Miller, Tracy, Braun, Funk & Miller, Ltd. presents

More than Just a Number:
A School Administrator’s Guide to Section 504

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I. The FAPE Obligation

HISTORY AND PURPOSE OF SECTION 504

Section 504 of the Rehabilitation Act of 1973, codified at 29 U.S.C. § 701 et seq., is a federal statute that guarantees certain rights to individuals with disabilities. Section 504 is widely recognized as the first civil rights statute for individuals with disabilities.

Section 504 states (in part):

No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.


While the Americans with Disabilities Act of 1990 (“ADA”) pertains generally to disability discrimination in public accommodations and employment, Section 504 governs the rights of individuals with disabilities in federally funded programming, including public schools.

The Department of Education is responsible for promulgating regulations implementing Section 504, which it has done at 34 C.F.R. §104.1, et seq.

WHAT IS AN APPROPRIATE EDUCATION?

“A recipient that operates a public elementary or secondary education program or activity shall provide a free appropriate public education to each qualified handicapped person who is in the recipient’s jurisdiction, regardless of the nature or severity of the person’s handicap.” 34 C.F.R. §104.33(a).

34 C.F.R. §104.33(b) defines an appropriate education as the provision of regular or special education and related aids and services that:

1. Are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met.

2. Are based upon adherence to procedures that satisfy the requirements of 34 CFR 104.34 [educational setting], 34 CFR 104.35 [evaluation and placement], and 34 CFR 104.36 [procedural safeguards].
In the Courts

Federal courts frequently have held that the standard of FAPE under Section 504 is similar to the standard of FAPE under the IDEA. See, e.g., W.B. v. Matula, 67 F.3d. 484 (3rd Cir. 1995), abrogated on other grounds by A.W. v. Jersey City Pub. Schs, 486 F.3d 791 (3rd Cir. 2007). In Matula, the 3rd Circuit held that “there appears to be few differences, if any, between IDEA’s affirmative duty and Section 504’s negative prohibition.” See also Grieco v. New Jersey Dept. of Educ., 48 IDELR 74 (D.N.J. 2007), quoting Matula: “While the IDEA sets forth an affirmative duty to provide an appropriate education to disabled students, [Section] 504 of the Rehabilitation Act is a ‘negative prohibition against disability discrimination in federally funded programs.’”

The 9th U.S Circuit Court of Appeals tackled the issue head on in Mark H. v. Lemahieu, 513 F.3d 922 (9th Cir. 2008), when it decided that parents can seek monetary damages for denial of FAPE under Section 504. The case turned on the definition of FAPE provided in both statutes. While the IDEA defines FAPE as “special education and related services provided to a child with a disability,” the Section 504 regulations define FAPE as “regular or special education and related aids and services” that are designed to meet the needs of students with disabilities as adequately as the needs of their nondisabled peers. Thus, the court explained, FAPE under Section 504 is a comparative standard.
II. Eligibility Under Section 504

A student is disabled within the meaning of §504 of the Rehabilitation Act if he or she:

(i) has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment. 34 C.F.R. §104.3(j).

Based upon the ADA Amendments Act, effective January 1, 2009, OCR has provided the following guidance (excerpt from OCR's FAQ on Section 504):

12. What is a physical or mental impairment that substantially limits a major life activity?

The determination of whether a student has a physical or mental impairment that substantially limits a major life activity must be made on the basis of an individual inquiry. The Section 504 regulatory provision at 34 C.F.R. 104.3(j)(2)(i) defines a physical or mental impairment as any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine; or any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. The regulatory provision does 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.

Major life activities, as defined in the Section 504 regulations at 34 C.F.R. 104.3(j)(2)(ii), include functions such as caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. This list is not exhaustive. Other functions can be major life activities for purposes of Section 504. In the Amendments Act (see FAQ 1), Congress provided additional examples of general activities that are major life activities, including eating, sleeping, standing, lifting, bending, reading, concentrating, thinking, and communicating. Congress also provided a non-exhaustive list of examples of “major bodily functions” that are major life activities, such as the functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions. The Section 504 regulatory provision, though not as comprehensive as the Amendments Act, is still valid – the Section 504 regulatory provision’s list of examples of major life activities is not exclusive, and an activity or function not specifically listed in the Section 504 regulatory provision can nonetheless be a major life activity.

* * *
21. May school districts consider "mitigating measures" used by a student in determining whether the student has a disability under Section 504?

No. As of January 1, 2009, school districts, in determining whether a student has a physical or mental impairment that substantially limits that student in a major life activity, must not consider the ameliorating effects of any mitigating measures that student is using. This is a change from prior law. Before January 1, 2009, school districts had to consider a student's use of mitigating measures in determining whether that student had a physical or mental impairment that substantially limited that student in a major life activity. In the Amendments Act (see FAQ 1), however, Congress specified that the ameliorative effects of mitigating measures must not be considered in determining if a person is an individual with a disability.

