

Section 504 of the Rehabilitation Act

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- Section 504 of the Rehabilitation Act of 1973 provides in relevant part:

No otherwise **qualified individual** with a disability in the United States, as defined in Section 7(8) [29 U.S.C. §706(8)], 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**.

- **29 U.S.C. §794 (emphasis added)**

- **“Federal financial assistance”** means any funds, grants, services, programs, or property the United States Department of Education provides or otherwise makes available to a school.
- In other words, local or regional school districts, charter schools and any private schools who accept any type of federal financial aid are covered and must comply with its requirements.

THE ELEMENTS OF SECTION 504 – Program or Activity

- **“Program or activity”** means all programs and activities of a state or local educational agency -- or a private or parochial school which receives federal financial assistance -- regardless of whether the specific program or activity involved is a direct funding recipient. **29 U.S.C. §794(b)**
- For example, even if only one school within a school system received federal financial assistance, every other school within that system would also be bound under Section 504.

- “**Qualified Individual With a Disability**” is an individual who:
 - (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 an impairment.
- **29 U.S.C. §706(8)(B)**

- “Qualified individual with a disability” does not include “[A]n individual who is currently engaged in the illegal use of drugs, when a covered entity acts on the basis of such use.” 29 U.S.C. §706(C).
 - This exception does NOT include individuals currently participating in, or have successfully completed, a supervised drug rehabilitation program **and** are no longer engaged in illegal drug use.
- Other conditions that by themselves do not qualify for 504 eligibility include: homosexuality, bisexuality, transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, other sexual identity disorders, compulsive gambling, kleptomania, pyromania, illegal drug-aided psychoactive substance disorders.
 - But note, **gender dysphoria** – which can manifest as anxiety or depression resulting from gender identity issues – is included in the DSM-V and has been recognized as a basis for a Section 504 designation.

- **“Physical Impairment”** means 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;
 - Genito-urinary;
 - Hemic and lymphatic; skin; and
 - Endocrine

- **34 C.F.R §104.3**

- **“Mental Impairment”** means any mental or psychological disorder, such as:
 - Cognitive Impairment
 - Organic Brain Syndrome
 - Emotional or mental illness
 - ADHD, ADD
 - Bi-Polar
 - OCD, ODD, Dysthymia, Anxiety
 - Other DSM Diagnosis
 - “Specific learning disabilities”
- **34 C.F.R §104.3**

- Impairments that are “**transitory and minor**” do **not** generally qualify as the basis for a disability, unless they are sufficiently severe. See ADA Amendments Act of 2008, §3(4)(B).
- Transitory is typically seen as lasting less than 6 months.

■ PLEASE NOTE

- An “impairment that is episodic or in remission ***is*** a disability if it would substantially limit a major life activity ***when active.***” Id., §3(5)(C). This is true even if the active phases each last less than six months. Examples of this could be digestive issues such as celiac disease or irritable bowel syndrome.
- Accordingly, an individual may be considered disabled even if the individual’s impairment or condition does not substantially limit a major life activity when inactive.

- **“Major Life Activities”** include, but are not limited to:

Caring for oneself
Seeing
Sleeping
Lifting
Learning
Thinking
Reading

Performing manual tasks
Hearing
Walking
Bending
Concentrating
Communicating
Eating

Standing
Speaking
Breathing
Working

34 C.F.R. §104.3(j)(ii)

- “**Substantial Limitation**” in the context of education generally refers to a situation in which a student is:
 - **Unable to perform a major life activity that the average student of approximately the same age can;**
 - **Significantly restricted as to the condition, manner or duration** under which a particular life activity is performed as compared to the average student of approximately the same age.
- The standard that is commonly used to determine whether a physical or mental impairment results in a substantial limitation ***is average performance in the general population.***
- Congress has defined “substantially limited” as meaning “materially restricts”
- An impairment need NOT prevent, or severely or significantly restrict a major life activity to be substantially limiting

REASONABLE ACCOMMODATIONS

- Although an “**undue hardship**” exception to “**reasonable accommodations**” is provided in the portion of the Section 504 regulations pertaining to employment opportunities, it is ***not*** contained in the regulations pertaining to schools.
- Nonetheless, OCR traditionally applied that standard to cases involving K-12 schools, although its 2016 guidance suggested that that might no longer be its perspective.

