Learning from the Successes and Failures of Others

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A Word of Caution

No two cases are exactly alike. This material is designed to provide educators with a deeper understanding of recent key case law pertaining to certain aspects of the IDEA and Section 504. The decisions contained in this material may be subject to appeal. This material does not include every aspect of the law, nor does it discuss every case involving the IDEA and Section 504. 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 review a selection of recent key decisions which have been rendered in the field of special education law. This material does not cover all aspects of the Individuals with Disabilities Education Act ("IDEA") or Section 504 of the Rehabilitation Act ("Section 504"), nor does it contain a complete discussion of all recent IDEA and Section 504 cases or opinions. The goal of this material is to provide the educator with the tools necessary to interpret certain aspects of the statutory and regulatory law pertaining to the IDEA and Section 504.

II. The Philosophy Behind the IDEA

The key to understanding the IDEA lies in understanding the philosophy behind the IDEA. When Congress adopted the IDEA, it did such with the intent of ameliorating the systemic inequities that existed with regard to the education of individuals with disabilities. With the 1997 and 2004 reauthorizations of the IDEA, Congress set in law the educational concept of inclusion, by requiring that students with educational disabilities be included, to the extent possible, in the regular education classroom.

A. A "Free Appropriate Education at Public Expense"

The fundamental concept behind the IDEA is that every student is entitled to a **free appropriate education at public expense ("FAPE").** The Act does not require a school to maximize the potential of each disabled child commensurate with the opportunity provided non-disabled children. Rather, Congress sought primarily to identify and evaluate disabled children, and to provide them with access to a free public education. A School District satisfies the requirement to provide a free appropriate public education by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. The "appropriateness" standard is a floor rather than a ceiling.

1. What is a "FAPE?"

According to the definitions contained in the Act, a "free appropriate public education" consists of special education and related services that are provided at public expense, under public supervision and direction, without charge, and which meet the standard of the State Educational Agency, include an appropriate preschool, elementary school, or secondary school education, and are provided in conformity with the individualized educational program required under the Act. 20 U.S.C.A. §1401(9); Ed 1102.01(s). School districts must provide a free, appropriate public education to children with disabilities who are between the ages of 3 and 21, and who have not yet received a regular high school diploma. See e.g. Ed 1102.01(r).

2. What are "Related Services?"

The term "Related Services" means transportation and such developmental, corrective and other supportive services required to assist a child with a disability to benefit from special education. 20 U.S.C.A. §1401(26); Ed 11002.04(q). Related services include the early identification and assessment of disabling conditions in children, but do not include medical devices that are surgically implanted, or the replacement of such devices. Id. The Act sets forth numerous examples of related services, including, but not limited to, the following: interpreting services, psychological services, recreation, including therapeutic recreation, social work services, school nurse services designed to enable a child with a disability to receive a FAPE as described in the child's IEP, and medical services that are for diagnostic and evaluation purposes only. Id.

3. The "FAPE" Test

As a checklist for adequacy under the Act, school districts must ensure that instruction and services be provided at public expense and under public supervision, meet the State's educational standards, approximate the grade levels used in the State's regular education, and comport with the child's Individualized Educational Program ("IEP").

Thus, if personalized instruction is being provided with sufficient supportive services to permit the child to benefit from the instruction, and the other items on the definitional checklist are satisfied, the child is receiving a "free appropriate public education" as defined by the Act.

A court's inquiry in suits brought under the IDEA is twofold. First, has the School District complied with the procedures set forth in the Act? Second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits? The Court's inquiry is really no different than the inquiry that every teacher should make when providing instruction to a student who has been identified as having an educational disability: **Is what I'm doing reasonably calculated to enable this student to make educational progress?**

B. Reauthorization of the IDEA

The 2004 reauthorization amended most sections of the IDEA. However, the Congressional findings indicate that the concept of inclusion remains paramount. The LEA Representative is vital to ensuring that this inclusion requirement is met.

Congress found ". . . that the education of children with disabilities can be made more effective by having high expectations for such children and ensuring their access

to the general education curriculum in the regular classroom, to the maximum extent possible, in order to –

(i) meet developmental goals and, to the maximum extent possible, the challenging expectations that have been established for all children; and

(ii) to be prepared to lead productive and independent adult lives, to the maximum extent possible."

20 U.S.C. 1400(c)(5)(A)(i)-(ii) (emphasis added).

C. The State Educational Agency and the Local Educational Agency

1. The State Educational Agency (SEA)

As a condition of receiving federal IDEA funds, the State is responsible for ensuring that all children with disabilities between the ages of 3 and 21, inclusive, residing in the State receive a free, appropriate public education. 20 USC 1412(a). This responsibility is placed on the State Educational Agency, which is the "State board of education or other agency or officer primarily responsible for the State supervision of public elementary schools and secondary schools . . ." 20 USC 1401(32). The Department of Education serves as the SEA in New Hampshire. The Department of Education is responsible for ensuring IDEA compliance on a State-wide level.

2. The Local Educational Agency (LEA)

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The term "Local Educational Agency" is defined as "a public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary or secondary schools in a city, county, township, school district, or other political subdivision of a State, or for a combination of school districts or counties as are recognized in a State as an administrative agency for its public elementary schools or secondary schools." Ed 1102.03(o); 34 CFR 300.28.

The LEA is responsible for complying with the IDEA on a local level. In New Hampshire, the local school districts serve as the LEA. Thus, each school district is responsible for locating, evaluating, and identifying all eligible children with disabilities in their district. See Ed 1105.01. Once a student is identified as eligible for services under the IDEA, the local school district is responsible for ensuring that the student receives a free, appropriate public education. This is done through ensuring that the IEP team complies with the procedural components of the IDEA, as well as ensuring that the student substantively receives a free, appropriate public education.

The Local Educational Agency Representative is an integral member of the IEP Team. The LEA Representative is responsible for ensuring – at a local level – that the District is complying with the procedural and substantive requirements of the IDEA, and that students are receiving a FAPE.

a. The Local Educational Agency Representative's Role on the Multi-Disciplinary Team

The IDEA requires that the IEP Team for each child with a disability include, among other individuals,

> a representative of the public agency who:
>
> - Is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities;
>
> - Is knowledgeable about the general education curriculum; and,
>
> - Is knowledgeable about the availability of resources of the public agency.

34 C.F.R. 300.321. This individual is commonly referred to as the "Local Educational Agency Representative". The LEA Representative is a required member of the IEP Team, and therefore, must attend each IEP Team meeting.

The LEA Representative must also have the authority to commit District resources and must be able to ensure that all of the services that are described in a child's IEP will be provided by the District. See Fed. Reg. Vol. 71, No. 156 at 46670 (Aug. 14, 2006).

As the following case illustrates, the failure to have a LEA Representative at a meeting can be costly for the District.

Blount County Board of Education, 111 LRP 73137 (Ala. SEA Aug. 4, 2011).

Facts: Student was eligible for services under the IDEA. He attended and received Part C services from a private pre-school program. His teacher was certified by the State Department of Education and was supervised by a Board Certified Behavior Analyst (BCBA).

Shortly before his third birthday, a special education and referral meeting was held. A speech-pathologist, a representative from the private school, and the parent

attended the meeting. They reviewed the Student's evaluations and the speech-pathologist relayed that the District's preschool could only accommodate the student for 2 days per week, due to over-crowding. The private school provider and the parent indicated that they did not think that the District's proposal was appropriate, and suggested that the student continue in the private program. The SLP did not make a placement proposal.

Subsequently, parents informed the District that the Student would be attending the private program. Student attended that program for the next school year. The District convened a Team meeting to propose an IEP for the Student. At the parents' request, the IEP was written to provide consultative and related services for the student. The SLP agreed that the District would provide the Student with certain of those services at the private school, and with the remainder of the services to be provided in the student's home or after school hours.

