Letter to Zirkel

United States Department of Education
Office of Civil Rights
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to Perry A. Zirkel
August 23, 1993

This is in response to your letter of June 28, 1993, in which you expressed concern regarding the policy of the Office for Civil Rights (OCR) with regard to school districts' substantive obligations under Section 504 of the Rehabilitation Act of 1973 (Section 504). The questions you pose focus on the Department of Education (Department) regulation implementing Section 504, specifically 34 C.F.R. § 104.33(a):

> (a) General. A recipient that operates a public elementary or secondary education program shall provide a free appropriate public education to each qualified handicapped person who is in the recipient' s jurisdiction, regardless of the nature or severity of the person's handicap.

The key question in your letter is whether OCR reads into that Section 504 regulatory requirement for a free appropriate public education (FAPE) a "reasonable accommodation" standard, or other similar limitation. The clear and unequivocal answer to that is no. Section 104.33(a) guarantees all qualified individuals with disabilities FAPE, which consists of regular or special education and related aids and services that are designed to meet the individual education needs of qualified persons with disabilities as adequately as the individual education needs of other persons are met and that are designed and delivered in accordance with the Department's regulation. 34 C.F.R.§ 104.33(b)(1).

The Section 504 regulation was originally promulgated by the Department of Health, Education, and Welfare (HEW) and received thorough public scrutiny, with opportunities for written comment as well as for participation in 22 public meetings, prior to publication in the Federal Register on May 4, 1977. The regulation became effective on June 3, 1977, following congressional review that failed to elicit any objections. The regulation was adopted without change by the newly created Department of Education end published in the Federal Register on May 9, 1980. Thus, I believe that the FAPE requirement in the Section 504 regulation does reflect congressional intent.

Since that time there have been no actions by the Congress, the Federal courts, or the agencies and administrative tribunals of the executive branch that would require OCR to modify § 104.33, or its interpretation thereof, to allow for some limitation of the FAPE guarantee.

The regulation establishes different compliance standards for different educational contexts. A reasonable accommodation limitation on the responsibilities of recipients is contained in Subpart B of the regulation, which covers employment. See 34 C.F..R. § 104.12. Subpart E, which covers postsecondary and vocational education, contains a similar limitation on the recipient's obligation to modify its academic requirements to ensure that they do not discriminate or have the effect of discriminating on the basis of disability. If a recipient can demonstrate that an academic requirement is essential to the program of instruction being pursued by the student with a disability or to a directly related licensing requirement, failure to modify the requirement will not be regarded as discriminatory. See 34 C.F.R. § 104.44. Such limitations are not contained in Subpart D, covering elementary and secondary education. We conclude therefore that the regulation writers intended to create a different standard for elementary and secondary students than for employees or postsecondary/vocational students.

You have cited two particular Supreme Court cases as supporting your position that Section 504 was intended to re quire only reasonable accommodation for elementary and secondary students with disabilities. OCR's position is that § 104.33 is not in any way inconsistent with the U.S. Supreme Court's interpretations of Section 504 and its implementing regulation. I will address each of these cases in mm in order to explain their inapplicability to the FAPE requirement.

In *Southeastern Community College v. Davis*, 442 U.S. 397(1979), the Court considered the appeal of Frances Davis, a woman with a hearing impairment, who sought admission to the associate degree nursing program at Southeastern Community College. The court found that the college's refusal to admit her was not a violation of Section 504. In effect, the Court found that Davis was not a qualified handicapped person as defined in 45 C.F.R. §84.3(k)(3), the Section 504 implementing regulation of the former Department of Health, Education, and Welfare. This regulation is identical to 34 C.F.R. § 104.3(k)(3) in the Department's implementing regulation enforced by OCR. This section of the regulation states that with respect to postsecondary and vocational education services, a qualified handicapped person is a handicapped person who meets the academic and technical standards required for admission to or participation in the recipient's education program or activity. Davis was not a qualified individual with a disability because she did not meet the "technical standards" required for admission to the college's program. The balance of the court's opinion was devoted to determining that the physical qualification of hearing was a necessary "technical standard."