REASONABLE ACCOMMODATIONS

- Schools must make reasonable accommodations for a student's physical or mental limitations that substantially limit a major life activity.
- That being said, a school **is not required to fundamentally alter the school's program or curriculum.**
- For example, while an accommodation might include an examination with fewer questions or which focus only on major issues, a school is not required to eliminate examinations altogether.

▪ Pertinent Court Cases:

- The accommodations do not have to be "optimal." Moody ex rel. J.M. v. NYC Department of Education, 2013 WL 906110 (2nd Cir. 2013).
- Section 504 does not mandate "substantial" changes to a school's programs. There needs to be a balance between the rights of the student and the legitimate financial and administrative concerns of the school district. Ridley School District v. M.R., 680 F.3d 260 (3rd Cir. 2012).
- A "reasonable" accommodation is one that gives the individual with a disability "meaningful access" to the program or services sought. Mark H. v. Lemahieu, 513 F.3d 922 (9th Cir. 2008).

REASONABLE ACCOMMODATIONS

- "There is no precise reasonableness test, but an accommodation is unreasonable if it either imposes undue financial or administrative burdens, or requires a fundamental alteration in the nature of the program." Allen DeBord and Debra DeBord o/b/o Kelly DeBord v. Board of Education of the Ferguson-Florissant School District, 126 F.3d 1102 (8th Cir. 1997).
- An "effective" accommodation, as an alternative to a specific demand, can be reasonable. T.B. by and through Allison Brenneise v. San Diego Unified School District, 2012 WL 1611021 (S.D. Ca. 2012).

MODIFICATIONS ARE ACCOMMODATIONS

- A common misperception in the context of Section 504 is that modifications are different than accommodations. This is perhaps based upon a belief that the modification of a student's work constitutes "specialized instruction," and thus special education. That is an erroneous belief.
- The fact that a student may require the modification of certain academic expectations does not automatically render that student eligible for special education. **Again, a modification is also an accommodation.**

- Investigations of complaints filed with the U.S. Department of Education's Office of Civil Rights ["OCR"].
- Because Section 504 is a civil rights statute, **individuals claiming Section 504 violations can proceed directly to court** even if OCR investigations and other administrative proceedings have not been concluded.
- An **exception** to this, however, is that parents must first exhaust the administrative hearing process under the Individuals with Disabilities Education Improvement Act of 2004 ["IDEA"] if they are seeking relief that may also be available under the IDEA.

- Individuals can bring a private cause of action in court under Section 504 (i.e., they are entitled to a jury trial).
- A plaintiff must prove that the defendants acted **intentionally or willfully, or that they were deliberately indifferent to discrimination or harassment of which they were aware and which they could have taken steps to halt.**
- Liability can be assessed against individuals who are found to have engaged in **intentional or deliberately indifferent misconduct.**
 - NOTE – Such conduct would not be covered under Conn. Gen. Stat. §10-235, which means that districts are prohibited from indemnifying school board members or employees who are found liable for a violation of Section 504.

OTHER CONSEQUENCES OF THE ADA AMENDMENTS

The 2008 ADA Amendments also implemented the following somewhat significant changes to the ADA **and** to Section 504:

1. Mitigating measures such as medication, assistive technology, accommodations, or modifications, cannot be taken into account when determining whether an impairment substantially limits a major life activity. **The one exception to this are eyeglasses.**
2. Impairments that are episodic or in remission **are to be assessed in their “active state”** when determining eligibility for Section 504 coverage.
3. Adding “thinking” and “concentrating” as “major life activities.”

OCR'S JULY 26, 2016 DEAR COLLEAGUE LETTER

- On July 26, 2016, OCR issued a guidance letter in conjunction with *Students with ADHD and Section 504: A Resource Guide* [*Guide*].
- Although as the title suggests, the letter and the *Guide* address attentional disorders, the broad language could be easily transferrable to Section 504 as a whole.

