

Section 504 COMPLIANCE ADVISOR

ROUTE TO	

Your Guide to Understanding and Administering Section 504

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Let's get together: Pair up Title IX, Section 504 coordinators on complaints

A district's Title IX coordinator became aware of a situation where two students were involved in inappropriate sexual touching on the bus. She knew she must follow the appropriate grievance procedures to investigate the alleged harassment. 34 CFR 106.45(a).

However, she was also aware that one of the students involved, the respondent, had a number of absences during the year. Because of this, she decided to collaborate with the district Section 504 coordinator to determine whether the student who allegedly initiated the inappropriate touching could have an undisclosed disability.

When there are issues in districts that contain an overlap of disability and sexual harassment, Title IX and Section 504 coordinators need to work together. That means pausing before launching an investigation to consider whether a disability complaint contains sexual issues and vice versa. Looking out for red flags and overlapping issues will help coordinators work together and reduce compliance missteps of Title IX and Section 504, said Jessica Heiser, founder and lead project attorney for Imprint Legal Group in Noblesville, Ind.

"Critical thinking and collaboration are necessary in some of these complicated scenarios. It mitigates so much risk for the district moving forward and ultimately creates better outcomes for our students," Heiser said.

Pause when addressing complaints. During a complaint investigation, whether under Title IX or Section 504, coordinators should pause to consider whether any other factors are at play and communicate with each other, said Heiser.

Ensure that all relevant staff members are involved and informed about the complaint before proceeding with the complaint investigation. For example, if a Section 504 coordinator becomes aware of a disability-related complaint but feels it may be related to sexual harassment, then the Title IX coordinator should be looped in. Take a nuanced, broad approach and ensure you're looking at the whole picture of the complaint.

"They need to pause at the beginning, get all those ducks in a row, and make sure all of the appropriate administrators and teachers are involved. Then take the first step forward," she said.

Look for connecting red flags. When faced with a complaint, look for red flags warranting collaboration between the Title IX and Section 504 coordinators, Heiser said. These indicators can be disciplinary records or concerns voiced by parents that could alert a Title IX coordinator to involve a Section 504 coordinator in an investigation.

(See **TOGETHER** on page 3)

Does ‘data collection’ justify Utah student’s repeated restraint, seclusion?

A student attended a Utah charter school for children with autism. When the school changed the student’s classroom, the student began presenting extreme behaviors. These behaviors resulted in at least 40 incidents of restraint and seclusion over the course of two school years. Due to these incidents, the student lost at least 14 hours of instruction.

The school convened an IEP meeting to review the student’s IEP twice each school year. However, the IEP team initially declined to conduct a functional behavioral assessment and develop a behavioral intervention plan. It also never considered whether the student needed additional services or a different placement to receive FAPE. The IEP team alleged it initially declined to “move forward” with an FBA because the school’s behavior specialist wanted to collect data on the student’s behaviors in the new classroom. Once the data collection was complete, the school conducted the FBA and developed a BIP.

Office for Civil Rights selected the school for a compliance review and examined whether the school’s use of restraint and seclusion violated Section 504 and Title II.

When a student exhibits behavior that interferes with his learning or that of others, a district must evaluate or reevaluate the student’s needs before a significant change in placement. *See* 34 CFR 104.35(a).

Did the charter school’s failure to conduct an FBA deny the student FAPE?

A. No. Staffers needed to collect behavior data in the new classroom.

B. Yes. The student’s behaviors warranted an FBA and a BIP.

C. Yes. The school should have conducted an FBA upon enrollment.

How the Office for Civil Rights found: B.

In *Spectrum Academy (UT)*, 123 LRP 29184 (OCR 09/07/23), OCR determined that a Utah charter school denied FAPE to a student with autism in violation of Section 504 and Title II. It noted that the school restrained and/or secluded the student at least 40 times in two school years due to his dangerous behaviors. Although the repeated use of restraint or seclusion may suggest that a student’s services or placement are not meeting his needs, the school failed to take action. OCR concluded that the school failed to timely conduct an FBA, which delayed the development of a BIP. Moreover, the school failed to consider how the repeated incidents of restraint and seclusion affected the student’s educational progress. OCR instructed the school to provide the student any necessary compensatory services, among other corrective actions.

A is incorrect. The need to collect data didn’t justify the school’s failure to conduct an FBA and develop a BIP for two school years, OCR concluded.

C is incorrect. The school was required to conduct an FBA – or reevaluate the student – only if he presented behaviors that interfered with his learning or that of others.

