Understanding Section 504

August 21, 2014

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A Word of Caution

No two cases are exactly alike. This material is designed to provide educators with a broad understanding of certain aspects of Section 504 of the Rehabilitation Act of 1973. This material does not include every aspect of the law. You are strongly encouraged to seek a legal opinion from your school district's legal counsel regarding any specific case.

I. Overview

The purpose of this material is to provide educators with a better understanding of Section 504 of the Rehabilitation Act of 1973 (Section 504). This material begins with an overview of the ADA Amendments Act of 2008, and then focuses on the provisions of Section 504 which require that students with disabilities have an equal opportunity to participate in a Free Appropriate Public Education, inclusion in extra-curricular activities, the provisions pertaining to discipline, and procedural safeguards available under Section 504. This material is not intended to substitute for legal counsel, nor is it intended to provide an exhaustive statement of the law.

II. Brief Overview of Section 504

Section 504 applies to the recipients of grants from the federal government. Essentially, all public school districts are covered by Section 504 because they receive some form of federal financial assistance. See Marshall v. Sisters of the Holy Family of Nazareth, 44 IDELR 190 (E.D. Pa. 2005) (Section 504 does not apply to a private religious school that receives no federal funding).

Fundamentally, Section 504 is an anti-discrimination statute. In the educational system, it prohibits districts from discriminating against qualified students with disabilities on the basis of disability. Public schools are required to provide students with disabilities with a free, appropriate education at public expense. 34 C.F.R. § 104.33(a). Schools are also required to provide students with disabilities with an "equal opportunity for participation" in "non-academic and extracurricular services and activities." 34 C.F.R. § 104.37(a).

The Office for Civil Rights (OCR) enforces several federal civil rights laws, including Section 504 of The Rehabilitation Act of 1973 and Title II of the Americans with Disabilities Act of 1990. The primary vehicle for OCR enforcement is through the process of complaint investigation and resolution.

The determinations of OCR, and to some extent case law, provide guidance to school districts on how to handle the two pronged legal requirements of Section 504 in the area of non-academic and extracurricular services and activities for students with disabilities. It is only through an awareness of OCR and court decisions that an educator can effectively discern the scope of their obligation to provide these opportunities "to the maximum extent appropriate," in a manner that affords "an equal opportunity."

III. The ADA Amendments Act of 2008

The ADA Amendments Act of 2008 was signed by President Bush on September 25, 2008; it took effect on January 1, 2009. The Act amended definitions under both the ADA and Section 504, including:

- "The term 'disability' means, with respect to an individual

    - A physical or mental impairment that substantially limits one or more major life activities of such individual;

    - A record of such an impairment; or

    - Being regarded as having such an impairment (as [defined] in paragraph (3))."

The following terms, relating to the definition of disability, have also been amended:

- Major Life Activities, means:

    - "For purposes of [the definition of disability], major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, **eating, sleeping,** walking, **standing, lifting, bending,** speaking, breathing, learning, **reading, concentrating, thinking, communicating**, and working.

    - . . . for purposes of [the definition of disability], a major life activity also includes the **operation of a major bodily function**, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions."

- Regarded as having such an impairment:

    - "An individual meets the requirement of 'being regarded as having such an impairment' if the individual establishes that he or she has been subjected to an action prohibited under this Act because of an **actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity**."

    - For the purposes of defining the term "disability," an individual is **not "regarded as having such an impairment" if the impairment is ". . . transitory and minor**. A transitory impairment is an impairment with an actual or expected **duration of 6 months or less**."

(emphasis added).

In addition, the ADA Amendments Act contains the following "Rules of Construction Regarding the Definition of Disability," and states that the definition of disability . . . shall be construed in accordance with the following:

- The definition of disability in this Act shall be construed in favor of **broad coverage** of individuals under this Act, to the maximum extent permitted by the terms of this Act.

- The term '**substantially limits**' shall be **interpreted consistently with the findings and purposes** of the ADA Amendments Act of 2008.

- An impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability.

- An impairment that is **episodic or in remission is a disability if** it would **substantially limit a major life activity when active**.

- The determination of **whether an impairment substantially limits a major life activity** shall be made **without regard to the ameliorative effects of mitigating measures** such as –

    - **medication**, medical supplies, equipment, or appliances, **low-vision devices (which do not include ordinary eyeglasses or contact lenses)**, prosthetics including limbs and devices, **hearing aids and cochlear implants or other implantable hearing devices**, mobility devices, or oxygen therapy equipment and supplies;

    - use of assistive technology;

    - reasonable accommodations or auxiliary aids or services; or

    - learned behavioral or adaptive neurological modifications.

    - The regulations recently promulgated by the Equal Employment Opportunity Commission list "psychotherapy, behavioral therapy, or physical therapy" as additional examples of mitigating measures. See 29 CFR 1630.2(j)(5).

- The ameliorative effects of the mitigating measures of ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment substantially limits a major life activity.

- The term "'ordinary eyeglasses or contact lenses' means lenses that are intended to fully correct visual acuity or eliminate refractive error; and

- the term 'low vision devices' means devices that magnify, enhance, or otherwise augment a visual image."[1]

(emphasis added).

The Act also defines the term "auxiliary aids and services," as "including:

- qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments;

- qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments;

- acquisition or modification of equipment or devices; and

- other similar services and actions.

A. Eligibility Determinations

The determination of whether a student has a disability under Section 504 involves the following inquiries:

- Does the student have:

  - A physical or mental impairment that substantially limits one or more major life activities of such individual; or

  - A record of such an impairment; or

- Has the student been regarded as having such an impairment.

In making the determination as to what constitutes a major life activity, it is important for the Team to remember that the definition includes, but is not limited to, activities such as seeing, hearing, breathing, speaking, walking, thinking, and the

[1] Although not set forth in the Act, low vision devices include: spectacle-mounted magnifiers, hand-held or spectacle-mounted telescopes, hand-held and stand magnifiers, video magnification, large print items, instruments that provide voice instruction or information (computers, clocks, timers, calculators, scales, key chains), books-on-tape, and larger, illuminated watches and clocks, writing guides. See American Optometric Association, http://www.aoa.org/patients-and-public/caring-for-your-vision/low-vision/low-vision-devices?sso=y (accessed Aug. 5, 2014).

operation of a major bodily function. OCR has opined that "a school district should not need or require extensive documentation or analysis to determine that a child with diabetes, epilepsy, bipolar disorder, or autism has a disability under Section 504." Dear Colleague Letter, 58 IDELR 79 (OCR 2012).

In addition, neither the Section 504 regulations nor OCR require that a student receive a medical diagnosis as a prerequisite for Section 504 eligibility. See Williamson County (TN) Sch. Dist., 32 IDELR 261 (OCR 2000). If a school district is going to require such a diagnosis as part of the evaluation process, then it must obtain one at no cost to the parent. If the district requests a medical diagnosis or other medical documentation, but the parent fails to provide the requested documentation, then the Section 504 Team should make a determination based on the information that is available to the Team. See Montgomery County (MD) Pub. Schs., 31 IDELR 84 (OCR 1999) (finding that the District did not violate Section 504 when it determined that, based on the information available to the Team, the student was not eligible for services and noting that the "student's parent refused to authorize the district to secure an independent [medical] evaluation").

However, in another case, Gloucester County (VA) Pub. Schs., 49 IDELR 21 (OCR 2007), OCR found that the district violated Section 504 when it determined that a student did not qualify for services. In that case, the parent had provided medical information that diagnosed the student with severe peanut and tree allergies; the District did not request any further medical documentation, but the Section 504 Team had concerns about the diagnosis. OCR noted that the Section 504 Team did not include a physician, or anyone else with "qualifications approaching those of the Student's doctor to diagnose the nature and severity of the Student's" allergy, and that absent medical data to the contrary, the Team could not ignore the diagnosis, simply because it disagreed with it.

In the case of Bethlehem (NY) Central Sch. Dist., 52 IDELR 169 (OCR 2009), a student who was allergic to peanuts, dairy, egg, kiwi, and crab wanted to participate in the culinary arts program. The parent provided information from the student's allergist, who said that the student could participate as long as he wore gloves and did not eat the foods to which he was allergic. The district remained concerned about safety, in particular with regard to airborne allergens and accidental ingestion, and requested additional information about "the extent and nature of the student's allergies." The parent provided a letter from the allergist and signed a release authorizing the school to contact the allergist. The school did such, but the allergist was on vacation when they contacted him. The school did not make any further attempts to contact the allergist, and denied the student's request to enroll in the class. The parent filed a complaint with OCR. OCR found that the district had violated Section 504 because it failed to convene a Section 504 team to review the correspondence from the allergist and determine whether the student qualified under Section 504. In addition, the Team should have determined whether the student could have participated in the culinary arts course with accommodations.

OCR is in the process of reviewing the impact of the ADA Amendments to determine whether amendments to the federal regulations are appropriate. In re: Americans with Disabilities Act Amendments of 2008, 51 IDELR 80 (OCR, Oct. 18, 2008). In the meantime, the plain text of the ADA Amendments Act of 2008 does not impact the substantive portions of the Rehabilitation Act, such as the duty to provide qualified students with disabilities with an equal opportunity to participate in a Free Appropriate Public Education, inclusion in extra-curricular activities, the provisions pertaining to discipline, and procedural safeguards. The remainder of this material provides an overview of those requirements.

IV. FAPE: The Regulatory Framework

School districts "that operat[e] a public elementary or secondary education program or activity shall provide a free appropriate public education [("FAPE")] to each qualified handicapped person who is in the recipient's [school district's] jurisdiction, regardless of the nature or severity of the person's handicap [sic]." 34 CFR 104.33(a).

A. Defining FAPE

1. An 'Appropriate Education'

Section 504 defines an "appropriate education" as "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 non-handicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of Sections 104.34, 104.35 and 104.36." 34 CFR 104.33(b)(1).

By definition, an appropriate education under Section 504 includes "regular or special education and related aids and services." Thus, it is possible that a Section 504 accommodation plan would include related services, such as occupational therapy.

2. A 'Free Education'

An appropriate education must be provided without cost to the qualified student or to his parents or guardian, "except for those fees that are imposed on non-handicapped persons or their parents or guardian." 34 CFR 104.33(c)(1). A FAPE may consist either of the provision of free services, or if a recipient places a person with a disability in or refers such person to a program not operated by the recipient as its means of carrying out the requirements of this subpart of payment for the cost of the program. Funds available from any public or private agency may be used to meet the requirement of a free education. The free education requirement shall not be construed to relieve an insurer or a similar third party from an otherwise valid obligation to provide or pay for services provided to a person with a disability.

If the provision of an appropriate education requires aids, benefits or services "not operated by the" school district, then adequate transportation to and from the aid,

benefits, or services must be provided “at no greater cost than would be incurred by the person or his or her parents or guardian if the person were placed in the aid, benefits, or services operated by the recipient.” 34 CFR 104.33(c)(2). Similarly, if a student requires a residential placement, then it must be provided without cost. 34 CFR 104.33(c)(3). However, as with the IDEA, districts who offer a FAPE are not required to pay for unilateral private placements. 34 CFR 104.33(c)(4).

B. IDEA Compliance and Section 504

As a starting point to our analysis, it is important to note that the definition of FAPE under Section 504 is broader than under the Individuals with Disabilities Education Act. While the IDEA defines FAPE to include the provision of special education and related services, the Section 504 definition includes the provision of regular or special education and related aids and services. However, the implementation of an IEP developed in accord with the IDEA is one means of meeting the “appropriate education” standard. 34 CFR 104.33(b)(2). Thus, as a general premise, a district can assume that meeting its obligations under the IDEA to an identified child will constitute compliance with Section 504's FAPE requirement.

