

Digging In to Section 504 of the Rehabilitation Act

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Plan for Today

- Overview
 - Difference between 504 and IDEA
- Eligibility and Child Find
- Parental Consent and Evaluations
- Meeting and Plan
- Implementation
- Dismissal and Reevaluation
- Discipline
- Extracurricular Activities
- Bullying and Harassment (if we get there!)

504 Overview

Section 504

29 U.S.C. § 794(a)

- “No otherwise qualified individual with a disability in the United States... shall, solely by reason of her or his disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance[.]”

Section 504 - Application

- Applies to all recipients of federal funds
- Applies to all activities and programs, even if not funded by federal money

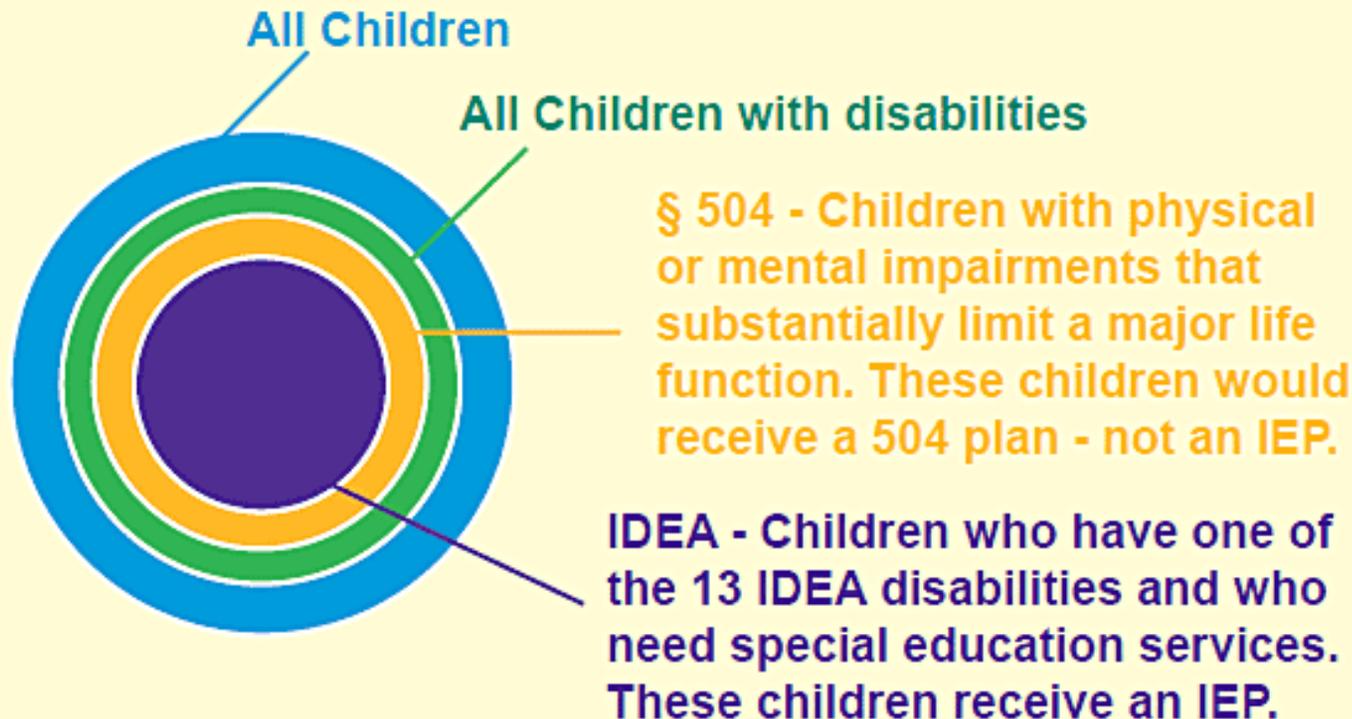
Section 504

29 U.S.C. § 794(a)

- Prohibits:
 - **Discrimination** on basis of disability (retaliation, intimidation, threats and coercion)
 - Exclusion of eligible students from programs and activities on basis of student's disabilities
 - Denial of participation or enjoyment of benefits of school's programs or activities because of student's disabilities
- Administrative Complaints
- Lawsuits

IDEA and 504 Eligibility

Eligibility for Section 504 and the IDEA



34 CFR 104.3(j)

(j) *Handicapped person* -- (1) *Handicapped persons* means any person who (i) has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.

(2) As used in paragraph (j)(1) of this section, the phrase:

(i) *Physical or mental impairment* means (A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine; or (B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(ii) *Major life activities* means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(iii) *Has a record of such an impairment* means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(iv) *Is regarded as having an impairment* means (A) has a physical or mental impairment that does not substantially limit major life activities but that is treated by a recipient as constituting such a limitation; (B) has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or (C) has none of the impairments defined in paragraph (j)(2)(i) of this section but is treated by a recipient as having such an impairment.

Section 504: Eligibility

- Section 504 and ADAAA: child who
 1. has a physical or mental impairment
 2. which substantially limits
 3. a major life activity
- And who “needs or is believed to need” services
- NOT necessary to establish adverse affect on educational performance

504 Terminology

- **Physical or Mental Impairment:**

Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine; or any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities

504 Terminology

- **Substantially Limits:**
 - Must consider eligibility without mitigating measures, such as medication
 - Excludes “transitory” impairments, which generally last 6 months or less
- Congress: “restricted as to the conditions, manner or duration under which they can be performed in comparison to most people”

504 Terminology

- **Substantially Limits:**
 - May include “episodic” impairments and impairments which are in remission

35. Is an impairment that is episodic or in remission a disability under Section 504?

Yes, under certain circumstances. In the Amendments Act (see FAQ 1), Congress clarified that an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active. A student with such an impairment is entitled to a free appropriate public education under Section 504.