NOTE: This feature is not intended as instructional material or to replace legal advice. ■

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TOGETHER (continued from page 1)

Consider these questions when a student is involved in a sexual harassment complaint:

- Do any students involved have a 504 plan or IEP?
- Is the student neurodivergent?
- Are doctor's appointments or private therapy contributing to the student's excessive absences?
- Have there been any documented changes in mental health or increases in depression or anxiety?

"If you have a Title IX coordinator or a Section 504 Coordinator who is trained to look at a much broader picture, you can start to have a more nuanced and intersectional approach to these complaints," she said.

Remember key overlap issues. There are certain situations where the Title IX and Section 504 coordinators may more obviously work together, Heiser said. See some examples below.

Students in self-contained classrooms. Any sort of sexual misconduct that occurs between two students in a self-contained classroom will warrant the involvement of the Section 504 coordinator or special

education director and the Title IX coordinator to understand what procedures are necessary, Heiser said.

Pregnancy. Title IX coordinators should alert the 504 team to pay attention to potential concerns like pregnancy-related issues. While not a disability, a pregnancy-related impairment could be classified as a temporary disability, and the student could be eligible for services.

Law enforcement. If the district learns through law enforcement about any sexual misconduct occurring between two students, that should alert both coordinators to work together to investigate.

Expulsion. If a district is considering expelling or long-term suspending a student for sexual misconduct, the Title IX and the 504 coordinators should work together before moving forward. Determine if that action was a manifestation of an unknown disability or impairment, said Heiser.

"It's really a question of getting all your ducks in a row. If you do think there was a disability that the district didn't see, then it should think about a different disciplinary tactic," she said. ■

Weigh options to address school nurse shortages

When students need nursing services as part of their Section 504 plans or IEPs, districts have an obligation to provide those services, even amid a nurse shortage.

For example, In *Portland School District 1J*, 82 IDELR 188 (SEA OR 2022), a district improperly placed a student with other health impairment on home instruction because of a staffing shortage. It should have considered other options, such as hiring a traveling nurse or certified nurse so that the student could receive the required IEP services in the least restrictive environment.

Districts need to get creative to figure out how to handle nursing shortages while still providing students with services outlined in their IEPs or 504 plans. Teams should also determine how state law dictates which medical services must be performed by nurses and which services can be delegated. Consider some of the following options pointed out by a school attorney.

Tap nonmedical personnel

First, teams should determine why a student needs a school nurse as part of a 504 plan or IEP and whether the service can be performed by other staff members. State law may determine what tasks nurses can delegate to assistive personnel and what tasks must be performed by a registered nurse, said Elizabeth

Heffernan, school attorney at Ahlers & Cooney P.C., in Des Moines, Iowa.

"Of those tasks, teams should ask how they can be distributed between what has to be performed by a nurse and what can be done through delegation and supervision," she said.

For example, a paraprofessional or teacher may get trained to watch out for certain signs or symptoms a student is experiencing and then call a nurse, Heffernan said. However, in some instances, a nurse may be needed to administer medication, feeding, or other tasks. See *Seattle (WA) Sch. Dist. No. 1*, 78 IDELR 143 (OCR 2020) (where a district appropriately revised policies to allow for parent-designated staff to administer medicine so that a student was not limited in the choice of school to attend).

Reassign nurse or student

Teams might consider reassigning where a nurse is stationed within the district to ensure that the student's services are being implemented, said Heffernan. If a district has multiple buildings and only one of them is where the nurse is stationed, consider adjusting building assignments.

"Location is different than the placement or the programming of the services for students. So, finding a location or a building that's able to provide those services is one way to respond," she said.

The team should also consider whether another location within the district can fulfill the student's program. If it comes down to a question of whether or not the district can provide the necessary services, then teams may need to consider an out-of-district placement, which is a different conversation, Heffernan said.

"Districts have to provide a continuum of placements, but not every building in every district has to provide the full continuum. If there's a different location within the district that has the personnel, that's definitely an option that's available," she said.

Document continued efforts to fill roles

While dealing with a nursing shortage, districts should document the efforts they are making to fill roles. This can include posting job openings and continuing to look for additional personnel. It helps show that the district is aware of the issue and is trying to get things going even when the resources aren't there, Heffernan explained.

Teams should have consistent meetings when things in a student's 504 plan or IEP aren't working and there needs to be adjustments reflected in the written plan, Heffernan said. Teams should have open communication with parents, showing their good effort to find nurses.

"Keep that pathway open and keep the options and ideas flowing on how to respond to difficult situations creatively," she said.

If a district is contracting with an outside agency to provide nursing services, it should be aware of the agency's schedule of personnel, Heffernan said. This will help to know when to shift personnel to different buildings while still looking for a permanent solution.