C. The Least Restrictive Environment

34 CFR 104.34(a) provides that the district shall educate, or shall provide for the education of, each qualified person with a disability in its jurisdiction with persons who are not disabled to the maximum extent appropriate to the needs of the person with the disability. A district shall place a person with a disability in the regular educational environment operated by the district unless it is demonstrated by the district that the education of the person in a regular environment with the use of supplementary aids and services cannot be achieved satisfactorily. Whenever a district places a person in a setting other than the regular educational environment pursuant to this paragraph, it shall take into account the proximity of the alternate setting to the person’s home. The following terms warrant notice:

- “The maximum extent appropriate;”
- The “regular educational environment;” and
- “The proximity of the alternate setting.”

The implication of this section is that most Section 504 student accommodations will occur within the regular classroom.

However, Section 504 does permit districts to place students in settings other than the neighborhood school, and there may be circumstance when it is necessary for a Section 504 Team to propose an alternate placement. See 34 CFR 104.33(b)(3); 34 CFR 104.34(a).

V. Evaluation Procedures

Districts are required to evaluate "any person who, because of handicap, needs or is believed to need special education or related services 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." 34 C.F.R 104.35(a). Districts must establish standards and procedures for the evaluation and placement of persons who, because of disability, need or are believed to need special education or related services. 34 C.F.R. 104.35(b). Those standards and procedures must ensure that:

a. Tests and other evaluation materials have been validated for the specific purpose for which they are used and are administered by trained personnel in conformance with the instructions provided by their producer;

b. Test and other evaluation materials include those tailored to assess specific areas of educational need and not merely those which are designed to provide a single general intelligence quotient; and

c. Tests are 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 (except where those skills are the factors that the test purports to measure).

34 C.F.R. 104.35(b).

When interpreting the evaluative data, districts are required to:

a. Draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior;

b. Establish procedures to ensure that information obtained from all such sources is documented and carefully considered;

c. Ensure that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and

d. Ensure that the placement decision is made in accord with the "least restrictive environment" provisions of Section 504.

34 C.F.R. 104.35(c).

Section 504 does not contain a specific time period within which an evaluation must be completed. OCR has indicated that evaluations must be conducted within a reasonable time period, and has looked to state timelines for guidance. See Beach Park (IL) Community Consolidated Sch. Dist., 62 IDELR 155 (OCR 2013) (using the State's 60-day IDEA time period to conclude that the district did not violate Section 504 when it completed a Section 504 evaluation within that time period); Yancey (NC) County Schs., 51 IDELR 23 (using the State's 90-day time period for IDEA evaluations and concluding that the district violated Section 504 by failing to complete the Section 504 evaluation process within that time period). Thus, it is likely that in New Hampshire, OCR would conclude that Section 504 evaluations must be completed within 45 days of the referral.

Query: A student who has been diagnosed with ADHD is achieving high grades in advanced placement classes, and frequently makes the District's honor roll. The Student has not been identified as a qualified student with a disability, and his parents request a referral under Section 504 to obtain accommodations. How should the District respond? See Letter to Colleague, 58 IDELR 79 (OCR Jan. 19, 2012).

Query: Can a medical diagnosis suffice as an evaluation for the purpose of providing FAPE under Section 504? See Frequently Asked Questions about Section 504 and the Education of Children with Disabilities, U.S. DOE at Q24 (March 27, 2009).

Query: Does a medical diagnosis of an illness automatically mean that a student receives services under Section 504? See Frequently Asked Questions about Section 504 and the Education of Children with Disabilities, U.S. DOE at Q25 (March 27, 2009).

VI. Section 504 Accommodation Plan

The Section 504 Accommodation Plan is the tool whereby the district meets it obligation to provide FAPE to the qualified person with a disability. While there is no explicit requirement that a Section 504 Plan be documented in writing, the purpose of doing such is to provide a summary of accommodations that the student will need in order to have equal access to the learning process, as well as the district's other programs, activities and services.

If the goal of Section 504 is to provide equality and opportunity, then the hallmark of Section 504 is **accommodation**. The Section 504 Plan seeks to offer accommodations in order to provide equality and opportunity. Section 504 does not require that an educational institution lower its educational standards. But it does require an effort on the part of the district to accommodate the student's disability so they have access to the same level of education offered to the non-disabled student.

Query: Is the District required to develop a Section 504 plan for a student who either "has a record of disability" or is "regarded as disabled?" See Frequently Asked Questions about Section 504 and the Education of Children with Disabilities, U.S. DOE at Q37 (March 27, 2009).

A. Accommodation Defined

The term “accommodation” was left undefined by Section 504. However, New Hampshire’s Rules for the Education of Children with Disabilities define ‘accommodation’ as “any change in instruction or evaluation determined necessary by the IEP team that **does not impact** the rigor and/or validity of the subject matter being taught or assessed.” Ed 1102.01(b) (emphasis added).

In other words, accommodations are “outside the body,” that is, physical or environmental changes around the student. Teachers usually refer to accommodations as good teaching strategies. See To *Accommodate,* To *Modify*, and to Know the Difference: Determining Placement of a Child in Special Education or 504, Hayes, Nakonia, http://education.jhu.edu/PD/newhorizons/Exceptional%20Learners/Law/hayes.htm (accessed Aug. 5, 2014).

B. Modification Defined

A modification is “any change in instruction or evaluation determined necessary by the IEP team that impacts the rigor and validity or rigor or validity, of the subject matter being taught or assessed.” Ed 1102.03(v) (emphasis added).

C. The Realm of Accommodation

Accommodation takes place in three areas. They are as follows:

- Physical accommodations;
- Instructional accommodations; and
- Behavioral accommodations.

Examples of accommodations include the following:

- **Pacing**: extending/adjusting time; allowing frequent breaks; varying activity often; omitting assignments that require timed situations.

- **Environment**: leaving class for academic assistance; preferential seating; altering physical room arrangement; defining limits (physical/behavioral); reducing/minimizing distractions (visual, auditory, both); cooling off period; sign language interpreter.

- **Presentation of Material**: emphasizing teaching approach (visual, auditory, tactile, multi); individual/small group instruction; taping lectures for replay; demonstrating/modeling; using

manipulatives/hands-on activities; pre-teaching vocabulary; utilizing advance organizers; providing visual cues.

- **Materials and Equipment/Assistive Technology**: taping texts; highlighting material; supplementing material/laminating material; note taking assistance/copies from others; typing teacher's material rather than using handwriting on board; color overlays; using calculator, computer, word processor; using Braille text; using large print books; using decoder for television and film; having access to any special equipment.

- **Grading**: giving credit for projects; giving credit for class participation.

- **Assignments**: giving directions in small, distinct steps; allowing copying from paper/book; using written back-up for oral directions; adjusting length of assignment; changing format of assignment (matching, multiple choice, fill-in-blank, etc.); breaking assignment into series of smaller assignments; reducing paper/pencil tasks; reading directions/assignments to students; giving oral/visual cues or prompts; allowing recording/dictated/typed answers; maintaining assignment notebook; avoiding penalizing for spelling errors on every paper.

- **Reinforcement and Follow-Through**: using positive reinforcement; using concrete reinforcement; checking often for understanding/review; providing peer tutoring; requesting parent reinforcement; having student repeat/explain the directions; making/using vocabulary files; teaching study skills; using study sheets/guides; reinforcing long-term assignment timelines; repeating review/drill; using behavioral contracts/check cards; giving weekly progress reports; providing before and/or after school tutoring; conferring with student (daily, bi-weekly, weekly, etc.).

- **Testing Adaptations**: reading tests verbatim to the student (in person or recorded); shortening length of test; changing test format (essay vs. fill-in blank vs. multiple choice, etc.); adjusting time for test completion; permitting oral answers; scribing test answers for student; permitting open book/notes exams; permitting testing in isolated/different location.

To *Accommodate,* To *Modify*, and to Know the Difference: Determining Placement of a Child in Special Education or 504, Hayes, Nakonia, http://education.jhu.edu/newhorizons/Exceptional%20Learners/Law/hayes.htm (accessed Aug. 5, 2014).

When determining what accommodations are necessary for a child with a disability, it is important to remember that the purpose of Section 504 is to provide students with an equal opportunity to access an education. Thus, accommodations should stem from what a child needs to benefit from the school's program or activities.

D. The Fundamental Components of a Plan

Once you have determined what accommodations and/or modifications the child requires, you will need to create a 504 Plan. At a minimum, plans should contain the following components:

- The student's name, grade, date of birth;
- The names of the individuals who attended the meeting, and the date of the meeting;
- A brief description of the student's disability;
- A description of the major life activities required by the school setting, which are substantially limited by the student's disability;
- A brief description of what the student needs to benefit from the school's programs or activities;
- The accommodations and/or modifications that the student requires as a result of his/her needs;
- A description of the settings in which the accommodations are necessary (in the classroom, lunchroom, during extra-curricular activities, etc.);
- A description of when the accommodations are necessary (during the school day, after school, on the bus, etc.);
- A statement indicating the time period over which the accommodations will be provided (entire school year, semester, etc.);
- The date that the plan will be reviewed; and,
- The names of the individuals who will receive the plan.

In addition, if the student is going to receive related services, then the plan should indicate:

- The identification (by title) of the individual who will provide the service;
- The quantity of the service that will be provided; and
- The frequency in which the service will be provided.

Query: A student with a peanut allergy has a health plan in place that requires frequent hand washing, a peanut free-lunch table, and other similar interventions to minimize the student's risk of exposure to peanuts. Does this student qualify as a student with a disability under Section 504? Should he have a Section 504 Plan instead of the health plan? See Letter to Colleague, 58 IDELR 79 (OCR Jan. 19, 2012).

E. Case Study

Facts: Student attended Northrop High School in Indiana. Beginning in 11th Grade, Student began having allergic reactions to body sprays, perfumes, colognes, laundry detergents, fabric softeners, and scented lotions. He did not react to all perfumes or colognes, and he did not know which ones caused the allergic reactions. He also did not know how much of a specific fragrance would trigger a reaction, and he could not predict the severity of the reaction, if any. When he experienced a reaction, symptoms included swelling of the face and throat, tightness of the chest, and difficulty breathing.

During Student's junior year, he spent the mornings at a Career Center and the afternoons at the High School. In November of that year, he had his first allergic reaction at the high school. The reaction began after he smelled a strong fragrance in the hallway between classes. Many students were present, and Student did not see anyone spray perfume. Within 20 minutes, he began to experience a reaction. He was given an EpiPen injection and an ambulance was called, pursuant to school policy. Student was seen in the emergency room and released.

He had other minor reactions during that school year, but could not recall whether he smelled any fragrance before those incidents. He never saw anyone spraying anything, and his symptoms were a rash on his arms and chest.

In December of that year, Students mother contacted the school nurse, to inquire whether a policy could be developed to stop the spraying of perfume at school. The nurse informed the parent that she did not think such a policy could be developed, but agreed to notify the student's teachers about the issue. On December 17, 2009, the nurse emailed all of Student's teachers. She informed them about the student's reactions and encouraged them to speak to their students about the dangers of spraying perfume, to tell the students not to spray fragrances, and to talk to their friends about the issue.

That same day, a school administrator sent an email to all school staff, instructing them to encourage students not to spray perfume, and to tell students that if they must spray fragrances, they could only do so in the restrooms.

