

# RIGHTS AND REMEDIES FOR PEOPLE WITH MENTAL HEALTH CHALLENGES IN EDUCATION AND EMPLOYMENT

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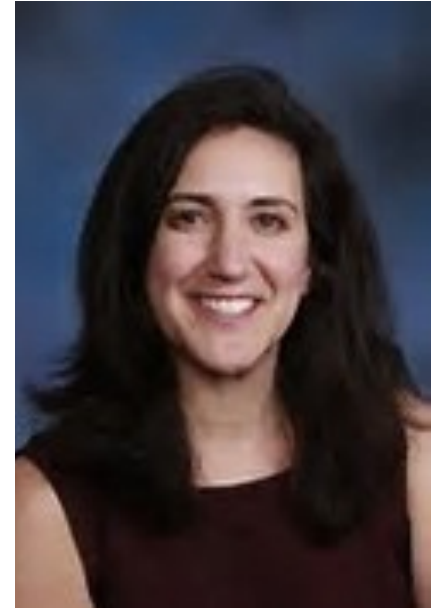
## PANELISTS – LAWRENCE D. ROSENBERG

Lawrence Rosenberg, JD, is a partner at the law firm of Jones Day in Washington, D.C., where he is a trial, appellate and US Supreme Court litigator. He recently won two 9-0 decisions in the US Supreme Court. Larry has extensive experience with legal issues and litigation concerning disabilities and mental health issues in education and employment. He is also an executive officer of the American Bar Association's Section of Litigation, directs the Supreme Court Clinic at the West Virginia University College of Law, and has been an IOCDF Ambassador. He is married to Dr. Deborah Topol and is the father of Alex, who is 19 years old and has OCD, and Jessica, who is 16 years old.



## PANELISTS – DEBORAH A. TOPOL, MD

Deborah Topol, MD, FACP, is the Associate Dean for Medical Education at Georgetown Medical School/Med Star Washington Hospital Center. She attended University of Pennsylvania undergrad and University of Maryland Medical School. She did her Internal Medicine Residency and Chief Residency at Georgetown. She has enjoyed teaching medical students and residents for over twenty years. Her interests include bioethics and managing moral distress in residents and medical students. Her 19-year-old son Alex Rosenberg was diagnosed with OCD in 2014. Though Alex struggled profoundly initially, he was fortunate to receive successful treatment and all of the members of our family want to help other children and teenagers successfully manage OCD and Anxiety.



## PANELISTS – ALEX ROSENBERG

Alex Rosenberg is a college student studying Psychology at Columbia University. He has been an active IOCDF advocate from an early age and is currently particularly engaged in advocacy pertaining to his challenges with OCD as a young adult and as a person of Jewish faith. Alex has spoken at the IOCDF's Annual Conferences, and Faith and OCD Conferences, as well as on IOCDF YouTube livestreams. He is also a member of the IOCDF's Faith and OCD and Young Adult Special Interest Groups. Alex wants to support others in finding hope to take their meaningful lives back from OCD just as others have provided similar support to him.



# DISABILITY DISCRIMINATION IN EDUCATION

- Three laws are applicable for students with disabilities
  - 1) Section 504 of the Rehabilitation Act of 1973 (public/private schools)
  - 2) Title II of the Americans with Disabilities Act (public/private schools)
  - 3) The Individuals with Disabilities Education Act (IDEA) (only applies to public schools)
- The difference between the laws is their applicability and the remedies available

# THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA)

- IDEA makes available a free appropriate public education to eligible children with disabilities and ensures special education and related services to those children
- **Eligibility:** 20 U.S.C. § 1401
  - Child is between ages of 3-21
  - Child attends a publicly funded primary or secondary school
  - Has disability that fits into one of the following categories: Autism, deaf-blindness, deafness, emotional disturbance, hearing impairment, intellectual disability, multiple disabilities, orthopedic impairment, other health impairment (including ADHD), specific learning disabilities such as dyslexia, speech or language impairment, traumatic brain injury, visual impairment
  - As a result of the named disability requires special education to make progress in school.

## AMERICANS WITH DISABILITIES ACT AND SECTION 504

- Title II of the Americans with Disabilities Act applies specifically to educational institutions, requiring them to make educational opportunities, extracurricular activities, and facilities open and accessible to all students.
- Section 504 of the Rehabilitation Act works concurrently with the ADA.
- ADA and 504 cover **both public and private** elementary and secondary schools as places of public accommodation. However private schools are not required to provide free appropriate education or develop an IEP like public schools, which are covered by IDEA.
- Any entity that receives some form of federal assistance is subject to provisions of Title II of ADA and Section 504 of the Rehabilitation Act.

