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Federal Legal Protections for Educators with Disabilities

Donald F. Uerling

Educators are generally aware that federal law protects persons with disabilities from unjustified discrimination, but they may not be familiar with the details of how these protections come into play when decisions are made about an individual's educational or employment opportunities. This article focuses on the protections that two federal statutes, § 504 of the Rehabilitation Act of 1973 (hereafter referred to as § 504)[1] and the Americans with Disabilities Act of 1990 (hereafter referred to as ADA),[2] afford educators with disabilities, both in college and university training programs and before and after employment in elementary and secondary schools.

Constitutional Protections

Before embarking on a discussion of the federal statutory protections, the limits of the constitutional protections should be noted. The primary source of federal constitutional protections against various forms of unjustified discrimination is the Equal Protection Clause of the Fourteenth Amendment. The U.S. Supreme Court has made clear, however, that the protections it extends to persons with disabilities are rather minimal. For example, in *Cleburne v. Cleburne Living Center, Inc.*, the Court refused to apply "heightened scrutiny" to a zoning regulation that discriminated against group homes for those with mental disabilities, noting that the range of disabilities precluded the application of a single test.[3] The Court did, however, apply the less-demanding "rational basis test" and struck down this particular zoning regulation as not being rationally related to any legitimate public purpose. In *Board of Trustees of the University of Alabama, et al. v. Garrett*, the Court noted that the Fourteenth Amendment imposed no obligation on government entities to take affirmative steps on behalf of persons with disabilities who were seeking employment, so long as their actions towards such individuals were rational. Furthermore, the Court stated: "States could quite hard headedly – and perhaps hardheartedly – hold to job qualification requirements which do not make allowance for the disabled. If special accommodations for the disabled are to be required, they have to come from positive law and not through the Equal Protection Clause."[4]

Federal Statutes

The primary sources of federal protections for educators with disabilities are found in § 504 and the ADA.[5] Congress enacted § 504 pursuant to its authority to regulate expenditures of federal funds and enacted the ADA pursuant to its authority to regulate interstate commerce and to implement the protections of the Fourteenth Amendment. Both statutes are accompanied by an extensive set of regulations promulgated by the agencies responsible for their implementation and enforcement. Because the ADA generally follows the protections provided by § 504, an overview of § 504 and its accompanying regulations will serve to explain the general protections that the two federal statutes afford educators with disabilities. Also, because many of the protections under federal law are grounded in the federal regulations, a number of the more important provisions in the regulations accompanying § 504, which are followed generally by the regulations accompanying the ADA, are set out below.

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§ 504 of the Rehabilitation Act of 1973

The basic protection of § 504 provides that: "No otherwise qualified individual with a disability in the United States, as defined in section 706(8) of this title, shall, solely by reason of her or his disability, 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…[6] The Rehabilitation Act of 1973 also provides that: "…the term 'individual with a disability' means…any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment."[7]

Many important definitions were not included in the legislation, but instead were promulgated in the Code of Federal Regulations. "Physical or mental impairment" and "major life activities" are defined as follows:

> (i) Physical or mental impairment means (A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine; or (B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.
>
> (ii) Major life activities means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.
>
> (iii) Has a record of such an impairment means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.
>
> (iv) Is regarded as having an impairment means (A) has a physical or mental impairment that does not substantially limit major life activities but that is treated by a recipient as constituting such a limitation; (B) has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or (C) has none of the impairments defined in paragraph (j)(2)(i) of this section but is treated by a recipient as having such an impairment.[8]

The regulations also define a "qualified" handicapped person.[9] With respect to employment, a "qualified" handicapped person is one… "who, with reasonable accommodation, can perform the essential functions of the job in questions…" while for postsecondary students and recipients of vocational education services, a "qualified" handicapped person is one "…who meets the academic and technical standards requisite to admission or participation in the recipient's education program or activity."[10]