504 Terminology

■ Major Life Activity:

- includes functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working, eating, sleeping, standing, lifting, bending, reading, concentrating, thinking, and communicating.
- includes "major bodily functions" that are major life activities, such as the functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

Differences with the IDEA

- **Need for Educational Impact:**
 - IDEA: adverse impact required
 - 504: no adverse impact required

OCR's Example

2012 DCL, p. 9, Question 11

For example, suppose a student is diagnosed with severe asthma that is a disability because it substantially limits the major life activity of breathing and the function of the respiratory system. However, based on the evaluation, the student does not need any special education or related service as a result of the disability. This student fully participates in her school's regular physical education program and in extracurricular sports; she does not need help administering her medicine; and she does not require any modifications to the school's policies, practices, or procedures. The school district is not obligated to provide the student with any additional services. The student is still a person with a disability, however, and therefore remains protected by the general nondiscrimination provisions of Section 504 and Title II.

Similarities with the IDEA

- **Child Find:** identify, evaluate, locate students in need of services
- **504 Committee/Team:** “knowledgeable persons draw upon information from a variety of sources”

Similarities with the IDEA

■ FAPE

104.33 Free appropriate public education.

(a) *General.* A recipient that operates a public elementary or secondary education program or activity shall provide a free appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction, regardless of the nature or severity of the person's handicap.

(b) *Appropriate education.* (1) For the purpose of this subpart, the provision of an appropriate education is the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of 104.34, 104.35, and 104.36.

(2) Implementation of an Individualized Education Program developed in accordance with the Education of the Handicapped Act is one means of meeting the standard established in paragraph (b)(1)(i) of this section.

(3) A recipient may place a handicapped person or refer such a person for aid, benefits, or services other than those that it operates or provides as its means of carrying out the requirements of this subpart. If so, the recipient remains responsible for ensuring that the requirements of this subpart are met with respect to any handicapped person so placed or referred.

Similarities with the IDEA

- **FAPE (from DOE Q&A)**

Free appropriate public education (FAPE): a term used in the elementary and secondary school context; for purposes of Section 504, refers to the provision of regular or special education and related aids and services that are designed to meet individual educational needs of students with disabilities as adequately as the needs of students without disabilities are met and is based upon adherence to procedures that satisfy the Section 504 requirements pertaining to educational setting, evaluation and placement, and procedural safeguards

Similarities with the IDEA

- **Accommodations for Activities:** 504 Team determines equal opportunities to participate
- **Discipline:** same 10-day rules and manifestation determinations
- **Bullying**
 - IDEA: may need additional services
 - 504: may need additional services, and may trigger nondiscrimination provisions

Interaction of ADA/504 & IDEA/Rule 51

- IDEA students all also have § 504/ADA protections *Letter to Mentink*, 19 IDELR 1127 (OCR 1993)
- Dual eligibility does not mean that schools provide an IDEA student with a § 504 plan in addition to his/her IEP. *Protecting Students with Disabilities*, 116 LRP 4782 (OCR 10/6/15)
- Parent may be able to reject IEP and demand § 504 plan
- Parent and student now can demand accommodations under § 504 that IEP team has rejected

Fry v. Napoleon Cmty. Sch.

137 S. Ct. 743 (2017)

- E.F. has cerebral palsy
- Parents bought “Wonder” the goldendoodle service dog who assisted E.F. with regular “life activities”
- Wonder helped E.F.
 - Retrieve dropped items
 - Balance
 - Opened doors
 - Turned off lights
 - Helped her on/off the toilet



Fry v. Napoleon Cmty. Sch.

137 S. Ct. 743 (2017)

- Parents requested that Wonder attend school
- School denied the request
- “Under E. F.’s existing IEP, a human aide provided E. F. with one-on-one support throughout the day; that two-legged assistance, the school officials thought, rendered Wonder superfluous. In the words of one administrator, Wonder should be barred from Ezra Eby because all of E. F.’s “physical and academic needs [were] being met through the services/programs/accommodations” that the school had already agreed to.”

Fry v. Napoleon Cmty. Sch.

137 S. Ct. 743 (2017)

- School allowed a “trial period” later in the year
- Wonder had to stay in the back of the room and couldn’t help E.F. like normal
- School again denied Wonder’s attendance
- Parents filed OCR complaint and homeschooled
- OCR: a school can provide FAPE and still discriminate
 - The school’s action is like “requiring a student who uses a wheelchair to be carried”
 - School violated Title II of ADA and Section 504

Fry v. Napoleon Cmty. Sch.

137 S. Ct. 743 (2017)

- Another public school “enthusiastically accepted” E.F. and Wonder
- Parents filed lawsuit
- District Court: parents must exhaust under IDEA
- 6th Circuit: upheld judgment for school, required exhaustion
- SCOTUS: we must decide “confusion” of exhaustion requirement

Fry v. Napoleon Cmty. Sch.

137 S. Ct. 743 (2017)

- 20 U.S.C. 1415(l):

“Nothing in [the IDEA] shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the [ADA], title V of the Rehabilitation Act [including §504], or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under [the IDEA], the [IDEA’s administrative procedures] shall be exhausted to the same extent as would be required had the action been brought under [the IDEA].”

Fry v. Napoleon Cmty. Sch.

137 S. Ct. 743 (2017)

- “Important as the IDEA is for children with disabilities, it is not the only federal statute protecting their interests.”

Section 1415(*l*) requires that a plaintiff exhaust the IDEA’s procedures before filing an action under the ADA, the Rehabilitation Act, or similar laws when (but only when) her suit “seek[s] relief that is also available” under the IDEA. We first hold that to meet that statutory standard, a suit must seek relief for the denial of a FAPE, because that is the only “relief” the IDEA makes “available.” We next conclude that in determining whether a suit indeed “seeks” relief for such a denial, a court should look to the substance, or gravamen, of the plaintiff’s complaint.⁴

Fry v. Napoleon Cmty. Sch.

