

# Table of Contents

<u>Chapter</u>		<u>Page</u>
<b>General Information</b>		
1.	Introduction.....	3
2.	For Further Reference .....	7
<b>IDEA Code and Regulations</b>		
3.	IDEA Alphabetized Index for IDEA.....	11
4.	Code Findings and Purpose for IDEA .....	17
5.	Code of Individual with Disabilities Education Act.....	25
6.	Code Sections Specifically Governing IEPs .....	41
7.	Interpretation of IEP and IDEA.....	59
<b>Selected IDEA Court Cases</b>		
8.	Court Case of Parents Forcing School to Pay for Child to Attend Private School.....	111
9.	Teacher Wins \$1 Million When Fired by School District for Advocating for Disabled Students .....	119
10.	Court Case of Parents Refusing to Agree to the Recommended IEP Placement .....	125

11.	Court Case of Of Inadequately Written IEP That Violates Federal Law .....	133
12.	Court Case of When There is a Change in Circumstances Requiring an IEP .....	145
13.	Court Case of Child Qualifying Under IDEA Even Though School Did Not Diagnose a Disability .....	153

**504 Plans and Law**

14.	Brief Summary of §504 Law .....	159
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**Behavioral Intervention**

15.	Court Case of Inadequate Behavior Modification Plan .....	169
16.	Behavioral Interventions Regulations in California .....	179

## CHAPTER EIGHT

# COURT CASE OF PARENTS FORCING SCHOOL DISTRICT TO PAY FOR CHILD TO ATTEND PRIVATE SCHOOL

**Union School Dist. v. Smith**  
**15 F.3d 1519 (9th Cir. 1994)**

**[Historical case showing the evolution  
of the law. Courts may not uphold this ruling]**

## **Facts of Case**

[Bernard Smith was a pupil in the Union School District (which for simplicity merely is called the “District”). At the District’s 1989 IEP meeting, the Smiths showed (but did not give) the District part of a doctors report with diagnosing Bernard with autism. The District verbally offered to place Bernard at a facility called McKinnon, but when the parents replied negatively, they did not give the Smiths a formal, written placement offer. The Smith pulled their son out of the San Jose school and put him in a private school for autistic children in Los Angeles, then sued the District asking that they pay for that private schooling.]

The Individuals With Disabilities Education Act is commonly known by its initials, “IDEA.” This federal legislation is found in the codes beginning with 20 U.S.C. §1400. This statute guarantees and mandates that every handicapped child receives a “free” and “appropriate” public education.

There were many issues to be decided by the court, and only selected portions of the Circuit Judge Ferguson’s court’s decision are included below. The judge’s decision is identifiable because it is significantly indented. Additionally, all citations and notations of missing text have been omitted to make the reading easier. Paragraphs are written by the author are in italics.

## Court Ruling

***Information Withheld by Parents.** The parents did not give the District a copy of the doctor’s report, but merely showed them a portion of it indicating a diagnosis of autism. The school district did not, itself, make a diagnosis of autism. The issue is if the parents’ failure to give the school a copy of the report or the District’s lack of its own diagnosis offers the District a way to avoid paying for Bernard’s private schooling?*

“Furthermore, the District was legally obligated to procure its own report from a specialist such as Dr. Siegel [who was the parent’s physician]. The District must make “a full and individual evaluation of the child’s educational needs,” 34 C.F.R. § 300.531, and must “ensure ... [that the] evaluation [of the student] is made by a multidisciplinary team ... including at least one teacher or other specialists with knowledge in the area of suspected disability” (i.e., a specialist in autism). 34 C.F.R. §300.532(e). Any failure of the Smiths to turn over portions of a specialist’s report cannot excuse the District’s failure to procure the same information for itself.

The District contends that McKinnon, the District's program for autistic children, was an appropriate placement for Bernard. As the district court found, and the District concedes, the District never formally offered Bernard a placement at McKinnon. The District argues that it did not offer McKinnon because the Smiths expressed their unwillingness to consider it as a placement. Thus, the question we face is whether the District was required to make a formal offer under the IDEA.

We find that a school district cannot escape its obligation under the IDEA to offer formally an appropriate educational placement by arguing that a disabled child's parents expressed unwillingness to accept that placement. The IDEA explicitly requires written prior notice to parents when an educational agency proposes, or refuses, to initiate or change the educational placement of a disabled child."