Congress did not define the term “mitigating measures” but rather provided a non-exhaustive list of “mitigating measures.” The mitigating measures are as follows: 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; oxygen therapy equipment and supplies; use of assistive technology; reasonable accommodations or auxiliary aids or services; and learned behavioral or adaptive neurological modifications.

Congress created one exception to the mitigating measures analysis. The ameliorative effects of the mitigating measures of ordinary eyeglasses or contact lenses shall be considered in determining if an impairment substantially limits a major life activity. “Ordinary eyeglasses or contact lenses” are lenses that are intended to fully correct visual acuity or eliminate refractive error, whereas “low-vision devices” (listed above) are devices that magnify, enhance, or otherwise augment a visual image.

* * *

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

Yes, under certain circumstances. In the Amendments Act (see FAQ 1), Congress clarified that an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active. A student with such an impairment is entitled to a free appropriate public education under Section 504.
“PHYSICAL OR MENTAL IMPAIRMENT”
+ 
“MAJOR LIFE ACTIVITY”
+ 
“SUBSTANTIAL LIMITATION”
= SECTION 504 ELIGIBILITY

In North Royalton (OH) City School District, 52 IDELR 203 (OCR 2009), OCR noted that the ADAAA expanded the list of major life activities and clarified that life activities are not limited to those identified in the statute.

SUBSTANTIALLY LIMITS?

- An impairment is a disability under the ADA and the Rehabilitation Act only if it substantially limits such an activity. Section 504 regulations do not define the word “substantially.” Further, OCR declined to interpret formally the term in nonregulatory guidance. Still, in Letters of Finding issued prior to the ADAAA, OCR said the term has been interpreted to require an important and material limitation. Pinellas County (FL) Sch. Dist., 20 IDELR 561 (OCR 1993). The decision of whether an impairment “substantially limits” a major life activities for a student should be made on an individual basis. Letter to McKethan, 23 IDELR 504 (OCR 1995).

- In the wake of the ADAAA, courts must turn to the standard used to determine whether a physical or mental impairment substantially limits one or more major life activities that was established when the ADA was originally enacted – “the individual’s important life activities are restricted as to the conditions, manner, or duration under which they can be performed in comparison to most people.” See S. Rep. No. 101-116, at 23 (1989) and Congressional Record, (Sept. 16, 2008), p. S8842.

“OTHERWISE QUALIFIED”

For purposes of school program eligibility, a student with a disability is “otherwise qualified” if he is of school age and meets other eligibility requirements. 34 C.F.R. §104.3(k)(2).

TEMPORARY DISABILITY

- A student with a temporary disability may be covered under Section 504, but there is nothing in either the statute or the regulations that expressly states that a disability must be permanent. Letter to Rahall, 21 IDELR 575 (OCR 1994). If the temporary disability substantially limits at least one major life activity for a period of time that likely will significantly disrupt the student’s education, then in all likelihood the student is covered for the duration of the disability.
The issue of whether a temporary impairment is substantial enough to be a disability must be resolved on a case-by-case basis, taking into consideration both the duration (or expected duration) of the impairment and the extent to which it actually limits a major life activity of the affected individual. The OCR Q&A document explains:

34. How should a recipient school district view a temporary impairment?

A temporary impairment does not constitute a disability for purposes of 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. The issue of whether a temporary impairment is substantial enough to be a disability must be resolved on a case-by-case basis, taking into consideration both the duration (or expected duration) of the impairment and the extent to which it actually limits a major life activity of the affected individual.

In the Amendments Act (see FAQ 1), Congress clarified that an individual is not “regarded as” an individual with a disability if the impairment is transitory and minor. A transitory impairment is an impairment with an actual or expected duration of 6 months or less.

In James A. Garfield (OH) Local School District, 52 IDELR 142 (OCR 2009), the mother of an elementary student with a broken foot asked for a tutor during her son’s absences from school. She also asked that he be allowed to leave class early when he returned to school and for someone to carry his books. OCR concluded that the student’s injuries were not substantially limiting since they hampered his mobility for just three months.