A few weeks later, the Principal sent out a reminder email to all staff and arranged to include reminders during the morning announcements. The school also ran an article in the school newspaper, reiterating that students should refrain from excessive use of fragrances, and should avoid spraying in the hallways or common rooms. The school also offered to put up posters around the building, if the parents wanted them to do such.

At the beginning of his senior year, on September 14, 2010, Student experienced another reaction at school. On September 17, his mother met with the principal to again request that the school develop a formal written policy prohibiting the spraying of

fragrance inside the school. The Principal informed her that she could not issue such a policy, because it was too late in the school year, and because formal policies needed to originate from the school district's central office. The Principal also believed that the policy requested by the parents would be difficult to police, and thought that the periodic reminders made during morning announcements would be more effective.

Student continued to have several minor allergic reactions while at school. At least one of the reactions occurred while he was in the common area, where students mill about between classes and at lunch. He recalled smelling a fragrance before most, but not all, of his reactions. He did not recall seeing anyone spraying anything before the onset of the reaction.

On October 25, 2010, Student had a significant allergic reaction, which resulted in a five day hospitalization. Thereafter, his parents asked his physician to write a letter to the principal, asking her to implement a no-spray policy at the school. The doctor sent the letter on November 9, 2010.

In November or December 2010, the school offered the following accommodations: allowing Student to park in a different area and enter the building through a different door to avoid the rush of students in the common areas; providing Student with a pass to leave class a few minutes early, to avoid the rush of students in the common area; allowing Student to arrive at different times; and, wearing a protective mask. Student accepted the first two proffered accommodations.

During the second half of his Senior year, student asked, and was permitted to eat lunch in the office area to avoid the lunch rush. In March, 2011, the District offered to provide Student with homebound instruction. Student and parents initially declined the offer. However, nine days later, the student suffered a severe allergic reaction, and he was admitted to the ICU. Thereafter, Student applied for homebound instruction and completed his senior year at home. He graduated in June 2011 with high honors and a 3.7 GPA.

Student filed suit against the District, alleging discrimination on the basis of disability, based on the District's failure to implement a written policy against spraying perfumes at school. The District moved for summary judgment, arguing that the Student's request was unreasonable, that there was no indication that the policy would have prevented the allergic reactions that the Student suffered, and that it provided Student with reasonable accommodations.

Query: Should the District have adopted the no spray policy?

Zandi v. Fort Wayne Community Schools, 2012 U.S. Dist. LEXIS 139211, 112 LRP 48082 (N.D. Ind. Sept. 27, 2012).

VII. Distinctions by Educational Level

The meaning of the phrase "qualified student with a disability" differs on the basis of a student's educational level. In addition, the nature of services to which a student is entitled under Section 504 differs by educational level as well.

A. The Elementary and Secondary Educational Level

At the elementary and secondary educational level, a "qualified student with a disability" is a student with a disability who is:

- Of an age at which students without disabilities are provided elementary and secondary educational services;
- Of an age at which it is mandatory under state law to provide elementary and secondary educational services to students with disabilities; or
- A student whom the state is required to provide a FAPE under the IDEA.

Elementary and secondary school districts are required to provide FAPE to qualified students with disabilities. As mentioned previously, this FAPE is defined as regular or special education and related aids and services designed to meet the individual educational needs of students with disabilities as adequately as the students without disabilities are met.

B. The Post-Secondary Level

At the post-secondary educational level, a qualified student with a disability is a student with a disability who meets the academic and technical standards requisite for admission or participation in the institution's educational program or activity. The post-secondary institution is required to provide students with appropriate academic adjustments and auxiliary aids and services that are necessary to afford an individual with a disability an equal opportunity to participate in a school's program. Post-secondary educational institutions are not required to make adjustments or provide aids or services that would result in a fundamental alteration of a recipient's program or impose an undue burden.

C. The Distinction Between Regular Education Intervention Plans and a Section 504 Plan

A regular education intervention plan is appropriate for the student without a disability. A student who is not suspected of having a disability may nevertheless qualify for a regular education intervention plan.

VIII. Invalid Reasons for a Section 504 Plan

There are a number of invalid reasons for placing a student on a Section 504 plan, including the following:

- The parent and/or doctor presents the school with a disability diagnosis and a 504 plan is written without first determining if the disability substantially limits a major life activity;

- A student is placed on a 504 plan solely because the parent wants the student to have additional time on college qualifying examinations (e.g., ACT, SAT);

- A student fails to qualify for special education support and is automatically signed up for a 504 accommodation plan without first qualifying them based on Section 504 criteria;

- A student is automatically placed on a 504 plan when the student no longer qualifies for special education services without first qualifying them based on Section 504 criteria; or

- A student is placed on a 504 plan as an alternative way to receive special education services because the parent refuses to "label" a student by including them in a special education program.

IX. Implementing the 504 Plan

The implementation of the 504 plan is key to ensuring a student receives FAPE. The failure on the part of a district to implement its own plan will be construed as a denial of FAPE. For example, in the case of Arlington, Texas Independent School District, 31 IDELR 87 (OCR Feb. 9, 1999), a student with ADD was the subject of a Section 504 plan. The parents complained to the Office for Civil Rights that a classroom teacher had failed to implement the student's Section 504 plan because they did not provide all of the accommodations described in the plan. The Office for Civil Rights ruled that the computer course teacher had failed to comply with the requirements of Section 504 because she did not provide all of the accommodations in the 504 accommodation plan. The Office concluded the plan had not been properly implemented despite the teacher's testimony that she "accepted late assignments, gave the student special instructions, and extended deadlines beyond what was allowed for other students."

Districts also need to be careful that the Section 504 plan follows the child. In the case of Banning Unified School District, 40 IDELR 77 (OCR May 21, 2003), the district

failed to ensure that its high school was informed that a student transitioning from middle school had a Section 504 plan. For several months the student was educated without his 504 plan. Section 504 requires that districts take measures to ensure that each school is made aware of a student's Section 504 plan in advance so that it can be promptly implemented. Failure to do such will be construed by OCR as a violation of Section 504 and a denial of FAPE.

A. The Enforcement Role of the Office for Civil Rights

OCR, a component of the US Department of Education, enforces Section 504, and the ADA which extends the prohibition against discrimination to the full range of state or local government services (including public schools), programs, or activities regardless of whether they receive any federal funding. The standards adopted by the ADA were designed not to restrict the rights or remedies available under 504. However, the Title II regulations applicable to Free and Appropriate Public Education issues do not provide greater protection than that available under the Section 504 regulations.

OCR becomes involved in disability issues within a school district when it receives complaints from parents, students or advocates. In addition, OCR provides technical assistance to school districts, parents and students on request. As a general rule, OCR does not review the result of an individual placement or other educational decisions, so long as the school district has complied with the procedural requirements of Section 504 relating to identification and location of students with disabilities, evaluation of those students and due process. It is rare that OCR will evaluate the contents of a Section 504 plan or an IEP in light of the fact that any disagreement can be resolved through a due process hearing.

OCR does examine the procedures by which school districts identify, evaluate and place students with disabilities and the procedural safeguards which those school districts provide students. OCR will also examine incidents in which students with disabilities are allegedly subjected to treatment which is different from the treatment to which similarly situated students without disabilities are subjected. For example, OCR will be concerned about the unwarranted exclusion of disabled students from educational programs and services.

The case of Whittier City (CA) Elementary School District, 50 IDELR 109 (OCR Oct. 30, 2007) illustrates the scope of an OCR investigation. In that case, parents filed a complaint, alleging that the District discriminated against their daughter based on her disability, by failing to timely assess her for a disability under Section 504. Parents alleged that the District was aware that the student had a disability (asthma) and that she had numerous disability-related absences. In addition, parents alleged that the District failed to develop a Section 504 plan in a manner that was consistent with the Section 504 procedural requirements.

OCR found that the parents requested an evaluation in May 2006, but that the parents and the District agreed to postpone the assessment until the fall of 2006.

Despite that agreement, the District failed to assess the student in the fall, and did not convene a meeting with the parents until December 2006.

OCR also found that there was confusion with regard to whether the District had agreed to contact the parent in the fall of 2006, or whether the parent had expressly waived the request for the assessment. However, the District was aware that the student had a disability and that the student was frequently absent due to that disability (during the 2005-06 school year, the student had 16 excused absences and 10 unexcused absences, and she continued to have frequent disability-related absences during the 2006-07 school year). OCR determined that there was insufficient evidence to establish that District violated Section 504 by failing to assess the student, noting that "[b]ecause the Student's teacher made classroom accommodations that enabled the Student to make up any missed work due to her absences, the Student suffered no educational harm." (emphasis added).

Finally, OCR determined that the District did not violate Section 504 when it developed the Section 504 plan. The final plan contained the accommodations that the parents had requested and that the District had agreed to implement. The cover letter to the parents that accompanied the plan stated that two of the parents' requested accommodations would be implemented: 1) the student could carry her inhaler, and 2) the student's absences would not be reported to the School Attendance Review Board. The plan stated that the student could carry her inhaler and that she "would not be penalized for absences related to her disability in any way." OCR stated that the plan could have been consistent with the cover letter, but that the accommodations set forth in the plan were sufficient. Thus, the difference was not sufficient to rise to the level of a Section 504 violation.

OCR also investigates complaints of retaliation. The Section 504 Regulations (found at 34 C.F.R. § 104.61) and the ADA incorporate by reference the procedural provisions contained in 34 C.F.R. § 100.7(e) of the Regulations implementing Title VI of the Civil Rights Act of 1964. These provisions prohibit recipients or other persons (including districts) from intimidating, threatening, coercing or discriminating against any individual for the purpose of interfering with any right or privilege secured by Section 504 and/or the ADA or because the individual has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under Section 504 and/or the ADA or the Regulations.

B. OCR and Investigations of Retaliation

Parents have frequently complained that school personnel have taken adverse action against a student in response to a parent's decision to assert his or her rights under Section 504. This concept has become known as "retaliation" in the case law. While it would be a rare case for an educator to intentionally take adverse action against a student in retaliation for assertion of his or her legal rights, the focus is not simply the educator's intent, but rather, how the educator's action is perceived in hindsight. OCR has developed a five-part test to determine whether a district has engaged in prohibited

retaliation. It may be useful for you to consider the steps of this test before taking action with respect to a student who is involved in due process proceedings or whose parents have filed a complaint with OCR.

The five questions you should consider are:

(1) Has the parent/student engaged in a protected activity?

Examples of protected activities include:

- initiating due process proceedings,
- filing suit in court,
- filing a complaint with OCR
- filing a complaint with the District

(2) Is the district or its agents aware of the protected activity?

- How and when did district receive notice of the activity?
- Is there a rumor or verified action?

(3) Was the parent/student subjected to an adverse action?

- Did the action significantly disadvantage the complainant as to her/her status or ability to access the benefits of the program?
- Did the action reasonably act as a deterrent to further protected activity or preclude the individual from pursuing discrimination claims?

Examples of adverse action may include:

- Suspension/Expulsion from school or athletics/extra-curricular activities
- Preventing parents from entering school grounds

(4) Will a neutral third-party decide there is a causal relationship or connection between the protected activity and the adverse action?

- Will the adverse action against the student occur prior to, at the same time as, or after the parent/student engaged in the protected activity?
- Is there sufficient evidence to raise an inference that the protected activity was likely the reason for the adverse action?

(5) Can the district offer legitimate, nondiscriminatory reasons for the adverse action, which a neutral third-party will not consider to be pretextual?

Superintendent of Public Schools (NY), 104 LRP 11453 (OCR April 30, 2003); Shelby County (AL) School District, 37 IDELR 41 (OCR March 12, 2002).