Finally, Heffernan said that districts should also reach out to their state educational agencies, keeping them informed about the nursing shortages they are experiencing.

"Keep communicating for assistance and resources. Hopefully, there will be alternative options available that another agency may be able to provide," she said. ■

Handle depression, addiction dual diagnoses with evaluation data, outside support

A student diagnosed with depression also has a history of drug addiction, and he has a 504 plan. He recently relapsed, which caused his parents to sign him up for a drug rehabilitation program. The parents want the district to pay for the program, so the team reconvenes to go over the student's current plan and evaluation data.

While the IDEA does not recognize drug addiction as a qualifying disability, students are not disqualified if they are eligible on some other basis, like emotional disturbance. *Letter to Scariano*, 213 IDELR 133 (OSEP 1988). When faced with a student who has a mental health impairment like depression or anxiety and a co-occurring drug addiction, a team may struggle to remove one from the other.

Teams should focus first on the disabilities identified by students' evaluations when discussing their eligibility for special education or accommodations under Section 504. Determine what supports a student requires as spelled out by the evaluation data, and then, address the substance abuse outside of special education or Section 504. Read on for more insights on a student with comorbid diagnoses of depression and drug addiction.

Address disability in school

Teams may have difficulty separating a student's drug addiction from a mental health impairment like

depression and anxiety. If a student who is addicted to drugs has been evaluated to have a disability, teams should focus on addressing the disability with supports justified by the evaluation, said Hans Graff, school attorney for Leon Alcala PLLC in Austin, Texas.

As a team, don't assume that a student's disability is caused by the addiction. Consider the whole student, the family, and any evaluation data that identifies a disabling condition, Graff said.

"I think it's a mistake to attribute academic deficits or behavioral deficits to the drug and alcohol use. Even if it is that, you have to base your decisions on what your evaluation says," he said.

Base placement decisions on data

Districts are not usually responsible for funding drug and alcohol counseling when parents place students there for addiction treatment and not for an underlying mental health condition, said Michelle Todd, school attorney with Hodges, Loizzi, Eisenhammer, Rodick & Kohn LLP of Arlington Heights, Ill.

"I often see these cases litigated where parents will place students residentially in a wilderness program or a treatment center and ask a school district to fund that placement due to the comorbidity," she said.

Any decision the 504 or IEP team makes should be based on data from the assessment, Graff said. These decisions made during a team meeting should be based

on knowledge of the student and his disability, not to placate the student's parents.

However, when these cases rise to the level of a dispute with a parent, a hearing officer will typically take the side of providing help to the students, Graff said. When addressing a student's mental health disability in school, consider what drug addiction recovery supports parents can be referred to in the community. In *Charter School of San Diego*, 114 LRP 49855 (SEA CA 10/17/14), a charter school had to cover the cost of a student's unilateral private placement in a residential program whose primary purpose was the student's education, not substance abuse treatment.

Vet drug treatment program

Sometimes, it may be difficult for the team to determine whether the reason the student needs a residential placement is the drug addiction or the mental health impairment. Consider what the treatment program addresses, Graff said.

Collect records from the program to determine whether it implements IEPs. If the primary reason for the referral to the program is drug use, then the

district typically does not have an obligation to pay for it, Graff said. However, districts can't know that for sure unless the team meets to get information about why the student needs the treatment.

"Districts may want to consider whether they have an obligation based not on the drug use, but the other characteristics of the disability that are causing the student to be unable to attend school in the district," he said.

Partner with community resources

Districts should seek to partner with community programs that they can refer families and students to for drug and alcohol counseling, Todd said.

"Districts can work closely with those agencies to support a student from more of a wraparound perspective," she said.

While a district may not be responsible for paying for drug addiction counseling, there can be accommodations in place during the school day. These can be access to a social worker or guidance counselor, extended time on assessments, and other accommodations that relate back to a student's qualifying condition, Todd said. ■

Raise possibility of standing desks as accommodations for students with 504 plans

A fourth-grade student with ADHD struggles to stay on task during class. He is constantly getting out of his seat, kicking his legs, and calling out, especially during moments of independent work. His Section 504 team meets to discuss accommodations related to his attention in the classroom and decides to try a counter-style stationary desk. The student can stand at the desk to satisfy his desire to move and avoid off-task behavior.

Students with ADHD and others who are sensory-seeking may benefit from using this alternative to sitting at a desk when learning in the classroom. Using a standing or stationary counter-style desk allows students to move and learn without having to remain seated for long periods of time. See some benefits, drawbacks, and more information about standing desks below.

