

Special Education and Charter Schools: Ensuring Inclusion and Legal Compliance

December 6, 2016

Ellen A. Callegary, Esq.

The Law Offices of Ellen A. Callegary, P.A.

410-576-7606

ellen@callegarylalaw.com

Presentation Topics

- Maryland Charter School Laws and Special Education Responsibilities
- Individuals with Disabilities Education Act (IDEA) and FAPE
- Legally Defensible IEPs
- Section 504 of the Rehabilitation Act
- Determining Liability for Special Education Missteps in Charter Schools
- Prevention of Harassment
- Dispute Resolution Under IDEA
- Dispute Resolution Under Section 504

Maryland Public Charter School Program

“The general purpose of the Program is to establish an alternative means within the existing public school system in order to provide innovative learning opportunities and creative educational approaches to improve the education of students.”

Maryland Code Annotated, Education § 9-101(b)

Maryland Charter School Laws and Special Education Responsibilities

A public charter school “is subject to federal and State laws prohibiting discrimination.”

Md. Code Ann., Educ. §9-102(8)

A public charter school must “...compl[y] with the Age Discrimination Act of 1975, title VI of the Civil Rights Act of 1964, title IX of the Education Amendments of 1972, section 504 of the Rehabilitation Act of 1973, the Americans with Disabilities Act of 1990, section 1232g of this title (commonly referred to as the “Family Educational Rights and Privacy Act of 1974”), and part B of the Individuals with Disabilities Education Act...”

20 U.S. Code § 7221i(2)

Maryland Charter School Laws and Special Education Responsibilities

Maryland charter schools **may be** granted waivers of certain “provisions of law and regulation governing other public schools”.
Md. Code Ann., Educ. § 9-106(a)

Charter schools **may not be** granted waivers of laws that protect “the health, safety, or civil rights of a student or an employee of the charter school.”

Md. Code Ann., Educ. § 9-106(c)(3)

Maryland Charter School Laws and Special Education Responsibilities

“Children with disabilities who attend public charter schools and their parents retain all rights under [the Individuals With Disabilities Education Improvement Act].”

34 C.F.R. § 300.209(a)

Maryland Charter School Laws and Special Education Responsibilities

A Local Education Agency (LEA) must serve students with disabilities “attending charter schools in the same manner as the [LEA] serves children with disabilities in its other schools, including providing supplementary and related services on site at the charter school to the same extent to which the [LEA] has a policy or practice of providing such services on the site to its other public schools...”

20 U.S.C. §1413(a)(5)(A); 34 C.F.R. §300.209(b)

Individuals with Disabilities Education Act (IDEA)

“Disability is a natural part of the human experience and in no way diminishes the right of individuals to participate in or contribute to society. Improving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities.”

20 U.S.C. § 1400(c)(1)

Individuals with Disabilities Education Act (IDEA)

Purposes:

- “(a) To ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living;
- (b) To ensure that the rights of children with disabilities and their parents are protected;
- (c) To assist States, localities, educational service agencies, and Federal agencies to provide for the education of all children with disabilities; and
- (d) To assess and ensure the effectiveness of efforts to educate children with disabilities.”

30 C.F.R. §300.1

Ensuring a Free Appropriate Public Education (FAPE) is Provided

“Free, appropriate public education” (FAPE) is a legal term. It means that the education is provided at no charge to the parents, meets the requirements of federal and state law, and is in accordance with an individualized education program (IEP) that has been written specifically for the child.

20 U.S.C. § 1401(9)

The IDEA states that a FAPE should be designed to “meet [a child’s] unique needs and prepare [him or her] for further education, employment, and independent living.”

20 U.S.C. § 1400(d)

Legally Defensible IEPs: Focus on the Child's Needs

The IEP is written to fit the child, not the school. The IEP should be based on a child's unique strengths and needs, which have been identified through the evaluation process.