Thus, the Court was addressing modifications unrelated to the part of the educational process covered by 34 C.F.R. § 104.33. The children covered by 34 C.F.R. § 104.33 have already been determined to be qualified handicapped persons according to 34 C.F.R. § 104.3(k)(2), which sets forth age-related qualifications. To apply *Davis* appropriately in this context, the question would have to be whether an elementary or secondary school should have to modify the age ranges that an individual must meet in order to qualify for their benefits and services and, if the school refuses to do so, whether that refusal is justified.

Even assuming *Davis* could be applied to issues other than qualification standards, the Court is not saying, as you imply in your letter, that any substantial accommodation "would constitute an unauthorized extension of the obligations imposed by [Section 504]." What the Court actually said is that

> [i]f [the Section 504] regulations were to require substantial adjustments in existing programs beyond those necessary to eliminate discrimination against otherwise qualified individuals, they would do more than clarify the meaning of § 504. Instead they would constitute an unauthorized extension of the obligations imposed by [Section 504].

442 U.S. at 410 (emphasis added). This statement has no impact on 34 C.F.R. § 104.33(a) because that section does not require changes beyond those necessary to eliminate discrimination. If a school district is meeting the needs of children without disabilities to a greater extent than it is meeting the needs of children with disabilities, discrimination is occurring. By meeting the educational needs of children with disabilities as adequately as it meets the needs of other children, the school district is eliminating discrimination, and even substantial modifications required to bring about this result are not suspect under the *Davis* decision. 34 C.F.R. §§ 104.4, 104.33(b).

In *Alexander v. Choate*, 469 U.S. 287 (1985), the Court relied in pan on its opinion in Davis to find that the reduction of annual inpatient hospital days that the state medicaid agency would pay for on behalf of all medicaid recipients was not discriminatory. The medicaid recipients who had challenged the cutback had argued that individuals with disabilities were disproportionately affected by the agency action. Setting aside the clear distinctions between the health care and the education contexts, this decision still does not support limitations on the provision of FAPE as mandated by 34 C.F.R. § 104.33(a).

The Court cites its *Davis* decision as support for the principle that "[s]uch a 'fundamental alteration in the nature of the program' was far more than the reasonable modifications the statute or the regulations required." *Alexander*, 469 U.S. at 300, quoting *Davis*, 442 U.S. at 410. Section 504 of the statute does not, despite the statements of the Choate Court, speak to what modifications are or are not necessary. The regulation originally referred to by the *Davis* Court and subsequently mentioned by the *Choate* Court is apparently 45 C.F.R. § 84.44, coveting postsecondary and vocational education, which states that a recipient shall modify its academic requirements as necessary to ensure that they do not discriminate or have the effect of discriminating on the basis of disability---unless the recipient can demonstrate that such requirements are essential to the program of instruction or to any directly related licensing requirement. This regulation is identical to 34 C.F.R. § 104.44, enforced by OCR.

The *Choate* Court, in effect, interprets the mandate of Section 504 in a manner that supports the language of the postsecondary/vocational education portion of the regulation: "fundamental" alterations referred to by the Court are those
defined in 34 C.F.R. § 104.44 as ones where the recipient can demonstrate that modification would affect the essential nature of the program or licensing requirements; "reasonable" modifications are those that would coincide with the modifications mandated by 34 CF.R. § 104.44, meaning those that do not affect the essential nature of a program and that must be made to eliminate discrimination. The Court did not make any pronouncement regarding the degree of modification that must he made to a recipient's program where modification is not already provided for in the regulation. Since 34 C.F.R. § 104.33 makes no provision for modification, as 34 C.F.R. § 104.44 does, the Court's interpretation of degrees of modification is not applicable to § 104.33. In fact, when the Court cites parts of the Section 504 regulation that support "reasonable adjustments in the nature of the benefit offered," it does not include any provisions of the regulation relating to a free appropriate public elementary or secondary education.