# RIGHTS OF STUDENTS AND PARENTS

- Under IDEA, students and parents have rights: 20 U.S.C. § 1412
  - Free appropriate public education (parents are not required to pay for any accommodations)
  - Children must learn side by side with peers as much as possible, called the least restrictive environment.
  - Schools must evaluate students who may have disabilities at no cost to families.
  - If a child has a qualifying disability, schools must offer special education and related services; this is completed through an Individualized Education Program (IEP).
  - Parents have a right to participate in all parts IEP process and they are entitled to a voice in their child's services.
  - Parents may access all educational records.
  - Parents must give consent to any services.



# ACCOMMODATIONS FOR STUDENTS WITH DISABILITIES

- The ADA also provides accommodations for students which include (but are not limited to)
  - Modification of application and testing procedures
  - Allowing students to tape-record or videotape lectures and classes
  - Modification of class schedules
  - Extra time allotted between classes
  - Note takers
  - Interpreters
  - Readers
  - Specialized computer equipment
  - Installing accessible doorknobs
  - Creating handicapped parking spaces

## CASE STUDY: INDEPENDENT SCHOOL DISTRICT NO. 283 V. E.M.D.H

- Student was diagnosed with several anxiety disorders, in addition to autism spectrum disorder, with unspecified Obsessive Compulsive Disorder traits, panic disorder, ADHD, and severe recurrent major depressive disorder. Despite these, student was considered intellectually gifted and received high standardized test scores.
- Beginning in middle school, the Student was frequently absent from school because of her mental health. The absences continued into high school. When the Student was in 9<sup>th</sup> grade the school's guidance counselor told her parents that, if she were placed into special education classes, she would not be allowed to remain in her honors classes; therefore, the parents did not request an evaluation. In 10<sup>th</sup> grade her parents were told the same. The school district did not provide the parents with a report evaluating the Student's eligibility for special education until she was in 11<sup>th</sup> grade. The parents filed a due-process complaint with the Minnesota Department of Education.
- The district argued that the student was not eligible for special education because she was too intellectually gifted and that, despite her absences, the rare occasions she made it to class were strong indicators that there were no services it could provide that would improve her educational situation.
- The District Court found the school district violated IDEA because the district did not refer the student for special-education evaluation because she had above-average intellectual ability even though she was suffering from mental-health issues that affected her ability to attend school.
- Indep. Sch. Dist. No. 283 v. E.M.D.H., 960 F.3d 1073 (8th Cir. 2020)

# WHAT ARE MY REMEDIES?

- The statute a party uses to file their complaint is relevant because it affects the injured person's options for compensation
- A party can sue for IDEA violations **and** ADA violations. They do not need to file an IDEA complaint before filing for ADA relief (Luna Perez v. Sturgis Pub. Sch., 215 L. Ed. 2d 95, 143 S. Ct. 859 (2023))
- If a parent feels their child's disability rights were violated under IDEA, they may file a complaint with their state's department of education or the Office of Civil Rights for the U.S. Department of Education
- Before a party can sue for a failure to provide a Free Appropriate Public Education (FAPE), the party must exhaust the administrative remedies under the IDEA.
- If a student's rights are violated under ADA, a student may file a complaint with the Department of Justice Civil Rights Division.
- The office where the complaint is filed will investigate and will either refer the complaint to an ADA Mediation program, a federal agency that handles the issues the complaint raises or litigate the case which could lead to a settlement or lawsuit.

## Potential Remedies:

- Court orders the school to make accommodation requested by student
- Loss of state/federal funding
- Monetary damages are **not** available under the IDEA; however, parents can be reimbursed for any out-of-pocket costs that should have been paid for by the school
- Monetary damages/compensation are available under ADA/Section 504

# EMPLOYMENT DISCRIMINATION

- The law prohibits discrimination when it comes to **any** aspect of employment including:
  - Hiring, firing, pay, job assignments, promotions, layoffs, training, fringe benefits or any other term or condition of employment.
- Two laws are relevant in employment disability discrimination cases:
  - Americans with Disabilities Act (ADA) 42 U.S.C. § 12101
  - Section 504 of The Rehabilitation Act of 1973 (Rehabilitation Act) 29 U.S.C. 794

# LEGAL PROTECTIONS

- Both statutes are analyzed the same way in a court of law. The difference between the laws is which entities are governed by them
- Americans with Disabilities Act: prohibits discrimination in employment, public services, public accommodations, and telecommunications
- Rehabilitation Act: covers federal contractors and programs receiving federal funds.

“No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual.” 42 U.S.C. § 12112

# WHAT DOES IT MEAN TO HAVE A DISABILITY?

- There are 3 ways to establish an individual is disabled 42 U.S.C. § 12112

S/he is physically or mentally impaired such that he is substantially limited in one or more major life activity;

S/he has a record of such an impairment; or

S/he is regarded as having such an impairment.

# DEFINITIONS FOR DISABILITY ARE BROAD

- Physical Impairment 42 U.S.C. § 12112

Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, hemic, lymphatic, skin, and endocrine

- Mental Impairment 42 U.S.C. § 12112

Any mental or psychological disorder such as an intellectual disability, organic brain syndrome, emotional or mental illness, and specific learning disabilities (ADD, OCD, ADHD, etc.