At that meeting, the parent inquired about why a LEA Representative was not at the meeting; she was told that he was "cutting grass." However, that individual subsequently signed the IEP, indicating that he had participated in the meeting as the LEA Representative, despite the fact that he had not attended the meeting.

Subsequently, parents filed a request for due process, seeking reimbursement for the costs associated with their private placement, and alleging, among other things that the District committed a procedural violation of the IDEA because a LEA representative did not attend Student's Team meetings.

Held: For the parent. The Speech-Pathologist (SLP) signed into the referral meeting as the LEA and served as the LEA Representative. It was clear from the meeting minutes that the SLP did not meet the criteria to serve as a LEA Representative because she was not knowledgeable about all of the resources available in the District, however, at the subsequent IEP meeting, the lack of knowledge benefitted the parents because the SLP committed to provide the student with services at the private school.

Because the SLP had agreed – through the IEP Team process - to provide the services at the private school, the Hearing Officer found that the District was acquiescing and approving of the parental placement. Since a LEA Representative did not attend the Team meetings, the SLP was deemed to be serving as the LEA Representative and therefore, was viewed as authorized to commit the District's resources to fund the private placement.

III. Evaluations

G.J. v. Muscogee County Sch. Dist., 58 IDELR 61; 112 LRP 5561; 668 F.3d 1258 (11th Cir. 2012).

Facts: In March 2005, G.J., an elementary school-aged child with autism and brain injuries was found eligible for special education services. In April 2008, the school district sought his parents' consent to complete a triennial reevaluation. Parents refused to consent.

In May, the child's mother again refused to sign the consent form, noting "Not approved by IEP or parents until lawyers work out guidelines. MCSD cannot evaluate [G.J.] for anything." By June 3, 2008, Parents were prepared to sign the consent form with several conditions including the condition that G.J.'s evaluation be conducted by a private doctor of their choice, and the condition that the district was prohibited from using the evaluation in any subsequent proceeding without their prior written consent.

Parents requested due process, and the hearing officer found that the school district was no longer obligated to provide special education services under IDEA because the parents had refused to consent to the IDEA-mandated triennial reevaluation. The hearing officer also found that a student had a right to an independent educational evaluation at public expense only when the school district has already performed an evaluation with which the parent disagrees. Parents appealed.

Held: For the school district. A school is entitled to reevaluate a child by an expert of its choice. The parents cannot force the school to rely solely on an independent evaluation. Parents have no right to a publicly funded independent educational evaluation until there is a reevaluation with which the parents disagree. The school district could not waive in advance its right to use its reevaluation in any challenge the parents made to the IEP proposed by the school district, particularly when the parents would retain the right to use their independent educational evaluations.

Practice Pointer: Before a parent may obtain an independent educational evaluation at public expense, the district must have an opportunity to evaluate the child. Parents cannot circumvent this requirement by placing conditions on a district's evaluation, where the conditions effectively turn the district's evaluation into an independent evaluation.

The case of Lincoln County Sch. Dist. v. A.A., 39 IDELR 185 (D. Ore. May 14, 2003) illustrates the LEA's duty to evaluate students.

Facts: Student, a 16 year old who was diagnosed with anorexia nervosa, was hospitalized for a total of 31 days during his freshman year, due to emaciation that compromised his cardiovascular system. Despite high academic assessment scores, his grades gradually declined from a GPA of 3.40 from the fall semester of his seventh grade year to a GPA of 1.43 for the fall semester of his tenth grade year.

With increasing frequency during his ninth and tenth grade years, Student expressed the view that classes were irrelevant and school was a waste of time. He also began drafting "dark" writings. His teachers observed that he was withdrawn, and he had conflict with his parents, including physical altercations.

In December 2000 (his freshman year), Student's parents contacted the student's counselor to inquire about a Section 504 plan, and whether the district would provide Student with assistance. A Team met and developed a 504 Action plan that contained several accommodations.

By the middle of his sophomore year, Student was using marijuana, and by March of that same year, he had failed 2 classes, and received a D in another class. Parents requested that he be placed in the District's alternative high school, but were told that space would not be available until the start of his junior year.

In May 2001, his counselor reported to his parents that Student was overheard telling other students that it would be more humane to kill his parents with a gun, rather than with a machete.

Shortly thereafter, Student's parents withdrew him from school and enrolled him in a wilderness program. One day later, the parents informed the District that Student would probably be going to a private residential facility after he completed the wilderness program.

In November 2001, parents filed a request for due process. Parents alleged that the District failed to advise them of their rights under the IDEA. The Hearing Officer found in favor of the parents, and held that the District had denied the Student a FAPE. As a result, the District was ordered to reimburse the parents for the costs associated with their unilateral placements. The District appealed this decision.

Held: For the parent. The Court found that the District had reason to suspect, and reasonably should have suspected, that the student had a disability, because the student was in recovery from anorexia, which had historically impacted his educational success. In addition, the District should have suspected that the Student required services under the IDEA because it was already providing services to the Student under Section 504. Moreover, the Court faulted the District for failing to provide the parent with notice of the Student's IDEA rights. The Court affirmed the Hearing Officer's decision that the parents were entitled to reimbursement due to the District's denial of a FAPE.

IV. Provision of a Free, Appropriate Public Education

In *D.B. v. Esposito, et al.*, 58 IDELR 181, 2012 U.S. App. LEXIS 6099 (1st Cir. March 23, 2012), the First Circuit discussed the standard of review for determining whether a school district has offered FAPE.[1]

Facts: D.B. is a disabled child who lives with his parents in Sutton, Massachusetts. From 1999 until 2005, D.B. was a student enrolled in the Sutton public school system. In 2005, dissatisfied with the educational services D.B. was receiving, his parents removed him from the Sutton public schools and enrolled him in the Lindamood-Bell Learning Center. The Sutton schools responded by seeking a determination from the independent hearing officer of the Massachusetts Bureau of Special Education Appeals that it had complied with the IDEA. D.B. and his parents sought reimbursement for the costs of D.B.'s private education.

The hearing officer ruled for the Sutton school system and the parents filed a law suit in Massachusetts State Court which was later removed to the United States District Court. The District Court upheld the hearing officer's decision on summary judgment and the parents appealed to the First Circuit Court of Appeals.

D.B. has a significant disability which affects not only his speech, but his expressive and receptive communication, reading focus and overall cognition. D.B. received early intervention services from infancy until he entered the Sutton public school system in the fall of 1999, whereupon he received his first annual IEP. The progress made by D.B. was slow and despite making some developmental progress, as the court indicated "D.B. still lagged far behind his classmates in important ways. The areas of deficit included toileting skills and the inability to cultivate foreign language skills, comparable to those of his classmates. Subsequent evaluations of D.B. produced recommendations that he "was a good candidate for a multi-sensory, structured learning program . . ." It was against this backdrop that the First Circuit Court of Appeal heard this case.

Held: For the district. The First Circuit's decision addresses two major areas of the law. First, it discusses the First Circuit standard for FAPE. Second, it addresses the circumstances under which a parent may maintain a Section 504 claim for money damages.

The court's opinion opens by addressing the legal issue as to how one should assess the educational benefit of a child's IEP. The court's analysis endorses the Third Circuit's position that "[t]he educational benefit of a child's IEP 'must be gauged in relation to the child's potential.'" The court affirms the Third Circuit's general statement of the law, but goes on to note that "Developmental disability takes many forms, however. It is not always feasible to determine a disabled child's potential for learning

[1] This case is also discussed in Section VIII (P), IDEA Actions Recast Under Section 504.

and self-sufficiency with any precision, particularly where the child's disability significantly impairs his or her capacity for communication."

The court observes that, "[i]n that situation, even without a complete understanding of the upper limits of the child's abilities, there can still be an assessment of the likelihood that the IEP will confer a meaningful educational benefit by measurably advancing the child toward the goal of increased learning and independence. If an IEP is reasonably calculated to confer such a benefit, it complies with the IDEA."

