Section 504 COMPLIANCE ADVISOR

ROUTE TO

Your Guide to Understanding and Administering Section 504

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Section 504 eligibility made easy

Is your 504 team facing an onslaught of 504 referrals? Do newer members of your team know how to consider parent requests for accommodations?

Remember that while Section 504 is meant to serve as a broad means of leveling the playing field for students with disabilities, students must still meet specific criteria to qualify for services. Just because a student has a disability, that does not mean he requires a 504 plan. Use the following walk-through and eligibility scenarios to give new team members a jump start on understanding eligibility under Section 504.

Determine eligibility

Section 504 is intentionally broad to cover a wide range of individuals, said Alex Hagel, an attorney at Cedar Law PLLC in Seattle. The definition of a physical or mental impairment under Section 504 includes "any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems" and any mental or psychological disorder, including mental illness or specific learning disability. 28 CFR 35.108(b)(1)(i)(ii).

To be eligible under Section 504 and the ADA Amendments Act, a student must be determined, as a result of an evaluation, to have a physical or mental impairment that substantially limits one or more major life activities. 28 CFR 35.108(a)(1)(i). The law does not spell out what "substantially limits" means. 28 CFR 35.108(d)(1)(i).

Once a team has determined that a student has a physical or mental impairment, it must gauge whether that impairment "substantially limits" one or more major life activities, Hagel said. Under the ADAAA, teams must disregard mitigating measures — such as medication and medical supplies, mobility devices, and prosthetics — when considering the "substantially limits" criterion, said Hagel. He said teams should remember, however, that ordinary eyeglasses or contact lenses do not rise to the level of mitigating measures.

Hagel offered an example of how teams should disregard mitigating measures. When a student with an invisible disability, such as ADHD, uses medication, educators may observe he is doing fine in the classroom and making satisfactory grades, Hagel said. It's only because of the medication, however, that he can function as well as nondisabled peers. The 504 eligibility team must consider whether the student would be "substantially limited" without medication, he said.

(See **ELIGIBILITY** on page 3)

Did school have reason to suspect student with asthma needed special education?

In 2020, the parent submitted enrollment documentation to the California charter school stating that the student had asthma and was prescribed an inhaler. She also provided authorization to administer or assist in administering medication.

In 2021, the student went to the office to self-administer her inhaler, and the parent often had to pick her up from school early. On one occasion, the parent had to pick-up the student from school after she over-medicated and felt ill. The school explained that a staff member was in the room while she self-administered her inhaler.

The parent requested a meeting to discuss medication administration and an individualized health plan. The student, who was doing well academically, had 22 absences.

In 2022, the parent requested a 504 plan. She contacted the Office for Civil Rights and alleged that the school failed to timely evaluate.

ADA Title II and Section 504 require districts to evaluate any student who needs or is believed to need special education because of disability before taking any action with respect to placement. They must ensure that all students who may have a disability and need special education are located, identified, and evaluated.

Did Calif. charter school violate its Section 504 child find obligation?

A. No. The student had minimal absences, excellent grades, and provided no indication that she had a disability impacting her basic life activities to the extent it impacted access to education.

B. No. The medication authorization in 2021 was the first notice the district received of the student's need to take asthma medication.

C. Yes. The school had reason to suspect disability as early as 2020.

How OCR found: C.

In *Alan Rowe (CA) College Preparatory School*, 124 LRP 2465 (OCR 07/06/23), OCR found that the charter school, which was its own LEA, should have evaluated because it had reason to suspect the student needed special education services. It didn't convene a 504 meeting or put any plan in place until the parent requested a meeting in 2022 although it had reason to suspect disability as early as 2020, OCR observed.

The parent informed the district of the student's asthma in 2020 when she submitted the enrollment application, it noted. Moreover, she notified the school on at least two separate occasions, prior to 2021, that she consented for staff to administer asthma medication. Consequently, in 2021, the student self-administered her medication without assistance and over-medicated, OCR observed. Yet, even after learning of this incident, the district still failed to convene a 504 meeting to put services in place, it added. Instead, it waited until the parent requested a 504 plan in 2022 to evaluate whether the student's asthma substantially limited her ability to receive an education.

A is incorrect. During the 2021-22 school year, the student had 22 absences; at least seven were related to illness. OCR found that the school had notice that the student was experiencing asthma related illness in 2021, because she was absent or missed classroom instruction when she went to the office for asthma medication, or the parent picked her up early. Further, the parent submitted numerous medication administration authorization forms.

B is incorrect. The parent informed the school as early as 2020 of the student's asthma and need for medication when she submitted the enrollment application.

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

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ELIGIBILITY (continued from page 1)

Provide accommodations

For students with impairments that substantially limit major life activities, teams must decide whether individualized measures are needed to avoid disability discrimination, Hagel said. Individualized measures include accommodations, auxiliary aids, and services, which help level the playing field and ensure the student can access her education to the same extent as peers.

Accommodations or modifications are meant to remove barriers to FAPE, Hagel said. For example, consider a student with juvenile diabetes whose medical appointments pose a barrier to turning in homework assignments on time. For this student, he said providing appropriate access could look like allowing assignments to be submitted late without penalty.

Another common accommodation would be allowing a student to take medication at school, even if school policy typically does not allow this, Hagel said.

A team might inadvertently discriminate if it fails to properly accommodate the student given the nature of her disability, said Hagel. For example, if a student has test anxiety, an appropriate accommodation would offer access to practice tests. Ensure that the accommodation is not written to be provided "at teacher discretion," as this could cause implementation errors down the line, he said.