Accommodations, modifications, services, and supports are determined based on what a child needs to achieve her goals and objectives, not what services are available at the school.

Legally Defensible IEPs: Focus on the Child's Needs

Examples:

If a child needs 1 hour per week of speech and language therapy, the IEP must provide 1 hour each week, even if the school's speech and language pathologist does not have an extra hour in her schedule.

If a child needs smaller classes in order to be successful, that must be included in the IEP, even if smaller classes are not available at the child's school.

Legally Defensible IEPs: Least Restrictive Environment (LRE)

“To the maximum extent appropriate, students with disabilities, including students in public or private institutions or other care facilities, are educated with students who are not disabled; and Special classes, separate schooling, or other removal of students with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services...cannot be achieved satisfactorily.”

COMAR 13A.05.01.10(a)(1),(2)

Legally Defensible IEPs: Placement

The IEP determines the placement. Once an IEP has been written to fit the unique needs of a child, the team must determine where the IEP can be implemented.

Some children need intensive, specialized services that only a non-public placement can provide. The child's needs are ultimately what determine the placement.

Section 504 of the Rehabilitation Act

“No otherwise qualified individual with a disability in the United States... 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”

29 U.S.C. § 794

Public school systems receive federal funding and therefore “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.”

45 C.F.R. § 84.33(a), 34 C.F.R. §104.33

Determining Liability for Special Education Missteps in Charter Schools

Each charter school “operates under the supervision of the public chartering authority from which its charter is granted and in accordance with its charter and... the provisions of law and regulation governing other public schools”

Md. Code Ann., Educ. § 9-102(11)

“The public chartering authority for the granting of a charter shall be a county board of education.”

Md. Code Ann., Educ. § 9-103

Determining Liability for Special Education Missteps in Charter Schools

In Maryland, a charter school operates under the local school system that authorized it.

The LEA is liable if a student is not provided with FAPE.

Determining Liability for Special Education Missteps in Charter Schools

“A public chartering authority shall ensure that the authorizing process for a public charter school and the charter application address the roles and responsibilities of the county board and the applicants and operators of the public charter school with respect to children with disabilities.”

Md. Code Ann., Educ. § 9-107(b)

“The public chartering authority shall ensure that, prior to opening a public charter school, the operators of the school are informed of the human, fiscal, and organizational capacity needed to fulfill the school's responsibilities related to children with disabilities.”

Md. Code Ann., Educ. § 9-107(c)

Prevention of Harassment: Denial of FAPE

Bullying or harassment of a student on *any* basis can be a denial of FAPE that the school system has an affirmative duty to remedy if the bullying results in a student not receiving meaningful educational benefit.

**Department of Education Office of Civil
Rights “Dear Colleague Letter” October 21, 2014**

Prevention of Harassment: Disability-based discrimination

Harassment or bullying on the basis of disability may be a civil rights violation under Section 504 of the Rehabilitation Act of 1973 (Section 504) and Title II of the Americans with Disabilities Act of 1990 (ADA Title II). 29 U.S.C. § 794, 42 U.S.C. § 12131 *et seq.*

Prevention of Harassment: Criminal Liability

In 2013, the Maryland General Assembly unanimously passed “Grace’s Law”, named after Grace McComas, a 15-year-old high school student who committed suicide after being harassed on social media sites.

“A person may not use an interactive computer service to maliciously engage in a course of conduct that inflicts serious emotional distress on a minor or places a minor in reasonable fear of death or serious bodily injury with the intent:

- (i) to kill, injure, harass, or cause serious emotional distress to the minor; or
- (ii) to place the minor in reasonable fear of death or serious bodily injury.”

Md. Code Ann., Criminal Law § 3-805(b)(2)

Dispute Resolution Under IDEA: Mediation

“A parent of a student or the public agency may request mediation when there is a dispute about any matter related to the identification, evaluation, or educational placement, or the provision of FAPE to a student.”

