

Section 504 COMPLIANCE ADVISOR

ROUTE TO	

Your Guide to Understanding and Administering Section 504

VOLUME 28, ISSUE 5

JULY 2024

IN THIS ISSUE

Did Colo. district fail to offer student nonverbal ways to request break during afterschool?.....	2
Can, or should, student have both IEP and 504 plan?.....	3
Reveal invisible disabilities to better support students.....	4
These tips can bolster weak 504 grievance policies, procedures.....	5
Consider 504 plan even when eligible student doesn't need accommodations.....	5
Don't assume IHP is enough without 504 plan.....	6
504 Checklist for Administrators.....	8
Lifting of pandemic-era precautions fast-tracks 504 suit over mesh mask.....	9
Teacher ties negative reviews to his attempts to secure students' services.....	10
Teacher grabs, rebukes 5-year-old for throwing toy, not for having autism.....	11
'Clustering' students who need ASL interpreters discriminates.....	11
Holding 'pre-504' meeting doesn't satisfy duty to timely evaluate.....	12
Skipping small-group testing in Spanish program impedes access, FAPE.....	13

With 504 accommodations, strive for anything but cookie-cutter

As more students cope with various disabilities and health conditions, Section 504 teams are becoming creative in developing accommodations.

It's important to "think outside the box," said Janice Lehmann, 504 coordinator for the Little Rock, Ark., school district.

Don't risk a denial-of-FAPE claim by failing to individualize accommodations to meet unique student needs. Make sure to incorporate students' feedback and write the 504 plan with their specific conditions in mind. Find additional tips on customizing accommodations below.

Make effort to be original

Lehmann said her district emphasizes the development of one-of-a-kind accommodations whenever possible. "When someone [on the 504 team] says, 'I never thought of that before' or 'I didn't know we could do that,' that lets me know some real thought was put into the creation of the accommodation," she said. "There is not a problem with using those types of accommodations as long as they meet the needs of the student."

Solicit student feedback

The district's 504 teams include the student in the planning process when age-appropriate, said Lehmann. The discussion should focus on how or why the student is having problems accessing her education, the skills she can use to access her education, and how others (adults, other students, parents, etc.) can offer support.

For example, administrators might ask students:

- ✓ What issues are you having in class, either with learning or completing work (or with homework, projects, tests, etc.)?
- ✓ What do teachers do in your classes that helps you the most?
- ✓ What else would help you in class (or with homework, tests, etc.)?
- ✓ What supports do you need from the adults in your life?

Lehmann explained that students answer the team's questions and actively participate in creating the plan. "This allows their voice to be heard and teaches them how to self-advocate appropriately," she said.

Such an approach is essential to successful implementation. "So many times, adults create plans that students never follow because there is no buy-in from them," Lehmann said. "They don't want to use the accommodation because it makes them 'different' in the classroom, or they don't have the skillset to use the accommodation."

(See **COOKIE-CUTTER** on page 3)

Did Colo. district fail to offer student nonverbal ways to request break during afterschool?

A student attended a Colorado district's afterschool enrichment program. Following a number of behavioral incidents, she was evaluated and determined eligible for a 504 plan. The 504 team concluded that, to receive FAPE, the student needed a nonverbal strategy to express her frustration and notify program staff when she needed a break. The team identified the use of a lanyard as the means of implementing that strategy and required the student to wear it daily during the program. Program staff were tasked with providing the lanyard and collecting it from the student each day.

The aftercare program director stated there were often days when there were very few staff members and so many students that staff would forget to provide the student with her lanyard or remind her to wear it. And, staff didn't follow the plan when the student was behaving well, since doing so wasn't necessary. There were also times, the director said, when the student accidentally left the lanyard at home or refused to wear it.

The parent alleged that the district discriminated based on disability by failing to implement the student's 504 plan during the afterschool program.

ADA Title II and Section 504 require districts to provide FAPE to students with disabilities by way of special education services designed to meet their individual needs as adequately as the needs of nondisabled students are met.

Did Colorado district implement student's 504 plan with fidelity?

A. Yes. Any failure to implement the 504 plan was due to the student losing the lanyard, refusing to wear it, leaving it at home, or lack of staff to implement the plan.

B. No. The district failed to offer the student alternate nonverbal ways to express frustration and re-

quest a break, as required by her 504 plan, on the days she didn't have the lanyard.

C. Yes. Hiring additional staff to implement the student's plan would be unreasonable and would require the district to fundamentally alter the nature of the program.

How the Office for Civil Rights found: B.