C. Case Study

The parents of a student filed suit against the school district, alleging: 1) that the District caused or aggravated a disability and/or failed to accommodate a disability in violation of Section 504; and 2) that the District retaliated against the Student in violation of Section 504.

In their complaint, the parents alleged the following facts:

In November 2007, when Student was in eighth grade, her sister was molested by B.C., a minor who lived near Student's family. The incident traumatized Student. B.C. was arrested in June 2008 and convicted two months later. He continued to live near Student's family.

In September 2008, Student started ninth grade at the District's high school. B.C. and his brother, J.C., also attended the high school, and J.C. was in Student's class. Prior to the start of the 2008-09 school year, Student's mother requested that Student be separated from J.C. and B.C.; the request was denied. At some point during the 2008-09 school year, Student's parents relayed her concerns about B.C. and J.C. attending school with Student; the newspaper published the story in April 2009.

The presence of the two boys reminded Student of her sister's molestation. In addition, J.C. harassed Student by staring, leering, and engaging in other disruptive behavior. B.C. harassed Student by pointing cameras at her in school. Student's academic performance declined and she experienced disciplinary problems at school.

When Student started tenth grade, she was again placed in the same class as J.C. She continued to experience academic and disciplinary problems, and she was diagnosed with anxiety disorder and post-traumatic stress disorder; Student believed that those disorders interfered with her ability to learn. Her physician recommended that she be placed in a different class. The District refused to do such.

For student's eleventh grade year, she was again assigned to the same class as J.C. Student's parents continued to attempt to convince the District to separate the students, but they refused. Student's doctor recommended that she receive homebound instruction to avoid J.C. In December 2010, Student became hysterical because of the situation with J.C., and the District agreed to provide her with homebound instruction, commencing in January 2011.

At some point during her high school career, student's parent filed discrimination and harassment complaints with the School Board. The Board referred the complaints to the County Solicitor, who hired an outside law firm to investigate. The Solicitor's wife was employed by the law firm that was hired to conduct the investigation, and she conducted or played a major role in the investigation. The firm issued a report that cleared the District of any wrongdoing. The report, which casts M.S.'s mother in a "bad light" was distributed to J.C., B.C., and other third parties who "had no need to know about" the details of the investigation.

The District filed a motion to dismiss, arguing that the plaintiffs had failed to state a claim for which relief can be granted. The District argued: 1) that the plaintiffs failed to allege that the student had a disability under Section 504; 2) that the plaintiffs failed to allege that Student was discriminated against because of her disability; and 3) that the plaintiffs failed to allege sufficient facts to support a claim of retaliation.

Query: Did the Plaintiffs allege sufficient facts to establish their claim that the Student suffered from a disability under Section 504?

Query: Did the plaintiffs allege sufficient facts to establish a claim that Student was discriminated against because of her disability? (The elements of this claim are: 1) the plaintiff is disabled under Section 504; 2) the plaintiff is otherwise qualified to participate in school activities; 3) the district receives federal funds; and, 4) the plaintiff was excluded from participation in, denied the benefits of, or subject to discrimination at the school).

Query: Did the plaintiffs allege sufficient facts to establish a claim that the District unlawfully retaliated against them? (The elements of this claim are: 1) that the plaintiffs engaged in protected activity; 2) that the district took adverse action against them; 3) that the District was aware of the protected activity at the time it took the adverse action; and, 4) that there is a causal connection between the District's adverse action and the protected activity).

M.S. v. Marple Newtown School District, 2012 U.S. Dist. LEXIS 125091, 112 LRP 44330 (E.D. Pa. Sept. 4, 2012).

X. Review and Reevaluation

A Section 504 plan should be reviewed by the 504 Team on an annual basis and if needed, more frequently. The primary purpose of the review is to add, subtract or modify student accommodations in response to any change in the student's disabling condition or their program.

Reevaluation should occur on a triennial basis. Before a 504 plan can be terminated, the 504 eligibility team must review the current student need and make an affirmative determination that the plan is no longer needed to provide the student equal

access. If there is any question, the team should conduct an evaluation which is, at least, as thorough as the evaluation used for identifying Section 504 eligibility.

The fact that a student is receiving good grades will not always excuse the failure to implement a Section 504 plan. In Livingston Township Board of Education, 40 IDELR 111 (NJ SEA, 2003), a 16 year old student who had limited use of his arms and upper body was denied consistent note taking accommodations and CD versions of his text books. Parents requested due process when the District refused to provide the student with note taking accommodations. The district pointed to the student's B+ average as evidence that the 504 plan was appropriate, but the administrative law judge disagreed, stating: "While grades are certainly one measure of the appropriateness of the Section 504 plan or an IEP, they are not the only measure. If an individual has the potential to do much better with reasonable accommodations, then grades alone should not be the dispositive issue." (Emphasis added). This case points out the potential distinction between the "adequacy," standard in the IDEA and the "reasonable accommodation," standard in Section 504.

XI. The Scope of a Plan

There is no preset scope for a 504 plan. For example, a student diagnosed with a medical condition may have a Section 504 plan which is no broader in scope than the student's medical protocol. The measuring stick for the scope of a plan is simply that amount of accommodation necessary to provide the student with equal opportunity and equal access.

XII. Assessment

Just as the IDEA and No Child Left Behind indicate that accommodations should be identified when implemented for state and district assessments, a Section 504 plan should also specify those accommodations necessary to enable the student participate in state or district-wide assessments. The educator should anticipate that if a student requires an accommodation for classroom testing, they will require the same accommodation for the state or district-wide assessment.

XIII. Practice Pointers

There are a number of practice pointers in the context of designing and implementing Section 504 plans. The following rules are worth noting:

1. All teachers and service providers must be involved in 504 plan implementation;

2. All teachers and service providers must understand the manner in which an accommodation is implemented;

3. If a plan truly provides equal opportunity, then grading should not be an issue;

4. Accommodations should be designed to deliver equal opportunity;

5. Section 504 plans should be designed with input from regular educators;

6. The Section 504 referral, evaluation and plan design process should occur at the building level.

XIV. Inclusion in Extracurricular Activities and Non-Academic Programs

Section 504 does not explicitly mention athletics, extracurricular programs or other school sponsored non-academic activities. However, the language of Section 504 is unquestionably broad, providing that "[n]o otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her/his disability, be excluded from participation in, be denied the benefits, or be subjected to discrimination under any program or activity receiving federal financial assistance." 29 U.S.C. 794.

The Section 504 Regulations make it clear that Section 504 extends two legal principles to non-academic programming: participation "to the maximum extent appropriate" and "an equal opportunity" for participation. The definition of these two terms has been left to the courts.

A. Participation to the "Maximum Extent Appropriate"

Pursuant to 34 CFR 104.34(b), when providing or arranging for the provision of non-academic and extracurricular services and activities, including meals, recess periods, and the services and activities set forth in 104.37(a)(2), school districts must ensure that qualified students with disabilities participate with non-disabled students in such activities and services to the maximum extent appropriate to the needs of the student with the disability.

B. "Equal Opportunity for Participation"

34 CFR Section 104.37(a) articulates a general "equal opportunity," standard. It states that a school "shall provide non-academic and extracurricular services and activities in such manner as is necessary to afford handicapped students an equal opportunity for participation in such services and activities." 34 CFR 104.37(a).

1. Defining "non-academic and extracurricular services and activities"

Nonacademic and extracurricular services and activities include:

- Counseling services
- Physical recreational athletics
- Transportation
- Health services
- Recreational activities
- Special interest groups or clubs sponsored by the recipients
- Referrals to agencies which provide assistance to persons with disabilities
- Employment of students, including employment by the school and assistance in making available outside employment.

34 CFR 104.37(a)(2).

2. Regulation of "counseling services"

34 CFR 104.37(b) injects a non-discrimination standard into counseling services. It indicates that a school which provides personal counseling, academic counseling, vocational counseling, guidance counseling, or placement services shall provide the services without discrimination on the basis of disability.

There is a specific requirement that the school district ensure that qualified students with disabilities are not counseled toward more restrictive career objectives than are non-disabled students with similar interests and abilities. Id.

3. Opportunity to access physical education and athletics

Pursuant to 34 CFR 104.37(c)(1), when providing physical education courses, athletics, and similar aids, benefits or services to any students, a school may not discriminate on the basis of disability. Schools that offer physical education courses or that operate or sponsor interscholastic clubs, or intramural athletics shall provide qualified students with disabilities with an equal opportunity for participation.

Practice Pointer: Occupational or physical therapy services may come into play as compensatory services for missed access or to compensate for lack of equal opportunity. See Franklin City Public Schools (VA), 38 IDELR 46 (OCR Sept. 10, 2002).

a. Separate or different programs

A school may offer physical education and athletic activities to students with disabilities that are separate or different from those offered to non-disabled students only if separation or differentiation is consistent with the requirements of 34 CFR 104.34 and only if no qualified student with a disability is denied the opportunity to compete for a team, or to participate in courses that are not separate or different. 34 CFR 104.37(c)(2).

In January 2013, OCR opined that school districts must make more of an effort to ensure that students with disabilities have an equal opportunity to participate in extracurricular athletics. See Dear Colleague Letter, 60 IDELR 167 (OCR Jan. 25, 2013). OCR noted that "schools may require a level of skill or ability for participation in a competitive program or activity," but that schools "must make reasonable modifications to its policies, practices, or procedures whenever such modifications are necessary to ensure equal opportunity, unless the school district can demonstrate that the requested modification would constitute a fundamental alteration of the nature of the extracurricular athletic activity." Id.

Query: A student with a hearing impairment makes the track team. During tryouts, the coach signaled the start of each race by using a visual cue, and the student's speed was fast enough to qualify. During meets, the start of the race is announced with a starter pistol, and the student requested that the district also use a visual cue to alert him to the start of the race. The district denied the request because it was concerned that the use of the cue may distract other runners. As a result, the student could not participate in track meets. Should this modification have been provided by the district? See Dear Colleague Letter, 60 IDELR 167 (OCR Jan. 25, 2013).

Students with disabilities who cannot participate in an existing extracurricular athletics program, even with reasonable modifications or aids and services, should still have an equal opportunity to receive the benefits of extracurricular activities. For example, OCR suggests offering opportunities for athletic activities such as wheelchair tennis or wheelchair basketball. OCR notes that these programs "should be supported equally, as with other athletic activities," and "when the number of students in a district is insufficient to field a team, school districts can also: (1) develop district-wide or regional teams for students with disabilities as opposed to a school-based team in order to provide competitive experiences; (2) mix male and female students with disabilities on teams together; or (3) offer 'allied' or 'unified' sports teams on which students with disabilities participate with students without disabilities." Id.

C. Extracurricular Activities: Case Studies

The following cases provide examples of the application of Section 504 to Extracurricular Activities and Nonacademic Programs. This is not an exhaustive list.

1. Tryouts

A mother filed a complaint with OCR alleging that the school district discriminated against her daughter on the basis of disability by failing to afford her an equal opportunity to participate in the tryouts for the cheerleading squad. The mother indicated that the school district had refused her request to videotape the cheerleading practice. Most likely the district's refusal had been based on the privacy interest of other students. Nevertheless, the district and the Office for Civil Rights (OCR) entered into a resolution agreement where the district agreed to take the following actions:

1. The district will develop a procedure to ensure that qualified students with disabilities are afforded an equal opportunity to participate in the district's extracurricular activities and interscholastic athletic programs. The procedure will specify that students with disabilities are entitled to necessary related aids and services and/or program modification in order to accomplish the objective of equal opportunity to participate in extracurricular and interscholastic programs. The procedure will also ensure that the necessary related aids and services and/or program modifications are determined on an individual basis.

