

STUDENT RIGHTS

SECTION 504

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No otherwise qualified individual with a disability in the United States, . . . shall, solely by reason of his or her disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. Chapter 16, Sec. 794 [Section 504]; *see also* 42 U.S.C. 12132 [ADA].

I. SECTION 504 OF THE REHABILITATION ACT OF 1973 AND THE AMERICANS WITH DISABILITIES ACT

A. **Section 504¹: Anti-discrimination Statute.** Section 504 prohibits any recipient of federal funds from discriminating against individuals with disabilities. Included in the definition of “recipient” are all public school districts.

1. “Section 504 is an anti-discrimination statute which does not confer any special rights on disabled persons beyond the right to be free from discrimination based *solely* on disability.” *Pottgen v. Missouri State High Sch. Activities Ass’n*, 40 F.3d 926 (8th Cir. 1994) (emphasis added).
2. Section 504 requires school districts to provide a free appropriate public education (FAPE) to qualified students with physical or mental impairments. FAPE consists of regular or special education and related aids and services designed to meet the individual educational needs of students with disabilities as adequately as the needs of students without disabilities are met. *See Section II for further discussion.*
3. The Office for Civil Rights (OCR), a component of the U.S. Department of Education, enforces Section 504.
4. Students with disabilities eligible under the IDEA also have rights under Section 504 and OCR enforces the Section 504 rights, including Section 504 FAPE rights of IDEA-eligible students enrolled in elementary or secondary

¹ Throughout this outline Section 504 of the Rehabilitation Act of 1973 is referred to as “Section 504” or “504”.

school. *Supporting Students with Disabilities and Avoiding the Discriminatory Use of Student Discipline under Section 504 of the Rehabilitation Act of 1973*, 81 IDELR 111 (OCR 2022).²

- B. **The Americans with Disabilities Act (ADA): Anti-discrimination Statute.** The ADA “gives civil rights protections to individuals with disabilities similar to those provided to individuals on the basis of race, color, sex, national origin, age, and religion. It guarantees equal opportunity for individuals with disabilities in public accommodations, employment, transportation, State and local government services, and telecommunications.” U.S. EEOC, U.S. Dept. of Justice, *Americans with Disabilities Act Questions and Answers* (2/24/17).
1. The standards adopted by the ADA were designed not to restrict the rights or remedies available under Section 504 and do not provide greater protection than applicable Section 504 regulations.
 2. OCR enforces Title II of the ADA.
- C. **Eligibility Criteria.** A student is entitled to the nondiscrimination protections of Section 504 and the ADA if he or she is a qualified disabled person – meaning that the student is school age under state law.
1. A student has a disability under Section 504 and the ADA if he or she has:
 - a. A physical or mental impairment that substantially limits one or more major life activities of such individual;
 - b. A record of such an impairment; or
 - c. Being regarded as having such impairment.
 - d. Typically, b and c set forth above cannot be the basis upon which the requirement for FAPE is triggered. “Unless a person actually has a handicapping condition, the mere fact that he/she has a ‘record of’ or is ‘regarded as’ handicapped is insufficient, by itself, to trigger those Section 504 protections that require special treatment (such as FAPE or reasonable accommodation) of persons with physical or mental impairments which substantially limit one or more major life activities.” *OCR Senior Staff Memorandum*, 19 IDELR 894 (1992); *see also* U.S. Dept. of Education, Office for Civil Rights, *Protecting Students with Disabilities*, Q. 37, (10/16/15) (The mere fact that a student has a “record of” or is “regarded as” disabled is insufficient, in itself, to trigger Section 504 protections that require the provision

² Throughout this outline this document is referred to as *Supporting Students with Disabilities*, 81 IDELR 111 (OCR 2022).

of FAPE. Therefore, a school district is not required to develop a Section 504 plan for such a student.)

- e. The Americans with Disabilities Act Amendments Act of 2008 (ADAAA) regulations provide that “An individual with a record of a substantially limiting impairment may be entitled to a reasonable modification if needed and related to the past disability.” 28 CFR 35.108(4)(e)(3). A public entity must reasonably modify its policies, practices or procedures to avoid discrimination, unless to do so would fundamentally alter the nature of its service, program or activity.
2. 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 a prohibited action 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.
 3. “Being regarded as having such impairment” does not apply to impairments that are transitory and minor. A transitory impairment is impairment with an actual or expected duration of six (6) months or less.
 - a. The ADAAA regulations provide that the effects of an impairment lasting or expected to last less than 6 months can be substantially limiting for establishing an actual disability or a record of a disability.
 4. A temporary impairment does not constitute a disability under Section 504 unless its severity is such that it results in a substantial limitation of one or more major life activities for an extended period of time, as determined on a case-by-case basis. U.S. Dept. of Education, Office for Civil Rights. *Protecting Students with Disabilities*, Q. 34, (10/16/15).
 5. A reasonable accommodation is not required to be provided to an individual who is “regarded as” being disabled. 28 CFR 35.130(b)(7)(ii)-(iii).
 - a. The “regarded as” prong is a legal fiction meant to reach situations where individuals either never were or are not currently disabled, but were treated by others as if they were. *OCR Senior Staff Memorandum*, 19 IDELR 894 (OCR 1992).
 6. The definition of “disability” shall be construed in favor of broad coverage of individuals to the maximum extent permitted by the terms.
 7. An impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability.

8. An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active. A student with such an impairment is entitled to FAPE under Section 504. U.S. Dept. of Education, Office for Civil Rights. *Protecting Students with Disabilities*, Q. 35. (10/16/15).
- D. A “physical or mental impairment” is defined as:
1. Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; muscular skeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine; or
 2. Any mental or psychiatric disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. 34 CFR 104.3(j)(2)(i).
 3. Excluded from the definition of physical or mental impairment include: homosexuality, bisexuality, transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identification disorders not resulting from physical impairments, other sexual behavior disorders, compulsive gambling, kleptomania, pyromania, and psychoactive substance use disorders resulting from current illegal use of drugs. 28 CFR 35.108(b)(3); 28 CFR 34.108(g).
 4. The regulatory provisions do not set forth an exhaustive list of specific diseases and conditions that may constitute physical or mental impairments because of the difficulty of ensuring the comprehensiveness of such a list. U.S. Dept. of Education, Office for Civil Rights. *Protecting Students with Disabilities*, Q. 12 (10/16/15).
 5. An impairment or a medical diagnosis of an illness does not automatically qualify a student for services under Section 504. The impairment must substantially limit one or more major life activities in order to qualify a student for Section 504 protection.
- E. A “major life activity” includes, but is not limited to:
1. 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, writing, communicating, and working.
 2. “Major bodily functions” are included in the definition of “major life activities” and include but not limited to, “functions of the immune system, special sense organs and skin, normal cell growth, the digestive,

- genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal, and reproductive system. The operation of a major bodily function includes the operation of an individual organ within a body system.” 42 USC 12102.
3. A student’s disability need not affect his or her ability to learn for the student to be considered disabled under Section 504 since a major life activity is defined as more than learning. *Dear Colleague Letter and Resource Guide on Students with ADHD*, (OCR 7/26/16). *See also* U.S. Dept. of Education, Office for Civil Rights, *Questions and Answers on the ADA Amendments Act of 2008 Q7* (1/19/12) (“Nothing in the ADA or Section 504 limits coverage or protection to those whose impairments concern learning.”)
 4. The list of major life activities is not exhaustive. Other functions can be major life activities for purpose of Section 504. U.S. Dept. of Education, Office for Civil Rights. *Protecting Students with Disabilities*, Q. 12, (10/16/15).
- F. In the educational context, a “qualified handicapped [disabled] person,” is defined as a student with a disability who meets the state definition of school-age.
1. A child is considered “of school age” as defined by individual states for Section 504 purposes. 34 CFR 104(1)(2). In Idaho, a child is of school age when he or she turns 5 years before September 1 for kindergarten, and turns 6 years before September 1 for first grade. (Idaho Code § 33-201.)
 2. For students with disabilities under the Individuals with Disabilities Education Act (IDEA), a free appropriate public education must be available to all children residing in each state between the ages of 3 and 21. 34 CFR 101(a).
- G. “Substantially limiting” is not defined in Section 504, but the ADA Amendments provide guidance:
1. In addressing the ADA, Congress stated that “whether an individual’s impairment is a disability under the ADA should not demand extensive analysis.” ADA Amendments Act of 2008; *see also* 28 CFR 35.101(b).
 2. “Substantially limits” is not meant to be a demanding standard. 28 CFR 35.108(d)(1)(i).
 3. An impairment that limits one major life activity need not limit other major life activities in order to be a disability.
 4. An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active. A student with such an

impairment is entitled to FAPE under Section 504. U.S. Dept. of Education, Office for Civil Rights. *Protecting Students with Disabilities*, Q. 35, (10/16/15).