OCR'S JULY 26, 2016 DEAR COLLEAGUE LETTER

- While there is no specific requirement for a Section 504 Plan, or what the plan should contain, if a student has a written 504 Plan **“It is vital that teachers and appropriate staff have access to” a student’s Section 504 plan** so that it is implemented consistently. **OCR Guide.**
- **The failure to ensure appropriate access to the Section 504 plan** or the student’s accommodations **constitutes evidence that the school failed to provide FAPE** and an equal educational opportunity.
- OCR also considers the absence of a district representative who can ensure that the district provides, or is able to provide, all services that are identified as necessary in the Section 504 plan could constitute a denial of FAPE.

Irrelevance of Academic Success

- In what might appear to be the most peculiar aspect of OCR's guidance is that a student's high academic achievement may be irrelevant. For example, if a student requires additional time or effort to do, say, his or her homework as the result of an impairment, then the student may be substantially limited in a major life activity.*
 - Thus, when assessing students, schools should ask how difficult it is or how much time it takes for a student with an impairment, in comparison to a student without such impairment, to plan, begin, complete, and turn in an essay, term paper, homework assignment, or exam.
- * As noted previously, “duration” is one of the considerations when ascertaining substantial limitation.

Irrelevance of Intervention Strategies

- According to OCR:
- **School districts violate Section 504 when they deny or delay conducting an evaluation of a student who may qualify for special education and instead implement an intervention strategy.** OCR suggests that the intervention strategy and the evaluation may take place simultaneously.
- Therefore, school districts must not use the intervention system to delay or fail to make a decision to grant or refuse a parent's or teacher's request for an evaluation of a student.

Irrelevance of Ameliorative Measures

- From a practical perspective, the OCR guidance most detached from reality and most at odds with the actual law has to do with determining a student's Section 504 eligibility without taking into account his or her mitigating measures. OCR suggests that a school could consider evidence of limitations a person experienced *prior* to using a mitigating measure – such as medication -- or consider the expected course of a particular disorder absent mitigating measures.
- In other words, OCR recommends that schools indulge in pure speculation. That seems contrary to Section 504's requirement that eligibility determinations be predicated upon evaluations, not upon guesswork.

Irrelevance of Ameliorative Measures

- Although school districts may no longer consider the ameliorative effects of mitigating measures when making a disability **determination**, mitigating measures remain relevant in evaluating *the need of a student with a disability for special education or related services or in determining the appropriate accommodations*.
- Thus, while a student's medication regimen cannot be considered for eligibility purposes, when considering what accommodations the student requires, the 504 Team can factor in the medication and might determine that he or she does not require any.

Medical Assessments

- OCR's asserts that if a school determines that a medical assessment is necessary to determine whether a child has a disability under Section 504 and, therefore, needs special education or related services, ***the school district must ensure that the student receives this assessment at no cost to the student's parents.***
- **NOTE:** In its 2016 guidance, OCR repeatedly, erroneously, and inexplicably equates Section 504 and special education eligibility determinations. They are two separate processes conducted by two separate entities – the 504 Team and the Planning and Placement Team. Nonetheless, both Teams should ***absolutely avoid*** suggesting to parents that they obtain a medical assessment.

ON A SIDE NOTE

- There is a not-uncommon belief that a student must have a medical diagnosis of an impairment in order to get the Section 504 eligibility wheels turning. That is, in fact, not the case.
 - For example, mental impairments include attentional disorders and specific learning disabilities. These impairments do not require medical diagnoses – in fact, it would be odd, and likely inappropriate, for a pediatrician to diagnose a learning disability.

CHILD FIND UNDER SECTION 504

- Schools that receive federal financial assistance of any kind are required, on an annual basis, to:
 - (a) Undertake to identify and locate every qualified handicapped person attending the school or, in the case of public school districts, residing within the school district, who is not receiving a public education; and
 - (b) Take appropriate steps to notify handicapped persons and their parents or guardians of the school's duty under this subpart.

- A school is required to provide a “free appropriate public education” [“FAPE”] to each qualified disabled student, regardless of nature or severity of disability **and to the maximum extent possible with non-disabled students**. 34 C.F.R. §104.33(a); 34 C.F.R. §104.34(a). This requirement also applies to provision of non-academic and extracurricular services and activities. 34 C.F.R. §104.34(b).
- In ***extremely*** rare cases, FAPE may also include a residential placement. 34 C.F.R. §104.33(c).

