Section
504 COMPLIANCE ADVISOR

ROUTE TO

Your Guide to Understanding and Administering Section 504

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IN THIS ISSUE

Be proactive with clear documentation before OCR investigation occurs

Sound the alarm.

A parent filed a complaint with the Office for Civil Rights against a district, and OCR sent a letter notifying the district of its intent to investigate. However, the district isn't worried because it has been maintaining relevant documentation of its practices all along to best respond in this situation.

During its investigation, OCR will ask for specific documentation involving the complaint, which can include documentation on district policies, communication between the parties, and information from internal reviews. Maintaining said documentation before a complaint occurs allows a district to respond with the strongest evidence that it took appropriate steps in that particular situation. Consider these insights regarding data requests from OCR during an investigation.

What OCR checks

When OCR makes a data request regarding an investigation into a complaint filed against a district, it is looking to see whether the district has policies that fit what the law requires, said Amy K. Dickerson, a school attorney at Franczek PC in Chicago, Ill.

"They're looking to see if the [district] has appropriate policies and whether those policies were followed," she said.

OCR is also looking to see what steps the district took in responding to the particular situation and whether those steps were appropriate and in compliance. Additionally, OCR checks whether the district communicated with the parents or applicable parties about the steps taken and outcomes from meetings. OCR's Case Processing Manual highlights information that districts should know regarding data requests.

Relevant policies

OCR will want to see the district's applicable policies and procedures. This can include the parent or student handbook provisions regarding whatever issue the complaint is raising. Additionally, OCR may request district policy on the process of handling internal complaints, Dickerson said.

Relevant communications

OCR wants to see relevant communications between district personnel and between the parents and the district. These communica-

(See **PROACTIVE** on page 3)

Did Colo. district discriminate by threatening truancy court due to 5th-grader's chronic absences?

The Colorado district's health records for a student dating back to first grade reflected health issues. In fourth grade, the parents shared a diagnosis with staff and indicated it was affecting his attendance. They communicated that the child's issues were persisting, the doctor was trying to diagnose them, and it was getting harder to get the student to school. They requested help with schoolwork.

The child's occupational and speech therapists advocated for help and supports in school and a needed evaluation, so he wouldn't "miss so much school." Notes in attendance records, school nurse records, statements to the teacher, observations, and statements by the parents and his occupational therapist evinced the child's struggles.

The district subsequently emailed all families whose children had eight or more unexcused absences. It explaining that 10 unexcused absences may result in truancy court proceedings under district policy. It then placed the child on probation pursuant to its continuing enrollment policy.

The parents received a third notice indicating the child was "chronically absent," and the district may initiate action through the truancy court. He accumulated 38 absences, with 10.5 days excused and 27.5 days unexcused.

The parents contacted the Office for Civil Rights. They alleged the district discriminated by disenrolling the student. The district asserted that no one knew the reasons for the child's excessive absences or that they were related to disabilities or health issues. It explained that the student was never disenrolled.

Section 504 and ADA Title II prohibit districts from discriminating based on disability.

Did district improperly disenroll child based on disability-related absences?

A. Yes. Students with disabilities are automatically excused from being absent.

B. Yes. The district discriminated when it disenrolled the child based on his unaccommodated disabilities and medical conditions.

C. No. District policies allowed for a truancy court action after 10 unexcused absences.

How OCR found: B.

In *Pueblo County (CO) School District 70*, 122 LRP 48476 (OCR 09/08/22), OCR expressed concern that all the decisions made by the school with respect to the child's attendance didn't consider his unaccommodated disabilities and health issues nor the potential impact they may have been having on his attendance. OCR referenced the school placing the child on probation, labeling him "chronically absent," and threatening disenrollment and truancy court. It was reasonable for the parents to believe he was disenrolled based on the school's communications and continuing threats, it noted.

Administrators were aware of the parents' and the occupational therapist's contentions that the child's absences were related to and could be caused by his unaccommodated disabilities and health conditions, OCR observed. Yet, the district never examined or considered the extent to which his disabilities or health condition were impacting attendance so that it could potentially accommodate him regarding enforcement of its attendance policies. Instead, it continued to threaten truancy, OCR found.

A is incorrect. Students with disabilities still have to abide by compulsory attendance laws.

C is incorrect. The school had an "abundance of information" evincing the child was struggling, OCR noted. It expressed concerns that the district's policies regarding attendance and absences were ambiguous, and its continued threats of truancy court were retaliatory.

Editor's note: This feature is not intended as instructional material or to replace legal advice. ■

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PROACTIVE (continued from page 1)

tions can include meeting notes, interview notes, email correspondence, phone conversations, notice received of any internal complaint, and more, she said.

Outcomes of internal reviews

OCR may ask for notes of any interviews that administrators conducted when doing an internal review and for the review's outcome. OCR could request the communications with the parties about the outcome of that review and ask what steps the district took following that outcome.