5. The determination of whether a student has a physical or mental impairment that substantially limits a major life activity must be made on a case by-case basis with respect to each individual student. U.S. Dept. of Education, Office for Civil Rights. *Protecting Students with Disabilities*, Q. 22, (10/16/15).
6. An impairment is a disability if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population. 28 CFR 35.108(d)(1)(v).
7. The comparison of an individual's performance of the same major life activity by most people in the general population "usually will not require scientific, medical or statistical evidence." 28 CFR 35.108(d)(1)(vii).
8. An impairment does not need to prevent, or significantly or severely restrict, the individual from a major life activity in order to be considered substantially limiting. 28 CFR 35.108(d)(1)(v).
9. By comparison, the IDEA involves a review of the individual's achievement in relation to his/her ability. *Bercovitch v. Baldwin Sch.*, 133 F.2d 141, 154-55 (1st Cir. 1998); *McCleary v. National Cold Storage*, 67 F. Supp. 2d 1288 (D. Kansas 1999).
10. There are no impairments which automatically mean a student has a disability under Section 504. The impairment must substantially limit one or more major life activities in order to be considered a disability under Section 504. U.S. Dept. of Education, Office for Civil Rights. *Protecting Students with Disabilities*, Q. 23, (10/16/15).
 - a. The ADAAA has identified certain impairments that "will, in virtually all cases, result in a determination of coverage" of an actual disability or a record of a disability. "Given their inherent nature, these types of impairments will, as a factual matter, virtually always be found to impose a substantial limitation on a major life activity. Therefore, with respect to these types of impairments, the necessary individualized assessment should be particularly simple and straightforward." 28 CFR 35.108(d)(2)(iii). These impairments include the following:
 - i. Deafness substantially limits hearing;
 - ii. Blindness substantially limits seeing;

- iii. Intellectual disability substantially limits brain function;
 - iv. Partially or completely missing limbs or mobility impairments requiring the use of a wheelchair substantially limit musculoskeletal functions;
 - v. Autism substantially limits brain function;
 - vi. Cancer substantially limits normal cell growth;
 - vii. Cerebral palsy substantially limits brain function;
 - viii. Diabetes substantially limits endocrine function;
 - ix. Epilepsy, muscular dystrophy, and multiple sclerosis each substantially limit neurological function;
 - x. Human Immunodeficiency virus (HIV) infection substantially limits immune function; and
 - xi. Major depressive disorder, bipolar disorder, post-traumatic stress disorder, traumatic brain injury, obsessive compulsive disorder, and schizophrenia each substantially limits brain function.” 28 CFR 35.108(d)(2)(iii)(A) through (K). *See also* U.S. Dept. of Education, Office for Civil Rights, *Questions and Answers on the ADA Amendments Act of 2008* (1/19/12).
- b. In addition to the impairments listed in the ADA, “OCR will presume, unless there is evidence to the contrary, that a student with a diagnosis of ADHD is substantially limited in one or more major life activities.” U.S. Dept. of Education, Office for Civil Rights, *Dear Colleague Letter and Resource Guide on Students with ADHD* (7/26/16).
- H. Mitigating Measures: In the ADA Amendments Act of 2008, Congress rejected the Supreme Court’s analysis it made in a trio of employment cases that the determination of whether an individual has a disability should be made with reference to mitigating measures, such as medication. *See Murphy v. UPS*, 119 S. Ct. 2133 (1999); *Sutton v. United Airlines*, 119 S. Ct. 2139 (1999); and *Albertsons v. Kirkingburg*, 119 S. Ct. 2162 (1999).
1. 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:

“(i) Medication, medical supplies, equipment, appliances, low-vision devices (defined as devices that magnify, enhance, or otherwise augment a visual image, but not including ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aid(s) and cochlear implant(s) or other implantable hearing devices, and oxygen therapy equipment and supplies;

(ii) Use of assistive technology; (iii) Reasonable modifications or auxiliary aids or services as defined in this regulation;

(iv) Learned behavioral or adaptive neurological modifications; or

(v) Psychotherapy, behavioral therapy, or physical therapy. 28 CFR 35.108(d)(4).

2. “[T]he non-ameliorative effects of mitigating measures, such as negative side effects of medication or burdens associated with following a particular treatment regimen, may be considered when determining whether an individual’s impairment substantially limits a major life activity.” 28 CFR 35.108(d)(3)(ii).

3. The language regarding mitigating measures is limited to the eligibility determination. The determination as to the need for services is a separate and distinct inquiry. *Memphis (MI) Community Schools*, 110 LRP 7395 (OCR 2009); *see also* U.S. Dept. of Education, Office for Civil Rights, *Questions and Answers on the ADA Amendments Act of 2008 (1/19/12)* (Mitigating measures remain relevant in evaluating the need for special education or related services.)

a. If a student has mitigated the disability to the point where no services are needed to “level the playing field,” then no obligation exists to provide the student with additional services. *See Dear Colleague Letter and Resource Guide on Students with ADHD*, (OCR 7/226/16).

b. Even though no additional services are provided, the student is a person with a disability and remains protected by the general nondiscrimination provisions of Section 504 and Title II (ADA). *Dear Colleague Letter*, Q. 11, 112 LRP 3621 (OCR 2012).

II. PROVISION OF A FREE APPROPRIATE PUBLIC EDUCATION (FAPE)

A. **Child Find Requirement.** Districts are required annually to “undertake to identify and locate every qualified handicapped person residing in [the district’s jurisdiction who is not receiving a public education.” 34 C.F.R § 104.32.

- a. The child find obligations under Section 504 exist independently from a district's child find obligations under the IDEA.
 - b. The requirements for child find are not specified and districts could fulfill it by annually posting notices in the community, state and local agencies, private schools and hospitals, and newspapers. *Letter to Veer*, 20 IDELR 864 (OCR 1993). Non-discrimination policies must be posted throughout the district. A general statement regarding the availability of special education and related services to students eligible under Section 504 and the IDEA must be published and provided throughout the district annually.
- B. If a student is found to have a disability as defined by Section 504, in that he or she has a physical or mental impairment which substantially limits one or more major life activities, the school district must provide the student with a free appropriate public education (FAPE). 34 C.F.R. § 104.33.
- C. **Definition of FAPE.** FAPE is defined as “the provision of regular or special education and related aids and services that are (i) designed to meet individual educational needs of handicapped persons as *adequately* as the needs of nonhandicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of [LRE, evaluation and procedural safeguards].” (Emphasis added). 34 C.F.R. § 104.33(b).
1. FAPE guarantees the provision of educational and related services without cost to the disabled student/parents; it is not a reasonable accommodation standard. Fees may be imposed that are imposed on the non-disabled student/parents. *See* U.S. Dept. of Education, Office for Civil Rights, *Letter to Zirkel* (8/23/1993).
 2. The obligation to provide FAPE extends to students with disabilities who do not need special education but require a related service. U.S. Dept. of Education, Office for Civil Rights, *Questions and Answers on the ADA Amendments Act of 2008* Q8 (1/19/12).
 3. FAPE under Section 504 “requires a comparison between the manner in which the needs of disabled and non-disabled children are met, and focuses on the ‘design’ of a child’s educational program.” *Mark H. v. Lemahieu*, 513 F.3d 922, 49 IDELR 91 (9th Cir. 2008).
 4. Adequate transportation to and from the program must be provided at no greater cost than would be incurred by the person or his or her parents.
 5. If residential placement in a public or private residential program is necessary to provide FAPE, the program, including non-medical care and room and board, will be provided at no cost.