Review 504 eligibility scenarios

Below, consider two scenarios regarding 504 eligibility of students with disabilities. Comparison of these scenarios reveals that even if a student has a disability, he may not require a 504 plan, said Hagel. If found ineligible, however, he said that the student would still have access to protections against disability discrimination under the ADAAA.

Student found eligible	Student found ineligible
Consider a student with asthma. She has a physical impairment that substantially limits the major life activity of breathing. Because she requires a rescue inhaler when she has an asthma attack, her parents requested that the student have access to it when needed. The question is whether the school, to avoid discriminating against the student, needs to develop a 504 plan with accommodations. Asthma may impact the student's ability to access her education. For example, if the student is in PE class and has an asthma attack, she needs to be able to use her inhaler. Even if the school has a no-medication policy, in this situation, an accommodation needs to be provided so that the student can use the inhaler.	Consider a student with ADHD. A severe case of ADHD may represent a physical or mental impairment that substantially limits the major life activity of concentrating or thinking. This student's ADHD is mild, however, and he does not take medication for it. His parents provide a diagnosis from the student's physician and request a 504 plan with an accommodation of extra time on tests and assignments. The 504 team reviewed a variety of assessment data including observations, academic assessments, and physician and parent consultations, finding that the student presently does not require accommodations. Although the student is identified with ADHD, the team determined that the impairment did not substantially limit a major life activity at school that would prevent him from accessing his education. ■

Watch your step! Know when 504 retaliation claims may spring up for staff

Imagine that after a parent of a student with a disability testified in a hearing against a school district, an educator at the school posted a video to her social media account complaining about "demanding parents." Other educators from the school commented on the post that they agreed. The parent believed the post was referring to her. Could this be considered retaliation? It depends on the facts of the case.

Section 504's anti-retaliation policy prohibits acts that intimidate, coerce, or threaten individuals for the purpose of interfering with their rights under Section 504. 34 CFR 100.7(e). Such rights include advocating for students with disabilities.

The Office for Civil Rights typically follows a four-step analysis to explore claims of retaliation.

1. Did the complainant engage in a protected activity?

2. Did the complainant suffer an adverse action around the same time (within a reasonable amount of time after the protected activity)?

3. Was the district aware of the complainant's protected activity?

4. Is there evidence of a causal connection between the protected activity and adverse action?

Common triggers for retaliation claims include student disciplinary incidents and mishandling of parent communication. Staff should be aware of these triggers and strive to avoid them. Review attorneys' advice on keeping tight

documentation and fending off parent claims of retaliation that tend to spring up in certain situations.

Retaliation means "materially adverse" action

A parent could consider a variety of actions retaliatory, but true retaliation requires a "materially adverse" action, said Randall C. Farmer, a partner with GDCR, LLC in Marietta, Ga. This means the action caused a material change to the student's educational programming, potentially triggering delays in services or evaluations, he said.

Consider the following contexts and how claims of retaliation may arise in these situations.

Student receives discipline following protected activity

If a child receives discipline after a complainant takes a protected action, such as advocating for the student in a 504 meeting, claims of retaliation could result, said Sonya E. Sallis, an attorney with GDCR, LLC in Marietta, Ga.

For example, after a parent of a student with ADHD, anxiety, and dyslexia advocated for her son at a parent-teacher conference, she claimed he began to receive disciplinary referrals and was sent to the principal's office due to his uncontrollable tics. In this case, *Santa Rosa County (FL) School District*, 75 IDELR 14 (OCR 2018), OCR found the district did not retaliate against the parent or student. District documentation showed the student was referred once for defiance of authority in refusing to sit down.

With parents who file frequent claims of retaliation, educators might have concerns about how to handle discipline for the student going forward, said Sallis. Take action to address classroom behavior only when there's a legitimate, nondiscriminatory reason for doing so, she said. Ensure that discipline is treated the same way as it would be for a general education student. Documenting the investigative and disciplinary processes will also help defend against claims of retaliation, Sallis said.

Tips for heading off retaliation claims

- When documenting disciplinary action, provide adequate detail regarding who was involved, where and when the incident happened, etc.
- Leave out subjective, feeling-based information, which can cause parents to question the district's motives.
- After a parent files a complaint against a district, be sure not to give parents too much information too quickly following meetings.
- Parents who feel overwhelmed and unable to participate in the meeting may claim retaliation by the district.

Source: Walking the Line Between Compliant Response and Advocacy-Based Retaliation.

Educators' communications change after protected activity

Watch educators' tone during 504 meetings after a complainant engages in a protected action, Farmer said. If educators sound dismissive of parent input, parents could interpret this as aggressive. Also be careful to communicate clearly and make sure parents understand, he said. For example, pause and ask parents whether they need clarification during a meeting, and document giving them the opportunity to ask questions.

Remember to document critical conversations that could turn into claims of retaliation down the line, said Sallis. Consider an educator who speaks with a parent about a sensitive topic, such as a parent claiming a student was unfairly disciplined. Sallis said the educator should follow up on the verbal conversation with a quick email confirming the discussion.

Also, understand that it's a bad idea to put in writing derogatory remarks or comments that reflect poorly on parents, said Farmer. This includes emails and text messages between district staff, he said. Be cognizant of the power of subpoenas and open records requests, Sallis said. ■

Take 504 team through these steps when student has uncommon impairment

A middle-schooler with a gastrointestinal condition has been in and out of doctors' offices with her parents, trying to get answers or a diagnosis. The parents inform the 504 coordinator about this, the student's symptoms, and how they may affect school. From there, the team springs to action. It's obvious the student has a physical impairment that affects a major life activity, but the team isn't sure what services the student may need.