137 S. Ct. 743 (2017)

- New test for determining if exhaustion applies or if parents can file suit under ADA/504
 1. Does the lawsuit seek relief for a denial of FAPE?
 - a) If “yes,” must exhaust
 - b) If “no,” proceed to prong 2
 2. What is the “gravamen” of the lawsuit?
 - a) “First, could the plaintiff have brought essentially the same claim if the alleged conduct had occurred at a public facility that was not a school—say, a public theater or library?”
 - b) “And second, could an adult at the school—say, an employee or visitor— have pressed essentially the same grievance?”

Fry v. Napoleon Cmty. Sch.

137 S. Ct. 743 (2017)

- “History of the proceedings” is also a factor—starting due process under IDEA may prove FAPE redress
- Hearing officers can only address FAPE
- FAPE applies only to students, so use that as a way to differentiate in the “could an adult ask for it” test
- Must look at what the complaint “seeks”
- Labels for claims do not matter
- The plaintiff becomes the “master of the remedy”
- Concurrence: majority’s test assumes no overlap of ADA/504 and IDEA, so we shouldn’t use it

Gallegos v. Adams Cty. Sch. Dist. 14

2017 U.S. Dist. LEXIS 156351 (D. Colo.)

- Prior to HS, 504 Plan for anxiety and depression implemented, to be updated annually
- HS – 504 Plan not maintained all 4 years
 - In addition, subjected to racial and sexual discrimination, false allegations of criminal conduct
 - “Everything Matters” – filmed without parental permission
 - Removed from football team, suspended, isolated, alternative ed. for diploma
- Parents sued for \$

Gallegos v. Adams Cty. Sch. Dist. 14

2017 U.S. Dist. LEXIS 156351 (D. Colo.)

- School – Dismiss ADA/504 claims:
 - No allegation that discrimination “due to” disability
 - Allegation is failure to maintain 504 plan, so must sue under IDEA
 - Claim is actually for denial of FAPE; exhaustion required
- Court
 - Construe 504 and the ADA similarly
 - Cited *Fry* - Cognizable claim for denial of FAPE by failing to implement 504 Plan may arise under Section 504.

Gallegos v. Adams Cty. Sch. Dist. 14

2017 U.S. Dist. LEXIS 156351 (D. Colo.)

- IDEA administrative exhaustion required
 - Injury complained of is educational in nature, i.e., the District denied Tyler, through suspension and expulsion, educational opportunities to which he was entitled under law, and, at best, it is unclear whether the IDEA provides a remedy for the injury.
- MTD 504 claim granted

504 and FAPE

- “Free appropriate public education” (FAPE) NOT found in Section 504
 - Nondiscrimination statute applicable to all federal fund recipients
- Standard imposed by USDOE/OCR through regulations
 - Employers – reasonable accommodation
 - K-12 Schools – FAPE
- NOT supported/required by courts

504, FAPE, and the Courts

- *Southeastern Community College v. Davis*, 99 S.Ct. 2361 (1979) (“Section 504 by its terms does not compel educational institutions to disregard the disabilities of handicapped individuals or to make substantial modifications in their programs to allow disabled persons to participate.”)
- *Parks v. Parkovic*, 753 F.2d 1397, 1409 (7th Cir. 1985) (Section 504 does not require states to create special education programs for disabled children.)
- *Smith v. Robinson*, 104 S.Ct. 3457 (1984) (Section 504 and the IDEA are very different substantive statutes. IDEA guarantees FAPE. Section 504 prohibits discrimination on the basis of a handicap. “There is no suggestion that Section 504 adds anything to petitioner’s substantive rights to a free appropriate public education.”)
- Trump Administration? Amend regs.? Ex. Ord.?

Private and Home Schools

- Unilateral parental placement in home or private school
- Resident district must evaluate
 - OCR says true even if placement is outside resident district
- FAPE?
 - OCR says no, as long as public school offered FAPE
 - *Letter to Veir*, 20 IDELR 864 (OCR 1993);
 - *D.L. v. Baltimore City Bd. of Sch. Comm'rs*, 706 F.3d 256 (4th Cir. 2013)
 - *Lower Merion Sch. Dist. v. Doe*, 593 Pa. 437 (2007) (dual enroll. – private K, public for therapy – access to “appropriate education”)

Reference to Quick Reference Guide

- Key Comparison Guide

Local Site Discussion #1

- ESU staff to talk about how they support 504 vs IEP services within the unit.

Eligibility and Child Find

Referrals for Evaluation: Child Find

Child Find Process

To identify, locate and evaluate children residing within the geographic boundaries of the school district who may qualify for special education (including homeless children and wards of the State), the school district will take the following practical steps:

- a) announce in mailings sent to families with school-aged children at least annually that the school district will identify and verify children at no charge for possible disabilities;
- b) include information about the identification and verification of children for possible disabilities at no charge in mailings sent to patrons, homeless shelters, and Health and Human Service offices located in the school district at least annually; and
- c) accept referrals for evaluation directly from parents, school personnel, and other state and regional agencies.

Section 504 of the Rehab. Act

34 C.F.R. § 104.32

- A recipient that operates a public elementary or secondary education program or activity shall annually:
 - (a) Undertake to identify and locate every qualified handicapped person residing in the recipient's jurisdiction who is not receiving a public education; and
 - (b) Take appropriate steps to notify handicapped persons and their parents or guardians of the recipient's duty under this subpart.

When is a school required to make a 504 referral?