- Major Life Activity 42 U.S.C. § 12112

Include, but are not limited to: caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others and working

# QUALIFIED INDIVIDUAL

- **Qualified individual with a disability:** an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.
  - “Qualified” means that the individual satisfies the requisite skills, experience, and education.
  - 42 U.S.C. § 12111 (8)
- **Essential Functions:** the basic duties an employee must be able to perform without reasonable accommodations
  - Fact-specific based on circumstances between individual and employer



# WHAT ARE MY RIGHTS?

- **The law forbids discrimination when it comes to any aspect of employment**
- An applicant or employee has the **right to be free from harassment** because they have a disability, had a disability in the past, or is believed to have a disability or mental impairment
  - Harassment can include, for example, offensive remarks about a person's disability.
  - Offhand comments, teasing, or isolated incidents that aren't very serious are considered illegal harassment when they are so frequent or severe that they create a hostile or offensive work environment or when it results in an adverse employment decision.
- Under the ADA a qualified individual with a disability is **entitled to reasonable accommodations** if they do not cause the employer "undue hardship" 42 U.S.C. § 12111 (10)

# REASONABLE ACCOMMODATIONS

- Under the ADA, qualified individuals with a disability are entitled to reasonable accommodations. 42 U.S.C. § 12111
- Accommodations are specific to the work environment but can include:
  - Making existing facilities readily accessible and usable (chairlifts/ramps)
  - Service animals
  - Modified work schedules (Extended leave of absence is **NOT** a reasonable accommodation)
  - Reassignment to vacant positions
  - Acquisitions or modification of equipment or devices (screen headers/text to typing programs)
  - Appropriate adjustment or modifications of examinations
  - Provision of qualified readers or interpreters

# INTERACTIVE PROCESS

- To receive an accommodation, an employee has the right to participate in an **interactive process** with their employer.
  - Employer and employee analyze the job involved and determine its purpose and essential functions
  - Parties identify accommodation and assess the effectiveness each would have in enabling the individual to perform the essential functions of the position
  - Employer has a right to ask for a reasonable amount of medical documentation
- **Individual asking for accommodation must initiate!**
- An employer does not have to offer an accommodation if it would cause undue hardship.
  - Categories of hardship 1) financial 2) operation of the facility

# ADA CASE STUDY: HUMPHREY DECISION

- Carolyn Humphrey worked for Memorial Hospitals Association as a medical transcriptionist from 1986 until her termination in 1995. Throughout her employment her transcription performance was excellent and consistently exceeded standards for speed, accuracy and productivity.
- In 1989 Humphrey began to experience problems getting to work on time, or at all. She engaged in a series of obsessive rituals that hindered her ability to arrive at work on time. She felt compelled to rinse her hair for up to an hour, and if after brushing her hair it didn't "feel right" she would return to wash it again. She also dressed very slowly and repeatedly checked and rechecked for papers she needed. She testified these obsessive rituals made it difficult to get to work. Humphrey was given several disciplinary warnings from her employer because of her tardiness and absenteeism. In 1995 she was evaluated and diagnosed with obsessive compulsive disorder (OCD). MHA proposed one accommodation by providing her a flexible start time arrangement, but this was unsuccessful. After several absences and Ms. Humphrey was fired.
- The Ninth Circuit found Humphrey's OCD constituted a disability. It held that if the initial attempt at accommodation fails, an employer is obligated "to explore further methods of accommodation before terminating" the employee. One attempt at an accommodation is not often enough. The duty to accommodate is a "continuing duty that is not exhausted by one effort."
  - Court found MMH's argument that Ms. Humphrey was not eligible under its internal policies to work at home because she had been disciplined for tardiness was not persuasive and that it would be incongruous for an employer to deny a reasonable accommodation for disciplinary reasons where the effects of the employee's disability were the sole reason for the discipline in the first place.
- Humphrey v. Mem'l Hosps. Ass'n, 239 F.3d 1128 (9th Cir. 2001).

# WHAT ARE MY REMEDIES?

- 42 U.S.C. § 12117 of ADA articulates the remedies for ADA violations
- If an employees' rights are violated under ADA, an employee must file a complaint with the Equal Employment Opportunity Commission (EEOC) 29 C.F.R. § 1614.110
  - An employee may not go to court without first filing their complaint with the EEOC, this is known as the exhaustion requirement.
  - The complaint must be filed within 180 calendar days from the day the discrimination took place
- Like the process for education discrimination, the EEOC will investigate the complaint and may litigate the case for the employee or issue a “right to sue” letter. The employee must have this letter to initiate a case with the court.
- Remedies:
  - Court orders for the employer to make accommodation employee requested
  - Financial award to complainant