***Must IDEA Be Followed Exactly?*** *If the basic concept of the IDEA is followed, does it matter if the EXACT procedure is not followed? For example, if the parents state they do not want their child placed at a certain facility, isn't it just form over substance to require a school district to provide written notification that will be rejected?*

"The Supreme Court has explained the great importance of [following] such procedural components of the IDEA. We find that this formal requirement has an important purpose that is not merely technical, and we therefore believe it should be enforced rigorously.

The requirement of a formal, written offer creates a clear record that will do much to eliminate troublesome factual disputes many years later about when placements were offered, what placements were offered, and what additional educational assistance

was offered to supplement a placement, if any. Furthermore, a formal, specific offer from a school district will greatly assist parents in “presenting] complaints with respect to any matter relating to the educational placement of the child.

For example, in this case, a formal offer of McKinnon would have served several purposes. It would have alerted the Smiths to the need to consider seriously whether McKinnon was an appropriate placement under the IDEA. The Smiths could not have been reimbursed for their unilateral placement of Bernard at the Clinic if McKinnon were an appropriate placement. Also, if a formal offer were made, the Smiths could have decided whether to oppose McKinnon or to accept it with the supplement of additional education services.”

***Appropriate Not Best Education.*** *If there are two school opportunities, and one is more expensive or somehow better for that child, must the school district pay for the one that offers the best education for that child?*

“An ‘appropriate’ public education does not mean the absolutely best or ‘potential maximizing’ education for the individual child. The states are obliged to provide ‘a basic floor of opportunity’ through a program ‘individually designed to provide educational benefit to the handicapped child.’

If a parent believes that a school district has failed to offer a free appropriate public education, parents may place an eligible child in an appropriate private program. Parents have an equitable right to reimbursement for the cost of providing an appropriate private education when a school district has failed to offer a child a free appropriate public education.”

***What is Appropriate.*** For Bernard's needs, would a Communicatively Handicapped Class at a school called "Carlton" be an "appropriate" education for his handicap?

"During this period, the District's sole explicit offer (as set forth in its November 1 letter) was an educational program implementing Bernard's IEP through seventeen and one-half hours a week in the Communicatively Handicapped Class at Carlton School, supplemented by some one-to-one behavior modification counseling.

The Hearing Officer found that this program was inappropriate. The Hearing Officer found that there were no other autistic children at Carlton and there was no evidence that the teacher had been trained to work with autistic children. Furthermore, the Hearing Officer heeded the testimony of the witnesses who had extensive experience with autistic children, who testified that the learning environment at Carlton was inappropriate for Bernard's individual needs. [He found that] Bernard requires a more restrictive and less stimulating environment than that offered at Carlton. He requires full-time, one-to-one instruction and is unable to benefit from group instruction.

In light of the deference we grant the Hearing Officer as to judgments of educational policy, we find that Bernard's placement at Carlton was inappropriate because it was insufficiently individually designed to meet Bernard's special needs."

*[If the District had an appropriate program, even if it were outside the normal school district, the parents would have had to accept that class. Even if such a class was not offered by the District, parents could not just pick the school or institution they want. It must usually be made in conjunction with input from the District.*

*This case is somewhat unique, because the District thought*

*that because Bernard was in Los Angeles, Bernard ceased to become a student of their district. Unfortunately, it was an expensive mistake by the District. ]*

**Receive Fees for Education.** *Since the Court found that the District did not offer an “appropriate” education, must it pay for Bernard’s school that the parents have chosen? Must it pay even though the school district Bernard attended was in San Jose and the private school his parents placed him in was in Los Angeles?*

“The Supreme Court has held that a court may order a school district to reimburse parents who have unilaterally placed their child in an appropriate private special education after the school district has failed to offer an appropriate public education. The Smiths are entitled to reimbursement for tuition at the Clinic because the District failed to offer them an appropriate placement and the Smith’s placement of Bernard at the Clinic was appropriate.”