Need

A 504 team will determine whether a student needs a standing desk as part of an accommodation plan through a comprehensive process, said Juliet Barnett, professor of special education at Arizona State University.

This can include conducting functional assessments and consulting specialists like occupational therapists as well as getting input from parents or guardians. Additionally, the team might review the student's medical

history and records, seeking medical documentation if necessary, she said.

The team should also evaluate how the student's condition impacts his access to education and whether the accommodation is necessary for equal access, she said.

If a standing desk is deemed appropriate for the student, it's typically included in the student's 504 plan with specific usage conditions.

"Regular monitoring and reviews are crucial to ensure the accommodation remains effective for the student's needs. Also, collaboration among team members and stakeholders is essential throughout this process," said Barnett.

Types

The type of standing desk that a student uses as part of an accommodation plan will vary depending on the needs of the student and the resources available, Barnett said.

One example is adjustable desks that allow the student to switch between sitting and standing positions. These offer flexibility and allow the student to customize the desk's height for ergonomic comfort, engaging in dynamic learning by moving while standing, she said. Additionally, stationary counter-type desks also provide stability, take up less space, and are simpler to use.

“It’s essential for the 504 team and educators to collaborate with the student to determine which type of desk best suits them, ensuring that the chosen accommodation effectively supports their well-being and learning experience,” she said.

Benefits

Standing desks can promote increased movement and fidgeting for students with ADHD and can aid in maintaining focus and reducing restlessness, Barnett said.

Standing may also enhance attention and cognitive function, encourage better posture, reduce distractions, and help students maintain better energy levels throughout the day, she said.

Standing desks can also offer customization to students who want to switch between sitting and standing during class.

“While not a universal solution, research suggests that standing desks can be a valuable tool for creating a

more conducive learning environment for students with ADHD who benefit from these advantages,” Barnett said.

Standing desks may also benefit a range of learners beyond those with ADHD. By making them available in the classroom, it could result in creating a more dynamic and focused learning environment. However, it’s crucial to consider the preferences and needs of individual students and educators when implementing such changes, she said.

Drawbacks

While standing desks offer benefits, there are also some drawbacks for teams to consider. Some students may find it uncomfortable to stand for extended periods of time, leading to fatigue or even more distraction, Barnett said.

Using standing desks effectively during class may also require an adjustment period for students. Additionally, physical space constraints in the classroom may limit the implementation of standing desks. ■

Brainstorm 504 accommodations for students with dyslexia

In evaluating Section 504 eligibility for a student with dyslexia, a district will consider information from a variety of sources. 34 CFR 104.35(c). This can include tests, materials, evaluation, and assessments. If found eligible, the team will determine which accommodations the student with dyslexia needs based on that data. Teams need to be intentional when determining which accommodations students with dyslexia will need during instruction and assessments.

“We have to be deliberate in our decision making for students with dyslexia. We have to make these decisions based on data and observation to know what’s actually working for these students and what is effective,” said Danielle Frith. Frith is a specialist professor in the department of special education at Monmouth University in West Long Branch, New Jersey.

Being deliberate with providing accommodations means carefully considering when and where in the classroom a student with dyslexia may need help to access the curriculum. When determining what accommodations students with dyslexia might need in the classroom, consider these four categories: presentation, setting, timing, and response. Give 504 teams this refresher before they meet to determine what accommodations a student with dyslexia may need.

Presentation

Teams should look at the ways the curriculum is presented to a student in class through instruction and during tests. They can then find accommodations that

may enable the student to access the content.

One accommodation that may allow a student with dyslexia to access content without requiring them to read standard print is providing audiobooks. These could be useful in subjects like science and social studies, where students are exposed to grade-level content but may not be able to access the digital or hardcopy text, Frith said.

This accommodation addresses a secondary consequence that a student with dyslexia may have, which is that they have less background knowledge and a less developed vocabulary. Both are important to reading comprehension, she said.

Other accommodations regarding presentation include how information is presented on a page. Information that is cluttered can be hard for students with dyslexia to decipher, Frith said. Consider spacing information out on a page.

On the assessment side, when students with dyslexia need to get their ideas on paper, consider assistive technology like speech-to-text programs, Frith said.

Setting

Pay attention to the setting or the environment where students may need accommodations. For example, in a history class, where a lot of specific information is presented, a student with dyslexia may benefit from being provided with copies of notes. These notes could have blanks for students to fill in information to learn the importance of taking notes.

“[If] they’re partial notes, you know, that’s going to help with their recall, that’s going to help with their retention,” she said.

The team can also discuss whether the student might benefit from completing assignments in a small group setting to reduce distractions.