What to do before OCR requests data

Districts should proactively maintain clear documentation before OCR makes a data request. Some missteps a district can make regarding maintaining documentation are taking vague or unclear notes during meetings, failing to document key conversations, and failing to notify parents of an outcome in a meeting, Dickerson said.

Keeping good, real-time documentation can help districts when a complaint involves matters that might have occurred in the past.

"If you've got really good documentation of all the steps that were taken, that can also help refresh staff members' memories as needed if it occurred a while ago," Dickerson said.

Determine who from the district will respond to the data request from OCR. That administrator will ideally work with legal counsel to gather the relevant information and reach out to relevant staff members who may be involved in the complaint, Dickerson said. As a district maintains good documentation, it should keep it organized so that the administrator overseeing the request can easily access the information.

"This is ideally maintained in one location with only those staff members who need to know about it actually having access to it," she said. ■

Cool for school: Address needs of students with disabilities in high temps

Extremely hot temperatures can affect the body in a myriad of ways. For students with disabilities, exposure to high temperatures can exacerbate any cerebral, respiratory, and cardiovascular conditions, resulting in severe health responses or death.

Districts must accommodate the medical needs of students with disabilities to allow them to access their education in the same manner as their nondisabled peers. This can include accommodations in an individual health plan, Section 504 plan, or IEP when rising temperatures exacerbate their conditions or impairments. A school attorney highlights what issues to discuss at the next team meeting.

Conditions

When a student with a condition requires accommodations to endure high temperatures at school, 504 teams should ensure that any recommendations they get from parents or a physician are specific. Avoid implementing recommendations from parents or physicians that are too vague or leave determinations up to staff, said Sundee M. Johnson, an attorney with Atkinson, Andelson, Loya, Ruud & Romo in Cerritos, Calif.

For example, if a physician recommends that a student not participate in outside activities when it's "too hot" outside, the team may not know what "too hot" means for that student.

"Districts should use specific recommendations such as a student should not participate in running activities in temperatures over 80 degrees or over 85 degrees. There isn't room to guess, and they know exactly what they're supposed to do and when," she said.

Teams should remember that other students with disabilities could also be impacted by excessive heat, including students with autism or intellectual disabilities. These students may need to receive accommodations before high temperatures affect behavior, she said.

Inside, outside accommodations

Accommodations for students with disabilities to beat the heat will look a little different depending on their location. An outside accommodation could be that a student is exempt from activities when temperatures are above a certain degree, which could increase a student's heart rate. Also, having access to water and taking breaks in the shade could be accommodations, Johnson said.

Some districts with older buildings with no central air conditioning may also need to consider accommodating students with disabilities inside. This can include having a window air conditioning unit in their classroom, extra fans, or a swamp cooler, which uses moisture to cool the air. Students in these classrooms

could also be allowed to take breaks from hotter classrooms, she said.

Remember that students may need access to transportation with air conditioning as well. *See Chicago (IL) Pub. Schs. Dist. #299*, 56 IDELR 81 (OCR 2010), where a district violated Section 504 when it supplied a vehicle without working temperature control for a student with spina bifida.

These accommodations should be written on a student's IHP or 504 plan. The plans should be accessible to those responsible for implementing them, including students' teachers, aides, bus drivers, coaches, paraprofessionals, substitute teachers, and more. When those individuals are not trained on the student's condition and the related accommodations, districts could get into trouble should the Office for Civil Rights conduct an investigation, Johnson said.

"I think it is best practice for a school nurse or administrator to go over the condition and the accommodation with any staff who may be required to implement it and then sign off that they understand from a compliance standpoint and making sure that everyone knows what they're supposed to do," Johnson said. ■

Deliver 504 evaluations when student pregnancy involves temporary disability

How does pregnancy fit into accommodations and eligibility under Section 504?

While pregnancy itself is not considered an impairment under Section 504, it could be a temporary disability. The EEOC, in following the ADA, has explained that complications from pregnancy could be considered a temporary disability if they substantially limit one more major life activities for an extended period of time. *See* 29 CFR 1630.2(h)(i).

Becoming pregnant doesn't automatically make a student eligible under 504 as having a temporary disability. Districts should keep an eye out for physical impairments from a student's pregnancy that signal a need for an evaluation and any mental health impairments that may follow a student postpartum. Read on to see when a pregnant student should be evaluated.

Evaluations

A student's pregnancy is not, in itself, a reason for a 504 team to convene. However, if the district becomes aware of complications occurring during the pregnancy that affect the student's access to education, it should evaluate whether the student requires accommodations, said Mallory Milluzzi, school attorney for Klein, Thorp, & Jenkins in Chicago, Ill. The team should be mindful of anything that could be considered abnormal and could interfere with a student accessing education, especially if the student and parents are being forthcoming about the pregnancy, she said.