When confronted with a student whose impairment is unfamiliar to the 504 team, it may feel like a daunting task to identify appropriate contents for a 504 plan. Don't panic. Lean on the expertise and experience both within and outside your district. Create space to research accommodation needs, how the impairment may present itself in school, and what the student needs to receive FAPE.

Collaborate

When the school team is made aware that a student has a rare impairment, it should convene to determine what information is needed to decide eligibility and provide the student with accommodations to access his education, said Jamie Benavides, assistant director of student services for Geneva Community Unit School District 304 in Illinois. The 504 coordinator should take the lead in creating a space where information can be shared with other team members. This can look like creating a shared folder in a central location where team members can access and contribute information when the team reconvenes, she said.

Reach out to other colleagues in the district or educators in neighboring districts to ask about their experiences with students who have similar impairments, Benavides said. Also, consult the school nurse or school psychologist, depending on the nature of the student's condition, said Benavides. For example, the school nurse will be able to ask questions regarding a student's impairment and interpret a treatment plan, communicating that back to other team members. The nurse will also know how a student's impairment may manifest in school and what accommodations may be necessary, she said.

Research

If a student has a condition the team has never encountered before, it should take time to research, said Benavides. A student with a rare disorder might be seen by a specialist. Get releases from parents to speak with outside providers to better understand the student's needs. The student's physician may provide the team with research, literature, or a website to learn more, she said.

Determine what the available district data suggest for the student, Benavides said. Review records, do a quick dive into attendance, health office visits, counseling office visits, grades, and missing assignments, Benavides said. Also, identify any missing gaps where accommodations may need to be put in place, she said.

Research the student's impairment on credible websites that are research-based, said Benavides. Avoid solely relying on personal websites or blogs. For example, teams in Benavides' district use the National Institutes of Health website that is part of the U.S. Department of Health and Human Services.

Implement

When you're dealing with a student who has special medical needs, teams may have to respond rather quickly, Benavides said. Always make accommodation decisions that are data-driven and individualized. Determine what might be required immediately to get the student what she needs for FAPE and avoid a discrimination claim, she said. If you have individualized data, then consider what accommodations can be tried for the student.

Follow-up

Always schedule follow-up meetings to determine whether the data suggest any needed adjustments in accommodations, said Benavides. When a student has a rare condition, it's important to recognize how well-being may fluctuate. Have the school nurse follow up with medical providers and parents on treatment plans, medication changes, or shifts in diagnosis, she said.

Observe how the student functions at school, and get teachers' feedback on how changing symptoms affect her ability to access her education, said Benavides. For example, a student with bone cancer who is undergoing a treatment cycle may experience different symptoms, depending on the day. On the treatments, the student may be absent, feel weak, or be nauseous. Off the treatments, the student might experience neuropathy, brain fog, or exhaustion.

Put it all together

To help your 504 team understand how Benavides' tips look in practice, review the example below.

Case study: A student with an autoimmune disease may have numerous symptoms that impact him at school. These can include fatigue, joint inflammation, fever, abdominal issues, and more.

Consider this: A team should involve the school nurse in obtaining a release of information and learn from the student's medical team about symptoms that pose challenges. Those will drive the accommodations that are needed, Benavides said.

Determine how the student's pain is affecting his learning, she said. Start with a trial of accommodations based on what is known about him. For example, utilize Universal Design for Learning assistive technology or dictation if the student has trouble writing. Or, offer accommodations of extended time to allow the student to complete tests and assignments when fatigued or following an absence.

Looking forward: Collect data to see if accommodations are appropriately individualized to the student, said Benavides. When the team reconvenes, it can use this data to make adjustments in accordance with what's reasonable for him. In this way, the team is making a good-faith effort to accommodate the student.

Word of caution: Don't arbitrarily throw out trial accommodations without connecting them back to data the team already has on the student, said Benavides. Determine the basis for providing the accommodation or not and let data drive Section 504 eligibility, she said. ■

Easy A? Resist carelessly changing grading system for student with 504 plan

You may think you're being supportive as a 504 team by changing how a student with a disability is graded. But using a different grading system for a student with a Section 504 plan could unintentionally result in disability discrimination.

It is up to the team to decide if a student should be graded on an alternate basis. *See Letter to Runkel*, 25 IDELR 387 (OCR 1996) (stating that the IEP team should determine whether he's subject to a modified grading system based on his individual needs); and *North Hunterdon/Voorhees Reg'l (NJ) High Sch. Dist.*, 25 IDELR 165 (OCR 1996) (upholding IEP team's selection of a different grading system for a student with cerebral palsy and a seizure disorder).

"The important piece to look at for a student is, are you attempting to modify something in the grading system just because the student has a disability or are you modifying it through an appropriate 504 team process based on that student's data and individualized needs?" said Lisa Woloszynek, an attorney at Weston Hurd LLP in Cleveland, Ohio. "Is it showing they're doing the work? Is it showing that they're mastering the core content they should be mastering? Individualized needs are going to be the crux of any decision any team makes. It's a tricky, tricky topic."

