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Discipline of Disabled Students

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DISCIPLINE OF DISABLED STUDENTS

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OVERVIEW

The treatment of disabled students under the Individuals with Disabilities Education Act[1] ("IDEA") and Section 504 of the Rehabilitation Act of 1973[2] ("Section 504") reflects the inherent conflict between the interest of the school system in maintaining a secure school environment and the entitlement of disabled students to receive a free, appropriate public education. IDEA is a federal statute which focuses specifically on the substantive and procedural rights of disabled students from birth to age twenty-one. Section 504, an omnibus anti-discrimination statute which protects disabled persons, has a broader scope than IDEA. The latter statute, although encompassing the educational rights of students in elementary and secondary schools, applies generally to entities which receive federal funds. Specifically, Section 504 governs, *inter alia*, activities of employment and public access.

The definition of disability under IDEA and Section 504 clarifies the difference in scope between the two statutes. For the purpose of qualifying for special education, IDEA defines disabled children as those who have specific disabilities which adversely affect their educational performance. Section 504 employs a functional definition, identifying a disabled student as one who "has a physical or mental impairment which substantially limits one or more major life activities."[3] One method of compliance with Section 504, as it relates to disabled students, is to comply with the standards set forth under IDEA.[4] Generally, all students who are disabled under IDEA and its regulations would also be disabled under Section 504 and its regulations. However, not all students who are disabled under Section 504 would be considered disabled under IDEA.

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Despite similarities in the definition of disability under these two federal statutes, determining the ramifications of disciplinary measures taken against disabled students under those laws has required both judicial and administrative interpretation. There are essentially two methods of disciplining disabled students. The first practice focuses on the discipline of a disabled student within the school environment, e.g., time outs, loss of privileges, or similar punitive measures short of cessation of services. The second approach relates to the cessation of services to the student by way of a suspension or expulsion from the student's school.

Although both the statutory language and the regulations relating to IDEA and Section 504 are relatively detailed, they are silent on issues concerning the discipline of disabled students. Consequently, much of the law relating to such discipline has resulted from legal actions brought by students, particularly with regard to the fundamental issue of whether a form or method of discipline constitutes a change in the educational placement of the disabled student. When such a change in educational placement takes place, the school system is prevented from implementing that form or method of discipline until all procedural safeguards have been exhausted.

Prior to invoking the due process rights in question, a student must meet the initial burden of establishing that a change in educational placement has occurred. In *Concerned Parents and Citizens for the Continuing Educ. at Malcolm X v. New York Bd. of Educ.*,[5] the United States Court of Appeals for the Second Circuit concluded that a change of placement generally arises when a substantial programmatic modification was made in a child's placement or when a modified educational program was not comparable to the plan set forth in the student's Individualized Education Plan ("IEP").[6] The *Malcolm X* decision interpreted IDEA and its regulations, but its reasoning appears to be equally applicable to Section 504.

In *Honig v. Doe*,[7] the United States Supreme Court further clarified what constitutes a change in placement under IDEA so as to necessitate the exhaustion of procedural safeguards prior to the implementation of the change in placement. The Court held that for the purposes of suspension and expulsion, a change in placement occurs when a student has either been expelled or otherwise suspended in excess of ten school days within a school year.

The administrative agencies charged with interpreting and enforcing IDEA and Section 504 have taken different approaches as to whether a ten day suspension may be cumulative or must be consecutive to constitute a change in placement. The Office of Special Education and Rehabilitative Services and the Office of Special Education Programs ("OSERS/OSEP") have taken the position that any period of suspension which exceeds ten school days in length, whether cumulative or consecutive, constitutes a change in placement.[8] Conversely, The Office of Civil Rights of the United States Department of Education ("OCR") has interpreted Section 504 and its regulations to mean that a suspension for ten consecutive days constitutes a change in placement, but that a suspension for ten days or more which is cumulative during a school year may not necessarily constitute a change of placement. OCR holds that a suspension which is greater than ten days but which was a result of a cumulative rather than a consecutive suspension (i.e., resulting from three separate five day suspensions) must be examined on a case by case basis to determine if a pattern of exclusion has occurred. If such a pattern of exclusion has taken place, a change of placement has occurred as well.[9]