Under the ADA Amendments Act, an individual is a “person with a disability” if he has a record of disability or is regarded as having a disability. In the revised Q&A, OCR clarified that students are not entitled to reasonable accommodations or modifications to policies, practices and procedures simply because they have a record of disability or are regarded as having an impairment. “[U]nless a student actually has an impairment that substantially limits a major life activity, the mere fact that a student has a ‘record of’ or is ‘regarded as’ disabled is insufficient, in itself, to trigger those Section 504 protections that require the provision of a free appropriate public education (FAPE),” OCR wrote.
Case Notes:

_N.L. v. Knox County Schools_, 315 F.3d 688 (6th Cir. 2003). This court ruled that if a student is not eligible under IDEA, she is also, automatically, not eligible under 504. The court holds that the standards of eligibility for the two laws are identical. *(NOTE: This is limited to those situations involving the major life activity of learning).*

_North Royalton (OH) City School District_, 109 LRP 32541 (OCR 2009). OCR found that the District violated Section 504 when it evaluated the student (who suffered from a life-threatening nut allergy) solely based on whether his disability impacted his learning. Learning is only one of the major life activities that school districts should consider, and OCR noted that the ADAAA expanded the list to include major bodily functions, concentrating, communicating and thinking. The District had provided the student with an “individual health plan”, but not a plan with the protections of Section 504. The District was required to revise its policies regarding 504 eligibility, and would not take into account mitigating measures, including any services provided in the IHP.

**DUTY TO EVALUATE**

The 504 evaluation should:

-- Be based on information from a variety of sources, e.g. teacher(s), other school staff members, a parent/legal guardian, physician, nurse, other professionals or persons in the community.

-- Document and consider all available pertinent information, e.g. records, assessment data or medical reports related to the suspected physical or mental impairment, which may be substantially limiting a major life activity.

-- Be conducted by a group of people, including those who are knowledgeable about the child, the suspected disabling condition, evaluative procedures, the meaning of evaluative data, and accommodation/placement options.

-- Use materials, tests or evaluation procedures tailored to assess specific areas of educational need that are not racially or culturally discriminatory and are validated for the specific purpose for which they are used.

34 C.F.R. §104.35 (c)
There is no specific timeline for conducting an evaluation for eligibility in the Section 504 regulations. Nevertheless, failure to conduct an evaluation within a reasonable period after referral violates Section 504 when it denies an eligible student an appropriate education. See, e.g., Dade County (Fla.) Sch. Dist., 20 IDELR 267 (OCR 1993) (seven-month delay between referral and evaluation); La Honda-Pescadero (Calif.) Unified Sch. Dist., 20 IDELR 833 (OCR 1993) (18-month delay between referral and evaluation); Community High Sch. Dist. 155 (IL), 51 IDELR 228 (OCR 2008) (five-month delay between referral and evaluation).

Districts may not use RTI or a similar process as an excuse for delaying or denying an evaluation under Section 504 unless those SST or RTI services are determined by the District to be appropriate for addressing the functional limitations demonstrated by the student. In Oxnard (CA) Elementary School District, 56 IDELR 274 (OCR 2011), the district delayed an evaluation of a first-grader with ADHD and a mood disorder for several months in part because school policy required the student be referred to a student support team prior to referral.

Broward County (FL) School District, 58 IDELR 292 (OCR 2012). A Florida school district was required to take both district-wide and student-specific action to remedy violations of Section 504, as its practice and policy was to require parents to provide a medical diagnosis of a disability before initiating a 504 review. OCR reminded the school district that the regulations require districts to evaluate students suspected of having disabilities “at no cost to their parents.” This school district required parents to provide documentation of a student’s disability diagnosis before it would commence the eligibility determination process.
DUAL ELIGIBILITY UNDER THE IDEA?

A student with a disability who is eligible for the protections and provisions of FAPE under the IDEA cannot also receive Section 504 services. Once a student is eligible under the IDEA, the IEP team is responsible for the whole child (although still entitled to the Section 504 protections against discrimination and equal access). A district has no flexibility or discretion to provide services and accommodations under Section 504 when a student is IDEA-eligible.

For a student to be eligible for special education and related services under the IDEA, he must have a physical or mental impairment that substantially impairs learning -- a major life activity. Thus, a student with a disability who is IDEA-eligible is also theoretically covered under Section 504 of the Rehabilitation Act of 1973 (Section 706(8)(A)).

No provision of either statute requires or allows either an IDEA-eligible student or a district to choose between the two statutory schemes. Letter to Veir, 20 IDELR 864 (OCR 1993) (OCR "cannot conceive of any situation in which [IDEA-eligible] children would not also be entitled to the protection extended by Section 504.").

Although a parent may wish to avoid having her child "labeled" as a special education recipient, OCR has stated that parents have no such flexibility. Letter to McKethan, 25 IDELR 295 (OCR 1996) (it is impermissible for a student's parent to refuse to accept IDEA services and require the district to develop an IEP under Section 504. A rejection of the services offered under the IDEA amounts to a rejection of similar services offered under Section 504). See also, Lamkin v. Lone Jack C-6 Sch. Dist., 58 IDELR 197 (W.D. Mo. 2012).

A district has no flexibility to opt to provide services and accommodations under Section 504 when the student is IDEA-eligible. Yankton Sch. Dist. v. Shramm, 24 IDELR 704 (8th Cir. 1996).

