PULLMAN & COMLEY

# Connecticut Association of Schools – Section 504

**Attorney Michael P. McKeon**

**May 6, 2021**

# BACKGROUND

PULLMAN & COMLEY

- Prior to the 1973 enactment of Section 504 of the Rehabilitation Act, many states had laws which permitted school districts to refuse to enroll any student they considered “uneducable.”
- Those districts that did offer educational services to cognitively and physically disabled students often did so in segregated settings.
- Consequently, approximately one million children were deprived of an education and an additional 3.5 million were “warehoused.”

# THE STATUTE

PULLMAN & COMLEY

- 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)**

# THE ELEMENTS OF SECTION 504
## Federal Financial Assistance

PULLMAN & COMLEY

- **"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, if a school – even one that is private or parochial -- receives **any** form of "federal financial assistance" from the federal government, it is covered under Section 504 and must comply with its requirements.

# THE ELEMENTS OF SECTION 504
## Federal Financial Assistance

PULLMAN & COMLEY

- The Payroll Protection Program, which was instituted in response to the economic consequences of the COVID-19 pandemic, qualifies as "federal financial assistance." Thus, along with the PPP loan came the obligation to comply with Section 504 as well as Title VI – which prohibits racial discrimination and harassment against students – and Title IX, which proscribes gender-based discrimination and harassment against students.

- These obligations, however, appear to be transitory, for the Small Business Administration, which oversees the PPP loan process, has advised that "**once the loan is paid or forgiven, the nondiscrimination obligations will no longer apply.**"

# THE ELEMENTS OF SECTION 504 – Program or Activity

PULLMAN & COMLEY

- **"Program or activity"** means all programs and activities of a state and 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.

# THE ELEMENTS OF SECTION 504 – Qualified Individual With a Disability

PULLMAN & COMLEY

- **"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)**
- **NOTE: As you will see, "substantially limits" is the most important phrase in Section 504.**

# THE ELEMENTS OF SECTION 504 – Qualified Individual With a Disability

PULLMAN & COMLEY

- The phrase "**qualified individual with a disability**" does ***not*** include: "[A]n individual who is currently engaging in the illegal use of drugs, when a covered entity acts on the basis of such use." **29 U.S.C. §706(C)**
- As such, Section 504 allows schools to take disciplinary action against students with disabilities using drugs or alcohol to the same extent as students without disabilities.
- **NOTE:** This exception does ***not*** include individuals currently participating in, or who have successfully completed, a supervised drug rehabilitation program ***and*** are no longer engaging in such drug use.

# THE ELEMENTS OF SECTION 504 – Qualified Individual With a Disability

PULLMAN & COMLEY

- Conditions that do not, in and of themselves, serve as grounds for Section 504 eligibility include: transvestism, 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:** Although gender-identity "disorder" is not considered a disability under either Section 504 or the Americans with Disabilities Act ["ADA"], **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 the basis for a Section 504 designation.

# PHYSICAL IMPAIRMENT

PULLMAN & COMLEY

- **"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 IMPAIRMENTS

PULLMAN & COMLEY

- **"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**

# TRANSITORY CONDITIONS

PULLMAN & COMLEY

- Impairments that are "**transitory and minor**" do ***not*** qualify as the basis for a disability. See ADA Amendments Act of 2008, §3(4)(B).

- A "**transitory impairment is an impairment with an actual *or expected* duration of six months or less.**" Id.

# TRANSITORY CONDITIONS

PULLMAN & COMLEY

- **WHAT DOES THIS MEAN IN PRACTICAL TERMS?**
- A student suffers a concussion or breaks a leg. If the effects of that are not expected to last longer than six months, then that impairment, despite its consequential limitations, is ***not*** a sufficient basis for finding the student eligible for Section 504 accommodations.
- If the substantially limiting effects of the concussion linger beyond six months, however, then that is no longer a transitory condition.
- Needless to say, if a school chooses to find a student eligible for Section 504 services despite the condition being transitory, there is no proscription against it.

# TRANSITORY CONDITIONS

PULLMAN & COMLEY

- **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

PULLMAN & COMLEY

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

- Caring for oneself
  Seeing
  Sleeping
  Lifting
  Learning
  Thinking
  Performing manual tasks
  Hearing
  Walking
  Bending
  Concentrating
  Communicating
  Eating
  Standing
  Speaking
  Breathing
  Working

**34 C.F.R. §104.3(j)(ii)**

# SUBSTANTIAL LIMITATION

PULLMAN & COMLEY

- **"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.***
-

# REASONABLE ACCOMMODATIONS

PULLMAN & COMLEY

- 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

PULLMAN &COMLEY

- 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.