Once it has been established that a change of placement has occurred as a result of disciplinary action, certain procedural rights become available to a disabled student that would not become available to a non-disabled student. Under IDEA and Section 504, the primary right available to a disabled student in this position is that no such change in placement can occur unless the student, his parents, or his guardians agree to the change in placement. In the absence of such an agreement, a multi-disciplinary team meeting, consisting of persons who are knowledgeable with respect to the student and/or the student's disability, must determine that the change in placement is appropriate. The team would also determine in the case of suspension or expulsion whether the behavior which caused the discipline was a manifestation of his or her disability. The student has the right to appeal the team's determination and is entitled to remain in his or her current placement pending exhaustion of the appeal process.[10]

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IN-SCHOOL DISCIPLINE

Although the primary focus of litigation pertaining to the discipline of disabled students has occurred as a result of suspensions or expulsions, some judicial and administrative agency decisions have addressed the issue of what disciplinary methods are appropriate while the student remains in the school environment. As a rule, any such disciplinary methods and approaches must be considered within the context of the IEP provided to a student. If any disciplinary methods or approaches would constitute a change in placement, the student would be entitled to due process procedural safeguards available under both IDEA and Section 504. Generally, unless a particular disciplinary method or approach intended to be used by a school system constitutes a material or substantial change in a disabled student's IEP, such discipline would not result in a change in placement so as to trigger the student's aforementioned due process rights.

If, for example, a student was repeatedly subjected to "time outs" which prevented the student from participating in his or her IEP classes or programs for a substantial period of time, such disciplinary action may be considered a change in his or her educational placement. Thus, the student would have the right to forestall such disciplinary action pending the outcome of his or her due process appeal hearings. On the other hand, if a disabled student were merely required to report to a study hall once a week, such action would probably not be deemed a change in placement so as to permit a due process appeal.

Judicial and administrative decisions have provided some insight into the propriety of certain disciplinary actions. In *Hayes v. Unified School Dist. No. 377*,[11] the United States Court of Appeals for the Tenth Circuit held that short term disciplinary measures taken against disabled students did not constitute a change in placement. In particular, the court in *Hayes* found that the discipline of a disabled student in school by removal from his or her usual classroom was a permissive action within the purview of IDEA.

OCR compliance rulings have also addressed whether a particular disciplinary approach is consistent with the requirement that a disabled student be provided a free, appropriate education designed to meet his or her unique needs. In an extreme 1991 case, OCR determined that detention of disabled students in a supply closet from four to seven days denied the students a free, appropriate education under Section 504.[12]

Thus, the determination of whether an in-school disciplinary action constitutes a change in placement rests upon the extent to which such action would disrupt the provision of services to the disabled student pursuant to the student's IEP. An equally important consideration, however, is whether such a disciplinary action is consistent with providing the particular disabled student an appropriate education to the extent that the action will allow the student a reasonable likelihood of achieving educational benefit.

SUSPENSION AND EXPULSION OF DISABLED STUDENTS

A more clearly defined but perhaps more difficult issue

arises in instances where disabled students are suspended or expelled from the school which they are attending.[13] Students who do not come within the ambit of either IDEA or Section 504 are entitled to some level of due process prior to the implementation of either a long-term suspension or expulsion.[14] These safeguards, however, tend to be somewhat minimal. On the other hand, disabled students granted protections under either IDEA or Section 504 are afforded much greater procedural safeguards before any significant deprivation of their interest in education, such as a long-term suspension or expulsion, can occur.[15]

The courts and administrative agencies have provided guidelines to aid in determining the period of suspension or expulsion that constitutes a change of placement. Falling within these criteria permits a disabled student both to appeal the school system's decision to implement the suspension or expulsion and to remain in his or her then current placement pending the appeal process.