What must elementary and secondary school employers and postsecondary educational institutions do to avoid unlawful discrimination based on disabilities? The Code of Federal Regulations addresses these requirements. For postsecondary students, including those preparing to become educators, the accommodations are referred to as "academic adjustments," as follows:

> (a) Academic requirements. A recipient to which this subpart applies shall make such modifications to its academic requirements as are necessary to ensure that such requirements do not discriminate or have the effect of discriminating, on the basis of handicap, against a qualified handicapped applicant or student. Academic requirements that the recipient can demonstrate are essential to the instruction being pursued by such student or to any directly related licensing requirement will not be regarded as discriminatory within the meaning of this section. Modifications may include changes in the length of time permitted for the completion of degree requirements, substitution of specific courses required for the completion of degree requirements, and adaptation of the manner in which specific courses are conducted.[11]

For those who are either seeking employment or who currently are employed, the regulations use the more familiar terminology of "reasonable accommodation." Further, they provide examples of accommodations that may be reasonable and set out factors used to determine if an accommodation would present an "undue hardship" for the employer as follows:

> (a) A recipient shall make reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its program or activity.
> (b) Reasonable accommodation may include:
> (1) Making facilities used by employees readily accessible to and usable by handicapped persons, and
> (2) Job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, the provision of readers or interpreters, and other similar actions.
> (c) In determining pursuant to paragraph (a) of this section whether an accommodation would impose an undue hardship on the operation of a recipient's program or activity, factors to be considered include:
> (1) The overall size of the recipient's program or activity with respect to number of employees, number and type of facilities, and size of budget;
> (2) The type of the recipient's operation, including the composition and structure of the recipient's workforce; and
> (3) The nature and cost of the accommodation needed.
> (d) A recipient may not deny any employment opportunity to a qualified handicapped employee or applicant if the basis for the denial is the need to make reasonable accommodation to the physical or mental limitations of the employee or applicant.[12]

Americans with Disabilities Act

The ADA extends the prohibitions of § 504 to covered entities that did not receive federal financial assistance. The ADA includes five titles, of which only the first three are pertinent to this discussion.[13]

Title I. Employment. Title I requires employers with 15 or more employees to provide qualified individuals with disabilities an equal opportunity to benefit from the full range of employment-related opportunities available to others. For example, it prohibits discrimination in recruitment, hiring, promotions, training, pay, social activities, and other privileges of employment. It restricts questions that can be asked about an applicant's disability before a job offer is made, and it requires that employers make reasonable accommodation to the known physical or mental limitations of otherwise qualified individuals with disabilities, unless it results in undue hardship. Religious entities with 15 or more employees are covered.[14]

Title II. Public Services. Title II covers all activities of state and local governments regardless of the government entity's size or receipt of federal funding, and it requires that state and local governments give people with disabilities an equal opportunity to benefit from all of their programs, services, and activities (e.g. public education, employment, transportation, recreation, health care, social services, courts, voting, and town meetings).[15]

Title III. Public Accommodations. Title III of the ADA covers businesses and nonprofit service providers that are public accommodations, privately operated entities offering certain types of courses and examinations, privately operated transportation, and commercial facilities. Public accommodations are private entities who own, lease, lease to, or operate facilities such as restaurants, retail stores, hotels, movie theaters, private schools, convention centers, doctors' offices, homeless shelters, transportation depots, zoos, funeral homes, day care centers, and recreation facilities including sports stadiums and fitness clubs. Transportation services provided by private entities are also covered.[16]

Case Law

Along with their accompanying regulations, § 504 and the ADA establish general rules. A review of pertinent case law provides insight into how these laws have been applied in specific situations.

What Is a Disability?

Not every "physical or mental impairment" is a "disability" for purposes of § 504 and the ADA. The U.S. Supreme Court has established some basic principles. In *School Board of Nassau County v. Arline*, the Court held that a person suffering from a contagious disease was a handicapped person within the protection of § 504.[17] Some years later, in *Bragdon v. Abbott*,[18] the Court held specifically that HIV/AIDS was a disability, bringing a person with asymptomatic HIV infection under the protection of the ADA.