**Receive Free Lodging, Airfare, and Transportation.** *Since the private school was hundreds of miles away, must the District also pay for Bernard’s housing, meals, transportation to school and airfare between San Jose and Los Angeles?*

*The Hearing Officer and the district court also found that the Smiths were entitled to reimbursement for transportation costs to and from the Clinic each day, the transportation costs of commuting between San Jose and Los Angeles at the beginning and end of Bernard’s participation in the program and when the school is officially closed to students (i.e., Thanksgiving, winter and spring breaks), and to reimbursement for the cost of lodging for Bernard and Mrs. Smith in Los Angeles.*

“Under IDEA, a ‘free appropriate public education’ includes not only special education, but also ‘related services.’ Related services include ‘transportation,.. and other supportive services ... as may be required to assist a child with a disability to benefit from special education.’ 20 U.S.C. 1401(a)(17). If a

child's appropriate special education placement is at a non-residential program not within daily commuting distance of the family residence, transportation costs and lodging near the school are related services that are required to assist that child to benefit from the special education.”

**Lesson from this case  
and cases like it**

Don't take the IEP lightly or assume it doesn't matter. The IEP and the placement of handicapped children may be one of the most important aspects of your educational requirements. Learn the procedures, and if in doubt, call your IEP specialists or special education officer for assistance. While a court today may not reach exactly the same result, the concept of having to adhere precisely to the existing requirements of the IEP is very relevant today.]

## CHAPTER FOURTEEN

# SUMMARY OF SECTION 504 LAW

## Section 504” Concerns

Even though section 504 of the federal Rehabilitation Act<sup>1</sup> is not part of IDEA, it is imperative to understand §504 to know when IDEA might not apply but section 504 would.<sup>2</sup> As this chapter will discuss, Section 504’s definition of disability is far broader and more encompassing than IDEA, so students might find coverage under its provisions.<sup>3</sup> While a section 504 student would have far fewer rights and in-

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1. Since January 1, 2009 the Americans with Disabilities Act of 1990 (“ADA”) amended Section 504 of the Rehabilitation Act of 1973 (“Section 504”). The ADA broadened the types of disabilities qualifying for Section 504, but otherwise made no major changes. In fact, the federal regulations concerning educational institutions remains unchanged. The regulations are at 34 C.F.R. Part 104.
  2. Section 504 provides: “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 ....” The code is found at 29 U.S.C. § 794 (Section 504).
  3. As do regulations concerning other code sections, Section 504 requires school districts to provide a “free appropriate public education” often abbreviated as FAPE. In summary, each qualified disabled student must be given the same aids, support and services as required to receive FAPE as would be received by a nondisabled student. The school district can in no way discriminate against a qualified disabled student.

terventions than IDEA, the student would still have certain procedural safeguards.

If you are presented with a medical report that the child is disabled, you should immediately think the student could be covered under Section 504. If you suspect the child is disabled under Section 504 and there is no diagnosis supporting that position, you may wish to meet with the parents to ask if there are medical reports that could be released with their permission. If the parent say the child has not been so diagnosed, be sure to document that discussion so there is a paper trail.

In one case involving IDEA the United States Supreme Court ruled that a school district not finding a child qualified for special services under IDEA could be held liable if the student should have been so qualified. Here the child was later found to have had Attention Deficit Hyperactivity Disease (“ADHD”) and the school district was asked to reimburse the parents the costs of the child’s tuition at a private school. The school district could be held liable if the district failed to provide a FAPE even though the child was never diagnosed by the school district as being IDEA qualified.<sup>1</sup> Under these rationale, the logic and law of the case should also apply to Section 504 children.<sup>1</sup>

## Definition of Disability

Section 504 defines a handicap, even if that handicap does not affect the child’s learning and educational process. A child is handicapped if he or she “(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 impairment.”

Basically, impairment is a disability, illness, or condition that “substantially” reduces the student’s ability to receive an appropriate education. It is not enough that a student have a physical or mental impairment; that impairment must be

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1. Forest Grove School District v. T. A., 557 U.S. \_\_\_\_, 129 S.Ct. 2484 (2009)

of such severity that it results in a substantial limitation of at least one of that child's major life activities. The major life activity may be a heart condition, hearing impairment, allergy, poor eyesight, or any other physical or mental condition that substantially limits the student's ability to receive an appropriate education.

**Every child who qualifies for IDEA is also disabled under Section 504. However, not every child who is Section 504 disabled is disabled under IDEA.**

Briefly, under IDEA the disability must affect a student's right to free, appropriate, public education that is provided by special education and related services. However, under Section 504, the disability generally does not adversely affect a student's education performance.