The court next discusses the circumstance where a child's potential might be unknowable, observing, "[f]or example, if a child's potential is unknowable, his or her IEP still could be reasonably calculated to confer a meaningful educational benefit if it is closely modeled on a previous IEP pursuant to which the child made appreciable progress." In its analysis, the court suggests that while a child's needs change over time, "if the two IEPs are substantially similar in design, that similarity provides a reasonable basis for assessing the likelihood of future progress."

After discussing the legal question of determining meaningful educational benefit, the court addresses the factual question of whether the District Court erred in finding that D.B.'s potential was "unknowable." The First Circuit finds sufficient evidence from expert evaluators such that "It was very difficult. . .to gauge [D.B.'s] potential in terms of his language skills," as indicators that the District Court did err in reaching the finding.

Finally, the court looks to the mixed question of law and fact as to whether or not the 2005 IEP complied with the IDEA because it was reasonably calculated to confer a meaningful educational benefit. The court affirms the process whereby "The District Court also looked to D.B.'s progress under his previous IEPs and 'agree[d] with the IHO that this progress, even if less than optimal, was likely to continue under the new IEP and would have been sufficient to satisfy the IDEA."

A. IEP Implementation

As mentioned in the Overview, the IDEA requires that each District provide a free appropriate public education to all children with disabilities residing in the District. This duty includes developing and implementing an individualized education program for each such child, as well as participating in the review and revision of the individualized education programs. The LEA Representative is responsible for ensuring that the IEPs can be implemented. As the following case illustrates, it is the failure on the part of a District to implement its own plan that frequently causes the most problems.

Berkshire Hills Regional Sch. Dist., 38 IDELR 282 (SEA Mass. 2003)

Facts: The parents of an autistic first-grader agreed to an IEP that provided that the student be placed in a separate small class (6-8 students) for first grade, with

inclusive settings for lunch, recess and specials. The District could only place three children in the class, including the student. The parents and the District agreed to a new IEP, which opened the small class to second graders. However, the parents and district did not agree whether the classroom would be comprised of the same group of students. Parents believed that the class would be comprised of a consistent group of children, while the District believed that the group did not need to be comprised of the same students each day. Parents requested due process, alleging denial of FAPE.

Ruling: The hearing officer found that by only having 3 students in the classroom, the District failed to fully implement the first IEP. However, the hearing officer was not able to determine the educational implications, if any, of the district's failure to provide the student with a classroom without the number of students required by the IEP. The hearing officer found that the second IEP was ambiguous and therefore could not make a finding as to whether the district complied with that IEP.

Key Concepts:

- The District must implement the special education program and related services required each IEP.

- This case also illustrates the importance of communication with parents during the creation and modification of IEPs.

B. Parental Participation in Team Meetings

The case of *Belvidere Community Unit School District No. 100*. 112 LRP 12955, (Ill. State Educational Agency (SEA), Feb. 27, 2012) involved a parent's request for accommodations at a Team meeting.

Facts: Parents of a student with an educational disability filed a request for due process, in which they alleged, in part that the district prohibited the parents from meaningfully participating in IEP meetings and evaluations.

The child's mother asserted that, due to her ADHD and dyslexia, she required assistance to understand and actively participate in the IEP process. She requested, through her advocate and husband, the use of a tape recorder at Team meetings so that she could review the meeting at her own pace after it was ended in order to better understand and formulate questions and express concerns pertaining to the recommendations being made at the meeting.

The District objected on the grounds that recording the IEP meeting would run afoul of an Illinois eavesdropping statute and that recording would have a chilling effect on open communication between the parties. The District offered instead to provide an independent advocate through a local service agency at no cost to the parent.

Issue: Whether a school district must provide tape recordings of IEP meetings for an ADHD-dyslexic disabled parent.

Held: For the district. The Hearing Officer noted that neither the IDEA nor its implementing regulations authorized the recording of IEP meetings, or required a school district to permit recording. Thus, a State Educational Agency or a public agency has the option to require, prohibit, limit, or otherwise regulate the use of recording devices at IEP meetings.

The School District's offer of accommodation to the Parents through an independent advocate at no cost to the Parent was considered a "reasonable accommodation." *See Kaskaskia (IL) Special Educ. Dist. 801*, 16 IDELR 132 (OCR 9/15/89). The District is not required to allow tape recording of an IEP meeting absent mutual agreement of both Parents and the individual IEP team members.

C. The LEA's Duty to Convene a Team Meeting

The IEP is a document that may only be modified in a Team setting. However, when making changes to an IEP after the annual IEP Team meeting, the parent and the LEA may agree not to convene a Team meeting for purposes of making the changes, and instead may develop a written document to amend or modify the current IEP. 34 C.F.R. § 300.324(a)(4)(i). However, Districts do not have the latitude to unilaterally alter an IEP.

Penn-Tyrone Area School District, 31 IDELR 20 (March 22, 1999)

Facts: An eight-year-old student with mental retardation and speech and language impairment had attended District's alternative school since kindergarten. The state Special Education Bureau found that the school was not age appropriate. The District then prepared a new IEP, without convening the team and without parental participation, which transferred student to another alternate regular school. District claimed it did not include parents because it knew they opposed transfer and that "no meaningful benefit" would be obtained from holding an IEP team meeting.

Ruling: Court declared the IEP a "nullity." District had to convene an IEP team meeting and start anew.

District of Columbia Public Schools, 8 ECLPR 85 (D.C. SEA Jan. 2, 2011).

Facts: Student was eligible for services under the IDEA due to autism. Beginning with the 2009-2010 school year, he began attending his local neighborhood public school, in the autism program. He began the school year with a dedicated aide, who was assigned to him by the "Office of the State Superintendent of Education's Autism Division" ("OSS"); however, the student's IEPs were not amended to reflect the addition of the 1:1 aide. In February 2010, OSS stopped providing the student with a 1:1 aide.

The District did not convene a meeting, did not provide the parent with prior written notice, and did not discuss the removal of the aide with the parent.

Prior to and during the 2009-2010 school year, the parent obtained several independent evaluations; all of the evaluators opined that the student required a dedicated 1:1 aide to participate in all activities.

In March 2010, the District convened an IEP meeting to develop the Student's annual IEP. The District's IEP did not include a provision for a dedicated 1:1 aide. Parent disagreed with the IEP and requested due process.

Held: For the parent. The District committed several procedural errors, and also substantively denied the Student a FAPE. First, the LEA should have ensured that the Student's IEP accurately reflected that the student received the support services of a dedicated aide. The Hearing Officer found that it did not matter that the 1:1 aide was provided by OSS, and not by the District. The Student was receiving the 1:1 assistance in school, and his IEP should have been amended to reflect the 1:1 aide.

Second, the LEA failed to ensure that the parent received prior written notice of the proposal to remove the dedicated aide from the student's educational program. Districts cannot change a student's educational program without first providing the parents with prior written notice.

Third, the Hearing Officer found that the evidence demonstrated that the student required a 1:1 aide to receive a FAPE, and therefore, the procedural violations resulted in a denial of FAPE to the student. As a result, the Student was denied a FAPE and was entitled to compensatory educational services (10 months of a dedicated aide).

Hunter College (NY) Campus Schools, 49 IDELR 18 (OCR Jan. 31, 2007).

Facts: Student was accepted to the Hunter College School, a school for academically gifted students, for the 2002-03 school year (kindergarten). At the end of the 2003-04 school year, student was referred for an evaluation and was ultimately found to have a learning disability. The Hunter School did not participate in the evaluation or eligibility process.

During the 2004-05 school year, student continued to have academic difficulty. In December 2005, the school Principal met with the parent and informed her that because of the Student's academic difficulties, Student would not be allowed to return for the 2006-07 school year (she was permitted to remain for the remainder of the 2005-06 school year).