6. If the district offers FAPE under Section 504, and the parent chooses to place the student in a private school, the district is not required to pay for the private school placement.
7. The FAPE obligation under Section 504 is ongoing. Districts may need to convene 504 teams to monitor the implementation of the 504 plan and effectiveness of a student's placement; determine if additional evaluations are needed; and determine if any adjustment in the placement, including in behavioral supports or the student's educational environment is needed. *Supporting Students with Disabilities*, 81 IDELR 111 (OCR 2022).
8. While a student may not be discriminated under Section 504 because he is "regarded as" or has a "record of" having a substantially limiting impairment, that student may not be entitled to FAPE under Section 504.

D. Least Restrictive Environment (LRE). The district is required to provide both academic and nonacademic services in the least restrictive environment. 34 C.F.R. § 104.34.

1. A student who is eligible for Section 504 protection must be educated, to the maximum extent appropriate, in the regular educational environment, unless it is demonstrated by the district that the education of that student in the regular environment with the use of supplementary aids and services cannot be achieved satisfactorily. 34 CFR 104.34(b).
2. Districts are not required to modify programs or staffing solely to allow a student with a disability to attend the neighborhood school. In *Montgomery County (MD) Public School*, 19 IDELR 43 (OCR 1992), OCR concluded that the district did not violate Section 504 by placing a student with a disability in a non-neighborhood school as long as the student had been evaluated and placed following the procedural guidelines of Section 504.
3. Medical procedures and LRE: Where a medical procedure is performed is a placement issue and must conform to LRE requirements. The decision must involve an individual review of the unique needs of the student and be made by the placement team. District wide policy that categorically states that medical procedures will not occur in the classroom, even if citing dangerousness to other students, violates Section 504.

III. SECTION 504 ELIGIBILITY PROCESS

1. **504 Team:** A 504 team consists of:
 - a. Persons knowledgeable about the student;
 - b. Persons who can interpret the evaluation data; and

- c. Persons knowledgeable about placement options.
 - i. The student’s parent may be invited to participate in the 504 team meetings, but parental participation is not a mandated. 34 C.F.R. § 104.35(c). Parental participation is best practice.
 - ii. OCR interprets the 504 team as requiring a group of persons (two or more). *See* U.S. Dept. of Education, Office for Civil Rights, *Parent and Educator Resource Guide to Section 504*, p. 15 (December 2016).
- B. Evaluation Requirements.** Districts are required to conduct an evaluation at no cost to the parent, before taking any action with respect to the initial placement, or subsequent significant change in placement of a student with a disability. 34 C.F.R. § 104.35. Districts must also conduct periodic reevaluations.
1. An evaluation must occur without unreasonable delay for those students who need or there is reason to believe need special education or related aids and services because of a disability. The decision to conduct an evaluation is based on individual circumstances and made on a case-by-case basis. *See* Dept. of Education, Office for Civil Rights, *Questions and Answers on the ADA Amendments Act of 2008 Q9* (1/19/12); *Supporting Students with Disabilities*, 81 IDELR 111 (OCR 2022).
 2. The fact that a student is doing well academically does not justify denying or delaying an evaluation when the district has reason to believe the student has a disability. *Supporting Students with Disabilities*, 81 IDELR 111 (OCR 2022).
 3. An evaluation is triggered when a student, because of his disability, “needs or is believed to need special education or related services.” 34 C.F.R. § 104.35(a). The amount of information required is determined by the 504 team convened to evaluate the student. The information must be sufficient to make a knowledgeable decision as to whether or not the student has a disability under 504. Sources and factors may include aptitude and achievement tests, teacher recommendations, physical condition, social and cultural background and adaptive behavior. U.S. Dept. of Education, Office for Civil Rights, *Protecting Students with Disabilities*, Q. 19 (10/16/15).
 4. A student who has not been identified as a student with a disability and who is repeatedly referred for discipline following inappropriate verbal outbursts beyond what is expected for students of a similar age may need an evaluation to determine whether the student is a student with a disability entitled to FAPE. *Supporting Students with Disabilities*, 81 IDELR 111 (OCR 2022).

5. Grades are just one consideration and are an insufficient basis on which to determine whether a student has a disability. Grades may not be the determining factor in deciding whether a student needs special education or related aids and services. U.S. Dept. of Education, Office for Civil Rights, *Questions and Answers on the ADA Amendments Act of 2008* Q9 (1/19/12).
6. A physician’s medical diagnosis may be considered among other sources in evaluating a student with a disability or believed to have a disability which substantially limits a major life activity, but a medical diagnosis does not suffice as an evaluation. Other sources to be considered, along with the medical diagnosis, include aptitude and achievement tests, teacher recommendations, physical condition, social and cultural background, and adaptive behavior. U.S. Dept. of Education, Office for Civil Rights, *Protecting Students with Disabilities*, Q. 24 (10/16/15).
7. In evaluating a student suspected of having a disability, staff may not rely on presumptions and stereotypes regarding persons with disabilities or classes of such persons. See U.S. Dept. of Education, Office for Civil Rights, *Dear Colleague Letter and Resource Guide on Students with ADHD* (7/26/16).
8. School districts may use the same process to evaluate the needs of students under Section 504 as they use to evaluate the needs of students under the IDEA. If school districts choose to adopt a separate process for evaluating the needs of students under Section 504, they must follow the requirements for evaluation specified in the Section 504 regulations. U.S. Dept. of Education, Office for Civil Rights, *Protecting Students with Disabilities*, Q. 20, (10/16/15).
9. In the event a student is determined to have a disability but is not to need of special education or related services, a school district is not required to provide aids or services. However, the student is protected by Section 504 and the ADA’s nondiscrimination prohibitions and the district must consider whether the student is entitled to a reasonable modification of policies, practices or procedures. U.S. Dept. of Education, Office for Civil Rights, *Questions and Answers on the ADA Amendments Act of 2008* Q. 10-11 (1/19/12).
10. At any time a parent may request an evaluation at public expense. Section 504 does not limit the number of evaluations a student may reasonably request or receive. The student’s parent is entitled to notice of the school’s decision and may challenge a denial of their request under Section 504’s procedural safeguards. Although parents may request an evaluation, the responsibility to timely identify students who may need an evaluation remains with the school. *Supporting Students with Disabilities*, 81 IDELR 111 (OCR 2022).

11. Reevaluations are required on a periodic basis and must occur before any significant change in placement. A significant change in placement must be decided on a case-by-case basis.
 - a. Generally, if the same services and programming are provided in substantially the same type of environment, the transfer does not trigger a reevaluation. *Conejo Valley (CA) Unified Sch. Dist.*, 22 IDELR 1140 (OCR 1995).
 - b. However, regular progressions in regular education may constitute a significant change in placement (transfer from middle to high school). *Mobile County (AL) Sch. Dist.*, 19 IDELR 519 (OCR 1992).
- C. There is no time frame for the completion of the evaluation but OCR may find discrimination occurred if it is not completed within a reasonable time period. Following the IDEA timelines would constitute a reasonable time period. 34 CFR 104.36. OCR would likely find it unreasonable for a district to delay a student's evaluation because it does not have sufficient personnel trained to perform the needed assessments and fails to secure private evaluators to meet the need. *Supporting Students with Disabilities*, 81 IDELR 111 (OCR 2022).
- D. Evaluations must be conducted by trained personnel and interpreted by a group of knowledgeable persons (504 team), and based on relevant information from a variety of sources. Sources of information include, but are not limited to: aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior. 34 CFR 104.35(a)-(c). Information from parents can be especially valuable, and observations of the student by psychologists or other professionals while the student is in class or during activities can be useful. *Supporting Students with Disabilities*, 81 IDELR 111 (OCR 2022).
- E. Although a functional behavioral assessment (FBA) is not discussed in Section 504 regulations, the Section 504 team may determine that an FBA is appropriate to be conducted for a student to assess challenging behaviors during the evaluation process. *Supporting Students with Disabilities*, 81 IDELR 111 (OCR 2022).
- F. All tests and other evaluation materials must be:
 1. Validated for the specific purpose used;
 2. Administered by trained personnel properly following test instructions;
 3. Tailored to assess specific areas of educational need; and
 4. Test results accurately reflect purpose of test and not impaired sensory, manual, or speaking skills. 34 CFR 104.34.