"Be on the lookout for red flags that indicate that it could be something other than a normal healthy pregnancy. Anything that indicates a complication, I would meet just to make sure," she said. Some pregnancy complications that teams should look out for include:

- High blood pressure.
- Preeclampsia.
- Increased medical-related absences.
- Physical pain.

For example, the district should consider an evaluation and whether accommodations are necessary if a student is increasingly absent from school because of complications due to pregnancy. *See Cabarrus County (NC) Schs.*, 73 IDELR 24 (OCR 2017) (finding that a district failed to evaluate a pregnant student's eligibility for homebound instruction after marking medically related absences as unexcused).

If a student is pregnant and has a temporary impairment that limits a major life activity, teams should consider how the major life activity is impacted and the expected duration of the impairment when determining Section 504 eligibility. See *Protecting Students With Disabilities: Frequently Asked Questions About Section 504 and the Educ. of Children with Disabilities*, 121 LRP 5510 (OCR 01/10/20).

Teams should determine whether a student is experiencing a passing symptom of pregnancy or a complication impacting a major life activity for a significant period of time. Each pregnancy is different, so teams should determine this on a case-by-case basis, said Milluzzi. For example, some pregnant students may experience nausea for a short period of time, while others experience it throughout their entire pregnancy. The persistence and duration of that symptom impacts the student's ability to participate in class, Milluzzi said.

"I think those unique situations that people assume are of a very short, temporary nature, like morning sickness, are what could be long lasting and impact a major life activity," she said.

Teams should request medical information and any recommendation from a student's doctor about the student's current condition and complications. For instance, this could include documentation on whether or not a student would need to be on bed rest. Having data from a student's doctor would shed light on pregnancy complications that are tied to any physical impairments, Milluzzi said.

Pregnant students can also experience mental health impairments like prenatal anxiety and depression, she said. Section 504 teams should consider that social-emotional complications caused by pregnancy could linger after giving birth, too. Even students who did not experience any complications during pregnancy could be diagnosed with post-partum anxiety or depression.

"I think the anxiety and depression aspect is something people don't always think of when it comes to pregnancy. They're looking for physical issues, but that social-emotional component is what districts should be most alert for," she said.

Title IX

Title IX provides ample protection against discrimination based on pregnancy and would be the primary law that a district would follow when it comes to a pregnant student, said Milluzzi.

Title IX prohibits districts from discriminating against students based on current, potential, or past pregnancy or related conditions. 34 CFR 106.40(b). Moreover, districts are to "treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom in the same manner and under the same policies as any other temporary disability." 34 CFR 106.40(b)(4). ■

Unmask students' anger, develop behavior management strategies

If a student with a Section 504 plan for ADHD is experiencing a change in behavior that shows up in the classroom as tantrums or angry bursts of shouting, the teacher may become alarmed. Although it's coming out as anger, the real emotion could be sadness, anxiety, or even fear for any number of reasons. The way to know for sure is to investigate what triggered the behavior.

Teams need to get to the root of students' behaviors to determine what anger management strategies will

be effective for students. When planning to help manage a student's anger, teams should also collaborate with parents and the adults implementing the behavior plan so that they understand when to cue students to use anger management strategies.

Get down to function

The 504 team first needs to determine the function of the student's behavior through a functional behavioral assessment. Teams should observe students, talk to teachers, and talk to parents or guardians to gather information on the student, said Michelle Gillard, coordinator of mental health and psychological and social services for St. Lucie Public Schools, in Florida. Depending on students' ages and maturity, teams could also get information from their students to understand what's going on with them.

"Then, we put that all together, and there's a bit of a scientific process where we are making a theory about what we think the function is. Then, we test that theory, putting some interventions in place to support it," Gillard said.

Remember that an FBA may qualify as an evaluation when it's focused on the educational and behavioral needs of a child. This may require parental consent. However, if a district uses FBAs as interventions to address behavior for all students, then consent may not be required. *See Letter to Christiansen*, 48 IDELR 161 (OSEP 2007).

Collaborate on plan

Teams can decide which interventions to implement after they determine why a student is experiencing a certain behavior. The team can include teachers, parents, school counselors, social workers, administrators, and more, said Gillard. Anger management strategies will vary for students but can involve a social skills or counseling group, taking breaks, counting to 10, and breathing exercises.

Teams should work with parents to reinforce the anger management strategies at home after students learn them in school. This overlap will likely result in more successful interventions, she said. "It's a two-way street. If they try things that they know work or don't work, then we would want that information as well so that we can also support what's going on," Gillard said.

Teach cueing

When implementing anger management strategies as part of 504 plans or behavioral intervention plans, teams should confirm that the adults in the room know when to cue students to use the strategies, Gillard said.