504 teams should weigh alternate strategies before adopting a modified grading system for a student with a Section 504 plan. If they ultimately decide to modify grading, they must ensure their decision is individualized to avoid inadvertent discrimination. Explore considerations to make beforehand and learn how to properly adjust grading for a student with a disability.

Explore alternatives to changing grading approach. Before changing how a student with a disability will be graded, ask what need you are trying to address, Woloszynek said.

Are there accommodations and modifications that can help meet that need instead of adjusting his grading system?

These may include:

- Reducing the number of math problems the student has to complete. You don't have to modify the content, but can reduce the number of problems from, for example, 20 to 10, she said.
- Giving the student options for retaking or correcting a test or assignment, which then could potentially improve performance and bump up the grade.
- Equipping the student with speech-to-text software or other tools.

Build student skills instead of modifying grading system. It may make sense for the student to learn additional skills before having her grading modified, Woloszynek said.

For instance, you may have her work on positive coping skills to use in response to challenging assignments.

Identify individual student need for grading changes. If you have considered and tried alternatives and determined that modifying the grading system is necessary, make sure it is an individualized team decision, Woloszynek said.

"Where you'd get into trouble is if it's becoming more generalized to a certain population of students," she said. "You can't just say all students with intellectual disabilities are going to have this modified grading system. That wouldn't be appropriate." It could be discriminatory, Woloszynek said.

Outline in the 504 plan. Outline in the student's Section 504 plan the conditions of the grading system, Woloszynek said. Will it be used in every class or just a couple of academic classes? "Make sure the specifics are very clear in the document," she said.

Be careful about the level of modification you are making to the student's grading system, Woloszynek said. "Teams need to be cautious that they're not now in a child find situation under the IDEA." Teams should at least have that on their radar, she said.

Keep eye on FAPE. Remember that the point of a Section 504 plan is not to ensure a student gets a certain grade, Woloszynek said. The goal is to offer FAPE.

"Teams need to be careful they're not putting too much emphasis on grades because grades alone are not going to tell you whether or not a student has made progress," she said. ■

Not necessary, but nice: Consider reevaluation, notice for 504-eligible grads

The process of getting high school seniors on track to graduate may already be in full swing at your school. As graduation approaches for students with disabilities on 504 plans, teams might wonder if they're doing enough legally.

The Office for Civil Rights may investigate a district

for disability discrimination or denial of FAPE if it seeks to inappropriately graduate a student with a disability. In *Caddo Parish (LA) Public Schools*, 79 IDELR 202 (OCR 2021), a district may have discriminated against a student by attempting to graduate him when he had not met state and local requirements for a regular diploma.

OCR does consider graduation to be a significant change in placement. Whether a student needs reevaluation or notice beforehand, however, is determined on a case-by-case basis. Don't delay decisions regarding whether these are appropriate for a given 504-eligible student. Make sure teams know what processes need to be in place before a student with a 504 plan is set to graduate.

Reevaluation

OCR generally views graduation with a regular high school diploma as constituting a significant change in placement, as indicated in *Letter to Runkel,* 25 IDELR 387 (OCR 1996). In this case, however, OCR did not interpret Section 504 regulations as requiring reevaluation prior to a student's graduation. See 34 CFR 104.35(a).

There's no explicit requirement for a 504 student to be evaluated before graduation unless the team considers a reevaluation necessary, said Stephanie M. Poucher, attorney for Phelps Dunbar LLP in Louisiana. Because Section 504 requires districts to establish procedures for periodic reevaluations of eligible students, 34 CFR 104.35(d), a triennial evaluation or annual check-in may be enough to catch cases in which a student is not on track, she said.

Reevaluation aside, teams should avoid waiting too long to assess whether a student with a 504 plan is on track to graduate, Poucher said. If a team is made aware that a student is not ready, meet early enough to address any issues. The student — particularly if he has reached the age of majority — should be included in the meeting, she said. If his 504 plan includes postsecondary transition accommodations, ensure those are being implemented. Poucher said the team should also discuss obstacles to graduating and whether they might be a manifestation of his disability.

Providing notice

Section 504 does not require districts to send a notice of procedural safeguards to parents of high school seniors with disabilities who will be graduating, said Poucher. In *Letter to Runkel*, 25 IDELR 387 (OCR 1996), parents were assumed to be aware of their Section 504 procedural safeguards, and giving them notice again was considered acceptable, but not mandatory.

If you opt to send a notice, do so in a timely manner, Poucher said, since providing one can allow any concerns or questions to be addressed before graduation. Also remember that the student, not parents, will receive the notice if the student has reached the age of majority as defined in the state. Rights under FERPA will transfer from the parents to the student when the student turns 18 years old or enrolls in a postsecondary institution, with a few exceptions. ■

Follow OCR's roadmap for serving transfer students with 504 plans

Section 504's requirements for serving transfer students with disabilities may not be as comprehensive as those found in the IDEA. Still, they can cause headaches for unwary school districts.

Part of the difficulty is that requirements for transfer students do not appear anywhere in the statute or regulations. Under Section 504, a district only needs to ensure that all qualified students with disabilities within its jurisdiction receive FAPE. 34 CFR 104.33(a). While that FAPE obligation extends to students who move to the district with Section 504 plans in place, the regulations leave some key questions unanswered.

Fortunately, OCR has provided districts with guidance for serving transfer students with Section 504 plans. In *Protecting Students With Disabilities: Frequently Asked Questions About Section 504 and the Education of Children with Disabilities*, 123 LRP 33181 (OCR 07/18/23), OCR recommends that districts take the following three steps:

1. Review the student's Section 504 plan, supporting documentation. According to OCR, this review should be conducted by a group that includes persons knowledgeable about the meaning of the evaluation data and the placement options.