The Court explained more precisely in several ADA cases what kind of an "impairment" constitutes an actual "disability." In *Murphy v. United Parcel Service*[19] and *Sutton v. United Airlines*,[20] the Court held that under the ADA, the determination whether impairment substantially limits major life activities is properly made with reference to mitigating measures. In the first case, a truck driver with high blood pressure was not found disabled because with medication his hypertension did not significantly restrict his activities. In the second, twin sisters with severe myopia were not considered disabled because with eyeglasses they could pursue normal activities. However, in *Toyota Motor Manufacturing Kentucky, Inc. v. Williams*[21] the Court held that a person with bilateral carpal tunnel syndrome and bilateral tendonitis was impaired but not disabled under ADA. To satisfy the statutory definition of being substantially limited in performing

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manual tasks, an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives, not just important to a narrow range of jobs. Also, the impairment's impact must also be permanent or long-term.

Two cases from U.S. courts of appeals illustrate how the issue of whether or not an individual is disabled for purposes of § 504 or the ADA has been resolved in education settings. First, *Wong v. Regents of the University of California* provides insight into the kind of mental impairment that does not bring a college or university student under the protections of the federal statutes.[22] Wong sued the University of California, alleging that the university discriminated against him in violation of § 504 and the ADA when it denied his request for learning disability accommodations and subsequently dismissed him for failure to meet the academic requirements of the medical school; that is, his ward performance was deemed unsatisfactory, and he received a failing grade. Wong contended that because of his disability he needed more time to prepare for his clinical clerkships. The district court granted the university's motion for summary judgment on the issue of whether Wong was "disabled," and the court of appeals affirmed.

The issue was whether a person who has achieved considerable academic success, beyond the attainment of most people, can nonetheless be found to be "substantially limited" in reading and learning and thus be entitled to claim the protections afforded under the Acts to a disabled person. The court of appeals held that he was not. The consideration of whether a given condition constitutes a disability involves three inquiries: (1) whether the condition is a physical or mental impairment; (2) whether the life activity as to which an individual alleges he or she is limited is a *major* life activity; and (3) whether the impairment *substantially limits* the identified major life activity. In this instance, Wong suffered from an impairment that limited his ability to process and communicate information. The limitations alleged by Wong involved major life activities of learning, reading, and working, but Wong's impairment did not *substantially limit* him in a major life activity. A student cannot successfully claim to be disabled based on being substantially limited in his ability to "learn" if he has not, in fact, been substantially limited, as that term is used in the Acts. The relevant question for determining whether Wong was "disabled" under the Acts is not whether he might be able to prove to a trier of fact that his learning impairment makes it impossible for him to keep up with a rigorous medical school curriculum. It is whether his impairment substantially limits his ability to learn as a whole, for purposes of daily living, as compared to most people.

On the other hand, *Peters v. Baldwin Union Free School District* illustrates an instance when an educator did in fact have a disability that brought her under the protections of § 504.[23] Peters sued the school district and various officials, alleging inter alia that they violated the Rehabilitation Act by terminating her employment as a guidance counselor because they perceived her to have a disability. At the close of plaintiff's case, the district court directed a verdict for the defendant, but the court of appeals overturned the verdict.

Peters had a history of serious medical problems. One night she described the pain she had experienced earlier that day to a fellow guidance counselor and joked that she could commit suicide with a gun belonging to her husband, who was a police officer. This comment was mentioned to the school psychologist who passed it on to the principal and superintendent. She was reassigned and finally dismissed. Peters contended that she came with the protection of the Act because she was perceived by her employer as a having a physical or mental impairment which substantially limited one or more of her major life activities. The evidence she submitted at trial was adequate to show that her employer perceived her as suffering from a mental illness that made her suicidal. For her employer's alleged perception to bring Peters under the protection of the Act, the condition she was perceived as having must be an "impairment" and an impairment that would "substantially limit" a major life activity.