# REASONABLE ACCOMMODATIONS

PULLMAN &COMLEY

- **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

PULLMAN & COMLEY

- "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).

# REASONABLE ACCOMMODATIONS

PULLMAN & COMLEY

- **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.**

# ENFORCEMENT AND REMEDIES

PULLMAN & COMLEY

- The United States Department of Education's Office for Civil Rights ["**OCR**"] enforces Section 504.
- **Nonetheless**, 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.

# SECTION 504 AND THE ADA

PULLMAN & COMLEY

- Congress used Section 504's definition of disability when it enacted the Americans with Disabilities Act ["ADA"]. Under both, there is a three-step process for determining whether an individual has a disability under Section 504:
- 
- 1. Whether the individual suffers from a physical or mental impairment.
- 2. Whether the activity in question is "a major life activity."
- 3. Whether the individual's impairment "**substantially limits**" the major life activity identified in step two.
- 

# SECTION 504 AND THE ADA

PULLMAN & COMLEY

- In most cases, there will be little dispute about the first two prongs of the tripartite test for determining eligibility under Section 504. An impairment and a major life activity can be recognized fairly easily. The issue that forms the crux of almost every dispute is whether that impairment "**substantially limits**" the major life activity.
- Because of that, the Supreme Court, Congress, and OCR have all taken turns seeking to define just what "substantially limits" means.

# SECTION 504 AND THE ADA

PULLMAN & COMLEY

- For example, in 2002, the United States Supreme Court held with respect to "substantially limits": "[T]he central inquiry must be whether the claimant *is unable to perform* the variety of tasks central to most people's daily lives." Toyota Motor Manufacturing, Kentucky, Inc. v. Williams 534 U.S. 184, 200-201 (2002)(emphasis added).
- In other words, the Court held that in order for an impairment to be substantially limiting, it must ***prevent*** an individual from engaging in a major life activity.

# THE ADA AMENDMENTS OF 2008

PULLMAN & COMLEY

- In 2008, Congress responded by amending the ADA, which amendments also affected Section 504. The 2008 amendments modified the definition of the term **"Substantially Limits"** to "depart from the strict and demanding standard applied by the Supreme Court in Toyota Motor Manufacturing, Kentucky, Inc. v. Williams and by numerous lower courts." **ADAAA, §2(b)(5)**.
- In doing so, Congress sought to redefine a fairly general phrase -- "substantially limits" – with another such phrase -- "**materially restricts**." ADAAA, §3(2).

# SUBSTANTIALLY LIMITS

PULLMAN & COMLEY

- **SO, WHAT DOES THAT MEAN?**
- According to OCR, under this new definition, an impairment need ***not*** prevent, or severely or significantly restrict, a major life activity. See *Dear Colleague Letter*, 58 IDELR 79 (OCR, January 19, 2012).
- This is somewhat peculiar given that "significantly" is generally recognized as a synonym for "substantially."

# SUBSTANTIALLY LIMITS

PULLMAN & COMLEY

- Despite this semantic shell game, when a student has a covered impairment, that, in and of itself, remains an **insufficient** basis for Section 504 eligibility. The law still requires that there be at least a **material restriction** of a major life activity.
- Thus, an impairment ***must*** do more than simply inconvenience a student or serve as a minor impediment.

# OTHER CONSEQUENCES OF THE ADA AMENDMENTS

PULLMAN &COMLEY

In addition to trying to dilute the definition of "substantially limits," the 2008 ADA Amendments also implemented the following, somewhat dubious 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.

# OCR'S JULY 26, 2016 DEAR COLLEAGUE LETTER

PULLMAN & COMLEY

- Despite the enactment of the 2008 ADA Amendments, schools and, to an extent, courts still essentially applied the same standards as existed prior to the Amendments. On July 26, 2016, however, OCR decided to ramp up Section 504 protections by issuing 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, their broad language could be easily transferrable to Section 504 as a whole.