In February 2006, parents wrote to the School principal and requested a Team meeting to discuss and implement appropriate accommodations for the Student. In

March, the Principal responded to the parent, reiterating that the Student would not be permitted to return to the school in the fall. She did not respond to the request for a meeting.

The parent wrote a second letter, requesting that the School provide accommodations and allow the Student to remain at the School with those accommodations in place. The principal responded by confirming that the Student would not be allowed to enroll in the fall.

Parent filed a complaint with OCR, alleging that the District discriminated against the student on the basis of disability by denying the student re-enrollment for the 2006-07 school year.

Held: For the parent. The School was aware that the parent had requested accommodations, and had notice that the Student might be in need of special education or related services under Section 504. Instead of convening a meeting, the Principal unilaterally decided to terminate the Student. The decision to terminate the Student also constituted a unilateral placement decision, since the Student would be required to attend a different program in a different school. Thus, prior to changing the placement, the Principal should have convened a meeting to determine whether the Student could be educated at the School with accommodations.

The School agreed to a resolution agreement, pursuant to which it was required to develop and amend its procedures for Section 504. The School was also required to convene a meeting to determine whether the Student could attend the School with accommodations, and if so, then the School was ordered to reenroll the Student.

Key Concept:

- Never permit unilateral deviation from an IEP. IEPs may only be modified by the Team at a meeting or, if the parents and the district have agreed in writing, the Team may, in lieu of convening a meeting, develop a written document to amend or modify a child's current IEP. 20 U.S.C. § 1414(d).

D. The Duty to Continue with the IDEA Process During Certain Disputes

Letter to Watson, 48 IDELR 284 (OSEP April 12, 2007).

Facts: A parent filed a request for due process, alleging that the District violated the IDEA by refusing to convene a meeting for the annual review of a student's IEP. The District refused to convene a meeting because the parties were involved in administrative and judicial proceedings about the prior IEP.

The District wrote to the Office of Special Education Programs ("OSEP") and inquired whether the IDEA required the IEP team to review and revise a student's present levels of performance and to develop new goals during the pendency of a judicial proceeding.

Opinion: The IDEA provides that during the pendency of any administrative or judicial proceeding regarding a due process complaint, unless the LEA and the parents agree otherwise, the child must remain in his or her current educational placement. The State and its public agencies must ensure that a free appropriate public education is made available to a child while the proceedings are pending. The IDEA does not relieve the LEA of its responsibility to convene Team meetings to review and revise the student's IEP, even if the District is required to maintain the child's current educational placement while the proceedings are pending.

The District also has a duty to maintain a student's "stay put" placement during the pendency of a dispute. When the placement is in a private facility, or for home bound services, the District must continue to fund those placements. T.H. v. Board of Education of Palatine Community Consolidated School District 15, 1998 U.S. Dist. LEXIS 19110, 29 IDELR 471 (N.D. Ill. Dec. 3, 1998).

E. The Duty to Document IEP Implementation

Districts have an absolute duty to maintain contemporaneous written documentation that the services, accommodations, and modifications contained in a child's IEP are delivered to the Student. Letter to Brousaides, 56 IDELR 108 (OSEP June 9, 2010); see also Ed 1109.06(a) (The LEA is responsible for developing and implementing procedures designed to monitor that all IEPS are implemented).

F. The Impact of Bullying on the Receipt of a FAPE

Clark County Sch. Dist., 112 LRP 27516 (Nev. SEA May 11, 2012).

Facts: At the time of the events at issue in this case, the student was a fifth grade student in an elementary school in the Clark County School District. The student was eligible to receive special education services under the IDEA due to a diagnosis of autism. Prior to 2011, student had been transported to and from school on a special education bus. In 2011, the District and parent agreed to transport the student in the general education bus, with specific accommodations. One of those accommodations included requiring that the student sit at the front of the bus, close to the bus driver. Parent was apprehensive about the transition to the general education bus, and there was discussion about the student returning to the other bus if the general bus did not work out.

On January 17, 2012, the student was allegedly attacked on the school bus on the way home from school. A first grader allegedly hit student on the head with a lunch

box filled with ice. The district investigated, but was unable to find any witnesses to the incident. The bus driver did not witness or report any incident involving the student on that date. The parent took the student to the hospital the following day, and the emergency room doctor prescribed no gym class for two weeks due to a head injury. Parent also received hospital discharge instructions pertaining to a head injury and a concussion.

At some point between January 17, 2012 and February 6, 2012, the transportation operations manager told parent that the student might be able to return to the special education bus. On January 24, 2012, the transportation nurse sent an e-mail informing the school nurse that the transportation operations manager had expressed willingness to resume curb to curb transportation service for student. On January 30, 2012, the school nurse sent an e-mail to the transportation nurse expressing the District's opposition to the parent's desire to return the student to the special education bus.

On February 6, 2012 at an IEP team meeting, the student's IEP was modified to include a "buddy provision." The transportation nurse suggested this modification, which would provide the student with a peer "buddy" on the bus.

On February 9, 2012, the bus driver wrote an incident report relating in part to the student's unhappiness with being required to sit in the front of the bus when his bus buddy had decided to sit in the back of the bus. On February 13, 2012, the assistant principal observed the student moving to the back of the bus with his bus buddy; he reminded the bus driver that the student was required to sit in the front of the bus.

On February 13, 2012, parent alleged that a second incident of bullying occurred. Parent alleged that student received bruising to his right side in the area of his rib cage. The bus driver denied witnessing student being attacked on the bus. The District was once again unable to verify that a bullying incident had occurred. The investigator visited the student at home, and was shown the area of student's alleged injury, but did not see any marks. Parent withdrew the student from school following the alleged bullying incident, and enrolled him in a private school.

Issues:

1) Has the student been a victim of bullying; and

2) Did the bullying result in a denial of FAPE?

Held: For the District. The hearing officer found that some bullying may have occurred, as there was reference to a possible instance of bullying by the student's fifth grade teacher. However, that incident did not occur on the school bus. In addition, the District investigated the incident and took steps to resolve the matter. The allegations of

bullying that occurred on the bus were unverified by the District. In addition, even if those incidents did constitute bullying, they did not result in a denial of a FAPE to the student.

The Hearing Officer noted that "Bullying results in the denial of FAPE only where the abuse is so severe that the child can derive no benefit from the services offered by the school district." The Hearing Officer found that there was no evidence that the bullying incidents had any effect on the student's education. To the extent that the student received low grades, those were the result of a change in grading standards, difficulty that the student had with his teacher, and a high number of absences.

The Hearing Officer also noted that the District took steps to address the issues that the parents alleged were occurring on the bus, by implementing a buddy plan. However, the parent withdrew the student before the student had the opportunity to implement that plan for any length of time. The Hearing Officer noted that the parents' removal of student from school immediately following the school bus incident of February 13, 2012, resulted in a failure to provide the District with the opportunity to modify Student's transportation plan. The transportation nurse testified to the District's willingness to re-evaluate the plan. . . but District was never given this opportunity."

G. Transition Services and the Least Restrictive Environment

The Office of Special Education Programs ("OSEP") was recently asked to opine with regard to several questions pertaining to transition services, including whether the least restrictive environment requirements ("LRE") of the IDEA applied to "transition work placements." OSEP responded as follows:

1. Is the IEP Team required to include work placement in a transition-age student's IEP? No. The IDEA does not require a specific service, placement, or course of study; instead, those decisions are left to the IEP Team. Transition services "are defined broadly and include a range of services, including vocational and career training that are needed to meet the individual needs of a child with a disability. Work placement can be an appropriate transition service, depending on the individual needs of a student, but it is not a required component of all IEPs that address transition services. If an IEP team determines that work placement is an appropriate transition service for a child, it must be included in the child's IEP.