COMAR 13A.05.01.15B

Dispute Resolution Under IDEA: Mediation

- Voluntary on the part of both parties.
- Both parties can be accompanied or advised by counsel.
- Should take place within 20 days of the request.
- Closed, confidential proceedings with the Office of Administrative Hearings.
- Any agreement reached by the parties is set forth in a written mediation agreement.

COMAR 13A.05.01.15B

Dispute Resolution Under IDEA: Resolution Session

“The public agency shall convene a meeting with the parent and the relevant members of the IEP team who have specific knowledge of the facts identified in the due process complaint before being provided the opportunity for an impartial due process hearing.”

COMAR 13A.05.01.15C(11)

A due process hearing will not occur unless the parties “participate in some other means to resolve the issues in the due process complaint.”

COMAR 13A.05.01.15C(11)(f)

Dispute Resolution Under IDEA: Resolution Session

- The parent and the school system determine which members of the IEP team will attend
- Must be attended by a school system representative with decision-making authority.
- The school system cannot have an attorney at the resolution session *unless* the parent has an attorney.
- If the parties reach a resolution, they execute a legally-binding agreement.

COMAR 13A.05.01.15C(11)

Dispute Resolution Under IDEA: Due Process Complaint

“A parent or a public agency may file a due process complaint on any matter related to the identification, evaluation, or educational placement, or the provision of FAPE to a student with a disability, in accordance with 34 CFR §300.507 and Education Article, §8-413, Annotated Code of Maryland.”

COMAR 13A.05.01.15C

Dispute Resolution Under IDEA: Due Process

- When a party files a due process complaint, the public agency responsible for the student's education shall:
 - Inform the parent of free or low cost legal and other relevant services available;
 - Provide the parent with a copy of the procedural safeguards
 - Inform the parent of the availability of mediation

COMAR 13A.05.01.15C(5)

Dispute Resolution Under IDEA: Due Process

At the hearing before the Office of Administrative Hearings, parties have the right to:

- Represent themselves;
- Be represented by an attorney
- Be accompanied and advised by persons with special knowledge or training with respect to the problems of children with disabilities.

COMAR 13A.05.01.15C(18)

Dispute Resolution Under IDEA: Due Process

“Stay Put”

“Unless the parent and the public agency agree on an alternative placement, the student shall remain in the present educational placement during the pendency of an administrative or judicial proceeding.”

COMAR 13A.05.01.15C(19)

Dispute Resolution Under IDEA: State Complaint

An organization or individual may file a written complaint with the Maryland State Department of Education (“MSDE”) regarding an alleged violation of the IDEA within 1 year.

The MSDE will:

- conduct an investigation
- issue a written decision
- issues on how the school can implement the final decision including technical assistance, negotiations, and corrective actions

No MSDE investigation while a due process complaint is pending.

COMAR 13A.05.01.15A

Dispute Resolution Under Section 504

Fewer procedural protections than under the IDEA

A parent can file a 504 complaint, but the school system must only provide:

- an opportunity for the parents to examine relevant records
- an impartial hearing (schools *could* ask the Office of Administrative Hearings to adjudicate cases, but we are not aware of any that do so)
- a review procedure

34 C.F.R. §104.36

Each school system has its own rules; check with your jurisdiction for its policies and procedures.

Dispute Resolution for Disability Discrimination: Office of Civil Rights Complaint

Discrimination against persons with disabilities is prohibited by Section 504 of the Rehabilitation Act of 1973 and Title II of the Americans with Disabilities Act of 1990.

The Office of Civil Rights (OCR) enforces federal civil rights laws that prohibit discrimination in programs or activities that receive federal financial assistance from the Department of Education, including public schools.

To file a complaint: www.ed.gov/about/offices/list/ocr/complaintintro.html

Questions?

Ellen A. Callegary, Esq.

The Law Offices of Ellen A. Callegary, P.A.

410-576-7606

ellen@callegarylalaw.com