- Schools must afford disabled students equal opportunity to participate in extracurricular programs, including sports. 34 C.F.R. §104.37.

- As is true with curricular accommodations, schools are not required to alter the fundamental nature of an extracurricular program – or students' individual roles in such program.
- Also, and as is true with their non-disabled peers, disabled students have no automatic entitlement to be selected to teams or groups that require tryouts or a certain skill level.
- Students must, however, be provided with reasonable accommodations in order to have an equitable opportunity at making the team or group and, if selected, to participate.

EXAMPLES OF EXTRACURRICULAR ACCOMMODATIONS

- A hearing-impaired student may be entitled to a sign-language interpreter to relay instructions during tryouts or, upon making the team, during practices and competitions.
- A student who requires assistance with glucose testing or insulin injections would likely be entitled to the provision of someone who can assist him or her with testing and/or injections during either tryouts or actual events.

- A student whose grades have been adversely affected by an intellectual or learning disability may still be entitled to participate in athletics despite the fact that his grades would otherwise disqualify him from participation.
- Likewise, the viability of age limitations has been called into question by cases of students who, due to a cognitive disability, have remained in school past the age of 18. Dennin v. CIAC, 913 F. Supp. 663 (D. Conn. 1996).

- Team members should be reasonably knowledgeable about the child, the evaluation data and/or the particular accommodations to be discussed or implemented. 34 C.F.R. § 104.35(c). Although regulations do not specify the number of individuals who must be assembled to constitute the Team, at the very least, **there should be a minimum of three individuals.**

- The IDEA expressly provides that parents are members of the Planning and Placement Team.
- Section 504 does **not** contain any such provision with respect to the Section 504 Team. Nonetheless, it is best practice to provide the parents with notice of meetings and to encourage their attendance.
- **If parents decline to participate in the 504 Team meeting, the Team can still meet.**

SECTION 504 TEAM - Parental Consent

- Even though Section 504 does not specifically include parents as members of the Section 504 Team, parental consent is required for initial evaluation. Letter to Durham, 27 IDELR 380 (OCR 1997).
- **BUT NOTE: Parental consent is *not* required for re-evaluation.** OCR Senior Staff Memorandum, 19 IDELR 892 (OCR 1992).
- With regard to a parental refusal to provide consent to the initial provision of Section 504 accommodations, OCR now appears to apply the IDEA's prohibition against taking parents to a due process hearing in order to override such refusal.

- As noted, determining eligibility for Section 504 is a three-part test. Consequently, an impairment in and of itself *is not a disability*. The impairment *must* substantially limit one or more major life activities in order to be considered a disability under Section 504.
- Therefore, whether a student has an impairment is simply the *beginning* of the eligibility process – it **is not the end!**

A DOCTOR'S DIAGNOSIS IS NOT DISPOSITIVE!

- As previously noted, a physician's medical diagnosis is not always required in order to find a student eligible for Section 504 accommodations.
- At the same time, a doctor's diagnosis does nothing more than establish the presence of an impairment, ***not a disability.***
- Therefore, a physician's diagnosis should be but one of the sources the 504 Team considers when considering whether a student qualifies for Section 504.

A DOCTOR'S RECOMMENDATION IS NOT DISPOSITIVE!

- Sometimes, a child's pediatrician will not only provide a note attesting to a student's impairment, but also recommend that the student be found eligible under Section 504 or even under the IDEA.
- A physician is qualified to make the diagnosis of an impairment – that is a medical determination. The physician, however, is not qualified to recommend eligibility – that is an **educational diagnosis**.
- It is the 504 Team's obligation to make the educational diagnosis. Therefore, it must consider, along with the medical diagnosis, aptitude and achievement tests, teacher recommendations, physical condition, social and cultural background, and adaptive behavior.

- As with the IDEA, Section 504 provides that a school district shall conduct an evaluation of any person before taking any action with respect to the initial placement of the person in regular or special education and any subsequent *significant* change in placement.
- Districts must establish evaluation standards and procedures, under which the evaluation materials:
 1. Must be validated for the specific purpose for which they are used;
 2. Must be administered by trained personnel in conformance with the instructions provided by their producer;
 3. Must include protocols tailored to assess specific areas of educational need and not merely those which are designed to provide a single general intelligence quotient; and

4. Must be selected and administered so as best to ensure that, when a test is administered to a student with impaired sensory, manual, or speaking skills, the test results accurately reflect the student's aptitude or achievement level or whatever other factor the test purports to measure, rather than reflecting the student's impaired sensory, manual, or speaking skills, unless, of course those impairments are the very reason for the testing.

