

CHANCELLOR'S OFFICE LEGAL OPINIONS MEASURABLE PROGRESS

Legal Opinion 95-05

ISSUE:

You have asked the following questions regarding the requirement that students with disabilities demonstrate measurable progress:

1. What is the definition of measurable progress as used in Title 5, Section 56010?
2. If a student fails to make measurable progress can the DSPS program terminate services to the student?
3. Would termination of services under these circumstances violate the Americans with Disabilities Act?

ANALYSIS:

Regulations governing the state-funded Disabled Student Programs and Services (DSPS) program are set forth in Title 5 of the California Code of Regulations commencing with Section 56000. Section 56010 describes responsibilities students must meet in order to be eligible to receive services from the DSPS program. Among these is the requirement in Section 56010(a)(3) that a student must "make measurable progress toward goals established in the student's Student Educational contract or, when the student is enrolled in a regular college course, meet the academic standards established by the college." A student who is enrolled in one or more regular courses is not subject to the measurable progress requirement and continues to be eligible for DSPS services (assuming all other requirements are met) so long as he or she has not been dismissed from the college for failure to meet academic standards pursuant to section 55756. However, a student who is enrolled in a special class must make measurable progress toward the goals spelled out in the Student Educational Contract (SEC).

Your first question is how to define measurable progress. Unfortunately the regulations do not provide much guidance on this point, but Section 56022 does state that "for students in noncredit special classes, each SEC shall include, but need not be limited to, a description of the criteria to be used to evaluate the student's progress." Thus, it would appear that there is no single definition of measurable progress. Rather, the individualized SEC for each student must identify the criteria which the student and the DSPS staff have agreed will be used to evaluate the student's progress.

When the DSPS staff review the student's progress each year, as required by Section 56022, the question will be whether the student has moved toward the specified goal to an extent that can be measured in terms of the criteria set forth in the SEC.

It is worth noting that the regulation does not require the student to achieve his or her goals nor does it say that the student needs to make "significant" or "satisfactory" progress; the progress just needs to be measurable. If, for example, the SEC indicated that a student's goal was to master ten specified skills, then it might be argued that the student continues to make measurable progress so long as he or she masters at least one additional skill each year. Therefore, if a college wishes to prevent a student from taking an excessive period of time to achieve a goal, the best solution is to make the evaluation criteria as specific as possible and spell out in the SEC exactly how quickly the student is supposed to move toward the goal.

Your second question is whether the DSPS program can terminate services if a student fails to make measurable progress. The answer is that services may be suspended or terminated if the district has so provided in a written policy established and implemented consistent with the requirements of Section 56010(b). In particular, that Section requires that each student receive a copy of the suspension/termination policy upon initial application for DSPS services, that the student receive written notice of the college's intention to suspend or terminate services, and that he or she be afforded an opportunity to appeal that decision.

Your last question was whether the Americans with Disabilities Act, 42 U.S.C. 12100 et seq. (ADA), would prohibit suspending or terminating DSPS services even if the college has complied with Section 56010(b). We think not.

The regulations implementing Title II of the ADA, which applies to public entities, are set forth at 28 C.F.R. 35. Section 35.130(b)(7) does provide that "a public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability." However, for the reasons discussed below, we are of the opinion that this provision would not preclude enforcement of the measurable progress requirement.

For one thing, the question of whether a student has made measurable progress is, technically, only relevant for purposes of determining whether the student continues to be eligible for services from the state-funded DSPS program. Even if ADA did require a college to continue serving a student who was not making measurable progress, it does not follow that such a student must be served by the DSPS program.

Second, the measurable progress requirement applies only to students enrolled in special classes and, as we stated in Legal Opinion 0 92-12, we do not believe community colleges are required to offer special classes in the first place. If a college does decide to offer special classes then it has, in effect, already modified its normal academic standards and curriculum to provide an educational experience specifically designed for students with disabilities. We do not believe that Section 35.130(b)(7) can be read to require the further modification or waiver of policies, and procedures which are themselves modifications of the normal academic standards of the institution.

To hold otherwise would mean that colleges would be trapped in an infinite series of modifications taking them further and further from the basic educational mission of the institution.

Finally, Section 35.130(b)(7) specifically provides that a public entity need not make modifications in its policies, practices, or procedures if it can demonstrate that doing so would "fundamentally alter the nature of the service, program, or activity." Prohibiting a college from requiring measurable progress would mean that the college would have to continue to allow a student to enroll in special classes indefinitely even though the student was not making any progress whatsoever. This would certainly appear to amount to a fundamental alteration in the nature of the program offered by the college in the sense that it would transform the educational program into something more akin to a social service or custodial care program. In the broadest sense, the mission of community colleges is to educate students and we do not think the ADA can be construed to require colleges to continue to serve persons who have utterly failed to make any progress in achieving their educational goals.

Conclusion:

There is no universal definition of measurable progress. The SEC for each student enrolled in special classes should spell out the criteria to be used for determining whether the student has made measurable progress and, if the college contemplates the possibility of suspending or terminating services, the criteria should be as specific as possible. If it is determined that a student has not made measurable progress as defined in the SEC, then it is permissible, notwithstanding the Americans with Disabilities Act, to suspend or terminate services so long as the district has adopted a policy on termination of services and complied with the notification requirements of Section 56010(b).