- G. **Parental Consent Required for Initial Evaluation.** The district is required to obtain consent from parents prior to conducting a Section 504 evaluation. In *Letter to Durham*, 27 IDELR 380 (OCR 1997), OCR stated that written parental consent is required prior to conducting an initial evaluation for identification, diagnosis, and prescription of specific educational services. “Parental discretion in matters involving student assessment/evaluation is an inherent part of the regulation and parental discretion is an appropriate and necessary policy component at the initial evaluation phase.”
1. If a parent withholds consent, a district may use 504 due process hearing procedures to override the parent’s denial of consent for an initial evaluation or initial provision of services. U.S. Dept. of Education, Office for Civil Rights. *Protecting Students with Disabilities*, Q. 41-43, (10/16/15).
 2. If parents wish to withdraw a student from a 504 plan, the district may initiate a 504 due process hearing to resolve the dispute if the district believes the student needs the services in order to receive an appropriate education. U.S. Dept. of Education, Office for Civil Rights. *Protecting Students with Disabilities*, Q. 32 (10/16/15).
- F. **Parental Consent not Required for Reevaluations.** Reevaluations do not implicate the same policy concerns as evaluations. OCR has taken the position that districts are not required to obtain parental consent for subsequent student evaluations. *Letter to Durham*, 27 IDELR 380 (OCR 1997); *see also OCR Senior Staff Memorandum*, 19 IDELR 892 (1992).
- H. **RTI Process.** The RTI process cannot be used as a reason not to evaluate a student for 504 eligibility if there is reason to believe the student may have a disabling impairment. *See* U.S. Dept. of Education, Office for Civil Rights, *Dear Colleague Letter and Resource Guide on Students with ADHD*, (7/26/16).
1. Use of intervention strategies and evaluating for a disability can occur at the same time, “as parallel responses in an attempt to identify and address a student’s needs. Interventions could be implemented while a student is being evaluated, and information gathered during the intervention protocol could be useful in the evaluation process.” U.S. Dept. of Education, Office for Civil Rights, *Dear Colleague Letter and Resource Guide on Students with ADHD*, p. 16 (7/26/16).
 2. “In OCR’s experience, school districts run afoul of the Section 504 obligation to evaluate for disability and need for special education or related services when they: 1) rigidly insist on first implementing interventions before conducting an evaluation, or that each tier of a multi-tiered model of intervention must be implemented first, regardless of whether or not a disability is suspected and there are needs based on the disability; or 2) categorically require that data from an intervention strategy must be collected

and incorporated as a necessary element of an evaluation.” U.S. Dept. of Education, Office for Civil Rights, *Dear Colleague Letter and Resource Guide on Students with ADHD*, p. 17 (7/26/16).

- I. **Independent Educational Evaluation.** Parents do not have a right to an IEE under Section 504. Failure to evaluate, however, may result in an order for reimbursement of IEE. The results of an outside independent evaluation may be one of the many sources of information considered by the 504 team. The 504 team determines the weight of the information given the student’s individual circumstances. U.S. Dept. of Education, Office for Civil Rights. *Protecting Students with Disabilities*, Q. 26 (10/16/15).
- J. **Periodic Reevaluation Requirement.** A reevaluation is required to be conducted periodically and prior to a significant change of placement. The reevaluation may be conducted in accordance with IDEA regulations, which requires a reevaluation at least every three years (unless waived by the parents and school) or more frequently if conditions warrant, or the parent or teacher requests another evaluation, but not more than once a year unless both the parent and school agree. U.S. Dept. of Education. *Protecting Students with Disabilities*, Q. 29 (10/16/15).
- K. **Placement Decisions/Determination of Eligibility.** The 504 team must analyze the evaluation data to determine if the student is a qualified individual with a disability that substantially limits a major life activity; determines the special education programming, related services and accommodation that a student with a disability must receive in order to receive FAPE and the setting in which he will be educated. 34 CFR § 104.35(c).
1. The 504 team draws upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social and cultural background and adaptive behavior.
 3. The relevant information received from all services must be documented and carefully considered.
 4. School districts must employ nondiscriminatory evaluation and placement procedures that ensure children are not misclassified, unnecessarily labeled as having a disability, or incorrectly placed, based on inappropriate selection, administration or interpretation of evaluation materials. *Protecting Students with Disabilities, OCR Guidance*, United States Department of Education, Office for Civil Rights (2011).
- L. **Development of an Individualized 504 Plan.** Once a disability is determined to exist pursuant to 504 provisions, the 504 team typically develops an individual 504 plan outlining the educational services and/or accommodations that are different from or in addition to those offered to students without disabilities. The academic services provided should be designed to adequately meet individual needs. See U.S. Dept. of

Education, Office for Civil Rights, *Parent and Educator Resource Guide to Section 504* (December 2016).

1. **Health Plans:** If a student needs or is believed to need special education or related services because of his disability, a health plan may not be sufficient. Further, a health plan could constitute a mitigating measure. The critical question is whether the district's actions meet the evaluation, placement, and procedural safeguard requirements of the FAPE provisions under the 504 regulations. If the district's actions in developing a health plan do not meet these requirements, 504 requirements may not have been met. *See* U.S. Dept. of Education, Office for Civil Rights, *Dear Colleague Letter* (1/19/12).
- M. **Students on IEPs:** Students who have an IEP are not required to have a 504 plan even though they are protected under 504. 34 CFR 104.36; *see also* U.S. Dept. of Education, Office for Civil Rights, *Parent and Educator Resource Guide to Section 504* (December 2016).
- N. **504 Plan Contents.** The Section 504 regulations do not explicitly require a written 504 plan. Best practice however, indicates that a 504 Plan should be in writing and should describe the regular or special education and related aids and services a student needs and the appropriate setting in which the student will receive those services. *See* U.S. Dept. of Education, Office for Civil Rights, *Parent and Educator Resource Guide to Section 504* (December 2016).
- O. **Behavior Plan.** For a student with disability-based behavior that interferes with his or her learning or others' ability to learn, the 504 plans may identify individualized behavioral supports for responding to the behavior and supporting the student's behavioral needs, explain how the school will implement those supports and describe how the 504 team can assess whether the supports are effective. *Supporting Students with Disabilities*, 81 IDELR 111 (OCR 2022); *see also* *A.G. v. Paradise Valley Unified Sch. Dist. No. 69*, 815 F.3d 1195 (9th Cir. 2016).
- P. **Parental Consent for Initial Placement.** The 504 regulations neither prohibit nor require school districts to initiate a due process hearing to override parent refusal to consent with respect to the initial provision of 504 services. U.S. Dept. of Education, Office for Civil Rights. *Protecting Students with Disabilities*, Q. 43 (10/16/15).
- Q. **Periodic 504 Plan Review.** Each 504 plan must be reviewed periodically by the 504 team for its content and need for additional evaluation and/or eligibility information. 34 CFR 104.35.
- R. **Regular education teacher:** A regular education teacher must implement the provisions of a Section 504 plan when the plan governs the teacher's treatment of students. If a teacher fails to implement a student's 504 plan, the failure can cause the

school district to be in noncompliance with Section 504. U.S. Dept. of Education, Office for Civil Rights. *Protecting Students with Disabilities*, Q. 39 (10/16/15).

- S. **Transfer Student.** If a student on a 504 plan transfers to a new district, the new district must review the plan and supporting documentation. The receiving district would then either implement the plan or evaluate the student to determine the educational program appropriate for the student. U.S. Dept. of Education, Office for Civil Rights. *Protecting Students with Disabilities*, Q. 38 (10/16/15).
- T. **Notice to Parents.** Parents must be notified of all actions related to identification, evaluation and placement of a child who is believed to be disabled.
1. The notice should explain the action proposed and declined, and the reasons why. *Briere v. Fair Haven Grade Sch. Dist.*, 25 IDELR 55 (D. Vt. 1996).
 2. The notice must be detailed enough to allow parents to meaningfully evaluate whether they wish to consent, refuse, or request due process. *Middleton-Cross Plains (WI) Area Sch. Dist.*, 16 IDELR 763 (OCR 1990).
 3. Parents must be informed of their procedural rights, including right to examine relevant records, request a hearing, and right to further review. U.S. Dept. of Education, Office for Civil Rights. *Protecting Students with Disabilities*, Q. 44 (10/16/15).
 4. Parents with limited English proficiency must be provided information in a language the parent understands regarding Section 504's FAPE requirements, including information about the development of a Section 504 plan. *Supporting Students with Disabilities*, 81 IDELR 111 (OCR 2022).
 5. Section 504 requires schools to communicate effectively with parents who have a disability, including by providing needed auxiliary aids and services to allow the parent to participate in their child's Section 504 meetings. *Supporting Students with Disabilities*, 81 IDELR 111 (OCR 2022).
- U. **Procedural Safeguards.** School districts are required to develop and implement a system of procedural safeguards to enable parents to challenge a school's actions regarding the provision of FAPE, including with respect to identification, evaluation and placement. Compliance with the IDEA's procedural safeguards is one means of meeting this requirement. 34 CFR 104.36.