2. Is the IEP Team required to provide parents with 'notice of placement' when determining a student's work placement? "If the work placement is included in a student's IEP, it becomes part of the student's educational program and part of the provision of FAPE to the student. If a public agency is proposing or refusing to initiate or change a work

placement that is part of a child's transition services, the public agency would be required to provide the parent with written notice of the proposal, a reasonable time before the proposed placement is initiated or changed. Therefore, initiating or changing a child's work placement that is part of the child's IEP would require" written prior notice.

3. Can segregated work be considered an appropriate outcome, particularly with appropriate assessment in a LRE before such a placement occurs? The IDEA does not prohibit segregated employment, but LRE provisions apply equally to the employment portion of the student's program and placement.

4. Is the LEA required to provide supplementary aids and services to allow the student to participate in the least restrictive work placement possible? When an IEP Team includes a work placement as part of the student's transition services, the IEP team must consider and include in the IEP, as appropriate, any supplementary aids and services needed to enable the student to participate with other students with disabilities and nondisabled students in the work placement described in the IEP. The LEA must provide any supplementary aids and services that are identified in the IEP.

See Letter to Spitzer-Resnick, Swedeen, and Pugh, 112 LRP 32664 (OSEP June 22, 2012).

V. Placement

Plainville Board of Education v. R.N., 58 IDELR 257; 112 LRP 16721, 2012 U.S. Dist. LEXIS 46995 (D. Conn. Mar. 31, 2012).

Facts: Student was diagnosed with child onset bipolar disorder in second grade (2003). He was placed in special education in February 2004, under the category of emotional disturbance. Despite the services provided to him, Student had a suspension and a psychiatric hospital stay during the 2004-2005 school year.

Student was diagnosed with ADHD in the fall of 2005, and his condition seemed to deteriorate between December 2005 and January 2006. Student's mother retained a neuropsychologist, who recommended that Student be placed in a therapeutic school until his condition stabilized. In March 2006, Student was placed by the IEP team at a therapeutic day school. He displayed verbally and physically abusive behavior towards staff at first, but his behavior improved over time. During 2005 and 2006, the district attempted to get a release from Student's mother to speak with Student's private care providers. The mother granted limited releases and declined the Board's request for an evaluation by a doctor of the Board's own choosing. Parent complained about

disciplinary practices at Student's placement, including locking Student in a timeout room with concrete walls when Student had a tendency to bang his head, and forcing Student to clean up his bodily fluids if he released them in the timeout room.

In January 2007, Student received a triennial evaluation. In April 2007, the IEP team met to review the results of the triennial evaluation. Parent requested an independent neuropsychological exam. The district agreed, but its director of special education objected to testing on the basis that Student disliked being tested. In May 2007, the team did an annual review, and agreed to change Student's disability to Other Health Impaired rather than Serious Emotional Disturbance. The team also found that Student had not mastered any goals or objectives listed in IEP and had only made minimal progress on many of them.

During the 2007-2008 school year, Student had problems with some of his new teacher's policies, including strictly enforced discipline for incomplete homework. His behavior escalated in September 2007, causing him to be sent to the emergency room and leading Parent to request a new placement. Student received one to two hours per day of homebound instruction while Parent investigated a new placement.

After a three week intake process, the district ultimately agreed to place Student at the Intensive Education Academy. Student continued to not make significant progress there, and was hospitalized twice. After the first hospitalization, the IEP was changed to provide for 30.75 school hours per week, but from January to May 2008, Student received no instruction in science, social studies, or specials, and he was dismissed at 11am. His counseling and services were reduced, and he did not receive homebound instruction. In June 2008, Student was suspended and then discharged due to safety concerns after he struck two staff members.

The IEP team met soon after to discuss alternative placements. Parent wanted residential placement. The district wanted a day placement with a summer ESY at a school that used restraint and seclusion, which did not appeal to Parent. Parent rejected school's recommended placement and subsequently requested placement at a residential school that provided year-round special education and therapeutic treatment. The district disagreed that residential placement was necessary and recommended a diagnostic placement at a clinical day school.

The Parent rejected this placement offer. In September 2008, Parent wrote to the district indicating that she intended to enroll Student in her chosen residential placement. Student seemed to be making academic progress at his residential placement, had not missed any school days since his enrollment, and had not been physically restrained.

Parent filed a request for due process, seeking reimbursement for the costs associated with the residential placement. The hearing officer found that the district

failed to provide a FAPE to Student during 2007-08 and 2008-09 school years and that it had to reimburse Student's parents for the cost of his attendance at a private residential school during the 2008-09 school year. The district appealed.

Issue: Whether the hearing officer erred in granting Parent reimbursement for Student's placement at the residential school.

Held: The court found for the parent, and upheld the hearing officer's decision. The court noted that whether a parent is entitled to reimbursement involves a three-step inquiry. First, the court asks whether the public agency has complied with IDEA's procedures. Second, it considers whether the IEP developed through IDEA's procedures is reasonably calculated to enable the child to receive educational benefits. If the IEP is procedurally or substantively deficient, it asks whether the private schooling obtained by the parents is appropriate to the child's needs.

Here, the district committed two procedural violations – it failed to provide adequate notice of its proposed evaluations and it failed to consider Parent's independent educational evaluations. Thus, the district's IEP was not reasonably calculated to provide the child with educational benefit.

The court noted that the student's educational programs for the 2007-08 and 2008-09 school years were not appropriate. In 2007-08, Student had to be forcibly brought to school every day, and had sufficient trouble in school to alert the district that the placement was inappropriate. Student only received one to two hours per day of homebound tutoring with no other services in September and October of 2007. After January 2008, Student returned to school for two hour academic days with no additional services, which was not sufficient to provide Student with a reasonable chance of making academic progress, particularly in light of the 30.75 hours per week he was supposed to receive per his IEP. Nor did Student receive the ESY services he was supposed to during summer 2008 to make up for this deficiency. Although the district made efforts to help Student, the court found that the measures taken were simply stopgaps designed to manage his behavior rather than provide him with educational benefit.

During the 2008-2009 school year, the district never developed an IEP. The court rejected the district's argument that it failed to do such because the parent refused to consent to an evaluation, noting the refusal to consent did not insulate the District from liability, for two reasons. First, the district did not give Parent sufficient information on which to base informed consent for an evaluation (the doctor's credentials were given very generally). Second, the district, which already had extensive information on Student's condition, did not identify any relevant new information that would be discovered through another evaluation.

Finally, the court found that the parent's placement was appropriate. The record reflected that Student made significant progress there. He was able to attend classes for full days. He required a residential placement because he had difficulty making transitions and needed therapeutic intervention throughout the day.

J.P. vs. New York City Dept. of Educ., 58 IDELR 96, 112 LRP 6150, 2012 U.S. Dist. LEXIS 12762 (E.D.N.Y. 2012).

Facts: At the start of the 2008-09 school year, the student was a 12-year-old boy with an emotional disturbance. He had been receiving special education services since preschool, and from kindergarten through sixth grade, he attended a small, private special education school. During that time period, his class sizes ranged from 6 to 11 students.

In February 2008, parents began considering 4 private schools that the private school had recommended the student attend during the 2008-09 school year. In February 2008, parents enrolled the student in one of the 4 placements suggested by the private school.

In March 2008, the student's IEP Team met to develop an IEP for the 2008-09 school year. The Team developed an IEP that recommended:

1) A special class within a community school with a ratio of 12 students to 1 teacher and 1 paraprofessional (12:1:1);
2) Individual and group counseling in a group of 3 two times per week;
3) Speech/language therapy twice per week in a group of 3.

The IEP also contained goals to address difficulties with reading, writing, receptive and expressive language skills, math word problems, and emotional issues.

During that meeting, the parents indicated that they had found a possible placement for the student. The District did not agree with that program, on the basis that it would be "almost impossible or very difficult for [J.P.] to function in a less restrictive environment than what they recommended because of his academic and emotional difficulties." The District informed the parent that it would contact her with its recommended placement.