Teachers, paraprofessionals, and other support staff need to know what responses signal an angry outburst or tantrum. By noticing the lead-up to this behavior, the adults implementing the plan can remind the student what strategy to use, said Gillard. This can also include paying attention to the student's environment. For example, a noisy lunchroom could trigger a student's angry behavior, so a strategy might be to sit him at the end of a table, not in the middle, she said.

Follow through

Teams have to remember to monitor strategies and student responses periodically. Teams can determine a regular schedule to check in with a student's anger management interventions to see if any adjustments need to be made, Gillard said.

"If we're monitoring regularly, and we need to tweak a plan, then we can have better outcomes as opposed to just kind of waiting and not paying attention to it," she said.

If a student's behaviors are not improving through the implementation of the strategies, then the team may need to conduct another FBA. Failing to develop an individualized BIP could result in a denial of FAPE. *See C.F. v. New York City Dep't of Educ.*, 62 IDELR 281 (2d Cir. 2014). ■

Know where bullying, harassment lurks for students with disabilities

A district must not delay in taking action when learning a student with a disability has been a victim of bullying. In *Estate of Barnwell v. Watson*, 64 IDELR 8 (E.D. Ark. 2014), a teen's letter to his school counselor and his parent's reports put a district on alert to investigate. Unfortunately, there was no investigation before the teen committed suicide. The inaction made a case that the district was deliberately indifferent to disability and sexual harassment under Section 504 and Title IX.

The U.S. Department of Education has defined harassment under Section 504 and Title II as intimidation or abusive behavior toward a student based on disability that creates a hostile environment. In *Dear Colleague Letter: Responding to Bullying of Students with Disabilities*, 64 IDELR 115 (OCR 2014), the Office for Civil Rights explained it likely will find discrimination in violation of Section 504 and Title II based on bullying or harassment when:

- A student is bullied based on a disability.

• The bullying is sufficiently serious to create a hostile environment.

• School officials know or should know about the bullying.

• The school does not respond appropriately.

When districts ignore or fail to address bullying that creates a hostile environment, they may discriminate against students with disabilities and violate Section 504. *Dear Colleague Letter*, 55 IDELR 174 (OCR 2010). Districts should know where to look for disability-based harassment and how to stop it from happening. Share this refresher on where to look for potential harassment and bullying with your team.

In classroom

Remind staff to take allegations of bullying seriously in the classroom. In *M.J. v. Marion Independent School District*, 61 IDELR 76 (W.D. Tex. 2013), a student was told to "sit down and get to work" when he reported in-class bullying to his math teacher. The court adopted the view that a district can be held liable under Section 504 if it is deliberately indifferent to harassment. In other words, it acted with conscious or reckless disregard of the consequences of its acts or omissions.

Additionally, explain to staff that their remarks made to students during class could spark harassment claims. Train staff to self-monitor comments and intervene when other staff engage in behavior that could be harassment.

Outside classroom

Train staff to keep an eye out for bullying or harassment that could occur during out-of-class time that is loose or unstructured. This can include afterschool clubs or activities, extracurricular activities, time on the playground, in the cafeteria, in the hallways, or on the bus. Staff members need to be able to recognize and report student bullying and harassment that occurs outside the classroom.

Remember that students who are bullied can be socially alienated from peers. Also, recognize when a student who is typically alone might be experiencing bullying and is in need of an informal group, or lunch bunch, to eat meals with at school.

Online, in nonverbal actions

Recognize that students with disabilities could be receiving harassment online. Bullying through an electronic medium, or cyberbullying, can include offensive emails, text messages, embarrassing photos, or fake online profiles. *Dear Colleague Letter*, 61 IDELR 263 (OSERS 2013). During an inquiry into a cyberbullying incident, consider whether the student with a disability would benefit from social media literacy skills.

Finally, explain that nonverbal harassment can occur on school property. This includes nonverbal behavior like graphic written statements; offensive graffiti; and actions that are physically threatening, harmful, or humiliating. ■

Dodge 3 mistakes in transportation of students with temporary disabilities

A parent walks into an administrator's office and requests transportation be provided to her son who recently broke his leg in a skiing accident. The administrator flatly denies the parent's request because the student is expected to heal within five months.

Did the administrator jump the gun? Maybe. If the student needs to use a bus equipped with a wheelchair lift and his parents don't have the capability of getting him to school, the district may have an obligation provide one to ensure equal access to education. *See Protecting Students With Disabilities: Frequently Asked Questions About Section 504 and the Education of Children with Disabilities*, 67 IDELR 189 (OCR 2015).

When it comes to transportation issues, don't be sidetracked by the duration of the student's condition. Evaluate the student's eligibility for 504 services and provide access through accommodations for students with temporary disabilities that substantially limit major life activities. Stay in 504 compliance by avoiding three common potholes.