2. Determine whether plan is appropriate. The group reviewing the Section 504 plan should determine whether it will allow the student to receive FAPE. This means the group must consider whether the Section 504 plan will meet the student's unique needs as effectively as the district meets the needs of nondisabled students. 34 CFR 104.33(b).

3. Decide whether to implement plan or evaluate. If the district deems the transfer student's Section 504 plan appropriate, it must implement the plan. If it determines the plan is not appropriate, it must evaluate the student to identify his needs. OCR has said that the district may implement the existing Section 504 plan in the interim if it chooses to do so.

OCR has not indicated in guidance how much time a receiving district has to complete this three-step process. Letters of Findings suggest that OCR will consider the reasonableness of any delays in the process when

determining whether the district violated Section 504. *Compare, e.g., Spokane (WA) Sch. Dist. No. 81*, 47 IDELR 272 (OCR 2006) (finding no evidence that a Washington district violated Section 504 by taking seven school days to develop and implement a new 504 plan for a transfer student with ADHD); *with Norfolk (VA) Pub. Schs.*, 70 IDELR 133 (OCR 2017) (finding that a Virginia district erred in taking 16 months to evaluate a transfer student with disabilities following its unsuccessful attempt to obtain his Section 504 plan from his prior district).

Procedures for 504 compliance

Notably, OCR's 2023 guidance does not distinguish between interstate transfer students — those who moved from another state — and intrastate transfer students from another district in the same state. This means district staff will only have one set of procedures to follow for all transfer students with Section 504 plans.

What's more, districts are free to adopt their own procedures for compliance, so long as those procedures align with Section 504 and any state law requirements. These procedures might address:

- The individual responsible for requesting or verifying the student's Section 504 plan.
- The process for verifying the student's Section 504 plan.
- The procedures the district must follow if it determines an evaluation is necessary.
- A timeline for implementing the Section 504 plan or conducting a new evaluation.
- The steps the district must take if it does not receive or cannot verify the student's Section 504 plan.

Districts may wish to consult with their state educational agencies for additional guidance on serving transfer students with Section 504 plans. ■

Quick Tips

Dispel myths about IEP, 504 implementation. Some general and special education teachers may believe they have unilateral authority to choose how frequently a student with a disability receives IEP or Section 504 services, especially when he's been performing well. Avoid legal liability by training school officials, including administrators, to follow plans to the letter.

Don't hinge 504 eligibility on 'educational impact.' When determining eligibility under Section 504, remember that "educational impact" is not necessary. Texas attorney Kendra Yoch pointed out that a student's impairment may impact something other than education. Consider the many major life activities that might be substantially limited. When determining whether an impairment does impact education, be careful not to limit the impact consideration to grades or intellect.

Gather parent input on 504 from multiple sources. During the Section 504 evaluation process, don't rely on a single source to obtain parent information. While it might be tempting for the school psychologist to be the only district team member gathering parent input, encourage related services assessors to reach out to parents as well.

Remove 'gray' phrases from 504 plans. Resist using phrases like "as needed" and "when possible" in Section 504 plans. These are vague and do not address a student's individual needs. Craft specific accommodations that will level the playing field for the student.

Remind 504 team that a symptom is not an impairment. Teams may hear that a student is "not doing well in class." This is not an impairment. An impairment is a disability if it substantially limits the ability of an individual to perform a major life activity as compared to most people. Consider data from a variety of sources to support the presence of an impairment.

Resist requiring Rx for 504 eligibility. Remind your Section 504 team that parents shouldn't be required to provide documentation of a formal diagnosis to initiate the 504 process. Section 504 doesn't require a medical assessment as a precondition to an eligibility determination.

Evaluate for IDEA when 504 student has abundance of modifications. When a student with a 504 plan needs many modifications in his classes, this may be a red flag for child find under the IDEA. Evaluate for IDEA eligibility to see if the student requires specially designed instruction.

Draft IEPs, 504 plans with discipline in mind. If an IEP or Section 504 team believes a student can understand and comply with the code of conduct, it should note this in the student's IEP or 504 plan. While this will not obviate the need for a manifestation determination review, the statement can be considered by the team if an MDR becomes necessary.

Use 'highlighter rule' before 504 referral. California attorney Alefia Mithaiwala suggests that the district train staff and school psychologists not to refer a student for a Section 504 plan unless they've first undertaken "the highlighter rule." That means that the psychologist should review the student's evaluation report to highlight the impairment that substantially limits a major life activity and what that major life activity is. ■

Service animals: When you can, can't remove them from school

Under Section 504 and ADA Title II, a district must generally permit students with disabilities to bring their service animals to school. 28 CFR 35.136(a). That said, there may be circumstances where a district may appropriately remove a service animal from campus. Use this guide to quickly determine whether you can exclude a service animal from the building. *Note: This guide is **not** exhaustive. Consult legal counsel to determine whether the removal of a service animal is appropriate based on your specific circumstances.*

A district CAN'T remove a service animal if:

The student or parent does not have documentation or proof that the service animal has been certified, trained, or licensed as a service animal. 28 CFR 35.136(f).

Example: A student with a peanut allergy brings a service dog to school. The district can't demand proof of the dog's certifications before allowing the student to attend class or other activities. *See In re: Student with a Disability,* 114 LRP 32429 (OCR 04/02/14).