Timing

Extended time can be an accommodation where a student is given additional time to complete an assignment or test.

Consider whether a student with dyslexia may need extended time on assignments throughout the school day, Frith said. As reading and writing are embedded throughout the school day, understand that these can be laborious tasks for students with dyslexia. Teams may decide whether a student would need breaks during class.

Changing the order of tasks that encompass a project could also be an accommodation for a student with dyslexia, she said.

Response

Teams should remember that a student may respond to an accommodation differently one day to the next, Frith said. Allow students alternatives in order to complete assignments and tests and showcase their skills. For example, students may have the option to either record oral responses to questions or point to response choices for an assignment.

Teams should also consider student perspective in accommodations for dyslexia, Frith said.

“As they continue to get older, we want them to use their accommodations. We don’t want it to be seen as something that’s taboo or something that they should be ashamed of,” she said. ■

Fill in 504 team on how best to serve students with eating disorders at school

For a student to be considered eligible for services under Section 504, she must be determined through an evaluation to have a physical or mental impairment that substantially limits a major life activity. 28 CFR 35.108 (a)(1)(i). One of the major life activities listed in the regulations is eating.

Some staff members don’t recognize that students with eating disorders may be students with disabilities, let alone know what accommodations matter for those students.

When students with eating disorders are eligible for services under Section 504, teams should discuss how best to serve their specific needs while at school. This can include training staff members on sensitive topics, discussing appropriate accommodations, and remembering that students with eating disorders may be the target of bullying. Take these often overlooked issues to your next 504 team meeting for a student with an eating disorder.

Sensitive topics

Districts should ensure that staff who interact with students who have eating disorders and require accommodations under 504 refrain from speaking about topics that might trigger the student. For example, conversations on “good” or “bad” food, diet topics, body shape, size, or weight should be relegated to private conversations, said Paula Edwards-Gayfield, an eating disorder specialist and licensed professional counselor at Looking Inward Counseling and Consulting Services

in Oklahoma.

“Educators should be mindful of the way in which they talk about students and themselves and where these discussions occur. Creating environments that are accepting of differences and that promote emotional and physical well-being is optimal,” she said.

Staff should receive training to increase their awareness of all triggering language and know that some students with eating disorders may have 504 plans that prohibit discussing dieting and body image in front of them. *See S.C. and B.C v. Round Rock Indep. Sch. Dist.*, 78 IDELR 40 (W.D. Tex. 2021) (A journalism teacher who helped develop the 504 plan of a student with anorexia nervosa and knew it prohibited staff from discussing dieting and body image in the student’s presence may have discriminated against the

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teen when she asked the teen to be featured in an article about mental illness.).

Flexible eating times

Students with eating disorders will have varied needs. If these needs interfere with students' education and health, districts must accommodate them, said Edwards-Gayfield. As eating disorders are illnesses and may require higher levels of care, some students may require homebound instruction. As those students return to school, they may need accommodations to maintain their recovery process, which can occur at different times throughout the day. For example, students with eating disorders who are learning how to eat more intuitively may need to be allowed to eat snacks at various times throughout the day, she said. At mealtimes, students may need to be permitted to eat lunch with the school nurse, school counselor, friend, or family member if appropriate, she said.

Access to counselors

A 504 plan may need to allow students to visit the school counselor if they feel symptoms that trigger them throughout the day. School counselors and professionals who are willing to be trained in eating disorder recovery could support students while at school, Edwards-Gayfield said.

Restrictions on PE

If the student's eating disorder includes exercise restriction, consider as a team how the student will be ac-

commodated during physical education, Edwards-Gayfield said. This could include allowing the student to research the focused activity and minimize physical participation, she said.

Keep the focus of PE on activity and not exercise, she said. The team should work with teachers to update the health class curriculum if it focuses on body mass index and good versus bad foods.

"Teach students that all foods fit, and moderate activity is recommended. Provide education about eating disorders in health classes and maybe invite a professional with eating disorder training to participate," she said.

Bullying, harassment

Watch out for instances of bullying where students' eating disorders are concerned. Harassment that is based on a student's disability, such as a remark about a student's weight gain or loss due to an eating disorder could trigger a district's duty to respond under Section 504 and the ADA. *See Dear Colleague Letter: Responding to Bullying of Students with Disabilities*, 64 IDELR 115 (OCR 2014).

For example, the parents of a student in Alaska alleged that their daughter was subjected to severe bullying because of a growth disorder and weight gain due to an eating disorder. The student committed suicide, and the parents stated that the district violated her Section 504 and Title II rights and was indifferent to the harassment. *See Moore v. Chilton County Bd. of Educ.*, 113 LRP 12940 (M.D. Ala. 03/27/13). ■

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Know your duty in providing transportation under Section 504

Section 504 considers transportation to be a related aid and service, and districts have requirements to provide appropriate transportation for eligible students. Share this one-pager with your 504 teams to see what considerations the team should make when a student needs transportation services.