The court of appeals found that she had presented sufficient evidence of a limitation relating to her ability to care for herself. The ability to care for oneself is a major life activity recognized under Act; it encompasses normal activities of daily living, including feeding oneself, driving, grooming, and cleaning one's home. A mental illness that impels one to suicide can be viewed as a paradigmatic instance of inability to care for oneself. It therefore constituted a protected disability under the Rehabilitation Act. Because the trial record raised unresolved factual issues as to why Peters was dismissed (poor performance or perceptions of disability), the court of appeals vacated and remanded.

Who is Otherwise Qualified?

Assuming that a person is indeed an "individual with a disability," the next question is whether or not that person is "otherwise qualified." The U.S. Supreme Court has addressed this issue in two cases arising in educational settings, the first involving an academic preparation program and the second involving a teacher's employment.

In *Southeastern Community College v. Davis*, the faculty of a nursing program denied admission to an applicant with a severe hearing disability.[24] Even with a hearing aid, it was necessary for her to rely on lip-reading to understand speech directed to her. The faculty determined that it would be impossible for her to participate in the normal clinical training program, and that the modification necessary to enable her to participate would prevent her from realizing the benefits of the program. She brought suit, alleging a violation of § 504. The district court concluded that she was not "otherwise qualified" because the disability would prevent her from functioning sufficiently in the program. The court of appeals disagreed, believing that the college must reconsider her application without regard to her hearing ability.

The Supreme Court reversed, holding that "[a]n otherwise qualified person is one who is able to meet all of a program's requirements in spite of the handicap."[25] Although the regulations applicable to postsecondary educational programs required covered institutions to make modifications in their programs to accommodate handicapped persons, the modifications required in this case would not have resulted in even a rough equivalent of the normal training in a nursing program. "Such a fundamental alteration in the nature of a program is far more than the 'modifications' the regulation requires."[26] The Court summarized by noting that situations may arise where an institution's refusal to modify an educational program might become unreasonable and discriminatory, but that "Section 504 imposes no requirement upon an education institution to lower or to effect substantial modifications of standards to accommodate a handicapped person."[27]

In an employment case noted above, *School Board of Nassau County v. Arline*, an elementary school teacher who was dismissed after suffering a third relapse of tuberculosis brought suit alleging that the board's decision to dismiss her because of her tuberculosis violated § 504.[28] After holding that a person with an infectious disease was a "handicapped individual" for purposes of § 504, the Court turned to the issue of whether such an individual is "otherwise qualified" to

teach elementary school. Because of the paucity of factual findings regarding that issue, the Court was unable to determine whether the teacher was "otherwise qualified" for her job. The case was remanded to the district court to resolve that issue, with the following guidance: "To answer this question in most cases, the district court will need to conduct an individualized inquiry and make appropriate findings of fact... The basic factors to be considered in conducting this inquiry are well established."[29]

The Court also said:

> In the employment context, an otherwise qualified person is one who can perform "the essential functions" of the job in question. When a handicapped person is not able to perform the essential functions of the job, the court must also consider whether any "reasonable accommodation" by the employer would enable the handicapped person to perform those functions. Accommodation is not reasonable if it either imposes "undue financial and administrative burdens" on [an employer] or requires "a fundamental alteration in the nature of [the] program."[30]

In the context of the employment of a person with a contagious disease, this inquiry should include findings of fact, based on reasonable medical judgments, about (a) the nature of the risk (how the disease is transmitted); (b) the duration of the risk (how long is the carrier infectious); (c) the severity of the risk (what is the potential harm to third parties); and (d) the probabilities the disease will be transmitted and will cause varying degrees of harm.[31]

What is a Reasonable Accommodation?