The student or parent declines to pay a surcharge for bringing the service animal to school. 28 CFR 35.136(h).

Example: A district may not require the family of a student with a service animal to pay a "cleaning fee" or obtain liability insurance before allowing the animal to enter the school building. *See Alboniga v. School Bd. of Broward County, Fla.,* 65 IDELR 7 (S.D. Fla. 2015).

Another child in the school or classroom is allergic to or fearful of the service animal.

Example: If a student wishes to bring her service dog to school but another child is severely allergic to dogs, the district can't ban the service animal from campus. It must find a way to accommodate both children's disability-related needs. *See Grand Rapids (MI) Pub. Schs.,* 115 LRP 10965 (OCR 10/21/14); and *Douglas County (CO) Sch. Dist.,* 81 IDELR 26 (OCR 2021).

A district CAN remove a service animal if:

The service animal is out of control and the handler does not take effective action to control it. 28 CFR 35.136(b)(1).

Example: A district may remove a service dog that constantly barks and destroys furniture in the classroom if the handler (i.e., the student or parent) can't stop the dog from barking or destroying items.

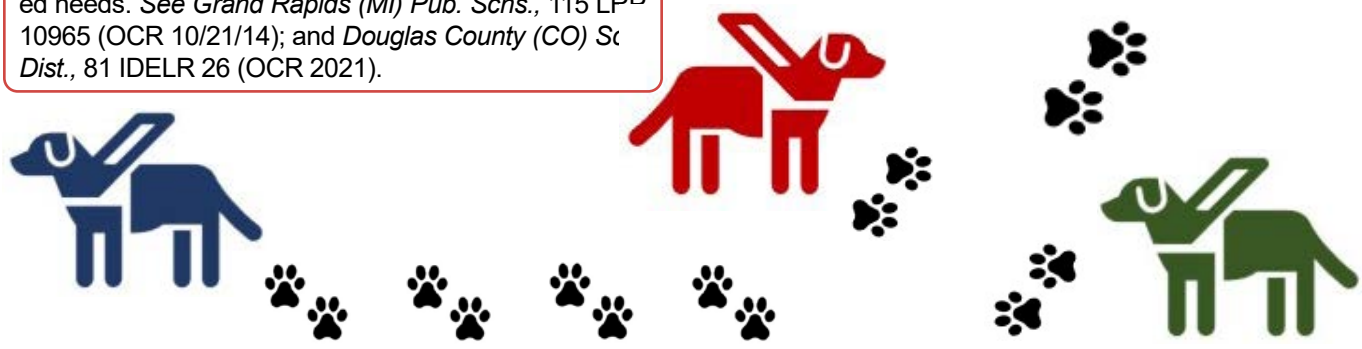
The service animal is not housebroken. 28 CFR 35.136(b)(2).

Example: A district may remove a service dog that repeatedly has accidents in the classroom and in school hallways.

The service animal poses a *direct threat. 28 CFR 35.139.**

*A *direct threat* means "a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures, or by the provision of auxiliary aids or services." 28 CFR 35.104.

Example: A district may remove a service dog that bites a classmate and has a history of disruptive or aggressive conduct. *See AP v. Pennsbury Sch. Dist.,* 68 IDELR 132 (E.D. Pa. 2016).



Child neglect report on heels of IDEA bus dispute hint at retaliation

Case name: *New York City (NY) Dep't of Educ.*, 124 LRP 1535 (OCR 08/14/23).

Ruling: A New York district resolved with OCR allegations that it retaliated against the parent of a student with an undisclosed disability in violation of ADA Title II and Section 504. The district agreed to review and revise existing policies and implement new policies and procedures pertaining to reporting and verifying student attendance. OCR will monitor the district's implementation of the agreement.

What it means: Although district personnel are mandatory reporters of suspected child abuse, they should first check student records, attendance, and reach out to the parent before making a report. Had this district made efforts to conduct appropriate outreach to the parent or reviewed student records, it might not have reported child neglect and avoid accusations of 504 retaliation for a parent's advocacy. It could have questioned whether the student's absences were the result of a pending transportation dispute.

Summary: A New York district's reporting of child neglect may have been in retaliation for the disability related advocacy of a parent of a student with an undisclosed disability and an IEP. The district agreed to ensure that staff first conduct appropriate outreach and verify attendance before reporting suspected child abuse and neglect in the future. The parent contacted OCR alleging that the district engaged in unlawful retaliation by reporting her to the New York Administration for Children's Services. She asserted that 15 minutes after speaking with a district employee, during which the employee "behaved unprofessionally and menacingly," an agent from children's services called her regarding her "medical and education neglect." OCR explained that ADA Title II and Section 504 prohibit discrimination and retaliation based on disability in public schools. To establish retaliation, the parent had to show that she engaged in a protected activity and, soon thereafter, experienced an adverse action caused by the district. Then, OCR determines whether the district had a genuine, legitimate, non-retaliatory reason for the adverse action. OCR determined that the student qualified with a disability, and the parent engaged in a protected activity, having advocated for her son's special education services in several due process hearings since 2016. In fact, an impartial hearing officer had issued a stay-put order in an IDEA dispute directing the district to provide round-trip special education bus transportation, OCR noted. The parent claimed that she was unable to send her son to school during the school year because the district didn't comply with that order. OCR identified concerns regarding the adequacy of the district's efforts to verify the student's attendance prior to reporting medical and educational neglect. It questioned whether the district adequately considered that the pending transportation dispute may have affected the student's attendance at the time. The district entered into a voluntary resolution agreement to resolve the allegations with OCR. ■

Assigning unqualified staff to Mich. special ed classrooms discriminates

Case name: *Dearborn (MI) Pub. Schs.*, 124 LRP 6311 (OCR 08/14/23).