Before receiving a placement offer from the district, the parents made two payments to the private school they had previously located. By July 1, 2008, they had paid for over half of the tuition for the 2008-09 school year.

On August 13, 2008, the district informed the parent that the student was going to be placed at "Life Sciences Secondary School," in a 12:1:1 class. Parents indicated that they would visit the school, but that J.P. would be starting the year at the private

school they had located. After vising the placement, the parents informed the district that they did not agree with the placement because the students in J.P.'s class were lower functioning than J.P. and the program was too restrictive. Parents indicated that they would seek reimbursement for their unilateral placement.

Parents requested due process, and the hearing officer ordered reimbursement. The district appealed and the State review officer reversed, finding that the district had offered the student a FAPE in the least restrictive environment. As a result, parents were not entitled to reimbursement for their unilateral private placement. Parents' appealed.

Held: The school district provided the child with a FAPE. The court rejected the parents argument that the district's placement was not the least restrictive environment for J.P., noting that J.P.'s recommended placement was in a therapeutic special education setting. The reports indicated that he required a lot of attention from his teacher to negotiate his social interactions and needed to be reminded not to disrupt the class and to raise his hand to answer questions. Everyone on the team, including the parents, agreed that a general education setting was not appropriate for the student, and that he required a more restrictive environment. Thus, the parents were not entitled to reimbursement.

The court went on to note, that even if the parents had established that the district had denied a FAPE, that their request for reimbursement would have been denied on equitable grounds. The court found that the parents never intended to enroll J.P. in a public school and did not participate in good faith in the IEP process. The court noted that parents "attitude as an observer in the process rather than an active participant displays an utter lack of good faith. The record suggests that plaintiffs were attempting to game the system and obtain reimbursement for their son's private school education."

Furthermore, because the mother failed to express any misgiving about the school district's placing her son in a special education setting during the IEP process, the court found that the student's parents were trying to game the system and force the school district to pay for a private education that the son did not actually need under the IDEA.

VI. Refusal of Services

Lamkin v. Lone Jack C-6 Sch. Dist., 58 IDELR 197, 112 LRP 13571. (W.D. Mo. Mar. 1, 2012).

Facts: Plaintiff A.M. had severe physical disabilities as a result of a seizure and bleeding on the left side of her brain when she was two days old. In Spring of 2011, her parents told the District that A.M. needed to transition from the private preschool that

she had been attending because she was aging out of that program. However, the district did not plan for her transition to an age-appropriate educational program.

On August 23, 2011, the District held an IEP meeting with Parents, and informed Parents that it believed A.M. should be placed in the "Missouri State School for the Severely Handicapped." Plaintiffs were displeased with this, and on September 2, Mother emailed a District official informing him that Mother withdrew consent for A.M. to receive IDEA services, and requested that the District provide A.M. accommodations under Section 504 of the Rehabilitation Act of 1973.

The official informed Mother that the District would not provide 504 accommodations because Mother had rejected IDEA services. Mother enrolled A.M. into District as a regular student and again requested 504 accommodations; her request was denied. On October 3, 2011, District allowed A.M. to attend school as a regular student (after allegedly placing a call to the Missouri Children's division for educational neglect).

Parents filed a complaint on October 19, 2011 alleging violation of 504, violation of Title II of the ADA, and claims under 1983 for procedural due process violations. Plaintiffs allege that Defendants subjected A.M. to discrimination on the basis of her disabilities and that Defendants interfered with the Parents' right to make decisions regarding A.M's upbringing and education. Parents filed a motion for preliminary injunction. Defendants filed a motion for summary judgment on the theory that Plaintiffs had not met the exhaustion requirement of IDEA.

Issues:

1) May parents sue under 504 and the ADA without exhausting their administrative remedies if parent has withdrawn consent for Child to receive IDEA services?

2) Must a District provide 504 accommodations after a parent has withdrawn consent for Child to receive IDEA services?

Held: For the district.

1) The IDEA's exhaustion requirement applies equally to relief available under other statutes if the relief sought under those statutes would also be available under the IDEA. There are three exceptions to the exhaustion requirement: 1) futility; 2) the failure of administrative remedies to provide adequate relief; and 3) the establishment of an agency policy or practice of general applicability that is contrary to law. A parent may not bypass the IDEA's administrative procedures by voluntarily revoking consent under the IDEA and then recasting their grievances under 504 and the ADA.

2) Recent amendments to the IDEA regulations provide that "[o]nce a parent revokes consent for a child to receive special education and related services, the child is considered a general education student…[After revocation], a teacher is not required to provide the previously identified IEP accommodations in the general education environment, …[and the child] should be treated the same as all other general education students in that classroom." Cmt. To the Regulation, 73 Fed. Reg. 73006, at 73011-73013 (Dec. 1, 2008). By rejecting the services developed under the IDEA, the parent essentially rejected what would be offered under Section 504.

VII. Admission of Additional Evidence on Appeal

Pass v. Rollinsford Sch. Dist., 57 IDELR 221, 2011 U.S. Dist. LEXIS 116770 (D.N.H. Oct. 7 2011).

Facts: Plaintiff, the older sister and guardian of a student with an educational disability under the IDEA, filed a request for due process, seeking reimbursement for the costs associated with the unilateral placement of the student in two private educational programs. The hearing officer found in favor of the District, and the guardian appealed.

The guardian filed a motion for an evidentiary hearing to introduce additional evidence into the administrative record. The evidence that the parent sought to introduce pertained to the student's recent performance at one of the private placements. The District objected.

Issue: Is evidence of the student's post-hearing progress at a private school admissible?

Held: For the guardian. The court found that the evidence of the student's progress and performance at the school was relevant and not cumulative of evidence already in the record. The court noted that the IDEA provides that a district court "shall hear additional evidence at the request of a party," but that the right to submit additional evidence is not automatic. The court noted that a person seeking to introduce additional evidence must provide a "solid justification for doing so." Generally, the court will "exclude evidence that merely repeats or embellishes evidence already in the administrative record."

However, "evidence concerning relevant events occurring subsequent to the administrative hearing may appropriately be used to supplement the record." The court found that the additional evidence that the plaintiff sought to introduce pertained to the student's progress and performance at the school, after the hearing had concluded.

The court found that the evidence was potentially relevant to the appropriateness of the District's proposed IEP and the plaintiff's unilateral placement. The court noted that the additional evidence would not simply repeat or embellish material already in the record. The court indicated that at the time of the hearing, the student had only been in the private school for a few weeks. Thus, evidence of her progress and performance at the school for the additional five months "may provide a more complete and accurate portrayal of the comparative advantages offered by that placement."

VIII. Section 504

A. 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."

1. 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."

(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.

2. Impact on School Districts and Children

The revisions to the definitions, which are explicitly made applicable to the Rehabilitation Act, will likely have an impact on disability determinations. The determination of whether a student has a disability under Section 504 will still involve 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.

However, the nuances of those inquiries expanded as of January 1, 2009. For example, the definition of major life activities now includes (among other items): eating, sleeping, standing, lifting, bending, reading, concentrating, thinking, and communicating.

Although the term "substantially limits" is not defined, we do know that Congress intended for it to be interpreted without regard to the impact of mitigating measures (except for eyeglasses and contact lenses) and that Congress rejected the interpretation that a substantial limitation must "preven[t] or severely restrict[t] [an] individual from" performing a major life activity. Thus, a child with a visual impairment that substantially limits the child's ability to read may be a child with a disability under Section 504 and the ADA, regardless of whether low vision devices ameliorate the impact of the child's impairment.

Although not set forth in the Act, low vision devices include: magnifying devices, closed circuit television, large print items, instruments that provide voice instruction or information (computers, clocks, timers, calculators, scales, key chains), and larger, illuminated watches and clocks, writing guides. See American Optometric Association, http://www.aoa.org/x5247.xml (accessed Nov. 28, 2011).