Bid for damages after deviation from IEP allows parents to skip due process

Case name: *Cease v. Henry*, 123 LRP 25721 (D.S.D. 08/18/23).

Ruling: The U.S. District Court, District of South Dakota held that the IDEA's exhaustion requirement did not apply to the constitutional, Section 504, and ADA Title II claims filed by the parents of a grade schooler with autism and ADHD. It rescinded its prior order at 82 IDELR 54 dismissing the parents' lawsuit. However, the court dismissed the South Dakota Department of Education as a party, concluding that it was entitled to 11th Amendment immunity.

What it means: According to *Perez v. Sturgis Public Schools*, 82 IDELR 213 (U.S. 2023), parents need not exhaust their administrative remedies before filing a federal action if they seek relief that is unavailable under the IDEA. This exception applies even if the parents' claim focuses on a denial of FAPE. These parents' complaint centered around the district's failure to provide the toileting assistance and sensory foods required by the student's IEP. Although the district highlighted the parents didn't timely appeal the underlying administrative order to satisfy the exhaustion requirement, it couldn't avoid further litigation due to the new exception created by *Perez*.

Summary: Thanks to a recent Supreme Court decision, a third-grader's parents will be able to bring their constitutional, Section 504, and Title II claims against a South Dakota district to a jury. A District Court held that the parents no longer needed to exhaust their administrative remedies under the IDEA before seeking monetary relief in federal court for potential FAPE violations. The IDEA generally requires a parent to exhaust her administrative remedies when the essence of the claim is a denial of FAPE. Although the parents' claims centered around the district's failure to properly implement the student's IEP, the court opined that the exhaustion requirement no longer applied. The court acknowledged that it initially dismissed the parents' claims at 82 IDELR 54 for failure to exhaust. However, in *Perez v. Sturgis Public Schools*, 82 IDELR 213 (2023), the U.S. Supreme Court subsequently held that the IDEA's exhaustion requirement does not apply when a parent seeks a remedy that is unavailable under the IDEA. In this case, the parents alleged that the district deviated from the student's IEP by failing to provide toileting assistance and sensory-safe foods and by improperly using restraint and seclusion. As a remedy, the parents specifically sought "trial by jury, judgment for damages" in addition to "interest, costs," and attorney's fees. These compensatory damages were unavailable as a remedy under the IDEA. Accordingly, the exhaustion requirement did not apply to the parents' claims "notwithstanding the gravamen appearing to be a failure to abide by [the student's IEP]," the court held. It rescind-

ed its prior order at 82 IDELR 54, but dismissed the state ED as defendant due to 11th Amendment immunity. ■

SRO's knowledge of teen's disabilities doesn't make tasing discriminatory

Case name: *J.W. v. Paley*, 123 LRP 26075 (5th Cir. 08/28/23).

Ruling: A school resource officer's tasing of a 17-year-old boy with disabilities to prevent him from leaving the school building did not make a Texas district liable for disability discrimination. The 5th U.S. Circuit Court of Appeals upheld a District Court ruling at 74 IDELR 157 that granted judgment for the district on the parent's Section 504 and ADA Title II claims.

What it means: Knowledge of a student's disability status will not, in itself, turn an employee's mishandling of a behavioral incident into an act of intentional discrimination. Still, districts should train school resource officers on how to interact with students with disabilities and ensure those officers know about students' behavioral interventions. In this case, the SRO said he tased the student to prevent him from leaving school grounds because his disabilities would make him especially vulnerable off campus. Had the district trained the SRO on appropriate behavior management techniques, it might have prevented harm to the student and avoided four years of litigation.

Summary: Although an SRO used "poor judgment" when he tased a teenager with emotional disturbance and intellectual disability for trying to leave school, his ac-

504 quick quiz

Q: Could districts' attendance policies result in FAPE challenges?