VIII. HEALTH AND MEDICAL SERVICES

- A. Section 504 does not specify which health-related services a district must provide to students with disabilities.

- B. The provision of FAPE dictates what health related services are required. In *Yuba City (CA) Unified Sch. Dist.*, 22 IDELR 1148 (OCR 1995), OCR found that the district had discriminated because, while the plan noted the need to bring the diabetic student’s blood sugar under control, it failed to describe what actions the district would take to meet those needs.
- A. Examples of health-related services include medical monitoring by a school nurse at least twice daily for MCS; monitoring snacks and blood sugar levels for diabetic students; administration of insulin shots; and administration of medications.
- B. “Section 504 does not necessarily require a district to conduct a medical assessment of a student suspected of a disability. If a district determines, based on the facts and circumstances in an individual case, that a medical assessment is necessary to make an appropriate evaluation consistent with 34 CFR Sect 104.35(a) and (b), then the district must ensure that the student receive this assessment at no cost to the parents.” *Letter to Williams*, 21 IDELR 73, 77 (OSEP 1994). This requirement applies both to testing necessary to determine eligibility and necessary aids and services.
- C. In some instances of delivering health services, equal treatment of disabled and nondisabled students constitutes discrimination. Districts may be required to modify the general policy (no reminders of need to take medication; no administration of medicine) for Section 504 students if the general policy results in a denial of FAPE. Requiring parents to come to the school to administer the medication or having the student leave early for the purpose of taking medication at home are not valid options, per OCR.
- D. **Contagious Disease.** Exclusion of a student with a contagious disease violates Section 504. The student must be placed in the regular education classroom unless he cannot be educated there, even with the use of supplementary aids and services. 34 CFR § 104.34(a). OCR guidelines were adopted from *Martinez v. School Board of Hillsborough County, Fla.*, 441 IDELR 257 (11th Cir. 1988):
1. Decide what an appropriate placement would be were it not for the contagious nature of the student’s disease.
 2. Decide if reasonable medical judgment and the state of medical knowledge indicate a significant risk of contagion by assessing the nature of the risk (how the disease is transmitted); the duration of the risk; the severity of the harm; and the probability of transmission which will cause varying degrees of harm.
 3. Determine if accommodations will reduce the risk to a medically acceptable level, bearing in mind the LRE requirement.
- E. **Environmental Issues:** A student with multiple chemical sensitivity may be entitled to 504 protections if the allergies interfere with his education. A district must take all

reasonable steps to ensure that a student with a disability is provided with an equal opportunity to participate in, and benefit from, an educational program as effective as that provided nondisabled students. 34 CFR 104.4.

IV. DISCIPLINE REQUIREMENTS

A. Implementing Discipline Policies

1. Section 504 does not interfere with a district’s ability to address emergency situations where a student’s behavior, including disability-based behavior, poses an immediate threat to the student’s safety or the safety of others. *Supporting Students with Disabilities 3*, 81 IDELR 111, (OCR 7/11/22).
 - i. Section’s 504 FAPE requirements do not prohibit schools from contacting mental health crisis intervention specialists or law enforcement under extraordinary circumstances, even if the result is that those professionals remove the student from school.
 - ii. In an emergency situation, a school may impose an immediate short-term disciplinary removal of a student with a disability because the student’s behavior presents a serious and immediate threat to the safety of the student or of others that cannot be mitigated by other means.

B. “Manifestation Determination”³ Requirement.

1. Before an expulsion recommendation or a significant change in placement (suspension of a student with disabilities for more than 10 consecutive school days or a pattern of removals which cumulatively total more than 10 school days) can be made for a student with disabilities solely under Section 504, a reevaluation, called “manifestation determination” must be made by a 504 team. The manifestation determination may be determined by the same group of persons who made the initial 504 placement decisions. *See OSEP Memorandum 95-16*, 22 IDELR 531 (OSEP 1995); *Supporting Students with Disabilities*, 81 IDELR 111 (OCR 2022).
2. The manifestation determination must be conducted whether or not the student with a disability is receiving services. *Letter to Veir*, 20 IDELR 864 (OCR 1993); *Dunkin (MO) R-V Sch. Dist.*, 52 IDELR 138 (OCR 2009).
3. A manifestation determination may need to be expedited in some instances, depending on the circumstances, to avoid violating Section 504 FAPE

³ The IDEA’s regulations use the term “manifestation determination” in connection with determining whether a student’s conduct is a manifestation of a student’s disability. Section 504 regulations do not use the term “manifestation determination” but require an evaluation prior to a significant change in placement. OCR views a manifestation determination review as an evaluation. *See Supporting Students with Disabilities and Avoiding the discriminatory Use of Student Discipline under Section 504*, 81 IDELR 111 (OCR 2022), 84.

- requirements. *Supporting Students with Disabilities*, 81 IDELR 111 (OCR 2022).
4. The 504 team must have considered information that competent professionals would require, such as psychological evaluation information related to behavior. The information must be recent enough to afford an understanding of the student's current behavior. U.S. Dept. of Education, Office for Civil Rights. *Discipline of Students with Disabilities in Elementary and Secondary Schools* (Oct. 1996). This information could include:
 - a. Any previous evaluation;
 - b. The student's Section 504 plan;
 - c. Psychological or medical evaluation data related to the behavior at issue;
 - d. Relevant information from the parents;
 - e. Academic records;
 - f. Relevant discipline records;
 - g. Relevant teacher notes, observations and data collected about the behavior. *Supporting Students with Disabilities*, 81 IDELR 111 (OCR 2022).
 5. The manifestation determination may not be made by the individuals responsible for the school's regular disciplinary procedures, such as the school principal. These individuals, however, may participate as members of the 504 team.
- C. Since Section 504 and the ADA regulations do not list time lines for completing a manifestation determination, it is recommended that schools use the time lines listed in the IDEA. (The IDEA requires a manifestation determination be conducted within 10 school days of any decision to change the placement because of a violation of a code of student conduct. 34 CFR 300.530(e)).
- D. A manifestation determination under Section 504 includes reviewing the student's misconduct, the student's disability, and the services being provided to the student. A manifestation determination is a two-step process:
1. Step 1: The 504 team determines whether the behavior in question was caused by or has a direct and substantial relationship to the student's disability.

2. Step 2: The school's next step depends on whether the behavior for which the school proposed discipline is determined to be based on the student's disability, i.e., whether or not the student's behavior was a manifestation of the disability.
 - i. If the behavior was a manifestation of the student's disability, the school is prohibited from carrying out any discipline that would exclude the student on the basis of disability. Discipline would deny the student equal educational opportunity by excluding the student based on disability in violation of Section 504.
 - ii. If the behavior is not based on disability, i.e., not a manifestation, the school is permitted to discipline the student as it proposed as long as it does so in the same manner that it disciplines similarly situation students without disabilities. *Supporting Students with Disabilities*, 81 IDELR 111 (OCR 2022).
- E. **Suspensions:** OCR has consistently concluded that a suspension of less than 10 consecutive school days does not constitute a significant change in placement or a denial of FAPE. Therefore, there is no obligation to conduct a reevaluation or manifestation determination when suspending a student for less than 10 school days. *Mason v. Board of Education of the Howard County Public School System*, 56 IDELR (D. Md. 2011); *Supporting Students with Disabilities*, 81 IDELR 111 (OCR 2022).
- F. **In-School Suspensions:** In-school suspensions are governed by the same procedures and time limitations applicable to other suspensions. *OCR Letter*, 305 IDELR 26, 28 (OCR 1986).
- G. **Informal Exclusions:** Informal exclusions occur for part or all of a school day and can sometimes last for an indefinite period of time. The school removes the student from class or school without invoking the school's disciplinary procedures. For example, asking a parent to pick up a student or not send a student to school because of a behavior incident, but no record is made of the informal exclusion. Informal removals are subject to the same Section 504 requirements as formal disciplinary removals. *Supporting Students with Disabilities*, 81 IDELR 111 (OCR 2022).
- H. **Bus Suspensions:** Disciplinary procedures applying to students with disabilities apply to bus suspensions whether the student is receiving transportation as a related service in accordance with an IEP or under the district's regular transportation policy. *OCR Letter*, 305 IDELR 51 (OCR 1989). Suspension from a school bus which results in cessation of education services is considered a significant change in educational placement. *Ann Arundel (MD) Public Schools*, 257 IDELR 63 (OCR 1985).