Dismissing duration

Districts may be tempted to write off a student's temporary impairment as transitory and minor if, at face value, the impairment is supposed to last less than six months, said Rebecca Bailey, a school attorney with Thompson & Horton LLP in Houston.

Decisions from the Office for Civil Rights give no clear indication about what amount of time qualifies a temporary impairment qualifies as a disability. See *James A. Garfield (OH) Local Sch. Dist.*, 52 IDELR 142 (OCR 2009) (where three months wasn't enough); and *Roselle Park (NJ) Sch. Dist.*, 59 IDELR 17 (OCR 2012) (where 10 weeks was sufficient).

Under Title II of the ADA, an individual is not regarded as having a disability if the district can demon-

strate that the impairment is transitory and minor. But this provision does not apply to the three prongs of the definition of an actual disability, Bailey said. Those three prongs are:

1. Having a physical or mental impairment that substantially limits one or more major life activities;

2. Having a record of such impairment; -

3. Being regarded as having such an impairment. 28 CFR 35.108(d)(1)(ix).

"Educators need to understand that, if there's a disability that substantially limits at least one major life activity for a period of time that likely will significantly disrupt a student's education, then in all likelihood, the student is going to be eligible for the duration of the disability," said Bailey.

Delaying evaluation

If a student has an impairment that significantly disrupts a major life activity, the district should not delay evaluating that student for eligibility under Section 504, Bailey said. For example, in *Anaheim City (CA) School District*, 115 LRP 19319 (OCR 12/02/14), a district should have evaluated a student's eligibility for Section 504 accommodations after he suffered a severe leg break during the summer that required him to use a wheelchair.

Go through the typical process to seek consent from the student's parents to evaluate and schedule a committee meeting to discuss what accommodations will be needed to ensure equal access. The parents can provide records to assist the committee in determining the severity and duration, she said.

During that time, contact the transportation department to set up the specialized transportation for the student as that process could take some time, she said.

Limiting accommodations

Section 504 ensures that students with disabilities have equal access to all aspects of their education, including transportation. 34 CFR 104.33(c)(2). When a student with a temporary disability requires transportation services or accommodations on the bus, work with the transportation department to find a reasonable accommodation.

"My philosophy is that it's easy just to say no, but the only time we need to be telling people no is if we can't reasonably make that accommodation," said Cody Cox, director of transportation for Cleveland ISD in Texas.

Accommodations for a student with a broken leg, for example, will often depend on the mobility of the student and on the district's resources. If a student is on crutches, an accommodation may be allowing the student to sit at the front of the bus to make getting on and off easier, said Cox.

Additionally, a temporary stop could be added in front of the student's home to alleviate the complication of navigating to a community bus stop with broken legs. A student who is in a wheelchair after a leg injury may need to be temporarily placed on a bus that is equipped with a wheelchair lift, he said. ■

What general education teachers need to know about special ed

Special educators are not the only ones responsible for students with disabilities. To one extent or another, every school staff member has obligations toward such students. That includes general education teachers. This chart explains a few key issues general education teachers should learn about their role in implementing the requirements of Section 504 and the IDEA.

Issue	Learn why it's important and how you fit in
DISCIPLINE	**Students with disabilities are not always subject to regular discipline.**
	Under Section 504 and the IDEA, students with disabilities are entitled to certain disciplinary protections to which other students are not entitled. • The protections include a manifestation determination review. A district has to conduct an MDR when it subjects a student with a disability to a disciplinary change of placement (usually, more than 10 days of disciplinary removals). The MDR team decides whether a disability or a failure to fully implement the IEP or 504 plan is caused by the student's misconduct. • A teacher's decision to remove a student from the classroom or call the parent to take the student home early may affect whether an MDR is required. It's important for teachers to track such removals and communicate about them with special education administrators.
IMPLEMENTATION	**All educators bear responsibility for implementing Section 504 plans and IEPs.**
	Section 504 and the IDEA require districts to implement 504 plans and IEPs as written. • If a teacher's class includes students with 504 plans or IEPs, the teacher should ensure he has a copy of each plan (or the relevant parts of it). • The teacher should review the plan and make sure he understands it. If the teacher needs clarification, he should contact the special education director or the appropriate individual to answer his questions. • The teacher should track his provision of accommodations, interventions, or supports under a 504 plan or IEP to help show he's implementing them. • The teacher needs to implement the plan even if he is teaching an advanced course and the student is gifted.
REFERRAL	**General educators have a role to play in finding students with disabilities.**
	The IDEA and Section 504 child find processes require districts to identify, refer, and evaluate students suspected of having a disability and needing special education services or accommodations. • Teachers must refer students to the special education department when they suspect a student may have a disability and need special education services. For that reason, teachers need to learn about the full range of disabilities under the IDEA. • Teachers should also be on the lookout for students who may have physical or mental health impairments, such as ADHD, diabetes, or food allergies, for which they need accommodations, even if they perform well academically. Teachers should inform Section 504 staff whenever they identify such a student. • Teachers should learn about child find red flags. Those signs vary widely but include, for example, a situation where a student continues to decline academically despite receiving general education interventions or other supports.
IEP, 504 MEETINGS	**General educators may be required to attend IEP and 504 team meetings.**
	The IDEA requires a general education teacher to attend a student's IEP meeting when the student is or may be participating in a general education classroom. General education teachers also may be invited or required to attend Section 504 meetings. • Teachers invited to meetings should be ready to provide input to the IEP team or 504 team concerning the student's academic ability, emotional concerns, behavioral challenges, ability to focus, or other issues pertinent to the meeting. The meeting notice should list the issues the team plans to address. If it doesn't, the teacher should contact the team leader for more information to properly prepare. ■