Ruling: The Office for Civil Rights expressed concerns that a Michigan district staffed special education classrooms with unqualified personnel in violation of ADA Title II and Section 504. The district promised to write a letter to parents notifying them that compensatory education or remedial services may be due. It also vowed to develop a plan for providing compensatory services deemed necessary as well as a staffing plan to implement each student's IEP.

What it means: A district discriminates in violation of the ADA and Section 504, and violates the IDEA, if it fails to provide teachers properly trained in special education to students with disabilities. In this case, the district utilized uncertified teachers and substitute teachers to provide instruction to students with disabilities in several programs. It should have had procedures in place to check teacher qualifications; hire sufficient, qualified staff to implement students' services; and properly vet, train, and prepare substitute teachers. It should have also devised a plan to retain qualified substitute teachers so as not to disrupt or impact students' learning.

Summary: A Michigan district may have discriminated against students with disabilities and denied them FAPE

504 quick quiz

Q: *Can bullying lead to charges of disability discrimination?*

A: Yes. If a district fails to respond to bullying when it is aware or should be aware of it, this can constitute disability discrimination. When a district becomes aware of possible disability-based harassment, it should take immediate action to investigate what has occurred. Then the district would need to take steps to end the harassment, eliminate any hostile environment, and prevent the harassment from recurring.

Developing detailed grievance procedures is one way a district can address and prevent harassment in schools. In *Lindenhurst (NY) Union Free School District*, 123 LRP 4475 (OCR 09/28/23), a district should have revised its procedures to specify how school officials process harassment complaints, create and maintain investigative records, and issue notifications to relevant parties. The district may have violated Section 504 and Title II when it failed to properly protect a student with an undisclosed disability from peer harassment.

by staffing their classrooms with teachers not certified in special education. It entered into a voluntary resolution agreement to resolve OCR's concerns.

OCR received a complaint alleging that the district discriminated and denied students with disabilities FAPE because their teachers weren't trained in special education. Instead, the district allegedly staffed classrooms with noncertified substitute teachers or teachers who didn't have special education endorsements. OCR explained that the quality of educational services provided to students with disabilities must be equal to that provided to nondisabled students under ADA Title II and Section 504. Thus, their teachers must be trained in the instruction of students with disabilities, and appropriate materials and equipment must be available, it added. OCR noted that the district staffed only one of five classrooms with a certified teacher endorsed to teach students with disabilities. Other classrooms were staffed with uncertified teachers, teachers with temporary approval, or substitute teachers, some of whom had multiple absences. One classroom had nine different substitute teachers, none of whom had teaching certificates, and only four had bachelor's degrees, OCR observed. One classroom had six substitute teachers, and another had 11, it added. OCR explained that personnel qualifications cannot be waived during teacher shortages and, at a minimum, teachers must have a bachelor's degree to teach special education programs. It expressed concern that none of the teachers and substitute teachers in three classrooms were certified in special education, and most substitutes had only daily permits. It was also concerned about the high turnover; approximately 25 substitute teachers taught in those classrooms. Finally, OCR noted that the lack of appropriate and consistent teaching staff may have led to behavioral and other issues, disrupted the continuity of information-sharing, and prevented students from receiving FAPE. ■

Not tracking informal removals likely leads VA district to discriminate

Case name: *In re: Student with a Disability (VA)*, 124 LRP 7756 (OCR 10/06/23).

Ruling: A Virginia district agreed to reconvene the IEP team of a student with an undisclosed disability to determine the student's need for compensatory education. The district signed a voluntary resolution agreement after OCR found that the district may have discriminated against the student in violation of Section 504 and Title II of the ADA.

What it means: Districts must train district and school staff to properly and consistently document disciplinary removals. This includes explaining to staff the importance of recording the times and reasons when a student is dismissed early for behavioral reasons. School staff here didn't consistently record the dates, times, and reasons when it called family members to pick up the student. Had it done so, it might have been able to determine whether to conduct a manifestation determination review. It could have then either conducted the MDR or informed the parent that an MDR wasn't required because the total removals didn't exceed 10 school days.

Summary: A Virginia district might have avoided an OCR investigation had it taught school staff to document informal disciplinary removals of students with disabilities. Before completing its investigation, OCR identified concerns that the district didn't conduct an MDR after subjecting a student with an undisclosed disability to multiple removals based on the student's behavior. The parent claimed the district discriminated against the student based on his disability when the school repeatedly disciplined the child for disability-related behavior, in the form of suspensions and early school pickups. OCR explained that short-terms disciplinary removals, including informal removals, trigger an MDR if they cumulatively exceed ten school days in a single school year and create a pattern of removal. Here, the evidence, including texts between the parent and staff members, showed the school regularly dismissed the student early due to behavior. OCR noted that, per the parent, "[s]he or another family member were required to pick up the Student early for behavioral incidents throughout the [redacted] school year, but that many of these incidents were never recorded as exclusions." Moreover, the school's early dismissal log indicated the student was picked up early multiple times, OCR observed. OCR remarked that the school, however, left the reason for the dismissal blank. Given the lack of evidence to the contrary, OCR stated that it appeared the school subjected the student to over 10 days of removal. Further, OCR found no evidence that the school conducted an MDR. The district signed a resolution agreement, pledging to convene the student's IEP team and determine the student's need for compensatory education. It also agreed to conduct an MDR unless it could establish that it didn't subject the student to a pattern of disciplinary removals. ■

Concern for teen's grades may not be genuine reason for removal to IAES

Case name: *The School District of Osceola County (FL)*, 124 LRP 8607 (OCR 11/06/23).