Typical section 504 disabilities that are not covered under IDEA include attention conditions (like ADD or ADHA) and physical conditions (like asthma or a severely deformed limb).

## **Purpose And Procedure**

The main purpose of Section 504 of the Rehabilitation Act is to include and integrate disabled people into mainstream society. Section 504 provides that no one with a disability

“shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving Federal financial assistance”

which includes schools. Section 504 prevents such schools from discriminating against disabled students and requires them to provide “access” to a free, appropriate education that is “as adequate” as that given to nonhandicapped people.

In other words, the schools must offer “reasonable accommodations” to insure handicapped student's educational opportunities are the same as those of regular students. To

accomplish this, the schools must generally develop a section 504 plan for the disabled student.

## §504 Goal Less Powerful Than IDEA

Section 504 is an anti-discrimination statute. When applied to education, §504 requires schools to provide school ramps for wheelchair students, and to make other reasonable accommodations for handicapped students to equalize their educational opportunities. However, it is not designed to increase a student's abilities over that of other students. There is no "individualized educational program," enhancing a child's educational development. **The section 504 plan only equalizes the child's opportunity for an education free of discrimination.** It's educational accommodations are general when compared to the specifics of IDEA.

## Court Case Involving Section 504

J.D. was an academically gifted high school student (an IQ test placed him in the top two percent of his age group). He also had certain emotional and behavioral problems, stemming from "boredom, alienation, apathy and hopelessness because of an absence of intellectual peers" at his high school. J.D.'s parents requested an evaluation for special education.<sup>1</sup>

The school team found J.D. was not qualified for special education under IDEA because he did not need remedial education as his superior grades demonstrated. However, the team did find that J.D. was "disabled" under section 504 of the Rehabilitation Act. The section 504 plan included individual counseling and the ability to sit in classes for older students.

His parents did not agree with the section 504 plan, and removed J.D. from public school. They sent him to an exclusive, out-of-state boarding school for academically gifted

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1. *J.D. Ex. Rel. J. D. v. Pawlet School Dist.* 224 F.3d 60 (2nd Cir. 2000).

students. The parents then sent the school a bill asking them to pay the cost of J.D.'s education.

The court sided with school system, finding the 504 plan resulted in educational opportunity that was equal to that of a non-disabled student.

Like IDEA, section 504 only requires an "appropriate" education, not the best education available. The parents had to pay for J.D.'s private schooling.

## Comparison to IDEA

	<b>§504 of the Rehabilitation Act</b>	<b>IDEA</b>
<b>Covers</b>	Regulates many organizations (including schools) that receive federal funds.	Affects schools that educate children with certain specified disabilities.
<b>Purpose</b>	This is a broad civil rights type act that protects people with disabilities.	Provides a free and appropriate education to disabled children.
<b>Funding</b>	No additional funding of this Act.	Direct federal funding to states for use in ensuring that its disabled students receive educational assistance.
<b>Who Covered</b>	Person who has a physical or mental impairment that limits one or more major life activities, or has a record of such disability, or is regarded as having an impairment.	A school aged student who falls into one or more of the 14 disability categories under IDEA.

	<b>§504 of the Rehabilitation Act</b>	<b>IDEA</b>
<b>Student Needs Written Plan</b>	Statute just requires adequate documentation of evaluation. Normally, this involves so sort of Section 504 written plan.	Formal written Individualized Education Program (IEP) according to statute, and, if qualified behavioral problems, a Behavioral Intervention Plan (BIP).
<b>Definition of Disability</b>	The physical or mental impairment that limits major life activity in walking, seeing, hearing, breathing, learning, speaking, or working.	The student has intellectual disabilities, hearing impairment, speech or language impairment, visual impairment, serious emotional disturbances, orthopedic impairment, autism, traumatic brain injury, other health impairment, deafness, deaf-blind, multiple disabilities, specific learning disabilities, intellectual disability, or developmental delay.

	<b>§504 of the Rehabilitation Act</b>	<b>IDEA</b>
<b>Services Required</b>	Requires reasonable accommodation, which for students can also mean aids and other support so child benefit from general education.	Must provide all services specified in the IEP and/or BIP, such as speech and language specialist, special instruction, aide, transportation, even physical or occupational therapists.
<b>References</b>	29 USC 794 34 CFR Part 104	20 USC 1400 et seq. 34 CFR Parts 300 & 303