The *Davis* and *Choate* Courts' findings regarding whether or not only reasonable modifications must be made are not in opposition to the Department's interpretation of Section 504; these findings do not relate to provisions in the regulation covering elementary and secondary education. I am sure that you are aware of the many significant differences between postsecondary/vocational and elementary/secondary education, beginning with the voluntary nature of the former. States, on the other hand, require elementary and secondary education for children between specified ages, and these children, whether or not they have disabilities, must attend.

The lower court cases that you cite do not require, or even suggest, any need for alteration of the FAPE regulation. Those cases that determine what a school district must provide to an elementary or secondary student with a disability under Section 504 restate the *Davis* interpretation: Section 504 is a statute that prohibits discrimination, rather than requiring affirmative action to overcome a student's disability. If particular educational services requested by the plaintiffs in these cases are denied by the courts, it is almost uniformly because the courts found that discrimination was not occuring; that is, those services requested were not necessary to prevent or eliminate discrimination because the services currently being provided were not discriminatory. This coincides with OCR's interpretation set forth above that the FAPE regulation requires school districts to meet the individual needs of all students to the same extent, though not necessarily by providing the same programs or services. Most important, though, is the fact that none of the cases cited calls into question the legality of the FAPE regulation.

Turning to your final question, OCR has been designated as the agency that investigates complaints under Title II of the Americans with Disabilities Act of 1991 (Title II) against public elementary and secondary schools, and its enforcement of Title II is guided by the Department of Justice's implementing regulation. 28 C.F.R. pt. 35. Title II's relationship to Section 504 is covered by 28 C.F.R. § 35.103 of the regulation. That section of the regulation states that Title II shall not be construed to apply a lesser standard than the standards applied under Title V of the Rehabilitation Act of 1973 (which includes Section 504) or other regulations issued by Federal agencies pursuant to Title V. "[C]ongress did not intend to displace any of the rights or remedies provided by the other Federal laws (including Section 504) ... that provide greater or equal protection to individuals with disabilities." 28 C.F.R. § 35.103(b) and 28 C.F.R. ch. 1, pt. 35, app. A., at 430 (1992).

Title II has been interpreted to adopt the standards of Section 504 in areas where Title II has not adopted a different standard. Title II does not specifically address discrimination in public elementary and secondary education programs. Accordingly, OCR has the authority to reference 34 C.F.R. § 104.33 standards when interpreting Title II's general discrimination provisions. Memorandum from Michael L. Williams, Assistant Secretary for Civil Rights, Department of Education, to OCR Senior Staff, Subject: Substantive Guidance Comparing Title II of the Americans with Disabilities Act of 1990 and Section 504 of the Rehabilitation Act of 1973, 19 IDELR 859, 860 (November 19, 1992).

According to the Department of Justice's comment on its Title II regulation, 28 C.F.R. § 35.130(b)(7) "is a specific application of the requirement under the general prohibitions of discrimination that public entities make reasonable modifications in policies, practices, or procedures where necessary to avoid discrimination on the basis of disability .... [T]he House Judiciary Committee Report directs the Attorney General to include those specific requirements in the title II regulation the extent they do not conflict with the regulations implementing section 504." 28 C.F.R. § 130(b)(7) and 28 C.F.R. ch. 1, pt. 35, app. A., at 440 (1992). Since the Department has developed the specific FAPE standard for compliance for elementary and secondary schools under Section 504, the Title II regulation in this instance is not intended to be applied to weaken the existing Section 504 standards.

OCR has and continues to enforce the Section 504 regulation as duly promulgated and reflective of congressional intent and the courts have not found otherwise. One of OCR's missions is to promote educational equity for all children. Defending the civil rights of children with disabilities as intended by Congress can never impair our integrity or our impact-- -but will only bring greater credibility to our efforts on behalf of all those served by this country's public schools.