A: Yes, they could, especially if the student's circumstances are not considered when the district applies the policy. In *Jefferson Township (NJ) Public School District*, 69 IDELR 110 (OCR 2016), the district had concerns about truancy, but its refusal to excuse the student's numerous celliac disease-related absences led to an agreement with the Office for Civil Rights to resolve claims that denied the student FAPE. The parent had requested an evaluation to determine whether the student was eligible for accommodations under a Section 504 plan that would have included an exemption from the mandatory attendance policy. The New Jersey district denied the request. It informed them that further absences would lead to the student losing course credits. OCR explained that the district should have gathered a group of people knowledgeable about the student, the meaning of the evaluation data, and placement options to determine if the student was eligible for an exception from the attendance policy. 34 CFR 104.35(c).

tions did not amount to disability discrimination. The 5th Circuit held that the parent's failure to prove intentional discrimination entitled a Texas district to judgment on her Section 504 and ADA claims. The three-judge panel noted that the parent was seeking compensatory and punitive damages under Section 504 and the ADA. As such, she did not have to seek relief in an IDEA administrative proceeding before suing the district in court for disability discrimination. To recover money damages, however, the parent needed to show the SRO intentionally discriminated against the student. The two-judge majority observed that the parent would need to allege "something more" than deliberate indifference to meet that standard. The parent argued that the SRO's explanation for the tasing — a belief that the student's disabilities made him especially vulnerable away from school grounds — showed that he was motivated by the student's disability. The majority disagreed. While it agreed that the tasing was "arguably excessive," it rejected the notion that the SRO's awareness of the student's disabilities established an intent to discriminate. Given that the SRO might have taken the same approach with a nondisabled student who tried to leave school while agitated, the majority found no evidence of disparate treatment. The parent also could not show that the district failed to accommodate the student's intellectual disability and emotional disturbance. Even if the SRO had prior knowledge of the student's disabilities, the majority explained, he was not necessarily aware of any related accommodations. Furthermore, the majority held that the availability of appropriate remedies for excessive corporal punishment under Texas law entitled the SRO to judgment on the parent's 14th Amendment claim. U.S. Circuit Judge James E. Graves Jr. disagreed with the majority's holding that the parent's Section 504 and ADA claims were not viable. The judge wrote in a dissenting opinion that he would have vacated the District Court's ruling at 74 IDELR 157 and remanded the case for further proceedings on the merits. ■

Stay-put agreement requires good faith of both parent, N.Y. district

Case name: *Killoran v. Westhampton Beach Sch. Dist.*, 123 LRP 27137 (E.D.N.Y. 08/28/23).

Ruling: The U.S. District Court, Eastern District of New York dismissed Section 504 and ADA Title II discrimination claims of the parent of a teen with Down syndrome. The court held that the parent's conclusory allegations failed to support his claim. The court also dismissed the parent's equal protection claim under 42 USC 1983.

What it means: Public schools must provide reasonable accommodations to students with disabilities, but that doesn't mean they discriminate if they don't accede to all parents' wishes. Here, the district established that the parent also had an obligation to collaborate to come up

with alternative off-site locations for instruction under a stay-put agreement and to act in good faith. It showed good faith in coming up with alternative locations, but the parent rejected them. Moreover, it showed the parent lacked good faith, insisting on only in-person, in-district instruction, which wasn't required under the agreement.

Summary: The parent of a teen with Down syndrome failed to establish that a New York district discriminated based on disability by failing to find an alternate location for instruction during the pandemic. The parent sued alleging discrimination arising out of a violation of a pendency agreement. The teen was to receive daily instruction in the district, followed by instruction in the local public library. However, due to the pandemic, the library was unavailable. The parent maintained his home was also unavailable and insisted the teen be educated in the district high school. To make a case under Section 504 and ADA Title II, the parent must show that the teen was denied the opportunity to participate in or benefit from district services, programs, or activities, or was otherwise discriminated against based on disability, the court explained. It added that there must be evidence of deliberate or reckless indifference, bad faith, or gross misjudgment. The parent alleged the district acted in bad faith by failing to reasonably accommodate the teen, educate him in-district, or at least come up with an alternate placement. The court noted that he rejected offers of remote instruction and instruction after school hours. The court was unpersuaded that the alleged failure to accommodate the teen, or the parent's preference for instruction at the high school, illustrated reckless indifference, bad faith, and gross misjudgment. The parent contended the stay-put agreement required solely the district to seek an alternative placement. However, the agreement was clear that both parties were to arrange for an alternative, off-site location (not the district's high school), and both were required to seek said location in good faith, the court pointed out. Finally, the parent didn't allege that he sought an alternative location in good faith, the court noted. ■

12-year-old's extensive needs make aide's abuse a disability-related matter

Case name: *Doe v. Cabell County Bd. of Educ.*, 123 LRP 29771 (S.D. W.Va. 09/15/23).

Ruling: A West Virginia district will have to defend allegations that it discriminated against a nonverbal 12-year-old boy with autism by assigning a one-to-one aide who sexually abused the student. The U.S. District Court, Southern District of West Virginia denied the district's motion for judgment on the parents' Section 504, ADA Title II, and state law disability discrimination claims.