2. The district will conduct training on the new procedure with the appropriate staff and district officials.

3. The district will ensure that if the student tries out for the cheerleading squad, the district will provide the student with effective accommodations, including but not limited to, the opportunity to videotape the cheerleading sponsor's instructions and demonstrations.[1]

Practice Pointer: 34 CFR 104.37(a)(1) does not require that districts adopt a written policy with regard to equal opportunity for participation in non-academic and extracurricular services and activities. However, the effective result of this resolution was that the district was required to adopt a procedure to ensure that equal opportunity was afforded to students with disabilities. The other lesson from this resolution agreement is that districts, when faced with competing interests, such as privacy interests and access issues should seek in the first instance to broach a balanced compromise. OCR frequently uses the complaint resolution process as an opportunity to see that district staff receive further training on Section 504. See Marion County School District (FL), 37 IDELR 13 (OCR Nov. 21, 2001). For a similar result see Moses Lake School District No. 161, 36 IDELR 218 (OCR Feb. 7, 2002).

2. Dismissal for unexcused absences.

In Shelby County (AL) School District, 37 IDELR 41 (OCR 2002), a parent filed a complaint with OCR alleging that the school district discriminated against her daughter on the basis of her disability ("Bipolar Rapid Recycler Depression" and ADHD) by not allowing her to participate on the high school volleyball team. The mother specifically alleged:

[1]Note the right to videotape did not extend beyond the cheerleading sponsor's instructions and demonstrations, perhaps addressing the district's concern as to privacy.

- That the district did not follow her daughter's IEP amendment which called for participation in athletics until after the district filed an eligibility form for the student;

- That the district dismissed the student from the team for unexcused absences that were due to her disability, and for unexcused absences that occurred during the time frame when she was ineligible for the team;

- That the varsity volleyball coach retaliated against the student because of a complaint that the parent had filed with the Alabama High School Athletic Association challenging its "no pass, no play" rule; and

- That the coach made embarrassing remarks about her daughter to the team and inquired about her attendance at school when she had an excused absence approved through the school office.

OCR found that the state code pertaining to athletics dictated the decision regarding a student with a disability's participation in extracurricular activities and that all students who compete on an interscholastic sports team in Alabama must file an eligibility form five days prior to the competition. As to the unexcused absences, the OCR pointed to the fact that the team rules state that three unexcused absences from practices or meetings will result in dismissal from the team. OCR found that the student was suspended for three days for fighting, and that she missed three days of practice because of her suspension. As a result, the student was dismissed from the team. OCR also found that the team rule in regards to unexcused absences was applied uniformly and therefore, the district did not fail to provide the student with an equal opportunity for participation on the district's volleyball team and did not treat the student in a different manner than any other student in regards to this allegation.

OCR found that the filing of the complaint with the Athletic Association was a protected activity and that the district was aware of the complaint and thus, aware of the protected activity. OCR concluded that the alleged adverse actions, to wit the remarks about the student, even if true, did not constitute adverse actions. The actions did not result in any denial of benefits to the student in that they did not result in the student being dismissed from the team.

Practice Pointer: The lesson from this case is that school districts remain free to uniformly exercise and impose team rules in the context of athletics. The key point the district needs to demonstrate is that the team rules are uniformly applied and that they do not result in disparate treatment of the disabled student.

Practice Pointer: Team rules, if applied uniformly, will generally not be deemed discriminatory. See Little Axe (OK) Public Schools, 37 IDELR 103 (OCR 2002).

3. Attitude and teamwork requirements.

In Kaneland Community Unit School District No. 302 (IL), 37 IDELR 287 (OCR Aug. 15, 2002), the high school baseball coach cut a student from the varsity baseball team on the final day of tryouts. The coach cited the student's attitude and teamwork skills as the reason for his decision to cut the student. The student's mother filed a complaint with OCR alleging that the district discriminated against her son on the basis of disability because her son was on the baseball team the previous year, was one of the best players on the team and his disciplinary record was no worse than some of the players who made the team. The district pointed to its extracurricular activities behavior code which governed student participation in any extracurricular activity. The code stated that "participation in these events at Kaneland is a privilege granted to students who can and do uphold the ideals of good citizenship, who abide by the rules and regulations of the school community and who commit themselves to academic success." Student participation in baseball was also governed by the baseball guidelines which established criteria necessary for participation in baseball. These criteria included attitude, ability, skills, teamwork and the ability to fit into the team's style and system. All students were provided a copy of those guidelines.

The district conceded that the student had the athletic ability and skills required to be a member of the team, but contended that he did not meet the other important criteria. For example, the student had a hot temper, a bad attitude and was not a team player. The coach denied the allegation that the student's disciplinary record was the factor in his decision to cut him from the team and further indicated that he was unaware at the time he made the decision to cut the student from the varsity team that the student had a disability or that he was a special education student. OCR specifically noted that the student's IEP did not preclude him from being subject to the same requirements for making the baseball team as other students. OCR observed that "He is subject to the district's established disciplinary policies and does not have a behavioral management plan that would preclude application of either the code or the guidelines." On that basis OCR determined the complaint to be unfounded.

Practice Pointer: The result might have been different if the student's IEP contained a behavioral intervention plan which was inconsistent with the district's athletic guidelines. This decision gives comfort to school districts that, absent IEP statements to the contrary, they may uniformly apply their team conduct codes to students and that this uniform application may include behavioral considerations.

4. Alcohol consumption at school events.

A student was disciplined for being under the influence of alcohol at a football game. OCR dispensed of the subsequent complaint noting that students without disabilities who committed the same offense were disciplined in the same manner. See El Paso Independent School District (TX), 35 IDELR 221 (OCR May 29, 2001).

Practice Pointer: Section 504 does not insulate students from disciplinary consequences when the discipline imposed does not constitute a significant change in placement. The review by OCR in such circumstances will be limited to whether or not the district acted in a non-discriminatory manner in disciplining the student.

5. Club sports.

A disabled student was expelled from a school funded intramural hockey club. The student had a disability and a behavior management problem. The hockey club did not implement the behavior management program during his participation in the club sport. The Office for Civil Rights ruled that the district violated its obligation to ensure the ice hockey club to which it provided financial assistance complied with the requirements of Section 504 and the ADA. See Rosetree Media (PA) School District, 40 IDELR 188 (OCR Aug. 27, 2003).

6. Scholarships

It is important to remember that access and equal opportunity extend to guidance counseling services and post-secondary opportunity. Therefore, districts should review the manner in which they disseminate scholarship information in order to ensure that students with disabilities have equal access to scholarship information. See Garden Grove Unified School District (CA), 37 IDELR 43 (OCR April 30, 2002).

7. Field Trips

Section 504 clearly indicates that a student should not be excluded from attending a field trip on the basis of their disability. See Accomack County (VA) Pub. Schs., 49 IDELR 50 (OCR Jan. 22, 2007) (excluding a student from an assembly and a field trip did not violate Section 504 because the student was not eligible for participation in those activities – participation was limited to students in certain courses, which the complaining student did not participate in); Lucas Local Schools (OH), 37 IDELR 77 (OCR April 12, 2002) (no evidence that the student was prohibited from attending the field trip on the basis of his disability).

Similarly, a district cannot make the parents' presence mandatory at a field trip when a similar obligation is not imposed upon the parents of non-disabled students. Doing such discriminates on the basis of disability in violation of Section 504. See Rim of the World Unified School District (CA), 38 IDELR 101 (OCR Oct. 10, 2002); compare id. with Stanwood-Camano (WA) Sch. Dist. No. 401, 48 IDELR 261 (OCR Nov. 15, 2006) (no violation of Section 504 where “the district’s requirement that the student’s grandmother attend [a] field trip were based on concerns with the student’s health and safety during the trip in question [specifically, the inability of district staff to be able to adequately address the student’s behavior in a public setting and their belief that the grandmother would be able to address the behavior], and the trip was the only one identified by OCR during the period investigated”).

a. Limits on liability

A complaint to OCR alleged that a school district discriminated on the basis of disability by revoking permission for their son to go on a school sponsored European trip. OCR concluded that the district had revoked permission because of concerns the student would violate trip rules rather than because of his ADHD. See Maine School Administrative District No. 1, 35 IDELR 166 (OCR March 23, 2001).

Practice Pointer: The district's liability for excluding a Section 504 student from a field trip is contingent upon not only a demonstration by the plaintiff of his exclusion from participation in services and that such treatment was by reason of disability, but that also the school officials showed gross misjudgment or bad faith. For a similar result see Miamisburg City Schools (OH), 36 IDELR 217 (OCR Feb. 11, 2002). While a district may use the student's health or safety as a reason for not participating in a field trip, the district has the burden of demonstrating that the exclusion is essential to that child's health or safety. During the time period that the child does not participate in the field trip, the district has a duty to provide educational services.

Practice Pointer: A district can refute a charge of disability-based discrimination by demonstrating a legitimate non-discriminatory reason for its actions.

8. Playgrounds

Playgrounds must be fully accessible to students with disabilities. For example, the playground surfaces and access ways leading to the playground must be maneuverable by students in wheelchairs.

Practice Pointer: Districts need to be careful when confronted with volunteer playground construction efforts. These type of volunteer efforts can produce safety and access issues. A district should reference the Playground Standards promulgated by the United States Access Board. While these guidelines have not become law, they are considered advisory by OCR. See Shiloh Village School District (IL), 37 IDELR 188 (OCR July 3, 2002).

9. Graduation

Students with disabilities who meet graduation requirements should be allowed to attend or participate in the graduation ceremony. Failure to afford such an opportunity is usually considered a violation of Section 504.

Practice Pointer: Decisions to exclude a student from activities based on safety considerations must follow a process. In particular, the decisions must be based on current information and must be made by either an IEP team or a Section 504 team.

10. Choir and Band

As a general premise, students should have access to and equal opportunity to participate in choir and band programs. However, accessibility and equal opportunity may be limited by legitimate safety concerns and ability concerns. See Grosse Pointe Public Schools (MI), 35 IDELR 225 (OCR May 7, 2001).

In addition, a student's lack of talent may be a legitimate non-discriminatory reason for his exclusion from the band. See Allegheny County (MD) Board of Education, 40 IDELR 220 (OCR Sept. 4, 2003).

D. Non-District Programs/Substantial Assistance

Section 504 prohibits school districts from providing substantial assistance to entities that discriminate on the basis of disability in providing any aid, benefit, or service to beneficiaries of the program or activity. 34 CFR 104.4(b)(1)(v); see also Rose Tree Media (PA) School District, 40 IDELR 188 (OCR 2003) (District that provides substantial assistance to a private club must either ensure that the club complies with Section 504 and the ADA, or sever its relationship with the club). The Office for Civil Rights recently issued two opinions in which it found that two districts had discriminated against qualified individuals with disabilities by "significantly assisting" after-school programs.

In the first case, Puyallup (WA) School District No. 3, the parent filed a complaint with OCR, alleging that the district discriminated against a student by refusing to provide the student with accommodations during an after-school program. 49 IDELR 20 (OCR March 23, 2007). The parents enrolled the student in an after-school program operated by a religious organization and requested that the district provide the student, who was deaf, with an interpreter. The district refused to provide the interpreter because the after-school program was a non-district private program, run by several community groups. The parent then requested that the after-school program provide an interpreter; it attempted to locate a volunteer, but was unsuccessful. As a result, the student was not able to participate in the after-school program.