B. 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).

1. Defining FAPE

a. 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).

b. 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).

2. 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.

3. 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.

C. 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).

D. 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.

1. 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/newhorizons/Exceptional%20Learners/Law/hayes.htm (accessed Feb. 12, 2013).

2. 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).

3. 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 Feb. 5, 2013).

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.

4. 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.

E. 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.

1. 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.

2. 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.

3. 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.

F. 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.

G. 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.

H. 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.

1. 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).

2. 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).

I. Review and Revaluation

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.

J. 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.

K. 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.

L. 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.

M. 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.

1. 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.

2. "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).

a. 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).

b. 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.

c. 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: There is no specific requirement under Section 504 that a district provide services such as occupational or physical therapy services. However, such 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).

i. 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).

3. 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.

a. 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).

[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.

b. 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:

- 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).

c. 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.

d. 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.

e. 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).

f. 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).

g. 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").

i. 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.

h. 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).

i. 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.

j. 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).

4. 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"

N. 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).

O. Procedural Requirements Under Section 504

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

1. 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.

2. 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.

3. 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 student, 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.

4. 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.

5. 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.

6. Annual Notification

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

7. 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.

8. 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. OCRs 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.

9. 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 IDEIA remedies, filing suit in federal court.

P. Recent Decisions

1. IDEA Actions Recast Under Section 504

In *D.B. v. Esposito*, 2012 US App. LEXIS 6099 (1st Cir. March 23, 2012), the First Circuit Court of Appeals dealt with the continuing question as to whether an IDEA based case can give rise to discrimination claims under Section 504 and, civil rights claims under Section 1983 and retaliation claims under the Rehabilitation Act and Title V of the ADA.

The court commenced its analysis by affirming the general principal of "exhaustion." Observing "Like an IDEA claim, a non-IDEA claim that seeks relief also available under the IDEA must be exhausted administratively through the IDEA's due process hearing procedures before it can be brought in a civil action in state or federal court." In analyzing the issue, the First Circuit noted that "Because the IDEA is 'simply not an anti-discrimination statute,' (citations omitted), a discrimination claim under the Rehabilitation Act or the ADA involving a denial of a FAPE is not co-extensive with an IDEA claim. (citations omitted). To prevail on an IDEA claim, a plaintiff must show that he or she has a qualifying disability and has been denied a FAPE. To prevail on a discrimination claim under the Rehabilitation Act or the ADA involving a denial of a FAPE, a plaintiff must make an additional showing that the denial resulted from a disability-based animus. (citations omitted)"

As the court turned to the retaliation claims, it observed that "[c]ompliance with the IDEA does not necessarily disprove a claim under the Rehabilitation Act or the ADA that a school system retaliated against a disabled student, or the student's family, for advocating on behalf of the student's right to be free from disability-based discrimination in the provision of a FAPE." The court also observed that: "However, in the face of a school system's compliance with the IDEA, as in this case, a plaintiff who asserts that the content of an IEP or the conduct of an IEP process was retaliatory must show evidence of something more than a disappointing IEP or the predictable back-and-forth associated with the IEP process in order to survive summary judgment. Appellants have not done so and thus, have not shown that the school system's legitimate non-retaliatory explanations for its actions were pretextual."

In light of these findings, the court had no difficulty disposing of a related First Amendment claim and a Section 1983 claim.

2. Nursing Services

R.K. v. Bd. of Educ. of Scott Cnty, KY,. 55 IDELR 247, 755 F. Supp. 2d 800 (E.D.Ky. Dec 15, 2010).

Facts: In March 2009, R.K.'s parents enrolled in him Kindergarten at his neighborhood elementary school (EES). The parents advised the school board that R.K. had been diagnosed with Type 1 diabetes, and the district informed the parents that their child would not be able to attend EES because it did not have an on-site nurse. The district offered transportation to either of two public elementary schools which were the only schools in the system with on-site nurses available. R.K. attended one of the schools, AMES for the 2009-2010 and 2010-2011 school years.

In December 2009, the parents advised the district that R.K. had an insulin pump and therefore no longer needed daily insulin injections. Instead, he only required assistance in monitoring the pump and counting carbohydrates. Parents requested that the district allow R.K. to attend EES, his neighborhood school, because he no longer required assistance from a nurse. The district denied parents request, on the basis that state law required that a nurse, or other qualified medical personnel, monitor the child's insulin pump and assist with carbohydrate calculations. State law required districts to delegate nursing functions in accord with the Kentucky Board of Nursing, and the Board of Nursing had issued an advisory opinion that nurses should maintain responsibility for monitoring insulin pumps and counting carbohydrates in a school setting. Thus, the district believed that the student was required to attend a school with a nurse on staff.

Parents filed suit in the United States District Court, alleging that the district's refusal to allow R.K. to attend EES with accommodations violated Section 504 of the Rehabilitation Act and the ADA (among other laws). The district moved for summary judgment.

Issues:

1. Whether parent has failed to meet the administrative exhaustion requirements of the Individuals with Disabilities Education Act; and,

2. Whether the district violated a) Title II of the ADA, b) § 504 of the Rehabilitation Act, and/or c) the Kentucky Civil Rights Act.

Held: With regard to the first issue, the court found for the parent. Parent's claims were outside of the purview of the IDEA. The IDEA states that nothing in it shall be construed to restrict or limit the rights, procedures, and remedies available under the

Constitution, the ADA, Title V of the Rehabilitation Act of 1973, or other federal laws protecting the rights of children with disabilities. Parent's claims included constitutional and statutory violations independent of the IDEA and are not subject to the IDEA's requirement of exhaustion of administrative remedies.

As to the second issue, the court found for the school district. The district declined to station a nurse at EES because full time nurses were already in place at two other schools and in light of the cost burden that would be placed on the school system by employing another full time nurse. The district considered parents' request that they train EES staff to monitor the student's blood sugar and administer insulin as necessary but declined to do so because of potential liability under Kentucky regulations.

The district decision to enroll the Child at AMES was objectively reasonable in light of the situation. Parent failed to articulate any reason that AMES is unreasonable or insufficient to provide an adequate education for the Child. The Court was not persuaded that either the ADA, § 504, or the Kentucky Civil Rights Act require school districts to modify school programs in order to ensure neighborhood placements when necessary services and a free and appropriate education are available at another site within the district. Parent could not demonstrate that the district failed to accommodate R.K. or discriminated against him on the basis of disability.

3. Compliance with Section 504 Plans

Morris (NJ) School District, 111LRP 70051. (Office for Civil Rights (OCR), E.D.N.Y. Sept 9, 2011).

Facts: Parent filed a complaint with OCR, alleging that during 2010-2011 school year, the District discriminated against her son (Student) on the basis of his disability, when it failed to provide:

1) Weekly emails - the Section 504 Plan indicated that the student was to receive weekly emails documenting his missing assignments, class progress with assignments and decorum in class, and that the student was to "answer and save each of these emails and that parents and supervisors will always be included on the cc: line.";

2) Written copies of homework assignments – the Section 504 plan required that teachers provide written copies of homework assignments and utilize proximity techniques to refocus Student;

3) Copies of class lecture notes – the Section 504 plan required that teachers provide copies of class notes and handouts "when possible"; and

4) A review and update of the Student's school contract – the Section 504 plan indicated that Student would meet with his teachers at various times throughout the

year, and that the Student agreed to maintain a minimum grade of B+ in each of his courses. If he failed to do such, he would suffer a consequence.

Held:

1) OCR found that the District failed to provide the Student and the complainant with weekly emails despite their providing him with regular emails. OCR found that the teachers provided regular, but not weekly, email correspondence; however, the Section 504 plan required weekly emails. Thus, the district failed to follow the plan.