An Illinois school district denied FAPE to a sixth-grader when it decided that a 504 plan was "sufficient" and an IEP would be "too intrusive." Chicago Sch. Dist. 299, 54 IDELR 304 (SEA IL 2010).
III. PROCEDURAL SAFEGUARDS UNDER SECTION 504

Compliance with the procedural safeguards required under the IDEA is just one possible means of meeting the obligations established under 34 CFR §104.36. While OCR recommends adoption of IDEA procedures, it does not make such adoption a mandate. Appendix B to the Section 504 regulations.

The Section 504 regulations establish a floor of procedural safeguards that districts must extend to the parents of students who have disabilities or who are suspected of having disabilities in connection with the provision of FAPE (i.e., identification, evaluation or educational placement). They include:

-- Notice.

-- An opportunity for the parents (or guardian) to examine relevant records.

-- An impartial hearing with opportunity for participation by the parents and representation by counsel.

-- A review procedure.

34 CFR §104.36.

REQUIRED PARENT NOTICES

General Notice of Nondiscrimination:

Quoting from In Re Ansonia (CT) Public Schools, 56 IDELR 176 (OCR 2010):

OCR learned that the Board designated two administrators as its Section 504/Title II Compliance Officers. However, OCR found that the Board’s designees did not understand the Board's obligations under Section 504 and Title II, such as key differences between a grievance procedure and an impartial due process hearing under Section 504 or that, as employees of the Board, they could not lawfully serve as, impartial hearing officers to review decisions regarding the identification, evaluation and placement of students with disabilities as required by 34 C.F.R. Section 104.36. Thus, although the Board designated at least two persons to coordinate its compliance with Section 504 and Title II, OCR determined that the Board’s designees could not effectively coordinate compliance because they did not understand important regulatory requirements, as is contemplated by Section 504 and Title II at 34 C.F.R. Section 104.7(a) and 28 C.F.R. Section 35.107(a).

Additionally, the Board provided no evidence that it issued and disseminated an appropriate notice to members of the school community that it does not discriminate on the basis of disability in it programs and activities, or any notification indicating the name, office address, and telephone number of the individuals designated as the Board’s Section 504 or Title II Coordinators, as expressly required by Section 504 at 34 C.F.R. Sections 104.7(a) and 108, and Title II at 28 C.F.R. Sections 35.107(a) and 35.108.
SPECIFIC PARENT NOTICES

Parent notice is required "with respect to actions regarding the identification, evaluation, or educational placement of persons, who because of handicap, need or are believed to need special education or related services." 34 CFR §104.36. Districts also must provide notice about the child find requirement to children with disabilities and their parents. 34 CFR §104.32.

Based on OCR opinions, notice should be given in the following circumstances:

- Notice of (and participation in) Section 504 Meetings
- Notice of Section 504 Evaluation and Reevaluation Decisions
- Notice of Section 504 Evaluation Results and Eligibility Decisions
- Notice of Section 504 Plan Decisions
- Notice of Significant Change in Placement (Including Disciplinary Removals Beyond 10 Days)
- Notice of Termination of 504 Eligibility or Services
- Notice of Procedural Safeguards

Unlike the 2006 IDEA Part B regulations at 34 CFR §300.504, the Section 504 regulations do not spell out every single item of information that must be included in a notice to parents provided as a procedural safeguard. OCR provides the following guidance regarding the content of such notices:

-- The notice should explain the action the district proposes to take, or declines to take, and the reasons why it has decided to proceed in that fashion. See, e.g., Briere v. Fair Haven Grade Sch. Dist., 25 IDELR 55 (D. Vt. 1996).

-- While the Section 504 regulations do not specify the level of detail that must be provided in the notice, OCR has stated that any notice must be detailed enough to allow parents to meaningfully evaluate whether they wish to consent to the proposed action, refuse to act, or request due process. See, e.g., Middleton-Cross Plains (WI) Area Sch. Dist., 16 IDELR 763 (OCR 1990).

-- The district must notify the parents of their procedural rights under Section 504. Fairfield-Suisun (CA) Unified Sch. Dist., 21 IDELR 1007 (OCR 1994).
PARENT CONSENT REQUIRED PRIOR TO CONDUCTING AN EVALUATION UNDER SECTION 504

Unlike the IDEA, neither 34 CFR §104.36 nor any other section of the Section 504 regulations contain any discussion of when, or whether, districts must obtain prior parental consent for initial (preplacement) evaluations or reevaluations. The Section 504 regulations require parental consent prior to the conduct of initial student evaluation procedures for the identification, diagnosis and prescription of specific educational services. Letter to Durheim, 27 IDELR 380 (OCR 1997). See also OCR Senior Staff Memorandum, 19 IDELR 892 (OCR 1992).

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 Durheim, 27 IDELR 380 (OCR 1997). See also OCR Senior Staff Memorandum, 19 IDELR 892 (OCR 1992).

