



Far-Reaching Effects of Katrina: The Education of Special Needs Students

By Betty A. Cox, Sandra S. Murray and Becky J. Cox

As Louisiana residents understand only too well, Hurricane Katrina imposed devastating effects upon the entire state. Among those changing the educational structure was the impact on the Orleans Parish schools. Orleans Parish experienced a growth in the number of charter schools and now has the highest concentration of these schools in the state.¹

The increase in the number of charter schools in Louisiana has fueled prospective litigation as various issues relative to charter schools have been brought to the attention of Louisiana attorneys. Members of the Louisiana State Bar Association's Legal Services for Persons with Disabilities Committee have ad-

ressed such matters post-Katrina and have concluded that there is a need for attorneys to learn more about protecting a child's right to an education in a charter school, including the school's level of responsibility for special education.

The majority of charter schools in Louisiana are approved public schools that receive a per-pupil amount yearly from the local school board.² The legal definition of a charter school is:

an independent public school that provides a program of elementary or secondary education, or both, established pursuant to and in accordance with La. R.S. 17:3971, *et*

seq., to provide a learning environment that will improve pupil achievement.³

Although charter schools are exempt from certain state laws, rules and regulations, they "shall comply with state and federal laws and regulations otherwise applicable to public schools with respect to civil rights and individuals with disabilities."⁴ Charter schools may not exclude a student based on the identification of a child with an exceptionality as defined in La. R.S. 17:1943(4).⁵

Numerous federal laws exist that protect disabled children attending public schools. The most prominent of these is

the Individuals with Disabilities Education Act (IDEA).⁶ IDEA was originally passed in 1975 as the Education for All Handicapped Children Act (EHA), which requires states to ensure full educational opportunity for children with disabilities as a requisite for receiving federal funds.⁷ Moreover, states must comply with IDEA's substantive and procedural requirements.⁸ Additional federal legislation applicable to disabled students includes Section 504 of the Rehabilitation Act of 1973, which protects persons against discrimination based on a disability by any beneficiary of federal financial assistance as well as any program that receives or benefits from such assistance.⁹ Finally, the Americans with Disabilities Act (ADA) is a federal law that makes it illegal for any public entity to discriminate on the basis of disability.¹⁰

Related Law

The primary purpose of IDEA and Section 504 is to ensure that all children with disabilities have available to them a free and appropriate public education (FAPE).¹¹ IDEA's definition includes special education and related services.¹² The definition of special education in IDEA is "specially designed instruction to meet the unique needs of a child with a disability."¹³ Section 504 differs from the aforesaid federal law in that students may not require special instruction or related services but may require modifications to instruction to guarantee they are receiving an appropriate education. Appropriate education in Section 504 is defined as "an education comparable to that provided to students without disabilities."¹⁴

Section 504 is distinctive from IDEA in further respects. It is less restrictive in the determination of a person with a disability. Its protection extends to all those with a disability who "(1) have a physical or mental impairment which substantially limits one or more major life activities; (2) have a record of such impairment; or (3) are regarded as having such an impairment."¹⁵ Persons must have a permanent or temporary substantial

limitation on at least one major life activity.¹⁶ Such activities include functions such as caring for oneself, performing manual tasks and walking.¹⁷

The definition of a child with a disability in IDEA is a child with mental retardation, hearing impairments, speech or language impairments, visual impairments or serious emotional disturbance who, by reason thereof, needs special education and related services.¹⁸ This IDEA definition is further delineated for children between the ages of 3 through 9 years of age.¹⁹

In both IDEA and Section 504, the local education agency (LEA) is responsible for the proper implementation of the requirements. These responsibilities include the timely evaluation of children suspected of having a disability, proper identification, and the preparation and maintenance of a written plan or program to address the student's needs.²⁰

The report required for a child identified as needing IDEA services is called an individualized education program (IEP). The definition of an IEP is a "written statement of each child with a disability that is developed, reviewed, and revised in accordance with this section."²¹ The IDEA IEP is written by an IEP committee comprised of a group of individuals responsible for developing, reviewing or revising an IEP for a child with a disability.²² This committee, at a minimum, consists of the parents of a child with a disability, not less than one regular education teacher of such child, not less than one special education teacher, a representative of the local educational agency, an individual who can interpret the instructional implications of evaluation results at the discretion of the parent or the agency and, whenever appropriate, the child with the disability.²³ Furthermore, a discretionary member to include a family member, attorney or other knowledgeable person to serve as a liaison for the parent also may be in attendance.²⁴ Generally, attorneys' fees are not awarded for an IEP meeting.²⁵