The leading case defining change in placement for the purposes of suspension and expulsion is *Honig v. Doe*.[16] In *Honig*, a twenty-year-old emotionally disabled student alleged that the school's decision to remove him from the classroom because of his dangerous and disruptive behavior violated Section 1415(e)(3) of IDEA. The student argued that the school system's action amounted to an improper cessation of the educational services to which he was entitled.[17]

Section 1415(e)(3) provides that during the pendency of any proceedings initiated under IDEA, the student shall remain in his or her then current educational placement unless the state or local educational agency *and* the parents or guardians of a disabled child agree otherwise. The Supreme Court ruled in *Honig*, in addition to deciding that expulsion or suspension of a disabled student for a period in excess of ten days constitutes a change in educational placement,[18] that no such change could be implemented unilaterally by the school system without exhaustion of the student's due process rights provided under IDEA and its regulations.[19]

Although not specifically required by IDEA or Section 504, a number of courts have required that prior to a disabled student's expulsion or suspension for more than ten days, a multi-disciplinary team must determine whether the student's misconduct bears a relationship to his or her disability.[20] This multi-disciplinary team must consist of persons trained and knowledgeable in the area of special education.[21]

In the event a multi-disciplinary team determines that a disabled student's disability did cause the behavior which resulted in the suspension or expulsion, the student in question must be maintained in his or her current educational placement.[22] In the event that a disabled student is maintained in his current educational placement because the student's behavior was a manifestation of the student's disability, the student's placement and IEP should nonetheless be reviewed to determine if it continues to remain appropriate.[23] If the multi-disciplinary team determines that the placement and/or IEP is not appropriate, the school agency may proceed to propose a revised placement or IEP to which the parents or guardians must then agree. Otherwise the school agency must proceed with a due process hearing on the issue of whether such a change in placement or IEP is proper.

In the event that the team decides that the behavior resulting in the suspension or the expulsion of a student did not relate to his or her disability, the suspension or expulsion may not be implemented if the student requests a due process hearing. As discussed previously, IDEA and Section 504 further guarantee a right to appeal the decision of the team regarding the connection between the disability and the behavior in question. Pending the appeal process, the student must remain in the placement in which he or she was receiving educational services at the time of the occurrence which gave rise to the student's suspension or expulsion proceedings.[24]

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Another important issue addressed by *Honig* concerns the handling of a student whose behavior presents an immediate threat to the safety of other students and to the school environment in general. The *Honig* Court held that such a student could first be suspended for up to ten days without constituting a change in placement, thereby avoiding the requirement of any special education due process procedural safeguards, including the team meeting. Further, *Honig* held that if the school system determines that the student in question presents a sufficient threat to the safety of the school environment, then the school system may, during the ten day suspension period, pursue injunctive relief in either federal or state court in order to enjoin the dangerous disabled child from returning to school pending the due process hearing and appeals resulting therefrom. In such a proceeding, *Honig* concluded that there is a presumption in favor of the disabled student's remaining in his or her then current educational placement, which the school officials can overcome only by showing that maintaining the student in such placement would result in the substantial likelihood that injuries to either the student or others would occur.

The decision in *Honig* overturned implicitly, if not explicitly, lower federal court decisions holding that a school

system maintains the right to remove a disabled child who presents a danger to students or others during the pendency of the due process appeals and without first obtaining injunctive relief in court.[25] The school system need not exhaust administrative remedies under IDEA after having pursued injunctive relief in order to prevent a disabled child, who has already been allowed to return to school immediately after a ten day suspension, from posing a danger to himself or others.

The *Honig* court favored the imposition of procedures such as the use of study carrels, time outs, detention, or the restriction of privileges on disabled students prior to the more drastic remedy of suspension. This language on the part of the court suggests that it would not consider the use of such procedures as described above to be a change in placement which would activate the due process procedural safeguards available under IDEA.[26]

Notably, the Supreme Court in *Honig* stopped short of deciding whether it is permissible to terminate all educational services to a disabled student as a result of an expulsion. The question arises whether a disabled student may be excluded completely from educational services in the event that a final determination is made, after all appeals are exhausted, that the student's disability did not cause the behavior resulting in his or her suspension or expulsion. The court in *S-1 v. Turlington*[27] ruled that under both IDEA and section 504 a complete cessation of educational services is prohibited, thereby requiring the school system to provide some sort of educational placement. The service required would presumably be more restrictive for a disabled student who has been expelled from his previous educational placement.