IMPARTIAL HEARINGS AND GRIEVANCE PROCEDURES

Internal grievance procedures are not an appropriate substitute for impartial hearings, as a Florida district discovered when it was found liable for violating Section 504. OCR concluded that the district’s grievance procedures, which allowed the board of education to determine whether a Section 504 or Title II violation occurred, did not offer sufficient protections to parents. Leon County (FL) Sch. Dist., 50 IDELR 172 (OCR 2007).

With regard to who may serve as a hearing officer, OCR has stated that it "applies judicially recognized principles of fairness." For example, districts may not use their own employees as hearing officers, nor may they use employees of a district that shares a contractual arrangement for the provision of services to children with disabilities. Additionally, school board members may not serve as hearing officers in proceedings conducted to resolve disputes between children with disabilities and officials of their school system. Leon County (FL) Sch. Dist., 50 IDELR 172 (OCR 2007); Griffith (IN) Pub. Schs., 40 IDELR 105 (OCR 2003).

Grievance procedures must be in place pursuant to 34 C.F.R. §104.7(b), which directs districts to adopt grievance procedures that incorporate due process standards and provide “prompt and equitable resolution” of complaints.

IMPARTIAL HEARING ⇒ DENIAL OF FAPE
GRIEVANCE ⇒ DISABILITY DISCRIMINATION COMPLAINT
IV. KEY COMPONENTS OF A SECTION 504 PLAN

The regulation at 34 CFR §104.33 (b) defines an appropriate education as the provision of regular or special education and related aids and services that:

1. Are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met.

2. Are based upon adherence to procedures that satisfy the requirements of 34 CFR §104.34 [educational setting], 34 CFR §104.35 [evaluation and placement], and 34 CFR §104.36 [procedural safeguards].

A Section 504 accommodation plan must address the following five concerns:

1. **Nature of the student's disability and the major life activity it limits.** Students are eligible for Section 504 protection if they have a physical or mental impairment that substantially limits one or more major life activities or if they have a record of or are regarded as having such an impairment. 34 CFR §104.3(j). In the school context, the major life activity affected most frequently is learning; however, it is not limited to that. It's the job of the multidisciplinary team that evaluates the student to determine if the disability substantially limits a major life activity. See Letter to McKethan, 23 IDELR 504 (OCR 1994).

2. **The basis for determining the disability.** Section 504, like the IDEA, requires schools to meet certain evaluation procedures, which must be documented in the accommodation plan. 34 CFR §104.35(b).

3. **The educational impact of the disability.** The multidisciplinary team must describe how the disability affects the child's educational performance so proper accommodations can be prescribed.

4. **Necessary accommodations.** Section 504’s FAPE standard requires schools to provide services designed to meet the individual needs of handicapped persons as adequately as the needs of non-handicapped persons are met. 34 CFR §104.33(b)(1)(i). Because this standard differs from the IDEA’s standard, it is possible, in some cases, for the required services to also differ from those mandated under the IDEA.

5. **Placement in the least restrictive environment.** Section 504 has an LRE requirement, codified at 34 CFR §104.34, that is similar to the LRE mandate of the IDEA.
V. DISABILITY HARASSMENT

Race; color; nationality; sex; sexual orientation; gender identity; gender-related identity or expression; ancestry; age; religion; physical or mental disability; order of protection status; status of being homeless; actual or potential marital or parental status, including pregnancy; association with a person or group with one or more of the aforementioned actual or perceived characteristics. *IASB Policy No. 7:20.*

Legal Standard enforced by U.S. Department of Education’s Office for Civil Rights:

The regulation implementing Section 504 at 34 C.F.R. §104.4 states that no qualified disabled person shall, on the basis of disability, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity that receives [federal financial assistance]. The Title II regulation at 28 C.F.R. §35.130 similarly states that no qualified individual with a disability shall, on the basis of disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any public entity.

Disability harassment under Section 504 and Title II is 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 from an institution’s educational program. Harassing conduct may take many forms, including verbal acts and name-calling, as well as nonverbal behavior, such as graphic and written statements, or conduct that is physically threatening, harmful, or humiliating. When harassing conduct is sufficiently severe, persistent, or pervasive that it creates a hostile environment, it can violate a student’s rights under the Section 504 and Title II regulations. A hostile environment may exist even if there are no tangible effects on the student where the harassment is serious enough to adversely affect the student’s ability to participate in or benefit from an institution’s educational program. When disability harassment limits or denies a student’s ability to participate in or benefit from an institution’s programs or activities, the institution must respond effectively. Where the institution learns that disability harassment may have occurred, the institution must investigate the alleged harassment promptly and respond appropriately, regardless of whether the victim of the harassment asks the institution to take action.