Section 504 also requires the development of a plan, although this written document is not mandated.²⁶ There is no

stipulation for this plan to be written by a team nor are there any specific contents for the plan.²⁷

In the event of a disagreement between the LEA and the parents of a child with a disability or one who is suspected of having a disability, IDEA provides for an impartial due process hearing.²⁸ Prior to the initiation of such a proceeding, the parent is required to provide a due process notice to the other party and to the state educational agency.²⁹ The notice must contain specific information including the name and address of the child, the name of the school in which the child is in attendance, a description of the problem and a proposed resolution.³⁰ The court, in its discretion, may award reasonable attorneys' fees to the prevailing party at the conclusion of a due process hearing.³¹

Specific provisions in IDEA have been stipulated for charter schools and for children enrolled in private schools by their parents.^{32, 33} These provisions include funding, responsibilities of the LEA and the responsibilities of the charter school regarding compliance.³⁴ IDEA stipulates that charter schools operating as public schools of the LEA must serve children with disabilities attending such schools "in the same manner as the local educational agency serves children with disabilities in its other schools."³⁵

The Americans with Disabilities Act of 1990 is a "civil rights law to prohibit discrimination solely on the basis of disability in employment, public services, and accommodations."³⁶ Title II of the ADA and Section 504 specifically address the "discriminatory assignment of disabled students to segregated classes or facilities."³⁷ The Office of Civil Rights (OCR) in the U.S. Department of Education is the enforcement agency for 504, IDEA and ADA.³⁸

Relevant Litigation

Charter schools have been established in many states that offer special education services to students with disabilities. In post-Katrina New Orleans, the Orleans Parish School Board had approved 20 charter schools by November 2005.³⁹

As previously stated, students with disabilities have specific educational rights and due process procedures for discrimination complaints. LEAs have experienced complaints of discrimination on the denial of free and appropriate education as well as the basis of disability. Parents have pursued recourse through the Office for Civil Rights and through district and federal venues. In many instances, the decision has been favorable to the parent and the charter school has been held liable.⁴⁰ Some of these decisions are noteworthy.

In a September 1997 ruling, the Boston Renaissance Charter School was found in violation of IDEA by not informing a kindergarten student's parents that the child had the right to classroom interventions.⁴¹ This same school was also adjudged to have violated the mandates of IDEA by not providing special education services according to a student's IEP.⁴² Similarly, another adjudicatory body opined that a

student's procedural due process and educational rights were violated when her IEP was not followed.⁴³

In *Irene B. v. The Philadelphia Academy Charter School, et. al.*, an action was filed by the parents of a disabled child contending that the student's rights had been violated under various state and federal laws including, but not limited to, IDEA and Section 504.⁴⁴ Relative to its consideration of a combined motion to dismiss the Philadelphia Academy Charter School (PACS) and the school's principal, the court opined:

Because the IDEA is at the heart of this case, the court will begin its analysis of the pending motion with a discussion of this statute. The IDEA protects the rights of disabled children in American public schools. It guarantees that "a free appropriate public education [FAPE] is available to all children with disabilities . . . between the ages of 3 and 21" 20 U.S.C. § 1412(2)(B). In exchange for federal funds, primary responsibility for ensuring that schools comply with the IDEA's requirements falls upon the "state educational agency," which in Pennsylvania is the PDE. *Id.* § 1401(28); Compl. PP 13, 14. In order to ensure that each disabled child receives a FAPE, the statute requires that "an individualized education program [be] developed, reviewed, and revised for each child with a disability" *Id.* § 1412(4). An individualized education program ("IEP") is a written document that identifies a child's present performance levels, establishes long-term and short-term achievement goals, and articulates the special instruction and related services the child will receive in order to progress towards these goals. Compl. P 16.