Assuming that an individual has a disability for purposes of § 504 or the ADA, the question remains as to whether or not that person can perform the essential functions of the job, with or without reasonable accommodation. Two employment cases from educational settings are discussed below.

In a § 504 case, *Borkowski v. Valley Central School District*, a federal court of appeals addressed the issue of whether or not a teacher with disabilities could insist that her employer provide her with a teacher's aide as a form of reasonable accommodation.[32] As a result of an automobile accident earlier in life, a library teacher had sustained serious neurological damage that interfered with her ability to maintain appropriate student behavior. Because of her unsatisfactory performance in this respect, she was denied tenure. She contended that with the provision of a teacher's aide to assist her in maintaining classroom control, she would be able to perform all the functions of a library teacher and therefore was otherwise qualified. The district court had entered summary judgment in favor of the school district, but the court of appeals vacated and remanded for further findings on several important issues: Was the ability to maintain appropriate student behavior an essential function of a tenured library teacher's job? How might a teaching aide assist her in maintaining appropriate student behavior? Would providing a teaching aide be unreasonable or constitute an undue hardship?

Although the placement of the burden of proof on the first question was not entirely clear, it would seem that the employer would be in the better position to establish through job descriptions or other means whether or not a particular activity was an essential function of the job. The court noted that to avoid unfounded reliance on uninformed assumptions about job responsibilities the identification of the essential functions of a job requires a fact-specific inquiry into both the job description and how the job is actually performed in practice.

In regard to the second and third questions, the court of appeals placed the initial burden on the employee to make out a prima facie showing that a reasonable accommodation is available and then shifted the burden to the employer to prove that the suggested accommodation imposed an undue hardship. In this case, the plaintiff employee had identified a plausible accommodation, the costs of which did not clearly exceed its benefits. Therefore, the defendant employer now had the burden of proving that the proposed accommodation was unreasonable or proposed an undue hardship, taking into account the three factors identified in the regulations.[33]

In a suit based on alleged violations of the ADA, *Taylor v. Phoenixville School District*, a federal court of appeals addressed the issue of whether a school district failed to provide reasonable accommodations for a principal's secretary who suffered from a mental disorder.[34] The district court had granted summary judgment for the defendant school district, but the court of appeals reversed and remanded. The district court was instructed to address two basic issues: (1) whether the plaintiff secretary was in fact an individual with a disability; and if so (2) whether the school district failed to provide reasonable accommodations. It is the second of these two issues that is discussed below.

The court of appeals noted that the ADA regulations provide that:

> To determine the appropriate reasonable accommodation it may be necessary for the [employer] to initiate an informal, interactive process with the [employee] in need of accommodation. This process should identify the precise limitations resulting from the disability and the potential reasonable accommodations that could overcome those limitations. 29 C.F.R. § 1630.2(o)(3).[35]

The analysis of this interactive process is divided into two steps: first, the notice that the employee must give to trigger the employer's obligations; and second, the employee's and the employer's duties once the interactive process comes into play. The notice does not have to be in writing, be made by the employee, or formally invoke the magic words "reasonable accommodation." The notice must nonetheless make clear that the employee wants assistance for his or her disability. Once the employer knows of the disability and the employee's wish for accommodations, the burden is on the employer to request additional information that the employer believes it needs. An employer who has received proper notice cannot escape its duty to engage in the interactive process simply because the employee did not come forward with a reasonable accommodation; however, the employee must respond to the employer's request for more information or more detailed proposals. Participation in this interactive process is the obligation of both parties.