To make a determination regarding the complainant’s disability harassment allegation, OCR considered the following: (1) whether the complainant’s daughter was harassed based on disability; (2) whether the harassing conduct was sufficiently severe, persistent, or pervasive to create a hostile environment, or limit the complainant’s daughter’s ability to participate in or benefit from the
District's educational program; (3) whether the District had actual or constructive notice of the harassment; and (4) whether the District failed to take prompt and/or effective action to end the harassment, prevent it from recurring, and, as appropriate, remedy the effects of the harassment on the complainant's daughter.

Quoted from Kearney R-1 (MO) School District, 111 LRP 24625 (OCR 2010).

DISCIPLINE UNDER SECTION 504

Generally, suspension and expulsion of students with disabilities have been treated the same way under both the IDEA and Section 504. The Office for Civil Rights stated the same protections available to students classified as disabled under the IDEA are available to students classified as disabled under Section 504, with the exception of students who are disabled solely by virtue of alcoholism or drug addiction.

Because an expulsion is considered a "significant change in placement" under the Section 504 regulations at 34 CFR §104.35, "proper procedures" include a manifestation determination and a result finding the student's misconduct was not related to his disability. Although the Section 504 regulations provide no direct guidance on whether a manifestation determination must be conducted before a disciplinary hearing under Section 504, this appears to be the case. OCR stated, pursuant to Section 504 and IDEA, a manifestation determination concerning "alleged misbehavior" must be conducted prior to proceeding with an expulsion hearing. Washington (CA) Unified Sch. Dist., 29 IDELR 486 (OCR 1998).

Under Section 504, LEAs may take disciplinary action -- to the same extent that such disciplinary action is taken against nondisabled students -- pertaining to the use or possession of alcohol against any student with a disability who currently is engaging in the illegal use of alcohol. Section 504 allows a school district to discipline all students with disabilities who are current drug users for use or possession of drugs in violation of the district's disciplinary code. 29 U.S.C. 705(20)(C)(iv). Because a student who is currently engaging in the illegal use of drugs is not considered a student with a disability under Section 504 or the ADA, the student can be disciplined in all instances under the district's regular code of student conduct, even if she has a drug addiction. See Appoquinimink (DE) Sch. Dist., 40 IDELR 157 (OCR 2003). Section 504 permits a school district to discipline a currently drug-using student with a disability for misconduct -- other than use or possession of drugs or alcohol -- in violation of the district's disciplinary code. To the extent the student is currently engaged in the illegal use of drugs, he loses all rights and protections afforded under Section 504.
Section 504 – Additional Case Notes:


The student relied on crutches when he was ambulatory and a wheelchair when he was not. Minor architectural barriers on school property forced him to take a 10-minute detour each way to go to and from the athletic fields. The 20-minute total detracted from his participation as manager of the football team and cut in half his participation time in a typical 45-minute PE class. The student sued the District from denying him meaningful access to its programs as provided under Title II of the Americans with Disabilities Act. A jury found the district liable and awarded $115,000. The court upheld the jury's decision on liability, finding that “For each of the physical areas found by the jury to have the effect of denying [the student] access to school programs, [the student] offered plausible, simple remedies, which are [minimal] compared with the corresponding benefits by way of access achieved.” However, the court vacated the award as arbitrary and remanded the case for a new trial on the issue of damages.


The court dismissed the case, holding that the student presented no evidence that she was an individual with a disability under ADA or Section 504. The student was diagnosed with bipolar disorder and presented a psychiatrist’s report, but there was insufficient evidence of any “substantial limitation” of a major life activity. The court noted that the problems cited by the plaintiff were primarily caused by the harassment she endured, rather than the bipolar disorder itself. Key Quote:

Nobody likes harassment, and the plaintiff’s reaction to the alleged constant teasing and threats she faced is understandable. However, self-isolation in response to peer harassment does not establish that Ms. Weidow's bipolar disorder impaired her interactions with others. To be disabled under the ADA or Section 504, the substantial limitation of a major life activity must result from the impairment, not from the individual's (natural) response to harassment caused by the impairment.

Comment: The court analyzed four major life activities: interacting with others, caring for oneself, concentrating, and sleeping.


The court held that the fact that the student was treated differently than other students did not mean the student was discriminated against. This issue arose in the context of class projects involving food, when the student was given different kinds of food due to allergies. Key Quote:

While each of these examples may illustrate how E.R.'s daily school routine necessarily had to be different than her classmates, they in no way establish that she was separated or isolated from her classmates.

Moreover, the record in no way reflects that [the student] was deprived of a learning opportunity due to her disability. Parents have not established that [the student] was prevented from meaningful participation in these activities, only that her diet was different than her classmates.
**Knaub v. Tulle, Commonwealth Connections Academy, 56 IDELR 230 (M.D. Pa. 2011).**

The court held that the teacher’s participation in an IEP Team meeting at another school was “protected activity” under the ADA/504. The teacher claimed that her participation in this meeting was the reason that she was fired. The court refused to dismiss that claim. The court held that participation in an IEP Team meeting is not protected activity under the 1st Amendment, since it does not involve speaking on a matter of public concern. But it is protected under ADA/504. The court also held that the teacher’s internal complaints within her own school about failure to comply with the law were protected under the 1st Amendment.