OCR found that the after-school program was not a district-operated program or activity. Nevertheless, the assistance that the district provided to the groups was deemed to be "significant."

The district provided the groups with:

- Organization and coordination assistance;
- Publicity on its website;
- Free use of space in district facilities after regular school hours;

- Office space;
- Computer services;
- A small grant to assist with program implementation.

However, the district did not:

- Exercise control over the content of the program;
- Provide direct funding to the groups that operated the program;
- Control or provide the staff for the after-school program activities; or
- Determine what students attended the programs, or whether students participated in the programs.

Similarly, in Capistrano (CA) Unified School District, parents filed a complaint with OCR, alleging that the district violated Section 504 by providing significant assistance to an after-school program that discriminated against students with disabilities. 108 LRP 17704 (OCR Oct. 10, 2007). The program was operated by the YMCA as an independent contractor under a five-year contract. However, the district allowed the YMCA to rent one of its facilities at less than the market rate and promoted the programs by distributing literature to parents one time per year and by providing a link to the YMCA website. The district did not provide the YMCA with any direct financial support, staff materials or oversight. OCR found that the district significantly assisted the YMCA's program by permitting it to use district facilities at a discounted rate and by promoting the YMCA program to parents. Therefore, the district was obligated to end its relationship with the YMCA or to ensure that the YMCA did not discriminate.

In a recent case, Fairfax (CA) School District, 111 LRP 70094 (OCR Sept. 13, 2011), OCR investigated whether a district "failed to respond appropriately to an internal complaint from a parent, alleging that the Fairfax Junior Baseball Club," discriminates on the basis of disability. During a school board meeting, the parent complained that the baseball club discriminates on the basis of disability, and indicated that she believed the district should terminate its relationship with the club. The complaint was recorded in the board's meeting minutes. Following the meeting, the Superintendent spoke with the president of the baseball club, and was told that every player played a minimum of two innings, but that if the Student was not allowed to play two innings, it was because of safety concerns. The Superintendent relayed that conversation to the Board chair, but did not take any further action. Subsequently, the parent filed a complaint with OCR.

OCR investigated, and determined that the district was providing the baseball club with significant assistance. OCR found that the district and the baseball club had a "long-standing relationship of at least 17 years wherein the baseball club used facilities at the Fairfax Middle School without paying costs." As a result, the district was responsible for ensuring that the baseball club did not unlawfully discriminate against participants.

OCR further found that the district failed to respond appropriately to the parent's complaint because it did not process the complaint according to its Uniform Complaint Procedures. In particular, the district did not obtain the answers from the baseball club that were responsive to the question as to whether the student had less playing time than other members of the club, and, if so, why the student had less playing time. The district did not document its conversation with the president of the baseball club, nor did it communicate its written findings and conclusions to the parent. Thus, the district's investigation failed to comply with the requirements of Section 504 (pertaining to grievance procedures). The district agreed to enter into a resolution session agreement, whereby it would provide training on its obligations with regard to organizations that receive significant assistance from the district, provide training about its complaint procedures, and conduct a complete investigation into the parent's allegation against the baseball club. If the investigation was substantiated, the district was further required to ensure that the club did not discriminate or terminate its contract with the club.

Key Points:

- Based on these opinions, it appears that OCR will find that a district has provided a private program with significant assistance when the district allows the organization to use its facilities without charge, or at a reduced rate, and when the district provides the program with publicity.

- It is important to remember that if your district provides substantial assistance to an organization, the district must ensure that the organization complies with Section 504 and the ADA. This includes conducting an investigation in accord with your district's grievance procedure, if a parent files a complaint against an organization that receives significant assistance from your district.

Another case was resolved without an OCR investigation when the District agreed to take voluntary action. School Union 49 (ME), 108 LRPP 63079 (OCR Aug. 15, 2008). In that case, the parents alleged that the District discriminated against their daughter on the basis of disability by denying or giving her limited access to the Lincoln Academy school building, because of icy sidewalk/pathway conditions leading from the parking lot to the school. At the outset, OCR noted that the Academy was not subject to its jurisdiction under Section 504 or the ADA because it did not receive federal funds and was not a public entity. However, the District was subject to the provisions of Section 504 and the ADA, and the District had placed the student at the private school

and was paying for her tuition. Thus, the District had an obligation to ensure that it was not perpetuating discrimination against the student by providing a significant aid, benefit, or service to an entity that discriminates on the basis of disability.

With regard to snow removal, the parents alleged that the Academy removed the snow before school, but did not address snowfall that occurred during the day. As a result, student occasionally missed classes in two school buildings because she was unable to navigate her wheelchair through the snow. The District entered into an agreement with the Academy whereby the Academy agreed to construct a wheelchair ramp, and agreed to have members of its maintenance department clear the walkway so that the student could transition from class to class.

Key Point:

- A private placement by a District may constitute "substantial assistance"

XV. Extended School Year Programming

Section 504 eligible students are entitled to the equal opportunity to access a school district's summer programming. A district may violate Section 504 if it fails to consider whether its Section 504 students are eligible for extended school year programming. See Boston (MA) Pub. Schs., 41 IDELR 137 (OCR Nov. 7, 2003).

Section 504 requires that students with disabilities are given an equal opportunity for participation in the non-academic services of a district. There are, however, limits on this access. For example, when teachers attempt to intervene to redirect a student's misbehavior and they are unable to accommodate the behavior without fundamentally altering the summer program, then the student's participation in the program may be limited. See Saint Paul Pub. Schs., 41 IDELR 37 (OCR Dec. 24, 2003).

XVI. Procedural Requirements Under Section 504

There are a number of procedural requirements which pertain to individuals protected by Section 504.

A. The Written Assurance of Non-Discrimination

34 CFR 104.5(a) requires that school districts provide the federal government with written assurance of non-discrimination and compliance with Section 504. Districts have been providing the government with this assurance since 1977.

B. Designated Section 504 Coordinator

34 CFR 104.7(a) requires that each school district designate a Section 504 coordinator. This individual is defined as the person responsible for coordinating the district's 504 efforts. Districts may designate more than one person as a Section 504

coordinator. Therefore, most school districts adopt building level coordinators, as well as an overall supervisory coordinator.

C. Grievance Procedures

34 CFR 104.7(b) requires that districts adopt grievance procedures to resolve complaints of discrimination. The procedures must "incorporate appropriate due process standards" and must "provide for the prompt and equitable resolution of complaints alleging" a violation of Section 504. Id. These procedures must be in writing and readily available to the public.

When determining whether a grievance procedure complies with Section 504, OCR considers a number of factors, including whether the procedures provide for:

- Notice of the procedures, including where complaints may be filed;
- Application of the procedure to complaints alleging discrimination carried out by employees, other students, or third parties;
- Adequate, reliable, and impartial investigation of complaints, including the opportunity to present witnesses and other evidence;
- Designated and reasonably prompt timeframes for the major stages of the complaint process;
- Notice to the parties of the outcome of the complaint; and
- An assurance that the school will take steps to prevent recurrence of any harassment and to correct discriminatory effects of the harassment on the complainant and others, if appropriate.

Akron (OH) Public Schools, 55 IDELR 146 (2010). In the Akron decision, OCR also noted that grievance procedures may include informal mechanisms for resolving complaints, but only if the parties agree. The procedures must indicate that the complainant may end the informal process at any time, and file a formal complaint. Id.

D. Notice

34 CFR 104.8 requires the district to provide notice to students, parents, employees, unions and professional organizations of non-discrimination in admission or access to or treatment or employment in its programs or activities. The notice must also specify the reasonable employee designated to coordinate compliance. It is prudent for every school district to have a 504 policy statement and the 504 policy statement is an appropriate location for identifying the designated coordinator.

The notice must also be given to individuals with vision and/or hearing impairments; therefore, it is important that the notice be available in alternate formats.

E. Annual Identification and Location

34 CFR 104.32(a) requires that districts annually identify and locate all Section 504 qualified children with disabilities in their geographic area who are not receiving a public education. This requirement is akin to the IDEA's Child Find requirement.

F. Annual Notification

34 CFR 104.32(b) requires that districts annual notify persons with disabilities or their parents or guardians of the districts' responsibilities under Section 504.

G. Consent

OCR has interpreted Section 504 to require districts to obtain parental permission for initial evaluations. Section 504 is silent on the form of parental consent required. Best practices warrant that the consent be in writing.

H. Procedural Safeguards Notice

Districts are required to provide parents or guardians with procedural safeguards giving them notice of their various rights under Section 504. There are several times during the planning process when parents/guardians should be provided their rights under Section 504. Those instances include:

- Eligibility determination
- When a plan is developed
- Before there is a significant change in the plan for services

Notification should include the following rights under Section 504:

- Right to file a grievance with the school district over an alleged violation of Section 504 regulations
- Right to an impartial hearing if there is a disagreement with the school district's proposed action
- Right to have an evaluation that draws on information from a variety of sources
- Right to be informed of any proposed actions related to eligibility and plan for services
- Right to examine all relevant records

- Right to receive all information in the parent/guardian's native language and primary mode of communication

- Right to periodic re-evaluations and an evaluation before any significant change in program/service modifications

- Right to be represented by counsel in the impartial hearing process

- Right to appeal the impartial hearing officer's decision.

Section 504 regulations do not:

- Establish timelines for submission of a hearing request

- Define "impartial" (in similar processes, impartial has been defined as a person not employed by or under contract with the district in any capacity)

- Require that the selection of the hearing officer be a mutually agreed upon decision between the school district and the parents/guardians

- Contain mediation or resolution session requirements

The case of Schenectady (NY) City School District, 50 IDELR 110 (OCR Dec. 28, 2007), involved an allegation that the District failed to provide notice of procedural safeguards, including the right to request an impartial hearing. In that case, the parents filed a complaint with OCR, alleging that the district discriminated against her son on the basis of his disability by failing to provide her with notice of her right to request an impartial hearing under Section 504. OCR's investigation established that the district's guidance counselor had provided the parent with a proposed Section 504 plan, and that the parent requested additional services. Following that request, the student's team met on two occasions to review those requested services, but declined to provide the services requested by the parent. Parent alleged that the district did not inform her that she could contest their decision in a due process hearing.

The district provided OCR with a copy of its Section 504 procedures, which included a description of the parents' right to a hearing. However, OCR's investigation established that district staff were unclear as to who was responsible for providing the parent with notice of Section 504 procedural rights, and the district was not able to confirm that the complaining parents received notice of their Section 504 procedural rights. In addition, district staff did not know whether the procedural rights were available on the district's website or if they were disseminated to parents with other publications.

OCR closed the investigation after the district agreed to implement a voluntary resolution plan, which provided that:

- The district would review its Section 504 procedures with all staff, and would provide OCR with documentation evidencing the same; and,

- The district would convene a meeting with the parents to determine whether the additional services requested by the parent were appropriate. If they are appropriate, the team will determine whether compensatory education services are necessary; if they are not appropriate, the district will inform the parent of her right to request a hearing. The district also agreed to provide OCR with documentation establishing that the meeting occurred, the team's decision, and either establishing that compensatory services were provided or that the parents received notice of their right to a request a hearing.

I. General Rights

Persons disagreeing with the identification, evaluation and placement of their children have several options available to them. Those options include the following**:**

- Filing a complaint or grievance through the district's Section 504 Grievance Procedure

- Parents/guardians may request a Section 504 Impartial Hearing

- Filing a complaint with the OCR; and

- Upon exhaustion of IDEA remedies, filing suit in federal court.