Concluding Comments

Section 504 of the Rehabilitation Act of 1973 and the Americans with Disabilities Act of 1990 do extend protections against unjustified discrimination to educators with disabilities. It should be noted that in addition to these two federal statutes, some states have similar statutory protections. However, the federal courts have made clear that not every impairment constitutes a disability for the purposes of § 504 and the ADA. Individuals who may suffer from an impairment that imposes a problem for education or employment, but are still able to continue on with their daily lives, are unlikely to find the two federal statutes to be a practical recourse. Still, educational institutions must be sensitive to individuals' needs for "reasonable accommodation" as defined in

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federal law and regulation; but reasonable accommodation does not mean that a person with a disability should not be expected to satisfy the basic requirements of an educational program or an employment position. Nor does it mean that the cost of accommodation cannot be taken into account particularly when it imposes what is considered an "undue hardship" on the institution or employer. Rather educational institutions must take some extra steps to enable such individuals to pursue opportunities in education and employment. Creative thinking about reasonable accommodations may at least in some instances be a matter of perspective. Thinking about the possibilities rather than the problems will be a more productive approach. In conclusion, § 504 and the ADA provide protections against unjustified discrimination to otherwise qualified individuals with disabilities, who can meet educational or employment requirements with or without reasonable accommodations. Nothing more is required, and anything less would not meet the expectations of most educators.

Endnotes

[1] Rehabilitation Act of 1973, Pub.L. 93-112, as amended by the Rehabilitation Act Amendments of 1974, Pub.L. 93-516.

[2] Americans with Disabilities Act, Pub.L. 101-336.

[3] *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985).

[4] *Board of Trustees of the University of Alabama, et al. v. Garrett*, 531 U.S. 367-68 (holding that suits in federal court by state employees to recover money damages by reason of the state's failure to comply with Title I of the ADA are barred by the Eleventh Amendment).

[5] Americans with Disabilities Act, Pub. L. 101-336.

[6] 29 U.S.C. § 794(a).

[7] 42 U.S.C. § 706(8)(B).

[8] 34 CFR § 104.3(2).

[9] The regulations accompanying § 504 still use the terminology of "handicapped person," rather than the terminology of "individual with a disability" used in both of the federal statutes and the ADA regulations.

[10] 34 C.F.R. § 104.3(l).

[11] 34 C.F.R. Sec. 104.44.

[12] See 34 C.F.R. § 104.12.

[13] The sections in the first three titles of the ADA that provide the basic protections against unjustified discrimination all follow the language of § 504, as do the ADA statutory definitions and agency regulations. For the purposes of this article, it is not necessary to repeat them.

[14] U.S. Department of Justice, Civil Rights Division, Disability Rights Section, "A Guide to Disability Rights Laws, http://www.usdoj.gov/crt/ada/cguide.htm. The basic prohibition of unjustified discrimination in employment is found at 42 U.S.C. § 12112(a). The agency regulations for Title I are found at Title 29 of the Code of Federal Regulations, Part 1630.

[15] Ibid. The basic prohibition of unjustified discrimination in public services is found at 42 U.S.C. § 12132. The agency regulations for Title II are found at Title 28 of the Code of Federal Regulations, Part 35.

[16] Ibid. The basic prohibition of unjustified discrimination in public accommodations is found at 42 U.S.C. § 12182. The agency regulations for Title III are found at Title 28, Code of Federal Regulations, Part 36.

[17] *School Board of Nassau County v. Arline*, 480 U.S. 273 (1986).

[18] *Bragdon v. Abbott*, 524 U.S. 624 (1998).

[19] 527 U.S. 516 (1999).

[20] 527 U.S. 471 (1999).

[21] 534 U.S. 184 (2002).

[22] *Wong v. Regents of the University of California*, 379 F.3d 1097 (9th Cir. 2004).

[23] *Peters v. Baldwin Union Free School District*, 320 F.3d 164 (2nd Cir. 2003).

[24] 442 U.S. 397 (1979).

[25] Id. at 406.

[26] Id. at 410.

[27] Id. at 412-13.

[28] 480 U.S. 273 (1987).

[29] Id. at 287.

[30] Id. at n. 17.

[31] Id. at 288.

[32] 63 F.3d 131 (2nd Cir. 1995).

[33] *See* 34 C.F.R. § 104.12(b).

[34] 184 F.3d 296 (3rd Cir. 1999).

[35] Id. at 311.