**C.C. v. Cypress School District, 56 IDELR 295 (C.D. Cal. 2011).**

The court issued an injunction, ordering the school to permit the student to bring his dog to school with him. The court held that the dog met the definition of a “service animal” under the ADA, and thus, the district was required to allow him to come to school unless it could show that this would create a fundamental alteration of its program. The school was able to show that it would incur some additional expenses and have to make some changes, but nothing that amounted to a fundamental alteration.

Comment: Note that this decision is entirely based on 504/ADA and not IDEA. In fact, the court cited prior case law to make the point that the educational benefit the dog offered was irrelevant.

The Illinois School Code provides:

(105 ILCS 5/14-6.02) **Service animals.** Service animals such as guide dogs, signal dogs or any other animal individually trained to perform tasks for the benefit of a student with a disability shall be permitted to accompany that student at all school functions, whether in or outside the classroom. For the purposes of this Section, “service animal” has the same meaning as in Section 1 of the Service Animal Access Act.

(720 ILCS 630/1). “Service animal” means “a dog or miniature horse trained or being trained as a hearing animal, a guide animal, an assistance animal, a seizure alert animal, a mobility animal, a psychiatric service animal, an autism service animal, or an animal trained for any other physical, mental, or intellectual disability. "Service animal" includes a miniature horse that a public place of accommodation shall make reasonable accommodation so long as the public place of accommodation takes into consideration: (1) the type, size and weight of the miniature horse and whether the facility can accommodate its features; (2) whether the handler has sufficient control of the miniature horse; (3) whether the miniature horse is housebroken; and (4) whether the miniature horse’s presence in the facility compromises legitimate safety requirements necessary for operation. [NOTE: But repealed by PA 97-1108 two weeks later???]

The court held that a FAPE-based claim under 504 must be exhausted under IDEA procedures. Key Quote:

> Section 504 specifically provides that the procedural safeguards available to contest the denial of FAPE shall be the same as under the IDEA. 34 CFR 104.36. Thus, it is evident that claims based on a denial of FAPE must be exhausted under the procedural due process protective scheme contained in the IDEA even if brought under Section 504.

**Comment:** This case also presents a more fundamental argument: That there can be no private right of action under 504 for denial of FAPE because the statute does not create a right to FAPE. The 504 right to FAPE arises from the regulations, not the statute. Unfortunately, the court does not address this issue.

The court dismissed claims of discriminatory disciplinary actions. Key Quote:

> The Defendants argue that Anthony’s status as having a “qualifying disability” does not prohibit UMSD from disciplining Anthony under Section 504 as there is no proscription against discipline in either the text of Section 504 or its implementing regulations. We have reviewed the relevant statutes and case law and, likewise, were unable to find any such prohibition.

**Comment:** Here’s a court that pays more attention to statute, regulation, and case law than OCR interpretation!


At the summary judgment stage, the court held that a private school was subject to Section 504, and could be held liable for denial of FAPE under 504, even though the FAPE claim under IDEA was barred by *res judicata*. The court noted that private schools would not be subject to an IDEA/FAPE claim, but could be held liable under 504.

**J.S. v. Attica Central Schools,** 57 IDELR 187 (W.D.N.Y. 2011).

The court dismissed a class action suit alleging that the school failed to provide accessible facilities. The court noted that the district had made many efforts to bring facilities into compliance. The court noted that the plaintiffs “point to a handful of items on non-compliance with regard to accessible facilities for mobility-impaired students, they have not asserted, much less presented, any evidence that Defendant’s non-compliance is the result of bad faith or gross misjudgment and discrimination against Plaintiffs.”

**Additional comments on facilities:**

- If a district facility qualifies as "new construction" but does not comply with the applicable guidelines, the district may have to renovate the facility to bring it into compliance. *See, e.g., J.S. v. Attica Cent. Schs.,* 57 IDELR 187 (W.D.N.Y. 2011) (noting that the district had undertaken several construction and renovation projects since 1999 to remedy accessibility issues); *Spieler v. Mt. Diablo Unified Sch. Dist.,* 48 IDELR 188 (N.D. Cal. 2007) (ordering a district to replace the engineered wood fiber surfacing installed on the playgrounds with rubberized surfacing).
- If a facility constructed or altered before March 15, 2012, does not comply with the UFAS or the 1991 ADA Standards, the district must make the facility accessible. A facility renovated before
March 15, 2012, may comply with the 1991 Standards, the UFAS, or the 2010 Standards. 28 CFR 35.151 (c)(5)(i).

- If the renovations occur on or after March 15, 2012, the completed facility must comply with the 2010 Standards. 28 CFR 35.151 (c)(5)(ii).

