public schools on the basis of disability. The two laws establish essentially the same legal standards. The main distinctions are that Section 504 predates the ADA by 17 years and that Section 504 is limited in its application to federal grant recipients.

The definition of "disability" under the ADA and Section 504 (a physical or mental impairment that substantially limits a major life activity) is broader than the definition of "disability" under the IDEA (certain enumerated conditions that impair a student's progress in the general curriculum). Therefore, all students who qualify as "disabled" under the IDEA are also disabled for purposes of coverage under the ADA and Section 504.

Do educators have a legal right to challenge the provisions of an Individualized Education Program or a 504 Plan?

No. The IDEA, Chapter 766 and Section 504 do not provide a right for educators to challenge accommodations or other provisions of an IEP or 504 Plan. These laws grant legal rights to the student and their parents or guardian.

Are there legal limits to the number of special education students in a class?

Not specifically for "inclusion" placements, such as a regular education class co-taught by a special education teacher. Nevertheless, the services called for in a student's IEP must be provided and the class must be set up in a way to make this possible. For instructional groupings outside of a general education classroom, the group is limited in size to eight, 12 or 16 students, depending on whether the special educator works alone or has one or two aides. 603 CMR 28.06(6)(c).

Can I be held liable for not implementing special education requirements?

Yes, but the risk is not great in most circumstances. The IDEA and the analogous state statute, M.G.L. c. 71B (often called Chapter 766), create a detailed regulatory system for identifying and providing services to students who meet the narrower definition of "disability" under the special education laws, as noted above. Many special education requirements arise under the IDEA, which is a federal law. Under Section 1983 of Title 42 of the United States Code, anyone acting in an official capacity, including an educator, who deprives a student of his or her rights under IDEA may be held liable for damages. "Liable" or "liability" means being ordered to pay money (known as "damages") for a violation of the law, in the case of Section 1983 for deprivation of a right established in federal law.

What is the risk of being held liable for not implementing special education requirements?

As already noted, in most circumstances the risk is not great. In order for failure to comply with special education requirements to constitute a violation of the ADA or Section 504, the failure must involve "bad faith or gross misjudgment." *Dohmen v. Three Rivers Public Schools, 207 F. Supp. 972, 990 (D. Neb., 2002); cf., Andrew S. v. School Committee of Greenfield,* 59 F.Supp 2d 237, 244 (D. Mass., 1999).

What kinds of problems might lead to liability?

Only serious problems that constitute "bad faith or gross misjudgment" might lead to liability, such as the complete failure to implement an IEP, complete failure to comply with evaluation requirements or the imposition of discipline ignoring safeguards for special education students, such as expelling a special education student and then not providing any education or services.

What kinds of problems are unlikely to lead to liability?

It is highly unlikely that the typical difficulties that arise in special education would result in individual liability for educators. For example, disagreements about the appropriate placement for a special education student or the failure to ideally implement each and every detail of an IEP would not result in liability. See *School Committee of Greenfield*, above, at page 246. Even though the school district was ordered to implement better training for personnel in an autistic child's placement, the district's violation of special education requirements did not rise to "bad faith or gross misjudgment."

Are there other protections for employees in federal law?

Yes. All claims for damages under Section 1983 are subject to the doctrine of "qualified immunity." Under that doctrine, public officials who carry out executive or administrative functions, including educators, are protected from personal monetary liability as long as their actions do not violate "clearly established [federal] statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Thus, an educator could be liable for damages under Section 1983 only for blatant IDEA violations.

So what should I be concerned about?

Personal liability for damages for educators and other staff involved in special education is a practical concern only in relatively extreme cases. Liability is not a significant concern in making reasonable "judgment calls" in implementing special education requirements; it becomes a concern when there are violations of clear special education requirements. Moreover, complaints about implementation of an IEP are usually directed toward the school district and rarely focus on an individual educator.

Can my employer discipline me even if I am not legally liable?

Yes. The employer's disciplinary action for job performance related to special education is a separate issue from financial liability for damages and is subject to different legal standards.

How can I protect myself?

Documenting failures to comply with special education requirements through e-mails up the "chain of command" is an appropriate way to document that the educator is attempting in good faith to comply with the law and that responsibility for any noncompliance (and therefore any liability) rests elsewhere. Because the administration bears the ultimate responsibility for implementing special education requirements, involving the administration is a guiding principle for situations involving failure to comply with those requirements, such as failing to provide a service called for in an IEP or failing to make the relevant portion of the IEP available in a timely fashion to the educators who are expected to implement it. The administration should also be made aware of claims by parents that the IEP is not being properly implemented. In general, communications with the administration should be factual and respectful.

The union's building representative should be made aware of special education issues at the same time so that the union can assist in resolving problems in a timely manner. Teachers without professional status may be asked or told to do something that violates the IEP or other special education requirements. Involving the union can take the focus away from the individual teacher without professional status and place it where it should be: on the administration assuring compliance with the legal requirements for special education.

So what's the bottom line for individual liability?

If the educator is attempting in good faith to comply with special education requirements, there should be no realistic concern about individual liability.

What insurance is available to MTA members?

By virtue of their NEA membership, MTA members are insured up to $300,000 through the NEA's Educators Employment Liability Program for civil rights claims arising from their work as educators.

What other assistance is available to me or my local association?

The MTA Legal Division provides legal advice and guidance to local associations, officers and MTA consultants to better advocate for members and the union in the context of special education. If a member receives a notice of intent to suspend or dismiss over special education-related issues or is the subject of a "51A" investigation, the MTA provides an attorney for the member in accordance with its Legal Services Policy. MTA legal services are accessed through a request to the local association, which then makes a request for Legal Division services.

Where can I go with pervasive special education problems?

If the union or an individual educator believes that there is a pervasive and systemic failure to comply with special education and disability protection laws, the union or individual could file a complaint with the Office of Civil Rights (OCR) of the U.S. Department of Education. The OCR will investigate the situation and take appropriate action to secure compliance with any systemic failure. Further information about the OCR complaint process is available at *http://www2.ed.gov/about/offices/list/ocr/docs/howto.html*.

Are special education issues bargainable?

Yes. Although a school district must comply with special education requirements, the impact of those requirements on terms and conditions of employment is subject to collective bargaining. Terms and conditions of employment include, among other things, workload, work assignments and job duties; and class size. To the extent that the implementation of a Section 504 Plan implicates job duties and workload, the impact is subject to collective bargaining and any applicable contract provisions. This may provide a direct avenue to assert educators' interests.

This Q&A was prepared by the MTA Division of Legal Services with the assistance of the MTA Center for Education Policy and Practice.

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