# OCR'S JULY 26, 2016 DEAR COLLEAGUE LETTER

PULLMAN & COMLEY

- In the wake of the July 26, 2016 OCR guidance, schools must keep in mind:

- **"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'S JULY 26, 2016 DEAR COLLEAGUE LETTER

PULLMAN & COMLEY

- **SO, WHAT DOES THAT MEAN?**
- A student's Section 504 plan must be provided to those staff members who are part of the student's instructional team and who will be required to implement the relevant accommodations.
- At the same time, it is not for general dissemination – it should only be shared with those individuals who interact with the student in a regular and meaningful way.

# OCR'S JULY 26, 2016 DEAR COLLEAGUE LETTER

PULLMAN & COMLEY

- **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 on slide sixteen, "duration" is one of the considerations when ascertaining substantial limitation.**

# OCR'S JULY 26, 2016 DEAR COLLEAGUE LETTER

PULLMAN & COMLEY

- **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 a intervention strategy.** OCR instead makes the nonsensical suggestion that the intervention strategy and the evaluation take place simultaneously.
- OCR's guidance is diametrically contrary to the IDEA and its Connecticut counterpart, which mandate that schools implement such tiered interventions prior to recommending evaluations. **As such, these IDEA and state-law requirements should be given precedence.**

# OCR'S JULY 26, 2016 DEAR COLLEAGUE LETTER

PULLMAN & COMLEY

- **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 504 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 is **totally inappropriate** and contrary to Section 504's requirement that eligibility determinations be predicated upon evaluations, not upon guess work.

# OCR'S JULY 26, 2016 DEAR COLLEAGUE LETTER

PULLMAN & COMLEY

- **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.

# OCR'S JULY 26, 2016 DEAR COLLEAGUE LETTER

PULLMAN & COMLEY

- **Medical Assessments**
- Particularly alarming is OCR's assertion 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.
- 

# MEDICAL ASSESSMENTS

PULLMAN & COMLEY

- **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.
- As you will recall from slide eleven, 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.

# APPLICATION OF SECTION 504

PULLMAN & COMLEY

- **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.
-

# SERVICES PROVIDED BY SCHOOL

PULLMAN & COMLEY

- 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 very rare cases, FAPE may also include a residential placement. 34 C.F.R. §104.33(c)

# EXTRACURRICULAR ACTIVITIES

PULLMAN & COMLEY

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

# EXTRACURRICULAR ACTIVITIES

PULLMAN & COMLEY

- 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.

# EXTRACURRICULAR ACTIVITIES -- Accommodations

PULLMAN & COMLEY

- **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 injections during either tryouts or actual events.

# EXTRACURRICULAR ACTIVITIES -- Accommodations

PULLMAN & COMLEY

- 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 have been vitiated in cases of a student who, due to a cognitive disability, has remained in school past the age of 18. Dennin v. CIAC, 913 F. Supp. 663 (D. Conn. 1996).

# SECTION 504 TEAM

PULLMAN & COMLEY

- 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.

# SECTION 504 TEAM

PULLMAN & COMLEY

- 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

PULLMAN & COMLEY

- Even Section 504 does not specifically include parents as members of the Section 504 Team, parental consent is required for initial evaluation. Letter to Durheim, 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 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.

# BASES FOR IDENTIFICATION

PULLMAN & COMLEY

- 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!**

# BASES FOR IDENTIFICATION – Doctor's Notes

PULLMAN & COMLEY

- **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.

# BASES FOR IDENTIFICATION – Doctor's Notes

PULLMAN & COMLEY

- **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 recommending 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.

# BASES FOR IDENTIFICATION -- Evaluations

PULLMAN & COMLEY

- 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
- **34 C.F.R. §104.35**.

# BASES FOR IDENTIFICATION -- Evaluations

PULLMAN & COMLEY

- 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**.

# BASES FOR IDENTIFICATION -- Evaluations

PULLMAN & COMLEY

- 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).

# BASES FOR IDENTIFICATION -- Evaluations

PULLMAN & COMLEY

- 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.

# BASES FOR IDENTIFICATION -- Evaluations

PULLMAN & COMLEY

- 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)**

# BASES FOR IDENTIFICATION -- Evaluations

PULLMAN & COMLEY

- 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.

# INDIVIDUALIZED DETERMINATION

PULLMAN & COMLEY

- The Supreme Court has held that "whether a person has a disability under the ADA is an individualized inquiry." Sutton, 527 U.S. at 483. 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.

