

## NEW BOSTON INDEPENDENT SCHOOL DISTRICT

### LEGAL ISSUES FOR DYSLEXIA TEACHERS AND CAMPUSES

#### **Provision of a Free Appropriate Public Education (FAPE)**

A recipient that operates a public elementary or secondary education program or activity shall provide a free appropriate public education to each qualified person with a disability who is in the recipient's jurisdiction, regardless of the nature or severity of the person's disability. 34 CFR §104.33

A school district's Section 504 compliance with the obligation to provide FAPE hinges on its following specific procedures in the provision of services to students with disabilities. Section 504 regulations at 34 CFR §104.33(b)(1)(ii) establish the procedural component of FAPE by requiring "*adherence to procedures that satisfy the requirements of §104.34, §104.35 and §104.36.*"

District violated Section 504 by failing to maintain guidelines for providing services to students with disabilities. [*School Admin. Unit No. 6* (1994)].

FAPE under Section 504 is NOT bound by a cost-sensitive standard, such as reasonable accommodation. [*Response to Zirkel* (1993); ADAAA, (2009)].

Insufficient staff, heavy workloads, and inadequate pay are NOT acceptable excuses for failing to provide students with disabilities with FAPE. [*Department of Public Instruction* (1988); *Sherry v. NYS Ed. Dept.* (1979)].

Violation of Section 504 resulted from failure of student's teachers to consistently implement certain accommodations, including progress reports, provided for under Section plan. [*Inglewood* (2008)].

Student deprived of FAPE when district did not provide him with class notes as required by Section 504 plan; two teachers did not receive copy of plan until a month into school year. [*Barlow County* (2009)].

Kindergarten student, who missed 30-minute block of inclusion time for at least two months, did NOT receive FAPE; shortage in time called for by the student's plan constituted material plan implementation failure. [*Norton* (2009)].

District failed to properly implement student's Section 504 plan when it failed to provide accommodations for use during the state assessment. [*Lake County* (2008)].

District inconsistently implemented services student's plan, as paraprofessional assigned to the student confirmed she was sometimes unavailable due to staffing shortages; district also did not fully disseminate copy of plan to all employees responsible for provision of services to student. [*Toltec* (2008)].

District denied FAPE to student with ADHD because Section 504 plan lacked specificity and was not distributed to staff responsible for implementing it. [*Corunna* (2005)].

In implementation cases, a denial of the FAPE regulation is triggered by substantial or fundamental alteration of a basic element of the student's program or in the level of services to the student; in this

case, a failure to provide 20 percent of the child's plan for the school year met this standard. [*Minneapolis* (2003)].

Significant persons responsible for a student's accommodation plan lacked requisite knowledge and training, resulting in denial of FAPE in violation of Section 504. [*Ocean View* (1995)].

### **Compensatory Education**

Although the majority of federal courts have held that compensatory damages are an available remedy under Section 504, they are divided on whether an award of damages must be conditioned on a showing of intentional discrimination. There is however some disagreement as to whether punitive damages are available under Section 504.

Compensatory damages are an available remedy under Section 504. [Salinas (2018); Breanne C. (2009); A.W. v. Jersey City (2007); Butler (2000); Garrett (1996); W.B. (1995)].

Because Section 504 claim relied on district's denial of FAPE and nothing in record indicated injury as result of anything other than denial of FAPE, appropriate remedy was compensatory education, not monetary damages. [School District of Philadelphia (2009)].

Parents have right to sue districts for alleged FAPE violations, as the definition of FAPE provided in the regulations further the statute's nondiscriminatory aims; parents also can seek monetary damages under Section 504 for a denial of FAPE. [Mark H. (2008)].

### **Fidelity of Program Implementation**

Fidelity of Implementation – means carry out an instructional program in the manner in which it was designed. All campus teams, from the RTI core team, Section 504 committee and/or ARD committee, are not able to analyze data and provide supports if it cannot determine the appropriateness of the instruction within the classroom.

"Fidelity means that district and campus staff apply the intervention in the manner it was intended, based on how it was researched and validated. If the intervention requires a minimum of three 30-minute sessions per week and you have decided that you don't have time but for two 30-minute sessions per week, then you have NOT met fidelity. You cannot reduce the total time or time per session or alter the materials and still maintain fidelity." [John McCook, *The RtI Guide* (2006)].

District level teams must outline the assessments to be used in the RTI, Section 504, and/or Special Education process; devise a user-friendly format for presenting the data; articulate the interventions endorsed by the district; create a system for analyzing the data; and outline methods for accountability – particularly when intervention non-compliance occurs. [Andrea Ogonosky, *The Response to Intervention Handbook* (2008)].

Lack of fidelity/treatment integrity comprises (1) our assessment of student progress and (2) our ability to determine the efficacy of the intervention. [Brown-Chidsey and Steege, *Response to Intervention* (2010), pg. 45].

The reauthorized Elementary and Secondary Education Act states that all reading intervention should be research-based. In order to be a valid research-based methodology, material, or strategy, the intervention must be delivered to replicate the intervention cited in the research. If it is not provided with fidelity, the

intervention is no longer research-based and , thus, is out of compliance with that component of the law. **“The delivery of a dyslexia program must be in accordance with the way the program was designed to be delivered.** Therefore, when a district or charter school has purchased a program, the amount of time for instruction/intervention reflected in the author’s/publisher’s program mandates the amount of time required to deliver the instruction.” [*The Dyslexia Handbook*, 2018 Update, Question #51, pg. 89].