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OSERS/OSEP has issued a letter ruling stating that the Education for All Handicapped Children's Act (now IDEA) requires that disabled students who have been suspended or expelled must receive some sort of educational services in some placement context during any such suspension or expulsion.[28] The Court of Appeals for the Seventh Circuit upheld the authority of OSERS/OSEP to make this ruling.[29]

SUMMARY

Lawyers, advocates, parents, and school districts should be aware of the following points regarding the discipline of disabled students:

1. A suspension or expulsion of a disabled student for a period in excess of ten days during a school year is considered under IDEA to constitute a change of placement, whether the ten days are consecutive or cumulative over the school year. Under section 504 more than ten consecutive days of suspension or expulsion is considered a significant change in placement. Cumulative suspensions in excess of ten days must be examined to determine whether they constitute a "pattern of exclusion."

2. A disabled student subject to suspension or expulsion is entitled to a team meeting to determine whether his or her disabling condition has caused the behavior which led to the suspension or expulsion proposed.

3. If the disabled student disagrees with the decision of the team that his or her disabling condition did not cause the behavior which led to the suspension or expulsion, the student may appeal the decision pursuant to the due process procedural safeguards which must be provided to disabled students under federal law.

4. If the student files an appeal under IDEA, the student must remain in his or her current placement pending exhaustion of the appeal process. Under section 504, the student may be removed by the school agency for emergencies without benefit of a court order as required under IDEA.

5. Where a disabled student appeals as described in the previous paragraph and the school system believes that he or she is a danger to themself or others, the school system under IDEA may pursue injunctive relief in a federal or state court to have the student enjoined from resuming attendance at school pending the outcome of the appeal process. The school system must initially overcome a presumption that the student is not a danger to himself or others. Furthermore, the school bears the burden of proving that the student poses such a threat.

6. In the event that a multi-disciplinary team determines that a student's disabling condition was the cause of the behavior which led to the suspension or expulsion, the student is entitled to remain in his or her then current placement without any further disciplinary action being taken.

7. If, after the exhaustion of all appeals, the decision of the team that the student's behavior was not a manifestation of the student's disability is affirmed, the student may be suspended or expelled. Presently, pursuant to regulatory interpretation of IDEA, students must be provided some sort of educational services even after his or her suspension or expulsion has been upheld. Under section 504, the law is unclear with regard to this issue.

8. Discipline other than suspension or expulsion, such as time outs, loss of privileges, study halls, or physical restraints, must be analyzed in terms of first whether such

time outs, loss of privileges, study halls, or physical restraints, must be analyzed in terms of first whether such discipline constitutes a change in placement. A disciplinary measure would be so categorized if it either deprives the disabled student from services which should be rendered pursuant to his or her IEP or the deprivation is otherwise comparable to a suspension greater than ten days or an expulsion. In addition, such disciplinary methods or approaches must be analyzed to determine whether they serve to facilitate the provision of a free, appropriate public education to the disabled student in question. The appropriate inquiry here is whether the student is receiving educational benefit pursuant to his or her IEP which includes the disciplinary methods or approaches in question.

Footnotes

[1]20 U.S.C. §§ 1400-1485 (1988 & Supp. IV 1992).

[2]29 U.S.C. § 794(a) (1988).

[3]*See* 34 C.F.R. § 300.5 (1992); *see also* 34 C.F.R. § 104.3 (1992).

[4]*See* 34 C.F.R. § 104.33(b)(2) (1992); *see also* 34 C.F.R. § 104.36 (1992). The scope of this article is confined to an analysis of the discipline of disabled students who are encompassed by either IDEA and/or section 504 and their respective regulations, who are twenty-one years of age or younger, and who are or may be enrolled in public educational institutions through and inclusive of elementary and secondary schools (and to the extent permitted by IDEA private and parochial schools as well). This article does not include a discussion of the discipline of disabled students who are enrolled in public or private post-secondary programs.

[5]629 F.2d 751 (2d Cir. 1980).

[6]*See* 34 C.F.R. §§ 300.340-300.349 (1992). IEP's are required under IDEA and its regulations. An IEP sets forth the specific program of special education and any related services that are required to be provided to a disabled student so that he or she receives a free and appropriate public

although not specifically called an IEP. As previously noted, one method of complying with section 504 is to provide an IEP which meets requirements under IDEA.

[7]484 U.S. 305 (1988).