# INDIVIDUALIZED DETERMINATION

PULLMAN & COMLEY

- 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.

# FOOD ALLERGIES

PULLMAN & COMLEY

- **A FOOD ALLERGY DOES NOT AUTOMATICALLY REQUIRE A SECTION 504 PLAN!**
- Traditionally, food allergies were not considered grounds for identification under Section 504. To the contrary, courts held that individuals "who must follow the simple 'dietary restrictions' that medical conditions sometimes entail" are not substantially limited within the meaning of the ADA or Section 504. Lawson v. CSX Transportation, Inc., 245 F.3d 916, 924-25 (7th Cir. 2001).
- Although the inability to eat would substantially limit a major life activity, dietary restrictions that merely required an individual to avoid certain foods was deemed nothing more than a "moderate limitation." Weber v. Strippit, 186 F.3d 907, 914 (8th Cir. 1999), *cert. denied*, 528 U.S. 1078 (2000).

# FOOD ALLERGIES

PULLMAN & COMLEY

- Following the 2008 ADA Amendments, however, some claimed that OCR was mandating that students with food allergies be found eligible for Section 504 services.

- **That advice was simply wrong.**

- All that OCR stated was that within the context of food allergies, a school must "**meet the evaluation, placement, and procedural safeguard requirements of the FAPE provisions described in the Section 504 regulation**."

# FOOD ALLERGIES

PULLMAN & COMLEY

- In other words, schools simply must apply to students with food allergies the same testing standards and procedures that apply to students with other impairments.
- Also remember, federal law requires individualized determinations. Thus, advising that all students with food allergies are required to have a Section 504 Plan is contrary to settled law.

# DISCIPLINE UNDER SECTION 504

PULLMAN & COMLEY

- Unlike the IDEA, Section 504 does not have a specific requirement that a "manifestation" PPT meeting be convened.
- Nonetheless, OCR has interpreted Section 504 as requiring that ***any*** significant change in a student's placement must be decided by the student's 504 Team.
- Furthermore, the imposition of discipline upon a Section 504 student where the student's conduct was a manifestation of his or her disability has been determined to be disability discrimination in violation of Section 504 which, again, is a civil rights statute.
- Therefore, schools ***must*** proceed with caution when disciplining a Section 504 student.

# DISCIPLINE UNDER SECTION 504 – Manifestation Determination

PULLMAN & COMLEY

- If a student is facing exclusion from school for more than ten consecutive school days, this is considered a change in placement, and the 504 Team must meet. If the motivation for this proposed change in placement is to implement disciplinary action such as an expulsion, then the Team must ascertain whether the conduct was a manifestation of – or caused by – the student's disability.

- If it was not a manifestation, then the student is subject to the same disciplinary consequences as his or her non-disabled peers. If it ***is*** a manifestation, then the student cannot be expelled. The rationale is that in such situations, the conduct is not being punished – the disability is, which constitutes discrimination.

# DISCIPLINE UNDER SECTION 504 – Suspensions

PULLMAN & COMLEY

- A school has no obligation to provide instruction to Section 504 – or, for that matter, special education – students during the first ten school days of suspension in any one school year.
- Upon the eleventh, cumulative day of suspension, however, an alternative education – typically in the form of tutoring or online instruction – must be provided.

# DISCIPLINE UNDER SECTION 504 – Suspensions

PULLMAN & COMLEY

- As noted, an exclusion for more than ten consecutive days constitutes a change in placement and requires a manifestation determination.
- Suspensions that total more than ten ***cumulative*** days, however, are ***not*** changes of placement and thus ***do not require*** a manifestation determination unless the suspensions are so closely proximate in time and the bases for them are so similar that they constitute "a pattern of removals."
- Whether there is a pattern is a somewhat subjective determination.

# STUDENT RECORDS

PULLMAN & COMLEY

- Neither Section 504 nor the ADA specifically addresses report cards or transcripts.
- At the same time, the same confidentiality provisions that apply to non-disabled student records are also applicable to disabled students, thus prohibiting the unnecessary disclosures of a student's disability status to third parties.

# STUDENT RECORDS – Report Cards

PULLMAN & COMLEY

- Schools are permitted to distinguish between general education curriculum classes and other types of programs and classes, such as advanced placement, honors, or remedial. Consequently, in order to properly reflect the progress of a student with a disability in a modified or alternate education curriculum, Section 504 allows school to also distinguish between special education programs and services provided under a modified or alternate education curriculum and regular education classes under the general education curriculum on the student's **report card**.
- 34 C.F.R. §104.4(b)(1)(i)-(iv); 28 C.F.R. §35.130(b)(1)(i)-(iv).