Parent picks infeasible placement for student with Down syndrome

Case name: *Killoran v. Westhampton Beach Sch. Dist.*, 123 LRP 20859 (2d Cir. 07/13/23, *unpublished*).

Ruling: The 2d U.S. Circuit Court of Appeals affirmed a District Court's judgment, holding that a New York district did not discriminate in violation of ADA Title II and Section 504 by failing to accommodate a student with Down syndrome. The court ruled that the parent's requested accommodation wasn't feasible or reasonable, the district's IEPs were appropriate, and their recommended out-of-district placements were the student's least restrictive environment.

What it means: A district's violation of the IDEA, without more, doesn't support a disability discrimination claim. Here, the district dodged a discrimination claim by pointing to the lack of any evidence to support that it failed to reasonably accommodate a student, other than an impartial hearing officer's finding that it denied the student FAPE. It showed that the parent's requested accommodation, placement at another district middle school, wasn't feasible, let alone reasonable, given the student's unique needs. *Editor's note: Per court order, this decision has not been released for publication in official or permanent law reports.*

Summary: A New York district didn't discriminate against a student with Down syndrome based on disability, and it placed him in the least restrictive environment. The 2d Circuit affirmed the District Court's ruling for the district. The parent filed an appeal challenging the district's IEPs, which recommended out-of-district placements. The parent alleged disability discrimination. The 2d Circuit explained that to make a claim under ADA Title II or Section 504, the parent must show that the student was denied the opportunity to participate in or benefit from district services, programs, or activities, or was otherwise discriminated against based on disability. A district discriminates when it fails to make a reasonable accommodation that would permit the student to access and meaningfully participate in district services, it added. The 2d Circuit agreed that the parent failed to establish disability discrimination. He primarily pointed to a previous IHO's decision concluding that the district denied the student FAPE. However, evidence of an IDEA violation, without more, is insufficient to demonstrate a violation under the ADA or Section 504, the court remarked. The parent also failed to show that his proposed accommodation, his son's placement at a district middle school, was reasonable, it added. He conceded that implementing the student's IEP wasn't possible in that school's existing program, and he provided no evidence to support that placement in its newly developed program or in a mainstreamed classroom was possible, let alone reasonable, it added. A district would be liable for its discriminatory refusal to undertake a feasible accommodation, not for mere refusal to explore potential accommodations where, in the end, no accommodation was possible, the court explained. It also ruled that the district's proposed out-of-district placements were the student's LRE. The district proposed to educate the student, to the maximum extent appropriate, with nondisabled students after considering an appropriate continuum of alternatives, including the parent's preferred placement, and it recommended the placement most appropriate for his needs, it held. His unique needs meant that educating him in a regular classroom couldn't be satisfactorily achieved even with the use of supplemental aids and services, the court added. ■

Efforts to prevent playground injuries show district 'took 504 plans seriously'

Case name: *Baker v. Bentonville Sch. Dist.*, 123 LRP 22497 (8th Cir. 07/27/23).

Ruling: Despite claiming that an Arkansas district "deliberately disregarded" their safety concerns, the parents of a kindergartner with a visual impairment could not show that the district failed to accommodate the child's disability. The 8th U.S. Circuit Court of Appeals upheld a District Court ruling at 81 IDELR 100 that granted judgment for the district on the parents' Section 504 and ADA Title II claims.