- (1) When district believes that the student has a physical or mental impairment that substantially limits one or more major life activities; **AND**
 - ADAAA: Must consider the student without mitigating measures
- (2) Student is in need of either regular ed. with supplementary services or special ed. and related services

Section 504 Eligibility

- Also includes students who
 - "have a record of such impairment"
 - Are "regarded as having such an impairment"
- Should evaluate each student who "needs or is believed to need" services
- NOT necessary to establish adverse affect on educational performance

When To Refer A Student

- Parents report health condition
- Parents request evaluation*
- Student failing to make progress
- Staff refers student to SAT*
- Student returning to school after a serious injury
- Student failed to verify for SpEd - consider immediately eligibility for Section 504 services
- Student habitually absent

**Parent request is a "trump card"*

Compliance with Child Find Two-Part Inquiry

- When did district have reason to suspect presence of disability and need for special education?
- Did district evaluate student within a reasonable time after having notice of circumstances likely to indicate a disability and a need for services?

Example: Failure to Identify

Freedom Area (PA) Sch. Dist., 111 LRP 64831 (OCR 2011).

- Parents of an elementary student noticed significant change in daughter's personality.
- She stopped smiling, began touching herself inappropriately in public, was anxious, and resisted going to school.

Example: Failure to Identify

- Parent told a teacher and another staff member that “she saw a problem and needed help.”
- Subsequently, the district received several mental health evaluations of the student.
 - One diagnosed student with ADHD, ODD, depression, mood disorder, OCD, and noted her excessive anxiety and refusal to go to school.
- The student’s teacher and another staff member knew the student was touching herself inappropriately in front of others at school.

Example: Failure to Identify

- District did not evaluate because student had excellent grades and did not appear to need disability-related services at school.
- The parent never requested an evaluation.
- The parent filed a complaint with OCR and alleged a child find violation.
 - OCR agreed, concluding that the child's behavior demonstrated a need for a referral and an evaluation under Section 504.

Takeaways

- Many due process and procedural safeguards ask whether the student ***should*** have been identified
- If a parent asks for evaluation and the school doesn't agree, provide procedural safeguards
- Respond to parent requests for evaluation immediately

Technically Eligible

- Student meets 504 eligibility criteria but requires no services from the school
 - Disability is mild
 - Remission
 - Mitigating measures
- Still receives manifestation, procedural safeguards, reevaluation, and nondiscrimination protections

Forms

- Referral Form
- Request for Consent to Evaluate
- Consent to Evaluate Student with Health Care Plan

Hypo Set #2

Little Bobby Truhe is very smart. He received a perfect score on all his 4th grade NeSA tests. However, in the classroom, Bobby cannot keep his hands to himself, he wanders around the classroom and he frequently refuses to come in from the playground. Lately Bobby has started singing Christmas carols when he doesn't want to work. Do we need to evaluate Bobby? If so, what data would you consider?

Hypo Set #2

Little Bobby Truhe is very smart. He received a perfect score on all his 4th grade NeSA tests. He is perfectly behaved in the classroom. However, mom reports at parent teacher conferences that he is out of control at home and that he throws screaming tantrums every morning before school. Do we need to evaluate Bobby? If so, what data would you consider?

Hypo Set #2

Little Bobby Truhe is very smart. He received a perfect score on all his 4th grade NeSA tests. He is perfectly behaved in the classroom. However, he has only been in school 10 days this year. Mom calls in with a variety of medical issues to explain Bobby's absences (strep, flu, athlete's foot, etc). Do we need to evaluate Bobby? If so, what data would you consider?

Parental Consent



"I don't like the term 'yes man.' I'm more of a consent provider."

Section 504 Consent

Letter to Durham, 27 IDELR 380 (1997)

- No consent requirement in text of 504 or regulations
- “Informed consent” still required
- Parental discretion is “an appropriate and necessary policy component at the initial evaluation phase”

Evaluation

Evaluation

- No timeline
 - “within a reasonable period of time”
- Placement Team/504 Committee
 - Membership not prescribed
 - Individuals who are knowledgeable about the student, the meaning of the evaluation data, and the placement options
 - Parent membership not required but recommended
- Requirements for evaluation specified in the Section 504 regulatory provision at C.F.R. 104.35

<http://www2.ed.gov/policy/rights/reg/ocr/edlite-34cfr104.html#S35>

Possible Evaluation Components

- Aptitude and Achievement Test Scores
- Test/evaluation material tailored to evaluate the specific area of educational need
- Grades
- Teacher observations & recommendations
- Physician's medical diagnosis
- Physical condition
- Social and cultural background
- Adaptive behavior
- Discipline records
- Attendance

Medical diagnosis issues

- Diagnosis alone not sufficient
- Must consider – along with info from other sources
- May not require parents to provide medical records
- If school determined medical assessment necessary, district must ensure child receives assessment

Meetings and Plans

504 Conference/Meeting

- Who participates?
 - No list – not IEP
 - Factually dependent
 - Parents not required to participate – but MUST have input
 - Student when appropriate
- Discuss evaluation information
- Determine eligibility for 504
- (Consider SpEd)
- Explain rights

Drafting 504 Plans

- Have knowledgeable team members
- Ensure that the whole group makes decisions about the 504 plan (not single member like a parent)
- Plan should be individually tailored to student needs with appropriate modifications and accommodations
- Be detailed but clear; keep it understandable
- Keep great records of all participants' input

Examples of Issues to Discuss

- Organization
- Environment
- Lesson presentation
- Assignments
- Test-taking
- Medical accommodations
- Behavioral issues
- Extracurricular participation
- Others as appropriate
- Health Issues
- Medical needs
- Psychological needs related to health
- Physical
- Social
- Academics
- Transportation

Forms

- Blank 504 Plan
- Examples of Accommodations for Specific Disabling Conditions

Hypo Set #3

- Bobby Truhe is a 275 pound offensive lineman who has an offer to walk on to UNL. Suddenly, Bobby's parents are concerned that he may need special help to make it at school. They have now reported that Bobby has asthma and have requested a 504 plan. How would you write this plan?