- I. **Series of Suspensions:** The district must determine whether a significant change in placement occurs when there are a series of cumulative suspensions, each of which is 10 or fewer days in duration, but which, in the aggregate, exceeds 10 days during the current school year. Such a series of suspensions may create a pattern of exclusions that constitutes a significant change in placement. Schools must ensure that they do not violate the rights of a student with a disability by creating a pattern of removals that constitutes a significant change in placement absent a manifestation determination. *Supporting Students with Disabilities*, 81 IDELR 111 (OCR 2022).
1. The factors OCR reviews to determine whether a series of suspensions constitutes a significant change in placement must be made on a case-by-case basis, considering evidence related to, among other factors:
 - a. The length of each suspension;
 - b. The proximity of the suspensions to one another; and
 - c. The total amount of time the student has been excluded from school.
 - d. OCR has sometimes also reviewed whether the behavior is substantially similar to the child’s behavior in previous incidents that resulted in the series of removals. *Portsmouth (VA) Pub. Schs.*, 48 IDELR 229 (OCR 2006).
- J. **Parent Notice:** Notice to the parent must be provided before taking action regarding the student’s evaluations, i.e., manifestation determination, or placement, including if the school district proposes discipline that would constitute a significant change in placement. *Supporting Students with Disabilities*, 81 IDELR 111 (OCR 2022).
- K. **Parent Rights:** After a manifestation determination, if the parent disagrees with the determination regarding the relationship of the behavior to the disability, or with the subsequent placement proposal in those cases where the behavior is determined to be caused by the disability, the parent may request an impartial hearing.
- L. **Behavior Plan:** OCR has held that a district must develop an individual management plan “when a student who is disabled within the meaning of Section 504 manifests repeated or serious misconduct such that modifying the child’s negative behavior becomes a significant component of what actually takes place in the child’s educational program, [a district] is required to develop an individual behavioral management plan.” *Elk Grove (CA) Unified School District*, 25 IDELR 759, 761 (OCR 1997).

M. Comparing manifestation determination pursuant to Section 504 and IDEA:

1. A 504 team, rather than an IEP team, may make the manifestation determination. In other words, parental involvement in the decision-making process is not required, but is best practice;
2. The parent is entitled to an impartial hearing, but it is not the same procedure required under the IDEA. The hearing process follows the school district's Section 504 and the ADA hearing policy;
3. The stay-put requirement does not exist under Section 504 and the ADA, and one is not implied. However, parents do have procedural safeguards.
4. Educational services may cease if a student is expelled to the same extent they cease for students without disabilities.

N. Drugs and Alcohol: A student who is addicted to drugs or alcohol is held to have a physical or mental impairment and thus meets the definition of having a disability under Section 504 and the ADA. However, the FAPE requirements including those regarding an evaluation before a significant change in placement do not apply if the student is current user of illegal drugs or the use of alcohol. *Supporting Students with Disabilities*, 81 IDELR 111 (OCR 2022).

1. “Current illegal use” is defined as use that “occurred recently enough to justify a reasonable belief that a person’s drug use is current or that continuing use is a real and ongoing problem.” *OCR Senior Staff Memorandum*, 19 IDELR 859 (OCR 1992).
2. Under Section 504, a student properly identified as being a “current user” is subject to suspension, expulsion, and all other disciplinary measures for the current use; the school may discipline the disabled student in the same manner that it would discipline a nondisabled student. In the event disciplinary actions are taken regarding the use or possession of alcohol or illegal drugs by students who are “current users,” the due process procedures do not apply.
3. This limited exception does not apply to a student who:
 - a. Has successfully completed a supervised drug rehabilitation program or has otherwise rehabilitated successfully and is no longer engaged in the illegal use of drugs;
 - b. Is participating in a supervised rehabilitation program and is no longer engaged in such use; or

- c. Is erroneously regarded as engaging in such use. *Supporting Students with Disabilities*, 81 IDELR 111 (OCR 2022).
 - a. The key is that the student’s offense is the current use of drugs or alcohol. If the district expelled the student for any conduct other than illegal use or possession of alcohol or drugs, then it would have violated Section 504 by not first conducting a manifestation determination. *Pinellas County (FL) School District*, 20 IDELR 561 (OCR 1993).
4. In some instances, a school official may suspect that a student with a disability is using illegal drugs or alcohol, but the official may be unable to properly identify the student as a “current user.” In these situations, a manifestation determination must be conducted to determine whether the student can be expelled, suspended for more than 10 consecutive school days, or can have a significant change in placement occur.

V. NONACADEMIC AND EXTRACURRICULAR SERVICES AND ACTIVITIES

- A. The provision of nonacademic and extracurricular services and activities, including meals, recess periods, and other services such as counseling, athletics, transportation, health services, recreational activities, special interest groups or clubs, referrals to other agencies etc. must occur by participating with nondisabled students to the maximum extent appropriate based on the needs of the disabled student in question. 34 CFR 104.34.
- B. Nonacademic and extracurricular services must be provided in such a manner as to afford disabled students an equal opportunity for participation in such services and activities. 34 CFR 104.37.
- C. When providing physical education courses, athletics and similar programs and activities to any of its students, a district may not discriminate on the basis of disability. A district that offers physical education courses, or operates or sponsors interscholastic, club, or intramural athletics must provide qualified disabled students an equal opportunity for participation in those activities. 34 CFR 104.37(c).
- D. **Extracurricular Activities:** Students with disabilities have a right under Section 504 to an equal opportunity to participate in their schools’ extracurricular activities, including athletics. *OCR Guidance Re: Extracurricular Athletics*, 60 IDELR 167 (OCR 2013).
 1. **Athletics:** Federal Circuit Courts have held that imposition of uniform age-eligibility requirements on disabled and nondisabled students alike is not discriminatory. However, OCR has opined that application of uniform age eligibility rules violate Section 504 when the disabled student’s failure to

meet age-eligibility is a result of prior discrimination on the basis of disability.

2. While there is no requirement that the district develop alternate programs for students with disabilities who cannot participate in extracurricular athletic activities, OCR strongly encourages school districts to consider providing such programs. *OCR Guidance Re: Extracurricular Athletics*, 60 IDELR 167 (OCR 2013).
3. **Counseling:** When providing counseling services, such services must be provided without discrimination on the basis of disability. The district must ensure that qualified disabled students are not counseled toward more restrictive career objectives than nondisabled students with similar interest and abilities. 34 CFR 104.37(b).
4. **Participation in non-educational programs:** Districts can establish eligibility requirements for participation in non-educational programs that may disproportionately exclude students with disabilities so long as the eligibility criteria are legitimate. It is a question of reasonable accommodations. *See Marietta (OH) City Sch. Dist.*, 19 IDELR 182 (OCR 1992) (excluding students with multiple severe disabilities from square dancing did not discriminate). On the other hand, OCR determined in a case in which eligibility to attend a district sponsored wilderness camp was based on behavior history and applied equally to all students, the actual result was discriminatory because it resulted in a higher proportion of disabled students being excluded. *Ontario-Montclair (CA) Unified Sch. Dist.*, 24 IDELR 780 (OCR 1996).
 - a. Programs operated by the district, such as after-school care, daycare, summer recreational and similar programs, are bound by the anti-discrimination requirements of Section 504. Such programs are non-educational, as opposed to extracurricular and nonacademic services that are part of school. The district may establish essential eligibility criteria for participation which all children, including students with disabilities, must meet, so long as they do not, by their very nature, exclude severely disabled students.
 - b. The district must offer meaningful and equal access to the program. Although the program does not have to be specially designed to meet the needs of a particular student, reasonable accommodations, such as providing a one-to-one aide, must be provided as necessary unless the district can demonstrate that the extra assistance will be an undue burden or alter the fundamental nature of the program. Districts will have discretion to determine what supplementary aids and services

are necessary to provide meaningful and equal access. Such determination must be made on a case-by-case basis.