In *Colorado Springs (CO) School District II*, 124 LRP 7215 (OCR 10/27/23), OCR found that the district discriminated based on disability. Even on the days when the student didn't have the lanyard or was behaving well, the district was still required to implement her 504 plan and provide her with nonverbal strategies to indicate she needed a break, OCR explained. The plan indicated it was important that she have nonverbal ways to express frustration.

The district admitted there were several instances when the student wasn't provided with the accommodation. And, when the lanyard wasn't available, the district didn't provide alternative nonverbal strategies, OCR noted. Instead, the student was told to tell staff verbally when she needed a break. Accordingly, OCR found that the district failed to implement the student's 504 plan.

A is incorrect. Inconsistent implementation constitutes a failure to implement the plan. The district was required to implement the plan during the program and provide and collect the lanyard each day. The student need not advocate for her required accommodations.

C is incorrect. Staffing shortages don't excuse a district's failure to implement a student's 504 plan.

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

SECTION 504 COMPLIANCE ADVISOR

Publisher:

Kenneth F. Kahn, Esq.

Chief Marketing

Officer:

Jana L. Shellington

Vice President,

Education:

Julie J. Kline, Esq.

Managing Editor:

Celine Provini

Editor:

Janiece Branson

Legal Editor:

Amy E. Slater, Esq.

Copy Editor:

Jack White

Product Group Manager:

Katie Cannistraci

Production Director:

Joseph Ciocca



Copyright © 2024 LRP PUBLICATIONS

This publication is designed to provide accurate and authoritative information regarding the subject matter covered. It is provided with the understanding that the publisher and editor are not engaged in rendering legal counsel. If legal advice is required, the service of a competent professional should be sought.

Section 504 Compliance Advisor is published monthly by LRP Publications, 360 Hiatt Drive, Palm Beach Gardens, FL 33418. Subscription Rate: \$330 per year.

COOKIE-CUTTER (continued from page 1)

Consider student health conditions

It is also critical to plan around the implications of a student's specific health condition, Lehmann said. She shared the following examples:

✓ A high school student diagnosed with Type 1 diabetes sometimes misses cell phone alerts reminding him to check glucose levels. His accommodation involves working with administrators to have his mother call a class phone when it's time to conduct a check.

✓ A student experiencing migraines is allowed to wear sunglasses in class. That simple change reduces light glare and helps the student with light sensitivity issues.

✓ A student with dyslexia is allowed to retake tests and redo assignments on which she earns below 65 percent, with specific teacher feedback on errors. Additionally, the student can photograph class notes and other relevant items and is not called on to read aloud in class.

✓ A student with emotional disturbance has a personal timer on his desk to show him how much time is left before a transition occurs. He also has a visual schedule of the day, so he knows what's coming next. The student gives a "transition item" to the teacher in each classroom he enters and retrieves it at the end of the period as a signal to transition again.

✓ A student with ADHD maintains a penny board on his desk and earns pennies for completing tasks. Those can then be exchanged for a token or small reward. ■

Can, or should, student have both IEP and 504 plan?

School teams may wonder if a situation could ever arise where a student would need both an IEP *and* a Section 504 plan. The answer is yes, but not very often.

"There are very rare circumstances in which a student might have both an IEP and a 504 plan," said Tammy Somogyie, an attorney who specializes in education law at Lathrop GPM in Overland Park, Kan.

Districts should avoid creating unnecessary 504 plans for students who already have IEPs. Make sure your teams know when a 504 plan is superfluous and could create extra work as well as legal risks. Somogyie offers additional guidance below.

Know exceptions

Somogyie explained that if a student is eligible for special education, all services and accommodations will typically be in her IEP. This means a 504 plan would not be needed.

Rare exceptions would include a twice-exceptional student who lives in a state that requires an IEP for giftedness, Somogyie said. In such a state, a gifted student with a disability who needs accommodations but not specialized instruction would have an IEP for gifted services and a 504 plan for accommodations.

Another circumstance where a student with an IEP also needs a 504 plan would be when a student with an IEP develops a temporary impairment severe enough to substantially limit one or more major life activities, said Somogyie. A student with the temporary condition of a broken limb, which is expected to heal without complications, would not meet this criterion, she said. In this case, Somogyie said the school could simply put in place an individual health

plan that spells out the student's needs during his recovery.

If, however, a team "is questioning whether a 504 plan is needed, it should do an evaluation to determine if the student is eligible," said Somogyie. She reminded teams that Section 504 entitles parents to certain procedural safeguards, including notice, an opportunity to review relevant records, and grievance procedures. Somogyie also clarified that for a student with health conditions, a district should consider whether he needs just an IHP or an IHP plus accommodations in a 504 plan.