Hypo Set #3

- Bobby Truhe is a high school student who suffers from migraines. His doctor confirms that these migraines are debilitating. He is almost never in school on Mondays and frequently doesn't come to school until noon. He is a devoted member of the dance team and wants to perform at all of the basketball games even though he has missed part of the day on game days.

Implementation

Implementing the 504 Plan

- **Must be done with fidelity!**
- Failure to implement the plan is a violation of Section 504 and could be discriminatory on its face
- Deviations from the plan likely violate FAPE
- Changes to the plan must be made by the team
- If in doubt, call a meeting to discuss changes in student needs and provisions of the plan

Rylan M. v. Dover Area Sch. Dist.

2017 U.S. Dist. LEXIS 70265 (M.D. Penn.)

- Elementary student with Ehlers-Danlos syndrome - complication is Postural Orthostatic Tachycardia Syndrome ("POTS")
 - "Severe dysfunction of the autonomic nervous system, and includes varied symptoms such as severe dizziness and fainting, headaches, severe fatigue, difficulty with concentration, heat or cold intolerance, palpitations and chest pain, weakness[,] and abdominal discomfort."
- Fainted twice in three and a half years.

Rylan M. v. Dover Area Sch. Dist.

2017 U.S. Dist. LEXIS 70265 (M.D. Penn.)

■ 504 Plan

- Unlimited access to water and the restroom
- Being accompanied to the restroom by a buddy
- Permitting extra time for homework and testing
- Providing forbearance for frequent tardiness and/or absence
- Nurse escort to health room for evaluation if dizzy, etc.

Rylan M. v. Dover Area Sch. Dist.

2017 U.S. Dist. LEXIS 70265 (M.D. Penn.)

- Fainted, hit head, concussion
- 504 Plan modified
 - Lie on floor immediately, call nurse for wheelchair
- Rylan – 504 requires school to provide medically trained dedicated aide to ensure FAPE
 - Medical experts did not recommend; pediatrician supported at parents' request
- School - Nurse provided training; 2 adults nearby

Rylan M. v. Dover Area Sch. Dist.

2017 U.S. Dist. LEXIS 70265 (M.D. Penn.)

■ Court

- Issue - extent of the accommodations necessary to provide Rylan with an "appropriate education."
- School "must reasonably accommodate . . . to ensure meaningful participation in educational activities and meaningful access to educational benefits."
- 504 does not require "substantial" changes to school programs

Rylan M. v. Dover Area Sch. Dist.

2017 U.S. Dist. LEXIS 70265 (M.D. Penn.)

- “[C]ourt should be mindful of the need to strike a balance between the rights of the student and [his] parents and the legitimate financial and administrative concerns of the school district.”
- “While the school nurse is not qualified to give an expert opinion on the medical necessity of a dedicated aide, the court finds that she is qualified to provide input on the interventions necessary to ensure Rylan receives appropriate care in school.
- Judgment for school

Failure to Implement

North Lyon County (KS) Unif. Sch. Dist.

51 IDELR 109 (OCR 2008)

- 2 substitute teachers from January 26 to end of year
- Notebook ID'd students on 504 plans, but not plans
- "Paras knew the plans"

OCR

- Subs stated, and PAL and para confirmed, subs knew plan

North Lyon County (KS) Unif. Sch. Dist.

51 IDELR 109 (OCR 2008)

OCR

- Both subs claimed they allowed student to work on every assignment until she earned grade of 70%+
- No supporting documentation
 - In fact, grade book included grades ranging from 0-66%
 - No evidence to support claim that S opted to accept lower grades rather than correct the assignments

North Lyon County (KS) Unif. Sch. Dist.

51 IDELR 109 (OCR 2008)

■ Resolution Agreement

- Develop policies and procedures
- Give subs access to 504/IEP
- Advise subs of implementation requirements
- Advise subs of record keeping requirements
- Require teachers include specific 504/IEP information in lesson plans and other information
- Requires PAL to maintain documentation that all of the above was provided to sub
- Training

S. L.-M. v. Dieringer Sch. Dist. No. 343

614 F. Supp. 2d 1152 (W.D. Wash. 2008)

- 8th grade had congenital medical condition causing UTIs, surgeries
- Missed lots of school
- 504 Plan – “some medical issues that may, or may not, be involved/related to his difficulties in school”
 - *Parents and school went with don’t ask, don’t tell
- **Transfers** 2 days before 8th grade begins
- School skeptical, but circulated plan to teachers

S. L.-M. v. Dieringer Sch. Dist. No. 343

614 F. Supp. 2d 1152 (W.D. Wash. 2008)

- Plan ignored for 2 quarters, but no absences/problems
 - 1st Q – No problems
 - 2nd Q – Failing most of classes
- Academic contract, online PASS system; 504 Plan not mentioned
- Things got quiet
- Staff held meeting – “unfair” to allow SLM to retake tests or have extra time
 - Staff removed without noticing meeting or parent

S. L.-M. v. Dieringer Sch. Dist. No. 343

614 F. Supp. 2d 1152 (W.D. Wash. 2008)

- 3rd Q – Student gets a D
 - Mom's e-mails resume, mentions 504, teacher silent, req'd IEP evaluation, dad takes over communication
- Near end of 4th Q – ½ point from graduation
 - Teachers refused to raise grades
 - SLM not allowed to attend graduation, passed on to 9th Gr.
- 9th Gr. – renewed 504 Plan w/o reevaluation
 - Private psych. – ADHD, schedule reduced due to anxiety and stress, fell behind

S. L.-M. v. Dieringer Sch. Dist. No. 343

614 F. Supp. 2d 1152 (W.D. Wash. 2008)

- Parents sue, move for SJ
- School – 504 accommodations made available “as needed,” not “as requested by mom”
- Plan vague, no SJ for school
- Court noted that OCR found procedural violations
 - Failed to give IDEA evaluation
 - Distributed plan despite legitimacy concerns
 - Waited many months to modify plan
 - Failed to notify parents of meeting or modification