34 C.F.R. §104.35.

- Notwithstanding the foregoing components of the evaluation, a full evaluation **may not** be necessary for students who do not need curriculum adjustments. OCR Memorandum, 16 EHLR 712, 714 (OCR 1990).
- While not specified or mandated, evaluations must be completed in a reasonable period of time. 34 C.F.R. § 104.35(a) (no time limitation specified); Lumberton (MS) Pub. Sch. Dist., 18 IDELR 33 (OCR 1991).

- In the context of the IDEA, it is well established that a school district is entitled to evaluate a child by evaluators of its own choosing prior to providing special education programming.
- The reasoning employed by courts in cases regarding this school district right under the IDEA has similarly been applied in the context of Section 504.

- Courts have held that a student is not eligible for special education identification and programming under the IDEA if the parents do not consent to an evaluation by the school district.
- At least one court has applied the same reasoning under Section 504, holding that because the student “has not submitted to testing by the school administrators to determine the existence of and possible extent of his handicap . . . [the student] is not ‘otherwise qualified’ to receive programs under the Rehabilitation Act.”

Schwartz v. The Learning Center Academy, 2001 WL 311247*6 (W.D. MI. 2001)

- Unlike under the IDEA, Section 504 does *not* provide any right to a publicly funded Independent Educational Evaluation, or “IEE.” Letter to Heldman, 20 IDELR 621 (OSEP 1993).
- Obviously, parents may obtain an IEE at their own expense, which the Section 504 Team should consider but which does not bind the Team.

- The Supreme Court has held that “whether a person has a disability under the ADA is an individualized inquiry.” Sutton v. United Air Lines, Inc., 527 U.S. 471, 483 (1999). See also Albertson's, Inc. v. Kirkingburg, 527 U.S. 555, 566 (1999).
- Similarly, in Schaefer v. State Ins. Fund, 207 F.3d 139 (2nd Cir. 2000), the court held: “Whether a given impairment constitutes a disability . . . is an individualized, fact-specific inquiry.” Id., at 143.
- Consequently, whether or not other similarly situated students are deemed to be disabled is irrelevant to whether or not a particular student is eligible for identification under Section 504.

- In other words, automatically identifying – or declining to identify – all students who share the same impairment, or, once having identified a student, giving the same accommodations without variation, violates Section 504.
- Remember, one shoe does not fit all feet, and students must be considered within the context of their individual limitations and, thus, needs.

- **A FOOD ALLERGY DOES NOT AUTOMATICALLY REQUIRE A SECTION 504 PLAN!**
- Previously, food allergies were not considered to constitute a basis for identification under Section 504. Schools often created an individualized medical or health plan for the student in question.
- In light of the ADA amendments and the fact that mitigating measures cannot be considered in determining whether someone has a disability, OCR has indicated that:
 - Continuing with a health plan may not be sufficient if the student needs or is believed to need special education or related services because of his or her disability. **The critical question is whether the school district's actions meet the evaluation, placement, and procedural safeguards of the FAPE provisions described in the section 504 regulations.**

***DISCIPLINE UNDER
SECTION 504 OF THE
REHABILITATION ACT***

Section 504 and Discipline

- What is the process for expelling a student under Section 504?
- There is no requirement under 504 that a “manifestation determination” as defined under the IDEA must be made prior to expelling a student.
- However, imposition of discipline of a covered student whose conduct was determined to be a manifestation of the student’s disability has been determined by the courts (*and* OCR) to be disability discrimination.
- Regardless, Section 504 does require that:
 - School districts provide procedural safeguards to parents regarding the identification, evaluation and placement of students with disabilities who need special instruction or related services;
 - The 504 regulations require school districts to evaluate students before initial placement and when a subsequent significant change in placement is made
 - US DOE Guidance states that *any* significant change in placement must be made by the Section 504 Team

- Prior to expulsion, therefore, there must be a meeting of the Section 504 Team to discuss the proposed change in placement, whether it is appropriate, and why it is being considered.
- If the motivation for the proposed change in placement is simply to implement a disciplinary action such as an expulsion, the Team must consider whether the proposed disciplinary change in placement is being considered as a result of the child's disability.
- If so, the change in placement would not be considered appropriate.
- The district should review and revise the student's Section 504 services as necessary.