The IDEA was formerly the Education for the Handicapped Act

("EHA"); therefore, some of the caselaw relied upon in this opinion will refer to the statute by its former title.

It is uncontested that this includes charter schools, such as PACS.⁴⁵

Pursuant to a complaint filed with the Office of Civil Rights, it was claimed that a special education student at Seven Hills Charter School was frequently excluded from classes, denied inclusion in regular education activities and encouraged to withdraw from the school.⁴⁶ During the approximate same time period, another student at the school was reported to have similar challenges. His parents also filed an OCR complaint stating that their son was not given curricular modifications or specialized instruction as mandated in his IEP.⁴⁷

The aforementioned cases are but a few of the examples located after a cursory review of the literature. It is readily apparent that charter schools across the nation are finding it challenging to meet the needs of students with disabilities. Louisiana charter schools too are ripe for potential litigation of these matters. For those wishing to determine the identity and type of charter schools in their geographical area, the Louisiana State Department of Education's Web site provides such information. Go to: www.doe.state.la.us.

FOOTNOTES

1. Susan Saulny, "U.S. Gives Charter Schools a Big Push in New Orleans," *N.Y. Times*, June 13, 2006, at A19.
2. La. R.S. 17:3995(A)(1).
3. La. R.S. 17:3973(2)(a).
4. La. R.S. 17:3996(C).
5. La. R.S. 17:3991(B)(3).
6. 20 U.S.C. § 1400 *et seq.*
7. Education of All Handicapped Children Act, Pub. L. No. 94-142.
8. *See id.* § 1400.
9. 29 U.S.C. § 794.
10. 42 U.S.C. § 12101 *et seq.*
11. 20 U.S.C. § 1400(d).
12. *Id.*
13. 20 U.S.C. § 1401(29).

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14. Henderson, K., *Overview of ADA, IDEA, and Section 504* (retrieved Jan. 12, 2007), www.kidsource.com/kidsource/content3/asa.idea.html.

15. Rosenfeld, S.J., *Section 504 and IDEA: Basic Similarities and Differences* (retrieved Jan. 15, 2007), www.wrightslaw.com/advoc/articles/504_IDEA_Rosenfeld.html.

16. *Id.*

17. 20 U.S.C. § 1401(3), (30).

18. *Id.*

19. 20 U.S.C. § 1401(9).

20. 20 U.S.C. § 1401(19).

21. 20 U.S.C. § 1414(d)(1)(A).

22. 20 U.S.C. 1221e-3.

23. 20 U.S.C. § 1401(30).

24. *Id.*

25. *Individuals with Disabilities Act, Pub. L. No. 108-446.*

26. Henderson, *supra* note 4.

27. *Id.*

28. Pub. L. No. 108-446, *supra* note 25.

29. *Id.*

30. *Id.*

31. *Id.*

32. 20 U.S.C. § 1413(a)(5).

33. 20 U.S.C. § 1412(a)(10)(A).

34. 20 U.S.C. § 1413(a)(15).

35. *Id.*

36. Student Placement in Elementary and Secondary Schools and Section 504 and Title II of the Americans with Disabilities Act (retrieved Jan. 15, 2007), www.ed.gov/about/offices/list/ocr/docs/placpub.html.

37. *Id.*

38. *Id.*

39. L. Hardy, "Katrina Exposes Our Schools' Shameful Inequality," 71 *The Education Digest* 27 (2006).

40. A.K. Ramanathan and N.J. Zollers, "For-Profit Schools Continue to Skimp on Special Education: A Response to Naomi Zigmond," 81 *Phi Delta Kappan* 284 (1999).

41. Peggy Farber, "The Edison Project Scores — And Stumbles — in Boston," 79 *Phi Delta Kappan* 506 (1998).

42. *Rebha G. v. Boston Renaissance School*, BSEA 96-2207 (Boston, 1996).

43. *Shayna W. v. Boston Renaissance School*, BSEA 96-1272 (Boston, 1996).

44. *Irene B. v. Philadelphia Academy Charter School*, 2003 WL 24052009 (E.D. Pa. Jan. 29, 2003).

45. *Id.*

46. Senosk, OCR Complaint No. 01-00-1148 (1999).

47. Ramanathan, *supra* note 40.

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