S. L.-M. v. Dieringer Sch. Dist. No. 343

614 F. Supp. 2d 1152 (W.D. Wash. 2008)

- Reasonable jury could conclude that school was “deliberately indifferent”
- SJ denied

Dismissal and Reevaluation

Reevaluations

- Consent not expressly required, but OCR says must initiate DP without it
 - *Calvert County (MD) Pub. Schs.*, 41 IDELR 139 (OCR 2003)
- Frequency - "Periodic"
 - Procedure consistent with IDEA is "one means"
 - At least every 3 years
- Prior to any "significant change in placement"
 - Usually disciplinary (manifestation)

Reevaluations

Other circumstances triggering reevaluation:

- Transfer to new school or program
 - Dramatic shift in a student's behaviors or grades
 - Decision to exit student on basis no longer requires it
 - Severe accident
 - Arrival of service dog – allergies
 - Bullying or harassment
- Recommendation: yearly reviews.

Removing Services

De Soto (KS) Unified Sch. Dist. #232

52 IDELR 20 (OCR 2008)

- KDE told school it had too many students receiving services outside of LRE
- School removed kids from literacy program if reached threshold score on single standardized test
- No 504 meeting held; no reevaluation conducted
- *Complaint filed by former school psychologist

Removing Services

OCR

- Removing program or service, even a single class, requires individual determination as to whether the change is appropriate
- Use of single set of objective criteria (std. test) is no substitute for fully evaluating the student and making a team decision based on the student's unique needs
- Resolution agreement
- *Complaint filed by former school psychologist

Hypo Set #4

Little Bobby Truhe has a 504 plan for diabetes. The plan says he will be provided “additional time as needed, due to his medical issues.” Bobby has 15 multiplication fact worksheets missing and his teacher has entered zeros in PowerSchool. Mrs. Truhe insists that the teacher has to give Bobby full credit for the math sheets when he turns them in. The teacher is adamant that Bobby’s missing worksheets weren’t caused by his diabetes. Who is right? What does the principal do?

Hypo Set #4

In middle school, Bobby Truhe had frequent bladder infections. His mother reported to the school that his pediatrician said that Bobby's urinary tract was underdeveloped and that the issues would resolve when he reached adolescence. His 504 plan, written when he was in 6th grade, says he can miss class as needed to use the restroom. Now Bobby is a 10th grader. He has been caught roaming the halls in search of female companionship when he is out of the classroom ostensibly to use the bathroom. What should the school do? What information do you need?

504 and Student Discipline

Student Discipline

- Good News: drugs and alcohol are simple
 - No special 504 procedures for using or possessing drugs or alcohol at school
 - Student Discipline Act procedures still apply
- All other offenses: Must follow “IDEA Light” process

“IDEA Light”

- OCR uses IDEA Discipline Rules in 504
- First 10 days “free”
- If changing placement; must conduct a manifestation determination
 - Is current placement appropriate?
 - Did disability cause or have a direct and substantial relationship to, the misconduct
 - Was misconduct direct result of 504 Plan implementation failure

“IDEA Light”

- If manifestation
 - Cannot discipline
 - Must consider whether plan needs to be change
- If not a manifestation
 - Can discipline like general education student
 - No IAEP

ISS

- OCR says they do not count:

“as long as the child is afforded the opportunity to continue to appropriately participate in the general curriculum, continue to receive the services specified on the child’s IEP, and continue to participate with nondisabled children to the extent they would have in their current placement.”

Fox (MO) C-6 School District, 109 LRP 54751 (OCR 2009)

No Stay-Put

- 504 and regulations do not have a stay-put requirement, *but . . .*
- *Letter to Zirkel, 22 IDELR 667 (OCR 1995)*
 - Must reevaluate student before initiating significant change in placement
 - "a fair due process system would encompass the school district waiting for the results of the process before making the change."

Doe v. Osseo Area Sch. Dist.,

2017 U.S. Dist. LEXIS 180161 (D. Minn.)

- Backpack search
 - Whiteout pen, binder with “K.L.U.R.P.” in whiteout
 - Claimed classmates wrote it
- 5 day suspension – security footage + backpack
- Lying led to expulsion
 - MDT – no manifestation
 - Hearing – 11 witnesses, 30 exhibits

Doe v. Osseo Area Sch. Dist.,

2017 U.S. Dist. LEXIS 180161 (D. Minn.)

- Doe sues, two theories
- 1. Reevaluation
 - Doe - must conduct reevaluation before any “significant” change in placement
 - School - nothing in 504 or regulations expressly requires a full reevaluation under § 104.35 for a student subject to a disciplinary change of placement.
 - Court – school is correct

Doe v. Osseo Area Sch. Dist.,

2017 U.S. Dist. LEXIS 180161 (D. Minn.)

■ 2. Standard

- Doe – School considered only whether behavior was caused by his disability (IDEA), instead of whether it was related to or connected to his disability (504/ADA).
- School – no explicit standard/procedural requirements in 504
 - 504 only requires certain procedural guarantees which may be may be satisfied by utilizing protections specified in IDEA; same causation standard as OCR guidance
- Court – school is correct; SJ granted

Forms

- Notice to Parent of 504 Meeting
- Manifestation Determination

Hypo Set #5

Big Bobby Truhe, the offensive lineman, is caught smoking pot in the locker room (he's getting ready for UNL, after all). Bobby has a 504 plan for anxiety and depression. Mrs. Truhe insists that Bobby is self-medicating for the school-based anxiety he suffers from being bullied by his teammates. How should the team respond in the manifestation?

Extracurricular Activities

Section 504 34 CFR 104.37(a)(1)

- School districts must provide nonacademic and extracurricular services and activities in "such a manner as is necessary to afford students with a disability an equal opportunity for participation in such services and activities"
- These activities may include "physical and recreational athletics, . . . recreational activities, special interest groups or clubs....."