Section 504 - An Exception to the Special Rules

- Section 504 explicitly permits a school district to take disciplinary action against a student with a disability who is currently engaging in the illegal use of drugs or alcohol to the same extent such disciplinary action is taken against students who are not disabled.
- Unlike under the IDEA, the “special” Section 504 due process and placement procedures (including manifestation determination reviews) do NOT apply to such disciplinary actions.
 - This exception does not apply to those students who previously used such substances but are not current users.

- While the IDEA is a funding statute, Section 504 of the Rehabilitation Act is a civil rights statute.
- Under Section 504, students and their parents may sue in federal court for damages against the school district AND against individuals.
- It is extremely important, therefore, that when dealing with disciplinary issues such as expulsion, that school districts provide to a 504 student similar protections as are afforded to students identified under the IDEA.
- Compliance with the IDEA's placement procedures is one means, and therefore the safest means, of complying with Section 504's procedural requirements.

Section 504 and Suspensions

- Out-of-School Suspension under Section 504
 - If the suspension does not equate to a change in placement (i.e., less than 10 days or not a “pattern”), the student may be suspended following the school’s regular suspension proceedings.

Section 504 and Suspensions

- What about in-school suspension?
 - Similar to the IDEA, time in in-school suspension is not considered a change in placement if the student receives the accommodations outlined in the child's Section 504 plan during the period of the in-school suspension.
 - If a child is not provided with the instructional services, modifications and accommodations outlined in the child's Section 504 plan during the period of in-school suspension, the time spent serving an in-school suspension is counted for purposes of determining if a significant change in placement has occurred (similar to the IDEA).

Section 504 and Procedural Safeguards

- Parents who disagree with a Section 504 decision regarding placement and/or the determination that behavior was not caused by a disability may request a Section 504 hearing.
- Unlike under the IDEA, the district establishes its own Section 504 hearing procedures and the district chooses the hearing officer to make the decision.
- Note that these procedures do not apply when the misconduct involves the current use of illegal drugs or alcohol.

Yes, There's More: New OCR Guidance on Discipline

- On July 19, 2022, OCR released *Supporting Students with Disabilities and Avoiding the Discriminatory Use of Student Discipline Under Section 504 of the Rehabilitation Act of 1973*.
- As its title suggests, it is a comprehensive overview of OCR's view of the rights of "Section 504-only" students with disabilities on student discipline matters.
- However, it has a wider remit than the title suggests in terms of its broad applicability to Section 504 as a whole (not just disciplinary matters).
- **May be relevant to special education students as well.**

New OCR Guidance: “Positive Behavior Supports”

- While Section 504 plans are spartan when compared to IEPs, OCR noted the importance of Section 504 plans containing individualized behavioral supports for responding to students with disability-based behaviors that interfere with their own *or* others’ ability to learn, while also explaining how the school will implement the supports and the Section 504 Team can determine whether the supports are effective.
- Supplementary aids and services under Section 504 to enable students to participate in the regular academic (and non-academic) environment include preferential seating, counseling services, **and the implementation of a behavior intervention plan (BIP).**
- Although not specifically discussed in Section 504’s regulations, OCR notes that a functional behavioral assessment (FBA) may be an important evaluative tool for developing and implementing a BIP and ***incorporating the BIP into the student’s Section 504 plan.***

OCR - Update and Evaluate

- A student's disability-based behavioral needs are likely to change over time, for example, because a student's mental health worsens ***or the environmental conditions at the student's home or school deteriorate, resulting in an adverse emotional or mental effect on the student.*** This triggers a duty to (re)evaluate.
- For example, a school may find it necessary to conduct an additional evaluation based on the student developing new or more significant behaviors that impede learning following the loss of a close relative.
- Similarly, a student may need an additional evaluation if the student's behaviors have improved significantly such that the placement no longer reflects the student's current needs.