- c. A district is not required to provide a modification if it can show that doing so would result in a fundamental alteration to the program. 28 CFR 35.130(b)(7).

VI. BULLYING AND HARASSMENT BASED ON DISABILITY

- F. Harassment based on disability violates Section 504 and the ADA. Disability harassment is defined as “intimidation or abusive behavior toward a student based on disability that creates a hostile environment by interfering with or denying a student’s participation in or receipt of benefits, services or opportunities in the institution’s programs.” U.S. Dept. of Education, Office for Civil Rights and Office of Special Education and Rehabilitative Services. *Prohibited Disability Harassment* (7/25/2000).
- G. Bullying may also be a violation of federal civil rights laws. “Bullying fosters a climate of fear and disrespect that can seriously impair the physical and psychological health of its victims and create conditions that negatively affect learning, thereby undermining the ability of students to achieve their full potential. The movement to adopt anti-bullying policies reflects schools’ appreciation of their important responsibility to maintain a safe learning environment for all students. I am writing to remind you, however, that some student misconduct that falls under a school’s anti-bullying policy also may trigger responsibilities under one or more the federal antidiscrimination laws enforced by the Department’s Office for Civil Rights (OCR) . . . by limiting its response to a specific application of its anti-bullying disciplinary policy, a school may fail to properly consider whether the student misconduct also results in discriminatory harassment.” *Dear Colleague Letter*, 55 IDELR 174 (OCR 2010).
- C. **Legal Interpretations:** A court declined to adopt the guideline letters issued by the U.S. Department of Education regarding bullying and harassment as legal standards and instead applied precedence that when alleging peer-on-peer harassment based on disability, the student must show the school had actual knowledge of the harassment and was deliberately indifferent.
 1. The Dear Colleague Letters specifically disclaimed any binding authority and explicitly state they don’t apply to private suits for money damages.
 2. “And the Letters are cock-full of vague and aspirational words— ‘encourag[ing] schools to ‘consider’ some of the recommendations they ‘can’ implement—that confirm the non-binding nature of their suggestions and undercut [the student’s] argument that they were meant to provide any binding regulatory standard for private enforcement.” *Csutoras v. Paradise*

High School, 79 IDELR 152 (9th Cir. 9/7/21).

IX. DOCUMENTING EDUCATIONAL PROGRESS

A. Grading.

1. The report card of a student with a disability may identify the special education or related services or resources that are being provided to the student as long as it provides the child's progress or level of achievement as effectively and informatively as the report cards provided for students without disabilities. U.S. Dept. of Education, Office for Civil Rights, *Dear Colleague Letter: Report Cards and Transcripts for Students with Disabilities* Q2 (10/17/08).
2. A report card for a student with a disability may refer to an IEP or 504 plan and a designation, such as an asterisk or other symbol may be used to reference a modified or alternate education curriculum, or accommodations as long as an explanation of the student's progress is also provided. U.S. Dept. of Education, Office for Civil Rights, *Dear Colleague Letter: Report Cards and Transcripts for Students with Disabilities* Q3-4 (10/17/08).

B. Transcripts.

1. The transcript of a student with a disability may NOT identify the special education or related services or resources that are being provided to the student. Transcripts are intended to inform postsecondary institutions or prospective employers about a student's achievements. Information that a student received special education or related services because of a disability is not information about academic credentials or achievements. U.S. Dept. of Education, Office for Civil Rights, *Dear Colleague Letter: Report Cards and Transcripts for Students with Disabilities* Q7 (10/17/08).
2. A transcript for a student with a disability may generally indicate, either through specific notations or the use of asterisks or other symbols, that the student took classes with a modified or alternate education curriculum. This is consistent with the transcript's purpose of informing postsecondary institutions and prospective employers of a student's academic credentials and achievements. U.S. Dept. of Education, Office for Civil Rights, *Dear Colleague Letter: Report Cards and Transcripts for Students with Disabilities* Q8 (10/17/08).
3. Special notations, including asterisks or other symbols, may NOT appear on a transcript for a student with a disability who received accommodations in general education curriculum classes because the use of accommodations generally does not reflect a student's academic credentials and achievement, but identifies the student as having a disability in violation of Section 504 and

the ADA. U.S. Dept. of Education, Office for Civil Rights, *Dear Colleague Letter: Report Cards and Transcripts for Students with Disabilities* Q9 (10/17/08).

4. The transcript of a student with a disability may indicate receipt of a certificate of attendance or similar document, rather than a regular diploma if it does not disclose the student received special education or related services and does not specifically disclose that the student has a disability. In order to provide a certificate of attendance or similar document, it would need to be available to all students, not just students with disabilities. U.S. Dept. of Education, Office for Civil Rights, *Dear Colleague Letter: Report Cards and Transcripts for Students with Disabilities* Q10 (10/17/08).

- C. **Graduation.** States may impose reasonable standards for graduation with a regular high school diploma, such as passing a state or district competency test. Eligible students with disabilities (those who have met the district's graduation requirements) have the same right to attend their graduation ceremony as nondisabled peers. *Special Sch. Dist. of St. Louis County (MO)*, 16 IDELR 307 (OCR 1989).

X. PROCEDURAL SAFEGUARDS & NOTICE

- A. **Procedural Safeguards Notice:** Procedural safeguards include notice to parents regarding the following: an opportunity for records review; an impartial due process hearing with an opportunity for participation by the student's parent and representation by counsel; and a review procedure.
- B. **Parent Notice:** Notice to the parent must be provided before taking action regarding the student's evaluations, i.e., manifestation determination, or placement, including if the school district proposes discipline that would constitute a significant change in placement. *Supporting Students with Disabilities*, 81 IDELR 111 (OCR 2022).
- C. **Impartial Hearing:** Districts must provide for an impartial hearing to review evaluation and placement decisions, with an opportunity for participation by parents and representation by counsel. The hearing process set forth under IDEA is one method to fulfill this requirement. 34 CFR 104.36.
 1. A review procedure must be provided for parents who disagree with the hearing decision. 34 CFR 104.36.
- D. **Grievance Procedure:** Parents have the right to file a grievance alleging illegal discrimination based on disability against a school district or any of its employees or any of the district's public facilities, programs or activities if there are 15 or more employees. 34 CFR 104.7(b).

- E. **Section 504 Coordinators:** Districts with 15 or more employees must designate an employee to coordinate the district’s efforts to comply with Section 504. 34 CFR 104.7(a).
- F. **Notice of non-discrimination:** The notice must identify the district’s Section 504 coordinator and notify participants, beneficiaries, applicants and employees that it does not discriminate on the basis of disability in admission or access to, or treatment or employment in its program or activity. 34 CFR 104.8(a).
- G. **Additional Rights:** In addition to grievance rights and administrative hearing rights, parents have the right to file a complaint with OCR, file a complaint with the Idaho Human Rights Commission or file a lawsuit in court.

XI. RETALIATION PROHIBITED

- A. Section 504 and the ADA prohibit any acts of retaliation and intimidation against any person(s) who have exercised a right secured by Section 504 and the ADA. This includes acts that are “intimidating, threatening, coercing or discriminating against any individual for the purpose of interfering with any right or privilege secured by [Section 504].” U.S. Dept. of Education, *Retaliation Discrimination* (10/15/15).
- B. Retaliation and intimidation against persons who advocate for the rights of students with disabilities (both parents and other individuals) must not be tolerated in a district.
- C. Retaliation requires the following elements:
 - 1. The complainant engaged in a protected activity.
 - 2. The district took a materially adverse action against the complainant; and
 - 3. A causal connection exists between the protected activity and the materially adverse action. *Hampton (VA) City Schools*, 68 IDELR 232(OCR 2016).
- D. Educators may be personally liable for retaliation under Section 504. *Alston v. District of Columbia*, 50 IDELR 152 (D.D.C. 2008).