[8]*See* 18 Individuals with Disabilities Educ. L. Rep. 217 (1991).

[9]*See* 16 Educ. of the Handicapped L. Rep. 156 (1990).

[10]The appeal process is multi-layered and includes the right to appeal to a federal or state court. *See* 34 C.F.R. §§ 300.506-300.513 (1992). *See also S-1 v. Turlington*, 635 F.2d 342, 349 (5th Cir. 1981); 353 Educ. of the Handicapped L. Rep. 351 (1989).

[11]877 F.2d 809 (10th Cir. 1989).

[12]18 Individuals with Disabilities Educ. L. Rep. 482 (1991).

[13]In interpreting section 504, OCR has indicated that in-school suspensions which result in a disabled student's deprivation of services which are mandated pursuant to his or her IEP would be treated in the same fashion as out of school suspension. In-school suspension resulting in a ten day cessation or interruption of IEP services because a student was, for example, placed in a different classroom or study hall would invoke the due process procedural safeguards relating to special education students. *See* 552 Educ. of the Handicapped L. Rep. 393 (1987). OCR rulings have also held that suspending a disabled student's access to school-provided transportation, whether or not such transportation is a related service pursuant to the student's IEP, will also be treated as any other suspension of a student. Any suspension of transportation services for a period in excess of ten days would entitle a disabled student under section 504 to the procedural protections relating to disabled students as discussed herein. *See* 305 Educ. of the Handicapped L. Rep. 51 (1989).

[14]*See Goss v. Lopez*, 419 U.S. 565 (1975).

[15]A question arises as to whether a student who is not yet identified as disabled but who appears to warrant such an identification should be entitled to the same protections as a disabled student for the purposes of suspension and expulsion. This issue remains unsettled, although some state statutes, administrative regulations, and court decisions have attempted to address it. *See, e.g.*, COMAR 13A.08.01.11G(3) (1992). *See also Hacienda La Puento Unified School Dist. of Los Angeles v. Honig*, 976 F.2d 487 (9th Cir. 1992) (permitting expelled student not previously identified as needing special education to invoke due process procedures under IDEA).

[16]484 U.S. 305 (1988).

[17]*Id.* at 308.

[18]*Id.* at 328.

[19]OSERS/OSEP has held that in the event a student is previously determined to be disabled, receives special educational services, and then undergoes a change of placement other than by way of a suspension or expulsion, the ten day period is restored. The school system may then suspend the student in question for an additional ten day period during the same school year without the student being permitted to appeal the second suspension or expulsion. The later change in placement must, of course, meet the standards set forth in *Malcolm X*, 629 F.2d at 751. *See* 18 Individuals with Disabilities Educ. L. Rep. 217 (1991).

[20]Under the amendment to § 504 effected by the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101-12213 (Supp. 1991), a disabled student qualifying only under § 504, who is disciplined for engaging in the illegal use of drugs or alcohol is not entitled to the procedural protections described herein. Such students would be treated as non-disabled students for purposes of suspension and expulsion. If, however, such a student were identified as disabled under IDEA, he or she would be entitled to the procedural protections described herein. *See S-1 v. Turlington*, 635 F.2d 342 (5th Cir. 1981). In *Honig*, the Court did not discuss the holdings in other federal cases. It also did not discuss the holding in the court below that disabled students were entitled to a team meeting to determine whether the student's behavior resulting in the suspension or expulsion was caused by his or her disability.

[21]*See* 34 C.F.R. § 300.532(e) (1992). *See also* 34 C.F.R. § 104.35(c)(3) (1992).

[22]*See Turlington*, 635 F.2d at 342; 16 Educ. of the Handicapped L. Rep. 491 (1990).

[23]*See* 34 C.F.R. §§ 300.530-300.534 (1992); 34 C.F.R. § 100.35 (1992).

[24]*See Honig*, 484 U.S. at 305.

[25]No language in § 504 precludes a school agency in the event of an emergency from unilaterally removing from his or her then current placement a § 504 student who is not covered under IDEA.

[26]The Court's discussion of these methods of discipline was not part of its ruling in the case. In the event that such methods interrupt the provision of services to a disabled student as established by his/her IEP, such action would constitute a change in placement.