# STUDENT RECORDS – Report Cards

PULLMAN & COMLEY

- **FOR EXAMPLE**

- OCR has noted that when a student's IEP calls for a modified tenth grade literature curriculum to be provided through the special education program, it would be appropriate for the report card to indicate that the student's progress was measured based on the modified education curriculum. This distinction also may be achieved by using an asterisk or other symbol meant to reference the modified or alternate education curriculum as long as the statements on the report card, including the asterisks, symbols or other coding, provide an explanation of the student's progress that is as informative and effective as the explanation provided for students without disabilities.

# STUDENT RECORDS – Report Cards

PULLMAN & COMLEY

- OCR also recognizes that accommodations – such as the provision of extra time, or signing, or the presentation of class materials in alternate formats -- are not intended to affect course content or curriculum.
- Therefore, OCR permits schools to use notations, asterisks, symbols, or other coding on a report card to indicate that a student with a disability received accommodations so long as it is part of the information given to parents regarding their child's progress or level of achievement in specific classes, course content, curriculum, the IEP, or the plan under Section 504.

# STUDENT RECORDS – Transcripts

PULLMAN & COMLEY

- **Transcripts Have Greater Privacy Restrictions Than Report Cards!**

- Whereas report cards are typically shared only with a student or with the student's parents or guardians, transcripts are generally disseminated to third parties, such as post-secondary institutions or employers. Therefore, different – and far more restrictive -- standards apply to transcripts.

# STUDENT RECORDS – Transcripts

PULLMAN & COMLEY

- A school district **may not include on a student's transcript** any information that a student has a disability, or has received special education or related services due to having a disability as it is not deemed to constitute information about the student's academic credentials and achievements. See 34 C.F.R. §104.4(b)(1)(i)-(iv) and 28 C.F.R. §35.130(b)(1)(i)-(iv).
- Furthermore, Section 504 **prohibits** a school from noting on a student's transcript that the student received accommodations in any classes.

# PROCEDURAL SAFEGUARDS

PULLMAN & COMLEY

- 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.

- **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.
-

PULLMAN & COMLEY

- **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, need or are believed to need special education or related services. The notice should be detailed enough to allow parents to meaningfully evaluate whether it wishes to consent to the proposed action, or refusal to act, or to request a hearing.

# PROCEDURAL SAFEGUARDS -- Hearings

PULLMAN & COMLEY

- 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).

# PROCEDURAL SAFEGUARDS – Other Considerations

PULLMAN & COMLEY

- 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.

# DISABILITY HARASSMENT

PULLMAN & COMLEY

- Both school districts **and individuals** can be held liable under Section 504 for staff-to-student or student-to-student harassment that is motivated by and predicated upon a student's disability. To prevail on such a claim, the student must satisfy the following five-prong test:
- 
- (1) the plaintiff is an individual with a disability;
- (2) he or she was harassed based on that disability;
- (3) the harassment was sufficiently severe or pervasive that it altered the condition of his or her education and created an abusive educational environment;
- (4) the defendant knew about the harassment; and
- (5) the defendant was deliberately indifferent to the harassment.
- 

# DISABILITY HARASSMENT

PULLMAN & COMLEY

- "Deliberate indifference" is what it appears to be, an essentially intentional failure to respond to complaints or take any meaningful action in response to them.
- The "deliberate indifference" standard underscores the importance of having written – ***and publicized*** -- grievance procedures. See 34 C.F.R. §104.7(b).
- Plaintiffs can seek monetary damages and prevailing party attorney fees against both the entity – such as a school district – and, unlike under Title VII or Title IX, against individuals. There is some split of authority as to the availability of punitive damages. "Compensatory education" may also be available.
-

# QUESTIONS?

# Contact Information

PULLMAN & COMLEY

**Michael P. McKeon**
Tel: 860.424.4386
Email: mmckeon@pullcom.com

PULLMAN &COMLEY

**These slides are intended for educational and informational purposes only. Readers are advised to seek appropriate professional consultation before acting on any matters in this update. These slides may be considered attorney advertising. Prior results do not guarantee a similar outcome.**