The Section 504 regulations, at 34 CFR 104.34 (c), add the comparability requirement to the mix, stating that for any district that “operates a facility that is identifiable as being for handicapped (sic) persons,” compliance with the LRE mandate of 34 CFR 104.34 (a) is not enough; the district must also “ensure that the facility and the services and activities provided therein, are comparable to the other facilities, services, and activities of the (district).”

- Although case law concerning the comparability requirement of 34 CFR 104.34 (c) is limited, *Hendricks v. Gilhool*, 441 IDELR 352 (E.D. Pa. 1989) contains a good explanation of what OCR will review in determining if the general condition of a facility’s instructional space is comparable. That decision involved the efforts of the SEA to develop and implement a plan to ensure provision of comparable facilities to students with disabilities. As part of that initiative, the state educational agency identified among the characteristics of a comparable facility that its classroom space be comparable in quality to that provided to nondisabled students in areas such as location, instructional appropriateness, accessibility, size, lighting and ventilation.

*Springfield (IL) Sch. Dist. #186, 55 IDELR 206 (OCR 2010).*

The school district was ordered to provide staff training on Section 504, conduct a manifestation determination, and provide compensatory services to a student with ADHD. The district suspended (for 10 days) and then expelled a student with a 504 plan for hitting a school employee, without first conducting a manifestation determination. OCR determined that the expulsion and proposed alternative placement was a significant change in placement that required a determination of whether the behavior was a manifestation of the student’s disability pursuant to Section 504. OCR also determined that the phrase “if applicable,” concerning modifications listed on a 504 plan, means that a determination should be made whether to provide modifications for a given situation, and does not mean that modifications are optional or provided at the teacher’s discretion.

*Kalliope R. v. New York State Dep’t of Educ., 54 IDELR 253 (E.D.N.Y. 2010).*

Parents’ allegation that NYSED directed its Local Committees on Special Education (“CSEs”) to stop placing students in its 12:2:2 classes, regardless of student needs or the recommendations of the CSEs, stated a plausible discrimination/gross misjudgment claim under Section 504.

*South Lyon (MI) Cmty. Schs. 54 IDELR 204 (OCR 2009).*

District denied student with ED the opportunity to participate in class field trip when the principal improperly required the parent to accompany him on the trip as a condition of his attendance, rather than providing the student with the related aids and services he needed to participate. (See also, e.g., *Metro Nashville (TN) Sch. Dist.*, 53 IDELR 337 (OCR 2009): Students with disabilities were inappropriately denied participation in class trip to Camp Sycamore and a grade-wide pizza party due to lack of appropriate communication about trip information by special education homeroom teachers to parents.)
Marana (AZ) Unified Sch. Dist., 53 IDELR 201 (OCR 2009).

A high school student with a disability who participated in his school’s marching band class and the marching band’s extracurricular activities participated in home football games by playing his drum in the stands and with other percussionists in front of the field at halftime. However, he was not permitted to participate in “high stakes events” like field show competitions, and during a marching band trip to Disneyland, he did not participate in the band’s recording session, parade through the park, or group picture. This amounted to disability discrimination under Section 504.

Sierra Vista (AZ) Unified Sch. Dist., 54 IDELR 35 (OCR 2009).

District discriminated against some students with disabilities who used the accessible bus, in that the district failed to ensure that its bus routes were established to ensure students get to school on time and subjected these students to a shortened school day. (See also, e.g., Questions and Answers on Serving Students with Disabilities Eligible for Transportation, 53 IDELR 268 (OSERS 2009): The transportation of nondisabled students in climate-controlled buses, while children with disabilities are transported in separate buses that are not climate-controlled, might raise issues of disability discrimination under Section 504.)

Raytown (MO) C-2 Sch. Dist., 53 IDELR 239 (OCR 2009).

A student with a disability who needed toileting assistance was improperly excluded from the district's before- and after-school services for students who were enrolled at the school. (But see, e.g., Shoreline (WA) Sch. Dist. No. 412, 24 IDELR 774 (OCR 1996): After implementing a pilot program to ascertain if a student with disability could meaningfully participate in the activities of its after-school program, district properly concluded that student with disability could not do so, even with reasonable accommodation.)

Wilson County (TN) Sch. Dist., 50 IDELR 230 (OCR 2008).

Changing a student's 504 plan to exclude academic accommodations (i.e., extended time on classwork, homework, and routine classroom tests) in his honors classes violated Section 504. (See also Letter to Anonymous, 108 LRP 16376 (OCR 12/26/07): If a Section 504-eligible student requires related aids and services to participate in a regular education class or program, then a district may not deny the student such related aids and services in an accelerated class or program. Additionally, condition enrollment in an advanced class or program on the forfeiture of needed special education or related aids and services violate Section 504.)