Cobb County (GA) Sch. Dis., 63 IDELR 297 (OCR 2016)

- High school student with diabetes
- 504 plan requires training for staff and allows time to check sugars
- Cheerleading
- Student was on JV team and was alternate
- Next year did not make team
- Allegation that she didn't make varsity because coaches didn't want to deal with diabetes

Cobb County (GA) Sch. Dis., 63 IDELR 297 (OCR 2016)

■ Coaches

- Resigned from on year to next
- Declined training offered by parents
- Coaches didn't review plan

■ OCR

- Student given equal opportunity in tryouts
- Violation in failing to provide JV (but not varsity) coaches the 504 plan

Mattituck-Cutchogue (NY) Union Free School District, 113 LRP 27884 (OCR 2013)

- Student with anxiety disorder
- School had asked to evaluate for 504, parents declined
- “informally accommodated”
- Student signed up for DC trip
- Student hospitalized for several weeks
- Principal would not allow her to go on trip

Mattituck-Cutchogue (NY) Union Free School District, 113 LRP 27884 (OCR 2013)

- OCR
- School “regarded as” disabled
- Student was excluded based on school’s perceptions about the Student's fitness to participate
- Decision not made by “a group of knowledgeable persons”

Isle of Wight County (VA) Pub. Sch., **115 LRP 39879 (OCR 2015)**

- OCR HS student with epilepsy and ADHD on the JV field hockey team
- Missed games and practices
- Talked over and argued with coaches
- Posted negative comments about team on social media
- Failed to put forth effort during practice and games
- Refused to follow coach's directions
- Dismissed from team

Isle of Wight County (VA) Pub. Sch.,

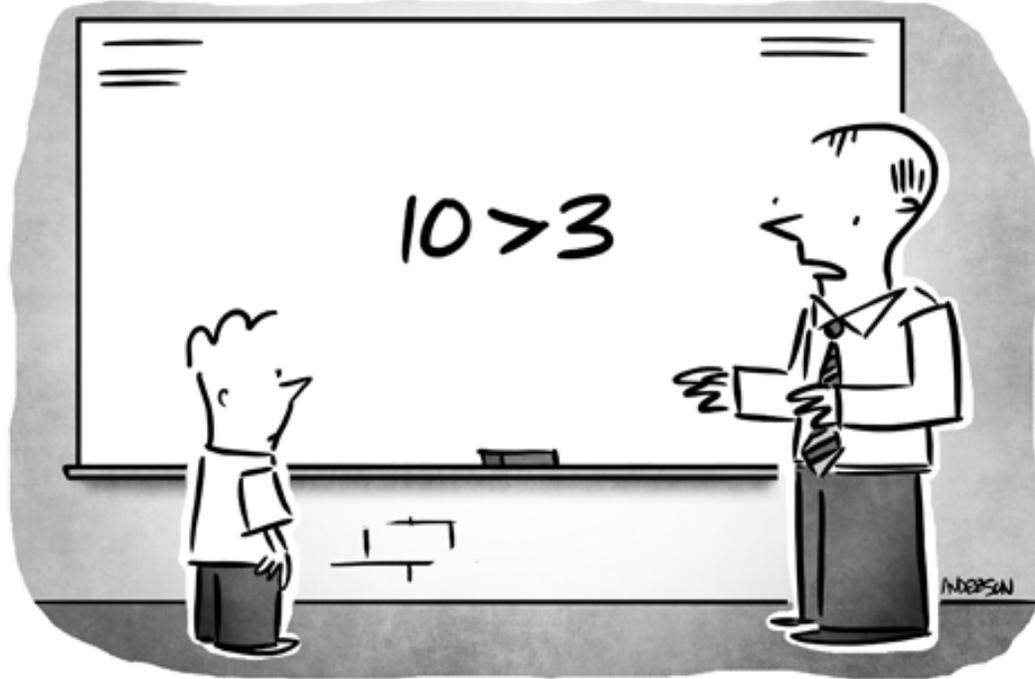
115 LRP 39879 (OCR 2015)

- OCR
- 504 plan did not include any need for accommodations on team
- Parent provided no evidence that student's disability necessitated waiver of team rules
- Rules applied equally to all students
- No evidence of pretext

Bullying and Harassment

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"It's not bullying, it's just greater than."

Bullying at a “tipping point”