What it means: A Section 504 plan is not deficient simply because it fails to include every safety measure or accommodation that a parent might request. If the student suffers frequent injuries, however, the district should reconvene her Section 504 team to discuss the need for different or additional accommodations. Although this district denied the parent's request for a one-to-one aide, it revised the child's Section 504 plan several times after

504 quick quiz

Q: *May districts wait for medical documentation before conducting Section 504 evaluations?*

A: No, a district's duty to evaluate a student does not depend on a parent's ability or willingness to provide medical documentation. As a district learned in *New Haven (CT) Public Schools*, 67 IDELR 99 (OCR 2015), if the district knows or has reason to suspect that a student has a disability, it must conduct a full and adequate evaluation. The Connecticut district refused to convene an eligibility meeting until the parent could produce medical documentation, and it relied on the medical information in developing the student's 504 plan. OCR explained that the district failed to evaluate the student's needs and determine appropriate services, which violated Section 504. While it is acceptable for districts to request medical information from a parent, it cannot decline to evaluate a student or determine eligibility for services based on the parent's failure to provide such documentation. Additionally, a medical diagnosis alone does not qualify as an evaluation for Section 504 purposes.

she suffered cuts, bruises, and scrapes on the playground. The additional safety measures the district put in place, which proved effective, showed that it was responsive to the child's disability-related needs.

Summary: An Arkansas district's willingness to revise a kindergartner's Section 504 plan after she suffered various injuries on the school playground undercut the parents' claim that it failed to accommodate the child's visual impairment. Citing the district's ongoing efforts to protect the student's safety, the 8th Circuit upheld a District Court ruling at 81 IDELR 100 that granted judgment for the district on the parents Section 504 and ADA claims. The three-judge panel pointed out that the parents were seeking money damages as a remedy for the alleged disability discrimination. As such, the panel explained, they had to show that the district's alleged failure to accommodate the child's disability amounted to bad faith or gross misjudgment. The panel held that the parents failed to meet that standard. The panel noted that the child's visual impairment was mild enough to place her in the normal range of visual acuity. Still, the panel observed, the district developed a Section 504 plan that included supervision during classroom transitions and activities, a "buddy" for errands and bathroom breaks, and specialized transportation. Following incidents on the playground in which the child collided with another student on the slide, got a splinter, and tripped on a concrete slab, the district twice amended the child's Section 504 plan to include additional safety-related accommodations. "[The child's mother] agreed to all three Section 504 plans, and [the child] did not experience any injuries after [the third plan] was implemented," U.S. Circuit Judge James B. Loken wrote. The panel acknowledged that the district declined to provide a one-on-one aide as the parents requested. However, given that the child's injuries were common among elementary school students and that the district took steps to protect the child's safety, the court found no evidence of bad faith or gross misjudgment. ■

'Disparaging' remarks about teen's disability spark retaliation concerns

Case name: *Interboro (PA) Sch. Dist.*, 123 LRP 17077 (OCR 03/02/23).

Ruling: OCR determined that a Pennsylvania district may have unlawfully retaliated against a high schooler with multiple disabilities after her parent advocated for her rights. It also found that the district may have failed to properly implement the student's Section 504 plan. To remedy the potential Section 504 and Title II violation, the district pledged to disseminate a training memorandum to all staff at the school, conduct staff training, and provide the student any necessary compensatory education.

What it means: Harassing or retaliatory conduct toward a student with a disability by a staff member may quickly create a hostile learning environment. Although a district can't always prevent employees from engaging in these behaviors, it can promptly investigate reports of discrimination and retaliation and take steps necessary to prevent such incidents from recurring. Soon after a parent advocated on her daughter's behalf, an educator allegedly made inappropriate comments toward the student that "reflected a misunderstanding of the student's disability." Had the district immediately initiated an investigation and took appropriate disciplinary action, the district may have avoided the parent's retaliation claim.

Summary: An educator's allegedly "offensive and disparaging" comments regarding a high school student's disabilities after her parent advocated on her behalf created compliance headaches for a Pennsylvania district. Although the educator's actions may have constituted unlawful retaliation, OCR concluded that the district could resolve the potential Section 504 and Title II violation by issuing a training memorandum to all school staff. Section 504 and Title II's anti-retaliation provisions prohibit districts from intimidating, threatening, coercing, or discriminating against any individual who has exercised her rights or advocated for the rights of a student under these federal laws. OCR determined that the district may have violated these anti-retaliation provisions. It noted that during SY 2021-22, the student attended her school's hybrid program in which students received integrated asynchronous online work with in-person instruction. When the parent expressed concerns that the student was not consistently receiving the accommodations required by her Section 504 plan in the hybrid program, an educator who worked with the student subsequently made comments toward the student that allegedly "reflected a misunderstanding of the student's disability, and were inappropriate." Before OCR could determine whether the educator's comments amounted to unlawful retaliation under Section 504 and Title II, the district voluntarily resolved the parent's complaint through a resolution agreement. In the agreement, the district pledged to disseminate a memorandum regarding and conduct staff training on the anti-retaliation provisions of Section 504 and Title II. The district also promised to issue a separate memorandum to the educator reminding him that "offensive and disparaging comments regarding a student's disability status is prohibited by law" and that "such conduct may warrant disciplinary action." Finally, the district agreed to reconvene the student's multidisciplinary team to determine whether she suffered an educational loss and, if so, to provide the student any necessary compensatory or remedial services. ■

Section 504 doesn't require private school to lower behavioral standards

Case name: *Bryant v. Calvary Christian Sch. of Columbus Georgia Inc.*, 123 LRP 23871 (M.D. Ga. 08/07/23).