[27]635 F.2d 342 (5th Cir. 1981).

[28]*See* 213 Educ. of the Handicapped L. Rep. 258 (1989).

[29]*Metropolitan School Dist. of Wayne Township v. Davila*, 969 F.2d 485 (7th Cir. 1992).

About The Author

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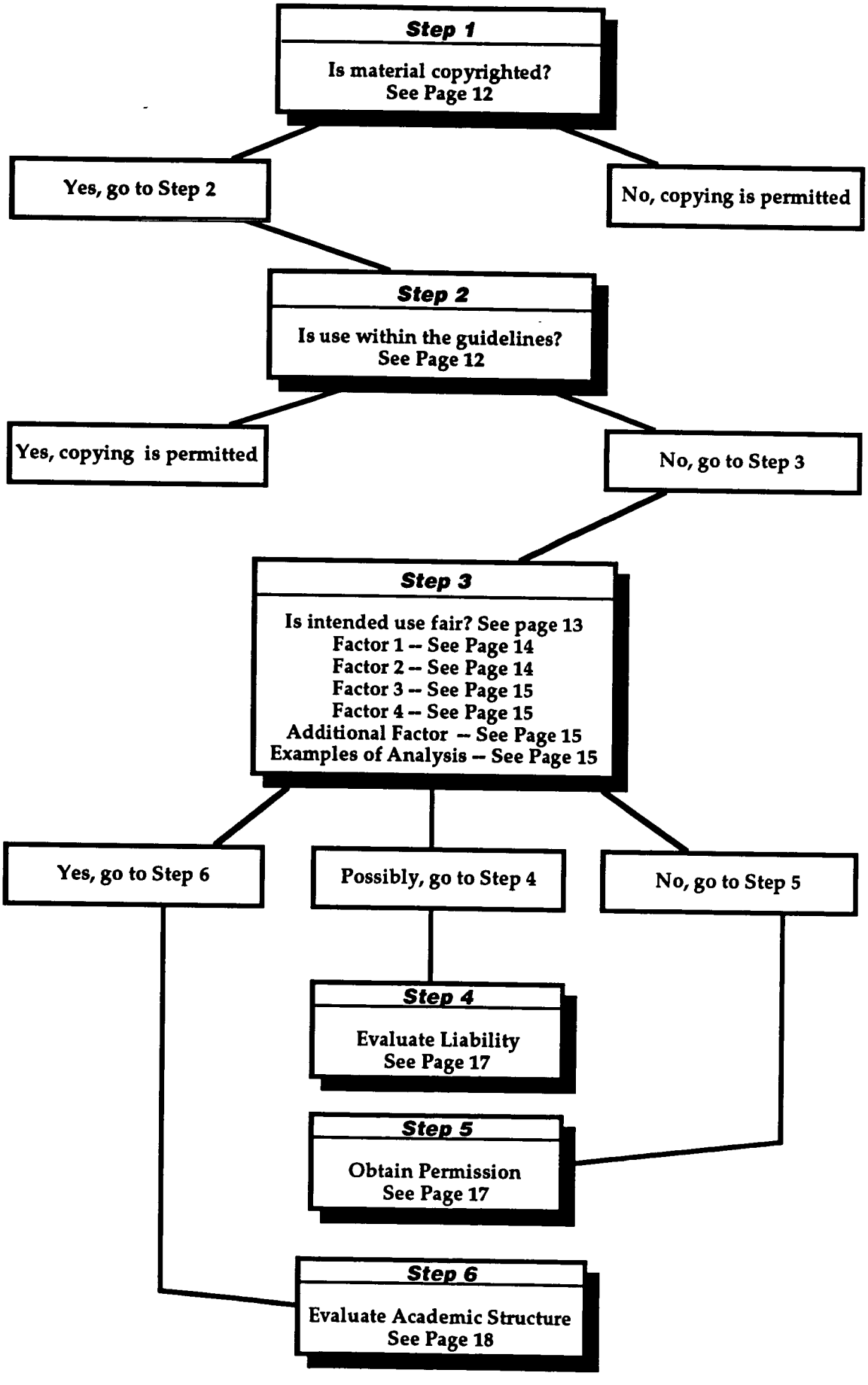
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