XII. MONETARY DAMAGES

- A. Parents may seek monetary damages under Section 504 for alleged denial of FAPE. Parents who allege a violation of the FAPE requirement under Section 504 may not obtain damages by simply providing that the IDEA FAPE requirements were not met. To obtain damages, parents must demonstrate that a school district was deliberately indifferent to the violation of whatever requirements the parents validly seek to enforce. *Mark H. v. Lemahieu*, 513 F.3d 922, 49 IDELR 91 (9th Cir. 2008).

- B. Parents are not required to exhaust IDEA administrative remedies before seeking monetary damages pursuant to Section 504 and the ADA in court.
1. The Supreme Court, in *Fry v. Napoleon Community Schools*, 69 IDELR 116 (2017), held that exhaustion is unnecessary when the essence of the plaintiff's suit is "something other than the denial of the IDEA's core concerns a denial of FAPE." If the answers to the following two questions are "yes," then exhaustion of administrative remedies isn't required:
 - a. Could the plaintiff have brought essentially the same claim if the alleged conduct had occurred at a public facility that was not a school, such as a public theater or library?
 - b. Could an adult at the school, such as an employee or visitor, have pressed essentially the same grievance?
 2. The Supreme Court in *Perez v. Sturgis Public Schools*, 82 IDELR 212, 143 S. Ct. 859 (2023) further defined exhaustion of administrative remedies and held that a parent or student seeking monetary damages under the ADA need not first exhaust administrative remedies under the IDEA.

XII. SECTION 504 OCR INVESTIGATIONS

- A. The parents of a kindergarten student with a G-Tube completed the online application form for a charter school. In the application the parents informed the school that the child had a G-tube and needed feeding assistance from a nurse. The school only had a nurse available 2 days a week. The principal advised the parent against enrollment due to lack of a full-time time nurse. The parent filed a complaint with OCR alleging discrimination. What was the outcome of OCR's investigation? *Colorado (CO) Charter Sch. Inst.*, 83 IDELR 48 (OCR 2023).
- B. The general teachers of a high school student with a 504 plan were informed of the student's plan 2 weeks into the school year. The student's accommodations included additional time to complete assignments; checking for understanding of directions; ensuring that student took notes in class; breaking assignments into steps and providing parents weekly updates about current grades, missing assignments and attendance. Once the teachers received the 504 plan it was not consistently implemented. The parent filed a complaint with OCR and alleged the district discriminated against the student and denied the student FAPE by failing to implement the 504 plan. What was the outcome of OCR's investigation? *Nampa (ID) School District 131*, 47 IDELR 109 (OCR 2006).
- C. A school district refused to convene an eligibility meeting until the parent produced medical documentation for a student with chronic medical conditions, and it relied on the medical information in developing student's 504 plan. The parent filed a complaint with OCR and alleged that the district failed to evaluate the student prior

to placing her on a 504 plan. What was the outcome of OCR's investigation? *New Haven (CT) Public Schools*, 67 IDELR 99 (OCR 2015).

- D. The district's policy required the parent and the student's physician to develop a diabetes management and treatment plan and submit it to the school, from which the school nurse developed a health plan. The parent of a child with diabetes filed a complaint with OCR and asserted that the student was missing instruction when he was pulled from class for insulin shots. What was the outcome of OCR's investigation? *Tyler (TX) Independent School District*, 56 IDELR 24 (OCR 2010).
- E. District personnel and the parents developed a health plan for a student with peanut allergies. The health plan was based on the information provided by the parents outlined a number of strategies to prevent the student from experiencing an allergic reaction in the cafeteria, classroom and at school events. The parent filed a complaint with OCR and alleged that the district discriminated against the student based on disability. What was the outcome of OCR's investigation? *Hanover County (VA) Public Schools*, 115 LRP 37657 (OCR 2015).
- F. A student on a 504 plan received a disciplinary referral for failure to comply with a teacher's request to stop dragging chairs and find his seat. The student failed to comply and stormed out of the classroom and slammed the door which hit the teacher. The student initially received 1 day out of school suspension (OSS), but upon further investigation it was determined the student's conduct was more serious and purposeful than initially thought and the student received 5 days OSS. Because the student had already accumulated 8 days OSS a manifestation determination meeting was scheduled with the parent for the next day. The parent was informed by phone about the sanction and the scheduled manifestation determination meeting, at which time the parent informed school personnel that the student had recently been diagnosed with oppositional defiant disorder (ODD). The parent disenrolled the student from the district and the manifestation determination meeting did not occur. Approximately a month later the parent reenrolled the student in school. Another incident occurred where the student failed to comply with a teacher's instruction and a manifestation determination was held. At the manifestation determination meeting the parent again stated the student had an ODD diagnosis. The 504 team determined that the behavior resulting in a suspension was not related to the student's disability. The parent filed a complaint with OCR alleging discrimination. What was the outcome of OCR's investigation? *Pitt County (NC) Schools*, 64 IDELR 223 (OCR 2014).

NOTE: This outline is intended to provide interpretations of law and a summary of selected cases. In using this outline, the presenter is not rendering legal advice. The services of a licensed attorney should be sought in responding to individual situations in a school district or charter school.

Your Rights Under Section 504

[Insert District Name or Logo]

You have the right to be informed by the school district of your rights under Section 504. This is a notice of you and your child's rights under Section 504 and the rights you have if you disagree with the school district's decisions.

WHAT IS SECTION 504?

Section 504 of the Rehabilitation Act of 1973, commonly called "Section 504," is a federal law that protects students from discrimination based on disability. Section 504 assures that students with disabilities have educational opportunities and benefits equal to those provided to students without disabilities. To be eligible, a student must have a physical or mental impairment that substantially limits one or more major life activity.

YOUR CHILD'S EDUCATION

Your child has the right to:

- Receive a free and appropriate public education.
- Participate in and benefit from the district's educational programs without discrimination.
- Be provided an equal opportunity to participate in the district's nonacademic and extracurricular activities.
- Be educated with students who do not have disabilities to the maximum extent appropriate.
- Be educated in facilities and receive services that are comparable to those provided to students without disabilities.
- Receive accommodations and/or related aids and services to allow your child an equal opportunity to participate in school activities.
- Receive educational and related aids and services without cost, except for those fees imposed on the parents of children without disabilities.
- Receive special education services if needed.

YOUR CHILD'S EDUCATIONAL RECORDS

You have the right to:

- Review your child's educational records and to receive copies at a reasonable cost. You will not be charged if the cost would keep you from reviewing the records.
- Ask the district to change your child's education records if you believe that they are wrong, misleading, or are otherwise in violation of your child's privacy rights. If the district refuses this request, you have the right to challenge the refusal by requesting an impartial hearing.
- A response to your reasonable requests for explanations and interpretations of your child's education records.

THE SECTION 504 PROCESS

Your child has the right to an evaluation before the school determines if he or she is eligible under Section 504. You have the right to:

- Receive notice before the district takes any action regarding the identification, evaluation, and placement of your child.
- Have evaluation and placement decisions made by a group of persons, often called a "504 team", including persons who know your child, the meaning of the evaluation information, and the placement options available.
- Have evaluation decisions based on a variety of sources, such as aptitude and achievement tests, teacher recommendations, physical conditions, medical records, and parental observations.
- Refuse consent for the initial evaluation and initial placement of your child.

If your child is eligible under Section 504, your child has a right to periodic re-evaluations, including re-evaluations before any significant change is made in your child's placement.

IF YOU DISAGREE WITH THE DISTRICT'S DECISION

If you disagree with the district's decisions regarding your child's identification, evaluation, educational program, or placement under Section 504, you may request mediation or an impartial due process hearing. You and your child have the right to take part in the hearing and have an attorney represent you. Hearing requests and other concerns can be made to your district's Section 504 Coordinator:

[Insert Section 504 Coordinator's Name]

[Address]

[City, State, Zip]

[Phone], [E-mail]

You have the right to file a complaint of discrimination with the U.S. Department of Education's Office for Civil Rights (OCR), or to file a complaint in federal court. Generally, an OCR complaint may be filed within 180 calendar days of the act that you believe was discriminatory. The regional office is located at 915 Second Ave, Room 3310, Seattle, WA 98174-1099. Phone: 206-607-1600/TDD: 206-607-1647 Website: www.ed.gov/OCR.