Ruling: A private religious school in Georgia did not discriminate against a seventh-grader with autism and ADHD when it dismissed him from its program for behavioral reasons. Holding that the student was not "otherwise qualified" to attend the school, the U.S. District Court, Middle District of Georgia granted judgment for the school on the parent's Section 504 claim.

What it means: Unlike public schools, which must serve all school-age students with disabilities, private schools only have to serve students who meet their essential eligibility requirements. A private school's duty to accommodate a student's disability under Section 504 turns on whether the accommodation in question requires more than a "minor adjustment" of its program. This school pointed out that it used progressive discipline to address repeated incidents of the student throwing items and causing disturbances in class. Its argument that it could not accommodate the student without substantially lowering behavioral standards helped demonstrate that the student failed to meet its eligibility requirements.

Summary: Despite arguing that a private religious school excluded her son for behavioral reasons after failing to implement his student support plan, a Georgia parent could not establish a failure to accommodate claim. The District Court granted judgment for the school on the parent's Section 504 claim after determining the student did not meet the school's eligibility requirements. U.S. District Judge Clay D. Land noted that the student, a seventh-grader with autism and ADHD, was an individual with a disability under Section 504. Not only did the school develop a support plan for the student, the judge observed, but it repeatedly recommended medication and applied behavioral analysis therapy to address his behaviors. To prevail on her failure to accommodate claim, however, the parent also needed to show that the student was otherwise qualified to participate in the school's programs and activities. Judge Land explained that the student's ability to meet academic demands did not in itself show that he met the school's essential eligibility requirements. "An individual is not qualified if accommodating him requires an educational institution to 'lower or ... effect substantial modifications of [its] standards,'" the judge wrote. The judge pointed out that the parent's requested accommodations included implementation of the student's positive behavioral supports, a transfer to another class, and a return to in-person learning. As such, the judge observed, the parent essentially sought an exemption to the school's regular discipline policy. Judge Land noted that the school applied the same progressive disciplinary measures that it applied schoolwide each time the student disrupted class by throwing objects. Although the student's eventual placement on a virtual learning program was not ideal, the judge held that the school did not have to modify its discipline policy for the student. The court also granted judgment for the school on the parent's race discrimination claims. ■

Parents can sue Mo. SEA over child's alleged abuse at state-run school

Case name: *D.O. v. Ozark Horizon State Sch.*, 123 LRP 25043 (W.D. Mo. 08/16/23).

Ruling: Parents who claimed employees at a state school for children with severe disabilities mistreated their nonverbal son could sue Missouri's state educational agency over its alleged failure to intervene. The U.S. District Court, Western District of Missouri denied the SEA's motion to dismiss the parents' Section 504 and ADA Title II claims.

What it means: An SEA can be liable for an employee's abuse of students at a state-run school if it knows of the abuse and fails to respond appropriately. That's why SEAs must investigate reports of abuse in a timely manner and address any misconduct by school staff that the investigation might uncover. Here, the parents claimed the SEA failed to investigate the employees' physical abuse of the student, remove them from their positions, or conduct staff training. Those allegations, if true, could support a finding that the SEA substantially departed from accepted professional judgment in responding to the employees' purported misconduct.

Summary: Allegations that Missouri's state education agency allowed employees at a state-run school to abuse a nonverbal student with a disability were sufficient to support the parents' Section 504 and ADA claims. Holding that the parents sufficiently pleaded a claim for disability discrimination, the District Court denied the SEA's motion to dismiss. The court did not decide the truth of the parents' allegations. Instead, it considered whether the parents pleaded a viable claim for relief under the two statutes. To hold the SEA responsible, the court explained, the parents had to allege that the SEA discriminated against their son on the basis of disability. Furthermore, the parents needed to show that the SEA acted in bad faith or with gross misjudgment, meaning that it substantially departed from acceptable professional judgment, practice, or standards. The court held that the parents' sufficiently pleaded disability discrimination. According to the complaint, the court observed, employees at the state school abused the student physically and emotionally. The employees' alleged acts included shoving, hitting, and kicking the student, pulling his hair, jerking him backwards by his shirt, and pinning his head, neck, and chest against a desk. What's more, the court noted, the parents claimed the SEA knew about the employees' mistreatment of the student and failed to investigate or otherwise take remedial measures. "[The parents] allege these failures demonstrate the [SEA and the state board of education] were deliberately indifferent toward [the student]," U.S. Magistrate Judge W. Brian Gaddy wrote. Because the parents sufficiently pleaded violations of Section 504 and the ADA, the court denied the SEA's motion to dismiss. ■