XVII. Discipline

A. The Regulatory Framework

Pursuant to 34 C.F.R. 104.4(b), discrimination occurs when a school district denies a student with a disability the opportunity to participate in or benefit from an aid, benefit or service which is afforded non-disabled students. Examples of discriminatory conduct in the area of behavior or discipline include the following:

- Denial of credit to a student whose absenteeism is related to his/her disabling condition;

- Suspending a student for greater than ten (10) days for behavior related to his/her disability;

- Expelling a student for behavior related to his/her disabling condition.

B. The Ten (10) Day Rule

As a general rule, a school district may not expel a student with a disability or suspend the student for more than ten (10) cumulative days during the school year for conduct related to the student's disability. This rule exists under Section 504 and the IDEA.

C. The Discipline of Section 504 Students

Under Section 504 a suspension or disciplinary removal of a student with a disability for more than ten (10) days may not be imposed without a determination that the student's misconduct is not a manifestation of his/her disability. See Letter to Williams, 21 IDELR 73 (OCR March 14, 1994). If the student's misconduct is related to the disability, the student may not be suspended for more than ten (10) days. If the misconduct is not related to the disability, the school district may impose normal disciplinary measures, subject to the parents' right to request an impartial hearing.

1. The Section 504 Manifestation Determination

The manifestation determination is made by convening a meeting of the 504 team to determine if the conduct was related to the disability. If the team decides that the conduct was related to the disability the district cannot expel the child and the team will need to consider alternate service and placement options. If the team determines that the conduct was unrelated to the disability, the district may proceed with long term suspension/expulsion of the child. Before this takes place the parent must be informed of their rights, including their right to request a hearing as to whether the manifestation determination was correct. This hearing process occurs under the Section 504 due process hearing requirements, and is not an IDEA due process hearing.

2. Cumulative Suspensions

OCR has opined that "[t]he permanent exclusion of a child with a handicap or exclusion for an indefinite period, or for more than ten (10) consecutive school days constitutes a 'significant change in placement' under Section 504." See OCR Memorandum re: Discipline of Students with Disabilities (OCR April 18, 1991).

A series of suspensions that are each of ten (10) days or fewer in duration that create a pattern of exclusions may be deemed under Section 504 to constitute a 'significant change in placement.' The determination of whether a series of suspensions creates a pattern is made on a case-by-case basis. However, OCR has opined that serial exclusions may never be used to avoid the requirements of re-evaluation before suspensions of more than ten (10) days.

OCR has identified the following factors to be used when determining whether a series of suspensions has resulted in a significant change in placement:

- The length of each suspension;
- The proximity of the suspensions to one another; and
- The total amount of time the child is excluded from school.

See e.g. Ponca City (OK) Sch. Dist., 20 IDELR 816 (OCR July 19, 1993). OCR has opined that a series of suspensions that, in the aggregate, are for ten (10) days or less during the school year do not constitute a significant change in placement. See OCR Memorandum re: Discipline of Students with Disabilities (OCR April 18, 1991).

As the following opinions demonstrate, the change in placement determination is not based on a specific number of cumulative days.

In Ralph C. Mahar Regional School District (MA), the parents filed a complaint with OCR, asserting that the District had discriminated against their son. 45 IDELR 103 (OCR Nov. 15, 2004). The student had received one-day suspensions on November 2, November 19, and November 30, 2004, and was sent home for disciplinary reasons on October 26. On December 6, he received a ten-day suspension, which he began serving on December 7. At a manifestation meeting on December 14, the team concluded that the behavior was a manifestation of the student's disability. On November 15, the District convened a team meeting to propose a 45-day diagnostic evaluation and placement in a therapeutic setting. By December 1, the parents had not formally responded to the District's proposal, and the District filed a request for an emergency hearing regarding placement and evaluation. On December 2, the parents responded to the District's proposal, agreeing with the placement but disagreeing with the length of the placement. During a December 16 pre-hearing conference, the parents and the district agreed to an eight-week diagnostic placement. The student began attending the school on December 21.

OCR determined that the fourteen days that the student was suspended amounted to a significant change in placement, which triggered the District's obligation to hold a manifestation meeting. OCR found that the District complied with its obligation to convene a manifestation meeting by holding a meeting on December 14, the 6th day of the 10-day suspension, and the 10th day the tudent was excluded from school during the school year. OCR also found that the student's new placement began within 10 days after the last suspension began, and within the 10-day 'cooling down period' described in Honing v. Doe, 485 U.S. 305 (1988); therefore, OCR concluded that the District did not discriminate against the student by excluding him from school during the period of December 15 through December 17. However, the District was required to inform parents, orally and in writing, of their child's right to return to school after there

has been a determination that the misconduct was a manifestation of the child's disability. The District was also required to amend the student's educational records to reflect that he was not suspended as of December 14.

Similarly, in Santa Barbara (CA) School District, parents filed a complaint which alleged that the District discriminated against their child by denying him a FAPE. 43 IDELR 172 (OCR Oct. 22, 2004). The parents alleged that the District made significant changes in the Student's placement without evaluating the Student and without conducting a manifestation meeting. Between October 2003 and January 2004, the student was transferred to three different schools and suspended six times (for a total of 23 days). OCR found that this constituted a significant change in placement, which triggered the District's obligation to evaluate the Student to determine if the misconduct was a manifestation of the Student's disability and to review the Student's placement.

In contrast, in Ponca City (OK) School District, three students with disabilities were given a series of suspensions which were shorter than ten (10) days individually, but in their aggregate, totaled more than ten days. 20 IDELR 816 (OCR July 19, 1993). Parents complained, asserting that the suspensions constituted a significant change in placement and the District failed to conduct an evaluation. The first student was suspended three times during the school year, for a total of 12 days. The second student received two suspensions in a three-month period, for a total of 11 days. The third student received four suspensions during the school year, for a total of 23 days suspended. OCR found that given the length of the suspensions, and their proximity to one another, the suspensions did not constitute a pattern of exclusions that amounted to a change in placement. Therefore, the District complied with Section 504.

3. The Re-Evaluation Process

The manifestation determination is achieved through the re-evaluation process. According to OCR, before implementing a suspension or expulsion that constitutes a significant change in the placement of a student with a disability, the district must conduct a re-evaluation of the student to determine if the misconduct in question is caused by the student's disabling condition or if the student's current educational placement is appropriate.

a. Step One: Appropriateness of the Current Educational Placement

The individuals making the manifestation determination must first determine whether the current educational placement is appropriate. Two questions are to be answered in determining plan appropriateness:

1. Are the accommodations in the student's 504 plan appropriate as they relate to the current misconduct?

2. Were the accommodations in place at the time of the alleged infraction?

If the consensus is that the plan is not appropriate as it relates to the current misconduct or that it was not substantially complied with, then the suspension/expulsion proceeding should cease and the team should review and update the current plan.

If the team determines that the plan is appropriate and in place, then it must consider whether the misconduct is the result of the student's disability.

b. Step Two: Is the Misconduct Caused by the Child's Disabling Condition?

The team must then determine whether the misconduct is caused by the child's disabling condition. OCR has opined that this determination may be made by the same group of individuals who made the initial placement decision under Section 504. The group must have available to it information that "competent professionals would require, such as: psychological evaluation data related to behavior; and relevant information current enough to understand the child's current behavior."

OCR is of the opinion that the "determination may not be made by the individuals responsible for the school's disciplinary procedures such as the school principal or school board officials, who may lack the necessary expertise and personal knowledge about the child to make such a determination. These individuals, however, may participate as members of the placement decision group."

If the misconduct is not caused by the child's disability, the child may be excluded from school in the same manner as similarly situated non-disabled children are excluded.

> Note: the fact that a student may in theory be deprived of educational services does not mean that this is the best practice. In fact, school districts may wish to afford some level of service even in the event of expulsion.

If the misconduct is caused by the disabling condition, the evaluation team must continue the evaluation under the requirements of Section 504 for re-evaluation and placement, to determine whether the child's current educational placement is appropriate. The team should also consider what behavioral accommodations may be appropriate.

c. Step Three: Procedural Safeguards

If there is a significant change in placement, then the parents' procedural safeguards under Section 504 are triggered. These requirements include the opportunity for substantive due process, which includes, at a minimum, the following:

- appropriate notice to parents;
- an opportunity for the examination of records;
- an impartial hearing with the participation of parents;
- an opportunity for legal counsel; and
- a review procedure.

Parents should be informed of their rights and should be afforded a hearing if they disagree with the determination regarding the relationship of the behavior to the disability or with regard to the subsequent placement proposal made by the team whether the behavior is determined to be caused by the disability.

In Arizona Community Development School District, a student, who had been identified as an individual with a disability (bi-polar disorder) and who qualified for services under Section 504, was suspended for 10 school days after he brought marijuana to school. 46 IDELR 54 (OCR July 18, 2005). The principal recommended that he be brought before the school board for expulsion proceedings. Prior to making that recommendation, the principal convened a meeting to determine whether the student's actions were a manifestation of his disability. In addition to the student and his parents, the Director of Special Education, the principal, vice-principal, the student's home-room and Creative Writing teacher and a psychologist attended the meeting. After reviewing the student's 504 Plan, his education records, counseling logs, information on bi-polar disorder, and a doctor's note provided by the student's parents, as well as receiving input from all individuals present, the team (over the objection of the parents and the psychologist) determined that the student's behavior was not a manifestation of his disability. OCR found that the District complied with the requirements pertaining to the composition of manifestation teams and closed the complaint.

D. Drugs and Alcohol – The "current user" distinction

According to OCR, drug and alcohol addiction may be disabling conditions covered by Section 504 so long as a person **is not a current user of alcohol or illegal drugs.**

Under the ADA, an individual who is currently engaged in the illegal use of drugs is not an individual with a disability under Section 504. However, a person who is addicted to drugs who is not a current user may be disabled and entitled to all of the rights under Section 504. Similarly, a person erroneously regarded as engaged in the illegal use of drugs may also be regarded as disabled under Section 504.

OCR has observed that, because alcohol and illegal drug users are not protected by Section 504, school districts may take disciplinary action regarding the use of illegal drugs or alcohol against any student with disabilities who currently is engaged in the illegal use of drugs or in the use of alcohol **to the same extent that disciplinary action is taken against non-disabled persons for the same behavior.** Furthermore, the local due process protections do not apply to disciplinary actions regarding the use or possession of illegal drugs or alcohol by students with disabilities who are currently engaged in the illegal use of drugs or in the use of alcohol.

A child who has a disabling condition other than alcoholism or drug addiction and who is not engaged in the illegal use of drugs or the use of alcohol, receives the protection of Section 504, even when in the possession of illegal drugs or alcohol. OCR 2has observed, "For example, if a mentally retarded child who does not use drugs or alcohol is found in possession of drugs or alcohol, the school district would be required to determine whether this misbehavior resulted from the child's handicapping condition."

E. Dangerous Students

OCR has stated that "[w]here a child presents an immediate threat to the safety of others, officials may promptly adjust the placement or suspend the child for up to ten (10) school days in accordance with rules that are applied even handedly to all children." However, unlike the IDEA, Section 504 does not contain a dangerousness exception.

F. Alternative Discipline

"Occasional detentions and similar forms of discipline do not require re-evaluation or determination of the cause of the misconduct under Section 504. Generally detentions would not constitute a significant change in placement, particularly if they occur before or after instructional hours. If, however, a pattern of disciplinary actions for behaviors caused by, or symptomatic of, the child's disability develops, there might be sufficient cause to believe that a Section 504 violation is occurring." See Letter to Williams, 21 IDELR 73 (OCR March 14, 1994).