2) OCR found that, despite the District's assertion that class notes were sometimes posted on "Moodle", an online system that the District used to provide all students with homework assignments and course information, the District staff did not consistently provide written copies of homework assignments to the Student. Although the District had provided the student with a Netbook and an iPad for use in class, and he could have accessed "Moodle" from either device, that was not a substitute for the terms of the plan, which required written copies of homework assignments.

3) The "Moodle" system contains syllabi for courses and teachers posted information to the system for students to use as study guides. However, the district did not provide hard copies of class notes to the student; thus, it violated the Section 504 plan.

4) OCR found that the District failed to review and update the Student's school contract.

As a result, the District agreed to enter into a voluntary corrective action plan, pursuant to which it agreed to provide training to teachers on the implementation of Section 504 plans.

4. Discontinuation of Section 504 Plans

Hudson (NH) Sch. Dist., 58 IDELR 22 (OCR Sept. 30, 2011).

Facts: A parent of a student with a Section 504 Plan filed a complaint with OCR alleging that the District discriminated against her daughter by failing to follow proper procedures in determining the student's eligibility for services under Section 504 prior to and during the 2008-2009 school year.

In February 2009, when the complaint was filed, the student was a junior at Alvirine High School. The student suffered from chronic migraine headaches.

A Section 504 Plan was developed in March 2008. The plan identified the student's impairment as migraine headaches and noted that the headaches impacted the student's learning, because the student was only able to attend school for half days. The plan included the following modifications: adjustment of academic schedule as needed to accommodate for medical difficulties; make up privileges for medically documented absences; and in-home tutoring to facilitate make-up work and continue class work. The plan did not state how often the tutoring services would be provided, nor did it prescribe any conditions for receipt of such services.

In May 2008, the District received a note from the student's doctor, indicating that the headaches had abated and she could return to school full-time. The student subsequently did such. E-mail communication between the parent and the principal indicated that there was an understanding that the Section 504 Plan would remain in effect, at least through the end of the 2007-2008 school year. It is unclear whether the parties agreed that the plan would continue into the 2008-2009 school year.

In August 2008, the parent contacted the principal via e-mail, and requested assistance with ensuring that tutoring services would be available in the event that the student needed them. Parent indicated that he did not believe that tutoring services were required at the present time, but that he wanted to ensure that a process was in place so that the services would be immediately available if the student needed them. In September, the principal responded with a detailed plan pertaining to tutorial services, in the event the student required such. The plan included a detailed description of how and under what circumstances the student would receive the services, and provided for a progressive level of services depending on the number of absences from school. The e-mail indicated that the student would be provided tutoring services if absent 60% of the time during a three week period. The principal also indicated that the plan would be in place immediately, even though the District did not have any medical documentation indicating that the headaches had begun to reoccur. The principal requested that the medical documentation be provided by October 1st, so that the team could put together a formal 504 Plan.

The District received a letter from the student's doctor in late September, indicating that he had met with the student and that her headaches were not under control. The letter indicated that the student may require further accommodations at school that would allow her to participate for a shortened day. The Section 504 team met in October and developed a new plan for the student, which incorporated the recommendations for tutorial services outlined in the principal's correspondence. Neither of the student's parents were present at that meeting. The revised plan was subsequently sent to the student's parents and they signed the same. However, the parent wrote on the plan that he was requesting that the 60% requirement not be a "hard and fast" rule. The District did not provide the parents with notice of the 504 Procedural Safeguards prior to or subsequent to the development of the October 2008 504 Plan.

In January 2009, the Section 504 team met again and modified the plan to reflect, among other things, an increase in tutoring and the student's enrollment in a Spanish 1 course. The student's parents were not given prior notice of the meeting, nor did they receive their Section 504 Procedural Safeguards.

Issues:

1) Whether the District denied the student a FAPE by not following required procedures to review and make placement decisions for the 2008-2009 school year; and

2) Whether the District failed to provide the parent with appropriate procedural safeguards.

Held: For the parent. As to the first issue, OCR found that the District failed to comply with the procedural requirements of Section 504 in making decisions regarding the student's Section 504 placement and services. Specifically, OCR found that the District's effectively discontinued the plan at the conclusion of the 2007-2008 school year, and that this action occurred outside of the Section 504 team process. Although the medical documentation indicated that the student's migraines had abated and that she could return to school on a full-time basis, there was no evidence that the District made a formal determination regarding the student's continued eligibility. Moreover, although the principal put various measures in place to address the student's potential absences for the 2008-2009 school year, pending the submission of additional medical documentation and the reconvening of a team meeting, this too, was done outside of the Section 504 team process.

With regard to the second issue, OCR found that the District failed to comply with Section 504 by failing to provide the parent with Notice of Team Meetings and with their Section 504 Procedural Safeguards. Although there was consistent communication between the District and the parents, the District failed to provide the parents with prior notice of the meetings and parents did not attend the same.

Because the medical documentation indicated that the student's headaches were no longer impacting her learning, OCR determined that the student was not entitled to an individual remedy. However, the District agreed to revise its Section 504 protocols to ensure that parents receive prior notice of team meetings and notice of procedural safeguards. The District also conducted training to staff regarding the requirements of Section 504.

5. Harassment

Dallas County (AL) Schools, 58 IDELR 233 (OCR Oct. 28, 2011).

Facts: A parent filed a complaint with OCR, alleging that the student's Aide discriminated against him on the basis of disability. Parent alleged that the Aide told the student that if he didn't find his glasses, Santa Claus would not come. Parent alleged that, the student, who was autistic and had limited intellectual abilities, took the statement literally and became so anxious that the parent had to bring him to the doctor the following day.

Parent alleged that she reported that the statement had been made to the IEP Team and that the student was upset, but she did not mention the Aide by name. Parent believed that the Aide intentionally discriminated against the student because she knew how much the statement would upset the student.

Issue: Whether the Student was harassed based on disability when his Aide told him that if he did not find his glasses, Santa Claus would not come, which caused him anxiety, in violation of Section 504.

Held: For the District – OCR found that there was insufficient evidence to support a conclusion that the Student was subjected to harassment on the basis of disability. OCR interviewed the parent, the Student's pediatrician, and several district staff members, including the Aide. The Aide denied making the comment to the Student. Instead, the Aide indicated that she had told the student that he would not be able to see the board without his glasses.

The student's pediatrician confirmed that he saw the student for an appointment, but he could not recall any specific incident at school nor did he have any notes to indicate that the Student had been upset by a teacher or aide at school. He stated that his notes only indicated that he treated the student for a behavior problem and for difficulty breathing.

IX. Family Education Rights and Privacy Act ("FERPA")

In Letter to Anonymous, 15 FAB 5, 111 LRP 67052 (FPCO May 17, 2011), the Family Policy Compliance Office ("FPCO") refused to open an investigation into an alleged FERPA violation, on the basis that the complaint did not provide specific allegations to give the FPCO office reason to believe that a FERPA violation occurred.

In that case, the complainant alleged that the school district violated FERPA by failing to provide her with the opportunity to inspect and review her child's education records within 45 days of the parent's January 27, 2010 request. The parent enclosed, with her complaint, a copy of a March 15, 2010 email to the parent from the school principal. The email indicated that the district attempted to set up an appointment for the parent to review and inspect the records, but that the parent did not respond until March 11, 2010, two days before the 45-day period expired. FPCO opined that it was

"unreasonable for a parent to expect a school to set up an appointment for the Parent to inspect and review education records in that timeframe."

X. Conclusion

Over the past year, courts have continued to refine, define and at times redefine our understanding of the IDEA. Perhaps one of the most significant developments has been the increased risk of litigation under Section 504 in which parents seek monetary relief rather than programmatic relief. The best preventive measure to such developments continues to be an approach to education driven by "best practices," rather than "adequacy" as the benchmark.