What it means: Some students with disabilities may be unable to report abuse, either due to the severity of their impairments or their inability to recognize inappropriate

behavior. As this case demonstrates, however, districts cannot rely on a student's reporting difficulties to avoid liability for an employee's alleged misconduct. This district noted that the parents' Section 504 and ADA claims hinged on their ability to connect the aide's purported misconduct to the student's disability. While the district's argument was correct, it failed to recognize that the student's impairments made him particularly vulnerable to sexual abuse and suggested a link to the student's autism.

Summary: Evidence that a 12-year-old boy with autism was vulnerable to sexual abuse undermined a West Virginia district's claim that his alleged molestation by his one-to-one aide was unrelated to his disability. Noting that the parents might be able to prove disability discrimination, the District Court denied the district's motion for judgment on the parents' Section 504 and ADA claims. U.S. District Judge Robert C. Chambers noted that parents seeking relief under Section 504 or the ADA must show that the district discriminated against the student because of his disability. Although the district argued that the parents couldn't connect the aide's purported misconduct to the student's disability, the judge disagreed. The judge pointed out that the student was nonverbal and required assistance with daily life activities, including toileting, which was why the district assigned him a one-to-one aide. Furthermore, the judge observed, the district knew the student was unable to report any acts of abuse or mistreatment to his parents. "In light of these facts, it would be reasonable for a jury to conclude that [the student] would not have suffered mistreatment but for his disability," the judge wrote. Judge Chambers also denied the district's motion for judgment on the parents' state law negligence claim, which required a showing of harm to the student. The judge rejected the notion that the student's inability to articulate (or possibly even appreciate) the injuries he suffered made the aide's conduct harmless. However, he granted the district's motion for judgment on the parents' 14th Amendment and state constitutional claims. ■

Teacher shows forced retirement may be result of special ed complaints

Case name: *Morrow v. South Side Area Sch. Dist.*, 123 LRP 29917 (W.D. Pa. 09/25/23).

Ruling: The U.S. District Court, Western District of Pennsylvania held that a retired teacher established that a district may have retaliated against her in violation of ADA Title II and Section 504 for her disability-related advocacy. Assuming she was required to exhaust administrative remedies prior to filing her 504 claim, the court found that her prior EEOC charge included her ADA retaliation claims and fairly encompassed the substance of her 504 claim. It dismissed her First Amendment retaliation claim under 42 USC 1983, her retaliation claim under the IDEA,

and her disability discrimination claim under the ADA.

What it means: Schools must ensure that adverse employment actions aren't related or in response to an individual's advocacy for students with disabilities. Otherwise, they may be deemed retaliatory. This teacher showed she was subjected to a variety of adverse actions soon after complaining about disability discrimination, noncompliance with federal law, and the failure to provide students with required services. The district will have to show its actions, such as denying paraprofessional support and conducting surprise observations, were based on legitimate nondiscriminatory reasons other than her advocacy and complaints. Detailed employee records, noting reasons for each employment action, will help support its defense.

Summary: A former teacher established that a Pennsylvania district may have retaliated, forcing her retirement, in response to her disability-related advocacy and complaints about disability discrimination. She can pursue her retaliation claims. The teacher sued alleging the district retaliated for her complaints to administration about disability discrimination against various students and staff members with disabilities. She asserted that she was subjected to numerous retaliatory employment actions leading to her forced retirement. Such actions included: frequently changing her job description, assigning her conflicting job tasks, denying her paraprofessional support, subjecting her to a surprise observation, threatening her with a hearing, and denying her opportunities provided to similarly situated employees. The court explained that ADA Title II and Section 504 prohibit retaliation based on disability-related advocacy. To state a claim, the teacher must show that she engaged in protected conduct of which the district was aware, that she suffered retaliation or an adverse action soon thereafter, and that a causal link existed between the two, it added. The teacher claimed she met with the new superintendent in May regarding the district's programs for students with disabilities, the court noted. At that time, she allegedly reported her concerns that students weren't receiving the proper federally mandated support from the district. And, she continued to complain to the superintendent, the principal, board members, and administrators about disability discrimination. The court noted that she also complained about the failure to provide required services to students and expressed concerns about noncompliance with the IDEA and Section 504. She sufficiently asserted a protected activity, the court held. In addition, the teacher contextually and temporally connected her disability-related complaints to the alleged adverse conduct she claimed led to her forced retirement, it added. She described alleged retaliatory incidents that continued for at least two years and adequately set forth a sufficient causal nexus between them and the protected activity, the court ruled. ■