G. 45 Day Rule – Drugs, Weapons and Serious Bodily Injury

Although OCR has not yet weighed in on the issue, the forty-five (45) day rule which applies to drugs, weapons and serious bodily injury under the IDEA should be available to districts under Section 504.

H. Cessation of Educational Services

The Department of Education has interpreted the non-discrimination provisions of Section 504 to permit school districts to cease educational services during periods of disciplinary exclusion from school where that exclusion is for misconduct that was not a

manifestation of the student's disability, and non-disabled students in similar circumstances do not receive educational services.

In Norfolk (VA) City Public Schools, OCR received a complaint from a parent who alleged, among other things, that the District failed to implement the student's Section 504 plan while the student was assigned to a 15-day in-school suspension. 46 IDELR 21 (OCR May 11, 2005). During the 2003-04 school year, the student was enrolled in the 11th grade at the public high school. During the period of February 4, 2004 through June 4, 2004, the Student had nine disciplinary infractions, served 15 days of in-school suspension ("ISS") and 8 days of out-of-school suspension. The District's ISS policy "is a structured alternative to out-of-school suspension that gives the students the opportunity to continue their education while experiencing the consequences of their actions and decisions." Students are given a discipline packet to complete; the students also work on schoolwork, if it has been provided by their teachers. Students are responsible for gathering assignments from teachers prior to reporting to their ISS." At the time of the student's ISS, there were no policies pertaining to implementing Section 504 plans for children assigned to ISS and the ISS teacher was not aware that the student had a Section 504 plan. OCR found that the 504 plan was not being implemented and determined that the District must adopt a policy regarding the implementation of Section 504 plans for students assigned to ISS.

XVIII. Service Animals

Effective March 15, 2011, all public entities, including school districts, were required to develop or modify their policies, practices, and/or procedures, to permit the use of a service animal by an individual with a disability. A service animal is defined as:

> any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability. Other species of animals, whether wild or domestic, trained or untrained, are not service animals for the purpose of this definition. The work or tasks performed by a service animal must be directly related to the handler's disability. Examples of work or tasks include, but are not limited to, assisting individuals who are blind or have low vision with navigation and other tasks, alerting individuals who are deaf or hard of hearing to the presence of people or sounds, providing non-violent protection or rescue work, pulling a wheelchair, assisting an individual during a seizure, alerting individuals to the presence of allergens, retrieving items such as medicine or the telephone, providing physical support and assistance with balance and stability to individuals with mobility disabilities, and helping persons with psychiatric and neurological disabilities by preventing or interrupting impulsive or destructive behaviors. The crime deterrent effects of an animal's presence and the provision of emotional support, well-

being, comfort, or companionship do not constitute work or task for the purpose of this definition.

28 C.F.R. § 35.104 (defining "Service Animal")[2]; see also RSA 167-D:1, IV (defining service animal as "any dog individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability. Other species of animals, whether wild or domestic, trained or untrained, are not service animals for purposes of this definition"); RSA 167-D:2 (pertaining to duties of service animals).

The amended regulations also contain the following general rules for the use of service animals:

- Service animals must be under control of their handlers. A service animal shall have a harness, leash, or other tether, unless either the handler is unable because of a disability to use a harness, leash, or other tether, or the use of a harness, leash, or other tether would interfere with the service animal's safe, effective performance of work or tasks, in which case the service animal must be otherwise under the handler's control (e.g., voice control, signals, or other effective means).

- Public entities are not responsible for the care or supervision of a service animal.

- Public entities shall not ask about the nature or extent of a person's disability, but may make **two** inquiries to determine whether an animal qualifies as a service animal. A public entity should not ask these questions if it is patently obvious as to the role of the service animal (such as the animal that is trained to serve as a guide dog for an individual who is blind). They are as follows:

    - A public entity may ask if the animal is required because of a disability; and

[2] The regulations also require that public entities make reasonable modifications in policies, practices, or procedures to permit the use of a miniature horse by an individual with a disability if the miniature horse has been individually trained to do work or perform tasks for the benefit of the individual with a disability. In determining whether reasonable modifications to policies, practices, or procedures can be made to allow a miniature horse into a specific facility, a public entity shall consider:

- The type, size, and weight of the miniature horse and whether the facility can accommodate these features;
- Whether the handler has sufficient control of the miniature horse;
- Whether the miniature horse is housebroken; and
- Whether the miniature horse's presence in a specific facility compromises legitimate safety requirements that are necessary for safe operation.

28 C.F.R. § 35.136(I).

    - What work or task the animal has been trained to perform.

- Public entities shall not require documentation, such as proof that the animal has been certified, trained, or licensed as a service animal.

- A public entity may ask an individual with a disability to remove a service animal from the premises if:

    - The animal is out of control and the animal's handler does not take effective action to control it; or,

    - The animal is not housebroken.

- If an animal is properly removed from the premises, the public entity must give the individual with a disability the opportunity to participate in the service, program, or activity without having the service animal on the premises.

- Individuals with disabilities shall be permitted to be accompanied by their service animals in all areas of a public entity's facilities where members of the public, participants in services, programs, or invitees, as relevant, are allowed to go.

- Finally, public entities shall not ask or require an individual with a disability to pay a surcharge, even if people accompanied by pets are required to pay fees, or to comply with other requirements generally not applicable to people without pets. However, if a public entity normally charges individuals for the damage they cause, an individual with a disability may be charged for damage caused by his or her service animal.

See 28 C.F.R. § 35.136; see also RSA 167-D:4 (authorizing service animals to accompany their handlers or trainers into any place of public accommodation to which the general public is invited); RSA 167-D:1, III (defining place of public accommodation to include "any kindergarten, primary and secondary school, . . . high school, . . . or any educational institution under the supervision of the state board of education, or the commissioner of education of the state of New Hampshire").

A student with a disability may require a service animal in order to receive a FAPE, or as a "necessary aid or service under the IDEA." Thus, even if the animal is not a "service animal," under the ADA regulations, or State law, a student's IEP Team may need to meet and determine whether the presence of the animal is necessary as a supplementary aid and service in order for the child to receive FAPE.

A recent settlement agreement between a parent and school district illustrates the importance of responding to requests for service animals in a timely fashion. In

June 2014, the Delran Township (NJ) School District agreed to pay $10,000 to a parent after it prohibited her son's service dog from attending school activities. Parent filed a complaint with the U.S. Department of Justice pursuant to Title II of the ADA, alleging that the District refused to allow her son, an 8-year old student "with autism, developmental coordinator disorder and encephalopathy," to be accompanied in school by his service animal when Parent was present as the animal's handler.

In October 2012, parent informed the district that she was interested in having student be able to be accompanied by his service animal in school. The animal is "trained to perform numerous tasks directly related to the child's disabilities. For the child's autism, the service animal is trained to prevent elopement (wandering), to disrupt stimming, and to apply deep pressure to prevent or limit meltdowns. In addition, the service animal is trained to provide mobility support for the child's core body weaknesses, alert others that the child is going to have a seizure, and perform search and rescue functions in the event the child wanders off."

In response to the parent's request, the School Psychologist requested medical documentation to establish that the student needed a service animal and informed parent that the district would need to determine "whether the child is able to benefit from instruction without the service animal." Parent submitted documentation from The Children's Hospital of Philadelphia "explaining that the service animal is 'an important part of the treatment program for [the child] in all settings, school, home, and community."

Parent was then informed that the animal would only be permitted in school if it was added to the child's IEP by his IEP Team. Parent objected, indicating that she was seeking to have the service animal present under the ADA and requested a copy of the district's policy pertaining to service animals. The policy was not provided because it did not exist.

On November 5, 2012, the district informed the parent that the dog would not be considered under the IEP process, but would be considered a "general accommodation." The district asked the parent whether the dog was require due to the child's disability and what tasks the dog had been trained to perform for the child. On November 9, 2012, parent provided the district with copies of documentation pertaining to the use of the service animal.

On November 21, 2012, the district requested additional documentation, including a copy of the dog's license, veterinarian certificate, and a specific response to the questions posed on November 5.

Parent responded via email on December 19, 2012, and specifically referenced the documents that had previously been provided. Parent also formally requested access for the service dog to attend school functions when the parent was present as the dog's handler. On January 10, 2013, the district requested clarification about the circumstances in which parent was requesting access.

Parent responded on February 26, 2013, and specifically stated that she was asking to bring the dog on a class trip in April. On March 22, 2013, the district inquired whether the parent intended to ride the bus with the student and service animal, or whether she intended to transport the student and service animal separately and meet the class at the destination. The district also requested copies of documentation pertaining to the service animal.

Parent responded on March 25, 2013, indicating that she thought she had submitted all requested documentation, and that she anticipated that she and the student would ride the bus with his peers and other chaperones. The district did not respond to that letter.

On April 15, 2013, parent contacted the district pertaining to the April 18 field trip. The district responded on April 16, requesting verification that the service animal was licensed and a statement from a veterinarian that the service animal did not have a contagious disease.

Parent's advocate provided the requested documentation on April 17. That same day, the district responded, denying the request that the parent be permitted to chaperone and attend with the service dog. The "articulated reason for its refusal was that it did not have adequate time to prepare for the presence of the service animal on the bus and field trip, or to address any concerns of other students and staff." Student rode the bus with his peers and the parent drove separately with the service dog.

The service animal was not permitted to accompany student at school or at school activities during the 2012-13 school year. As a result, the "child and service animal bond was jeopardized, making implementation of his training more difficult. This made it necessary to provide some re-training of the dog over the school year. On days when the child's motor function and balance were problematic because of his disabilities, the child was required to remain home."

The Department of Justice determined that the district discriminated against the student in violation of the ADA. The district disputed the Department's findings of fact but agreed to a settlement that included:

- Modification of policies, practices, and procedures to permit the use of a service animal by an individual with a disability;
- Submit such policies to the Department for review and approval, and upon approval, adopt the policies within 15 days;
- Train staff on the updated policies and on obligations under the ADA;
- Maintain records of all service animal-related requests; and,
- Pay damages to the parent in the amount of $10,000.

See Settlement Agreement Under the Americans with Disabilities Act Between the United States of American and Delran Township School District, DJ # 204-48-284 (June 24, 2013).

XIX. Health Plans

Individual health plans may be provided to students who are not eligible for special education and related services under the IDEA, and who do not have a qualifying disability under Section 504. Health plans generally focus on addressing a specific medical need. Thus, the school nurse will play an important role in the development of a health plan.

Before creating an individual health plan, the student should be evaluated to determine if he/she is a qualified student under Section 504 or the IDEA. If the student meets the eligibility criteria under either statute, then the Team would develop an IEP or the Section 504 plan, rather than an individualized health plan.

A health plan constitutes a "mitigating measure," and therefore, the plan may not be considered by the Section 504 Team when it is making its determination as to whether a student is eligible for Section 504 accommodations. See 58 IDELR 79 (OCR 2012). In certain circumstances, a student with a Section 504 disability may not require any accommodations or services, other than a health plan. In such cases, the Section 504 plan would need to make the determination that the student has a disability under Section 504, and then develop a health plan in accord with the Section 504 procedures.

If the student has not been referred for services under Section 504, and the health plan indicates that the school will be required to administer medication to meet the student's needs, then the District should initiate the Section 504 referral and evaluation process. See Dear Colleague Letter, 58 IDELR 79 (OCR 2012).

XX. Conclusion

Although Section 504 has existed since 1973, school districts frequently struggle with regard to their compliance duties. The key to successful compliance is to remember that every child is entitled to an equal opportunity to access an education.

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