Ruling: A Florida district may have retaliated against a parent and teen with a 504 plan in violation of ADA Title II and Section 504, according to the Office for Civil Rights. The district agreed to resolve OCR's concerns by convening the 504 team to determine whether compensatory services are due for the time the teen was placed in an alternative educational setting. It also promised to provide training to the hearing officer who presided over the teen's expulsion hearing.

What it means: When a district proposes to change the placement of a student with a disability for disciplinary reasons, it must ensure that it has a genuine, nonretaliatory reason justifying the decision. This district relied

on its expulsion hearing officer's concern for the teen's grades as a legitimate reason to place him in an IAES for students who needed credit recovery in lieu of expulsion. Instead, to show that the teen's removal wasn't in response to the parent's disability-related advocacy, the district should've contemporaneously documented the reason for the decision and had the 504 team review it to ensure it wasn't discriminatory.

Summary: A Florida district's reason for removing a 10th-grader with a 504 plan to an IAES may have been retaliatory and not genuine, according to OCR. The district agreed to determine whether compensatory services are due for the nine months the teen attended an IAES. The teen with an undisclosed disability was recommended for expulsion. In November, the disciplinary hearing officer placed the teen in an IAES in lieu of expulsion for the remainder of the school year. A complainant contacted OCR, on behalf of the parent and teen, alleging that the district placed the teen in the IAES in retaliation for her and the parent's disability-related advocacy on his behalf. To establish retaliation in violation of ADA Title II and Section 504, the complainant had to show that she or the parent engaged in a protected activity, OCR explained. She must also show that they experienced an adverse action caused by the district and a causal connection between the two, it added. Then, the district must proffer a genuine, legitimate, nonretaliatory reason for the adverse action, OCR noted. The complainant and parent engaged in a protected activity when they opposed the expulsion recommendation in writing, OCR found. They advocated for the teen by asking that he be able to return to school because they were working with the school to further evaluate his disability-related needs, it explained. Further, the teen experienced an adverse action when he was removed from school and placed in an alternative school, OCR determined. The district identified a reason for the adverse action, OCR pointed out. Concerned about the teen's grades, the hearing officer believed the alternative school, for students who needed credit recovery, would be able to provide him with needed services, the district asserted. OCR expressed concern that the unilateral decision to change the teen's placement and place him in an IAES may have been a disguise for retaliation. The district promised to resolve OCR's concern. ■

D.C.'s assistance to private aftercare program perpetuates discrimination

Case name: *District of Columbia (DC) pub. Schs.*, 124 LRP 8623 (OCR 11/20/23).

Ruling: The Office for Civil Rights noted concerns that the District of Columbia, through its involvement with an afterschool program, discriminated against a child with a disability in violation of ADA Title II and Section 504. To resolve OCR's compliance concerns, the district agreed to reimburse the parent for expenses she incurred as a result of the child's disenrollment from the program. It also promised to notify the aftercare provider that it must make individualized determinations regarding requests for aids and services to meet the needs of students with disabilities.

What it means: Districts cannot facilitate or perpetuate discrimination against students with disabilities by assisting entities that do. A district, like this one, may be found to have perpetuated discrimination by a third party it contracts with if it advertises the party's services, if it provides staff, and if the party's program is open only to district students and follows the district calendar. That may add up to significant assistance, making the district responsible for the third party's failure to consider modifications that would've allowed a child to participate in its program and, instead, basing decisions on staffing constraints.

Summary: The significant assistance the District of Columbia gave to a private aftercare provider furthered discrimination against a child with a disability in violation of Section 504. The district will have to reimburse the parent for expenses incurred as a result of the child's disenrollment from the program. The parent enrolled the child in an aftercare program that used a school's facilities and security personnel. Representatives of the aftercare program told the parent that she would have to provide a one-to-one aide for the child. The program eventually disenrolled the child after an aide wasn't provided. The parent contacted OCR alleging that the district discriminated by allowing the child to be disenrolled. The district asserted that, because the child required medication, he needed to be supervised alone while other children were outside, putting the program out of the required staff-student ratio. ADA Title II and Section 504 prohibit districts from directly, or through contractual arrangements, limiting or denying students with disabilities the opportunity to participate in or benefit from its programs or services, OCR explained. They may not aid or perpetuate discrimination by providing significant assistance to an entity that does, it added. The program was a private afterschool care provider that operated on campus under a contractual agreement, although the district didn't fund the program, OCR noted. Additionally, OCR pointed out, several school employees worked at the program, the school advertised the program to parents, and it listed the provider as a "partner." It was only open to students enrolled at the school and followed the school calendar, OCR observed. Because of the school's involvement and support of the afterschool program, OCR found the district provided significant assistance to the aftercare program. It expressed concern that the district discriminated by allowing the provider to disenroll the child based on his disability-related needs. OCR was also concerned that the district failed to ensure the provider considered modifications that would've allowed him to participate, based on his individualized needs rather than staffing or resource constraints. The district entered into a resolution agreement to resolve OCR's concerns. ■