OCR offers as examples of information for the Section 504 team to consider:

- any previous evaluations of the student with respect to disability-based behavior;
- the student's Section 504 plan (including any behavioral supports the student needs), any updates to the plan, **and information about whether the current plan is being implemented with fidelity**;
- psychological or medical evaluation data related to the behavior at issue;
- relevant information provided by the student's parents or guardians;
- academic records;
- relevant discipline records, including information on whether previous disciplinary actions led to changes in behavior, and incident reports, including any involving SROs or other law enforcement officials, consistent with applicable Federal or State privacy protections; and
- relevant teacher notes, observations, and data collected about the behavior.

More from OCR on Manifestation Determinations

- OCR states: “If a single person, such as a principal who is in charge of the school’s general disciplinary process for all students, alone determined whether a student’s behavior was based on the student’s disability, such a unilateral decision would not comply with Section 504.”
- The same logic may apply to special education students at PPT meetings.

- OCR indicates that modifications to school disciplinary policies may be needed to avoid disability discrimination against an individual student or a group of students with disabilities.
- Reasonable modifications can also include not applying a policy to students for behaviors that are manifestations of their disability or disabilities.
- Reasonable modifications can include adapting a policy to support a student's behavioral needs.

- For example, with respect to a student with a disability who harassed a classmate, the school could (as an interim measure) move the student with a disability to a different classroom within their current placement (if one is available) from that of the classmate who was harassed. Moving to a different classroom would not be a significant change in placement if the student could receive the same instruction, services and modifications in the new classroom, alongside students without disabilities to the same extent.
- OCR notes that in emergency circumstances, a school may seek to impose an immediate short-term disciplinary removal of a student with a disability because the student's behavior presents a serious and immediate threat to the safety of the student or of others that cannot be mitigated by other means.
 - OCR would review the facts to determine whether a school's conduct was reasonably necessary to ensure safety, including under circumstances where an immediate removal would result in a pattern of removals.
- **Query:** In addition to suspensions, could a district use the 45-day interim alternate placement for weapons/serious bodily injury cases just like the IDEA?

- At a minimum, schools must ensure that with respect to all actions concerning identification, evaluation, or education of persons with a disability, a system of procedural safeguards that includes notice, an opportunity for parents/guardian to examine relevant records, an impartial hearing with opportunity for participation by parents/guardian and representation by counsel, and a review procedure is in place.

34 C.F.R. §104.36

- **OTHER REQUIRED PROCEDURAL SAFEGUARDS**
- **Under Section 504, schools must:**
 - Appoint a Section 504 Coordinator to oversee compliance with Section 504 and to handle grievances filed under the school's required Section 504 grievance procedure.
 - Adopt a grievance procedure for the prompt and equitable resolution of complaints.
 - Provide notice to parents and students of the grievance procedure – including how to access it – and of the contact information for the designated Section 504 coordinator.

▪ OTHER REQUIRED PROCEDURAL SAFEGUARDS

- **Under Section 504, schools must:**
- Provide notice to parents and students, stating that school has a policy of non-discrimination.
- Provide notice to parents of actions regarding the identification, evaluation, or educational placement of persons, who because of handicap, or need are believed to need special education or related services. The notice should be detailed enough to allow parents to meaningfully evaluate whether they wish to consent to the proposed action, or refusal to act, or to request a hearing.

- Minimum due process requirements include the:
 - (i) opportunity to propound questions and present evidence;
 - (ii) right to timely decision;
 - (iii) impartial hearing officer;
 - (iv) right to counsel;
 - (v) written findings of fact; and
 - (vi) right to appeal.
- **NOTE:** There is no requirement that cross-examination be provided.
Commissioner of Education Circular Letter C-13, p. 3 (May 20, 2009).

- There are no specific guidelines under Section 504 as to when re-evaluations are required, except that they must be “periodic.” Nonetheless, the IDEA’s triennial review requirement would be considered appropriate.
- Unlike the IDEA’s “stay-put” provision, which mandates that a student’s last, mutually agreed upon placement must remain in place during the course of a hearing, Section 504 does not require stay-put.

QUESTIONS



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