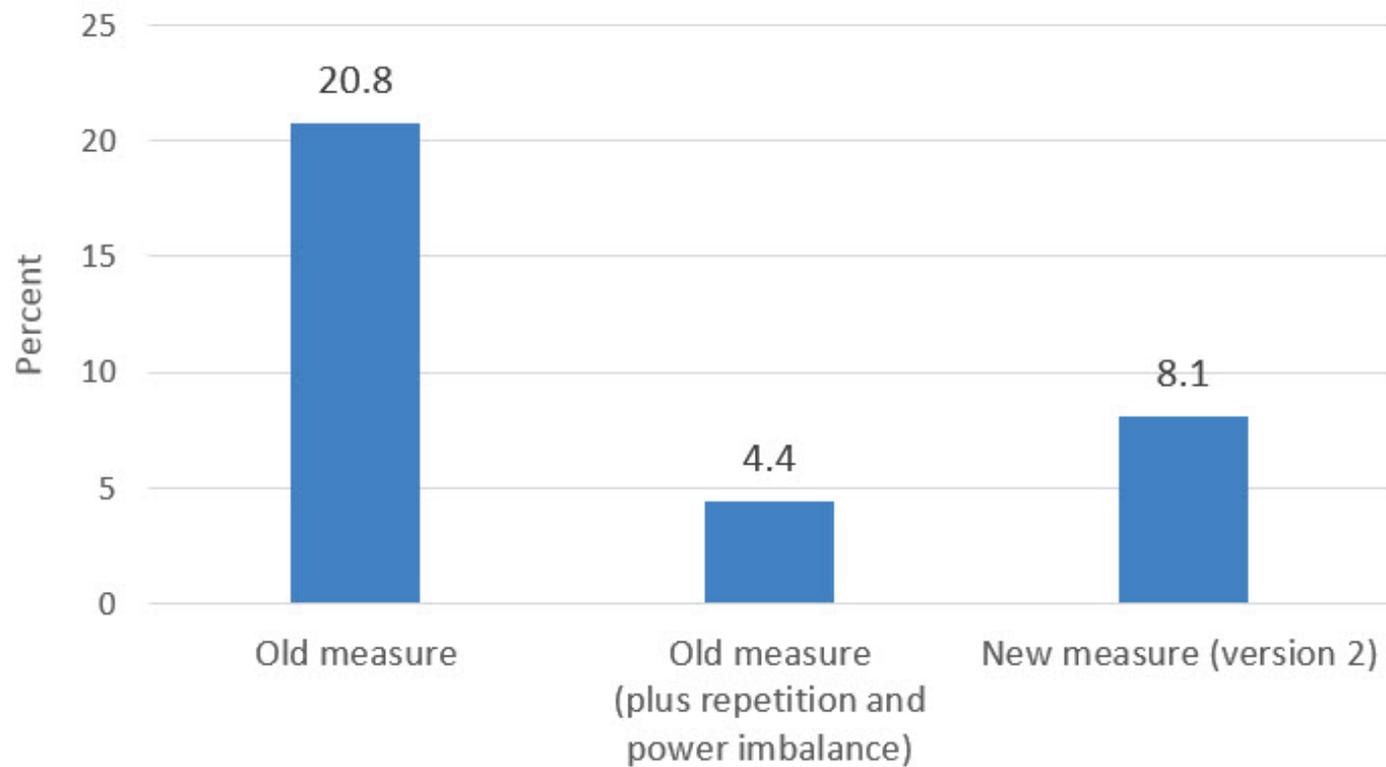
- 49 states have anti-bullying laws
- Heavy emphasis by OCR and USDOE
- Increase in bullying/harassment litigation nationwide:

Holben, Diane M. and Zirkel, Perry A. (2014) "School Bullying Litigation: An Empirical Analysis of the Case Law," Akron Law Review: Vol. 47: Iss. 2, Article 1

Bullying Definitions

- 2010 CDC and USDOE sponsored summit on bullying-prevention efforts
- CDC's new uniform definition (as of 2015):
 - "Bullying is any unwanted aggressive behavior(s) by another youth or group of youths who are not siblings or current dating partners that involves an observed or perceived power imbalance and is repeated multiple times or is highly likely to be repeated"
 - "behaviors could be verbal, physical or relational"

CHART 2. National Crime Victimization Survey School Crime Supplement - New Bullying Measure (2015)



Justin W. Patchin and Sameer Hinduja
www.cyberbullying.org

Harassment Definitions

- Behavior which is
 - Severe, pervasive or persistent
 - Creates a hostile environment at school
 - Is sufficiently serious that it interferes with or limits a student's ability to participate in or benefit from the services, activities, or opportunities offered by a school
 - Based on a student's race, color, national origin, sex, disability, or religion*

Differing Legal Standards

- The Courts
 - deliberate indifference
 - Schools must respond reasonably to known harassment
- OCR: schools should
 - Prevent harassment from happening in the first place
 - Eliminate harassment which it knows about or should know about
 - Remediate the effects of harassment

Court Cases Applying Deliberate Indifference Standard

- *M.L. v. Fed. Way Sch. Dist.*, 394 F.3d 634 (9th Cir. 2005)
 - “If a teacher is deliberately indifferent to teasing of a disabled child and if the abuse is so severe that the child can derive no benefit from the services that he or she is offered by the school district, the child has been denied FAPE.”
 - [Parent lost because she couldn't meet that standard]
- *Nevis v. Mart ISD*, 115 LRP 17173 (5th Cir. 2015)
 - “School officials are not required to purge” their schools of all bullying to avoid liability
- *Kendall v. West Haven Dep’t. of Ed.*, 33 IDELR 270. (Conn. Sup. Ct. 2000)
 - Parent warned of possible attack on student, assistant principal promised to “take care if it,” then called out of building
 - \$67,000 in damages (personal liability)

Dear Colleague Letter: "Harassment and Bullying," 55 IDELR 174 (OCR 10/26/2010)

- Before a claim, schools must:
 - Have a clear anti-discrimination policy
 - Have a curriculum focused on character/respect
 - Ensure a safe environment to report
- After a claim, schools must
 - Promptly investigate harassment claims
 - Follow up with students when harassment is suspected
 - Take steps beyond disciplining bullies
 - Provide victim with remedial measures

OCR Decisions

- *In re Redding (CA) School District*, 69 IDELR 16 (OCR 2016)
 - Finding had a legal obligation to investigate incidents of harassment on social media (even though there was no disruption at school) and to “respond in a prompt, thorough, and effective manner”
 - [Parent lost because she couldn't't meet that standard]
- *Fairfield-Suisun (CA) Unif. Sch. Dist.*, 51 IDELR 139 (OCR 2008)
 - After student had conflict with peer, school treated as routine discipline and did not investigate whether bullying was “because of disability”
 - OCR found violation: “Students with disabilities will almost certainly have disputes with other students at some point. However, if a district has information that a student was harassed because of a disability, it must take prompt action to investigate the complaint.”

Fear of bullying does not justify placement restrictions

- *J.E. v. Boyertown Area Sch. Dist.* 56 IDELR 38 (ED Pa. 2011)
 - “a free appropriate public education does not require that the District be able to prove that a student will not face bullying at a placement”
- *Charlotte-Mecklenburg (NC) Schs*, 113 LRP 18233 (OCR 2013)
 - Fear of bullying did not justify school failing to include severe and profound students in school dances

Questions?

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