Know legal risks

Districts must consider legal issues that could arise when considering an IEP or 504 plan, Somogyie said. For example, danger lurks when 504 plans are offered as a "consolation prize" after a student is found not eligible for an IEP, she said. Schools may also offer a 504 plan to a contentious parent to avoid or resolve a conflict.

"Neither scenario is a time to offer a 504 plan," she said. This is because unnecessary plans expose school districts to potential administrative proceedings and liability.

For example, Somogyie explained that parents of a student with a 504 plan have a right to request an impartial hearing to resolve complaints. 34 CFR 104.34. Hearings not only take staff away from their day-to-day work but can also cause school districts to incur legal expenses, Somogyie said.

"Assuming the school team followed procedural requirements for determining eligibility, and the student is clearly not eligible for a 504 plan, follow Nancy Reagan's advice — just say no!" she said. ■



Reveal invisible disabilities to better support students

Invisible or hidden disabilities are physical or mental impairments that are not readily apparent to others. These can include specific learning disabilities, diabetes, epilepsy, allergies, low vision, poor hearing, heart disease, or chronic illnesses. OCR's document on hidden disabilities highlights the civil rights students with these conditions have under Section 504. The following graphic provides a non-exhaustive list of invisible disabilities and sample accommodations.

Medical conditions

- Epilepsy
- Long COVID
- Kidney disease
- Heart disease
- Diabetes
- Epilepsy
- Allergies
- Cancer
- Endometriosis

Learning disabilities

- ADHD
- Dyslexia
- Dysgraphia
- Dyscalculia
- Dyspraxia
- Auditory processing disorder
- Low vision
- Poor hearing
- Brain injury

Emotional or mental impairments

- Anxiety
- Depression
- Emotional disturbance
- Fetal alcohol spectrum disorder
- Bipolar disorder

Chronic illnesses

- Rheumatoid arthritis
- Migraines
- Chronic fatigue syndrome
- Ulcerative colitis
- Immuno-deficiency

5 Sample Accommodations

1. A student with kidney disease may need a class schedule that allows for rest and recuperation following dialysis. Similarly, a student with cancer will need an adjusted schedule during chemotherapy treatment.
2. A student with a learning disability such as dysgraphia, which affects the ability to take notes in class, may require a notetaker or audio recorder.
3. A student with a mental health impairment such as anxiety or depression may need time for counseling sessions with the school psychologist.
4. A student with chronic pain from arthritis may require a modified physical educational program.
5. A student with chronic fatigue syndrome may need extra time between classes to avoid over-exertion.

These tips can bolster weak 504 grievance policies, procedures

School districts with at least 15 employees should have written grievance procedures to address parent complaints of discrimination under Section 504. 34 CFR 104.7. The goal is to conduct impartial investigations that include witnesses and evidence. However, the process is not without its challenges.

“Too often, we overlook the requirement to have a 504 grievance procedure,” said Kim Croyle, partner at Bowles Rice LLP in Morgantown, W. Va.

Help resolve complaints and avoid litigation by tightening up 504 policies and procedures. Begin by clearly articulating your district’s grievance policy, and make sure the school community knows about it. Croyle shares additional advice below and highlights potential district missteps as well as corrective actions.

Understand why it matters

Croyle said a strong Section 504 grievance procedure “is an important and necessary component in prohibiting discrimination against a [student] with a disability.”

Croyle explained that the law gives parents procedural safeguards including the right to file complaints and have them be investigated fairly and impartially. Further, districts failing to follow these requirements — including the obligation to notify students and parents of their appeal rights — risk 504 discrimination claims.

Spell out rights

One mistake is “not having a stand-alone 504 grievance policy that spells out student rights and district obligations when a complaint is filed,” said Croyle.

Another common misstep is when district processes are not “adequate, reliable, or impartial,” Croyle said. She offered an example of a parent’s complaint that the principal discriminated against a student when counting her absent while she was recovering from a migraine in a dark room. Croyle emphasized that if the principal then investigated the complaint, “It would hardly seem impartial to have the principal investigate the parent’s complaint.”

Foster communication, transparency

Croyle said even districts with effective policies tend to stay quiet about them, which she called “al-

most as tragic” as failing to have the policy in the first place. “Making sure all employees, students, and parents are aware of the policy and their rights within it is the first step in preventing mistakes,” she explained.

A complaint does not necessarily stem from an adversarial situation, said Croyle. “Many complaints are filed because of a lack of, or perceived lack of, communication.” She said the complaint and investigative process allows the parent to feel heard when communication has broken down. With that in mind, 504 also requires that complaints are resolved in a “prompt and equitable manner,” an approach that Croyle said keeps the student first.

Fine-tune investigation steps

Croyle emphasized that the 504 grievance policy or procedure should outline who will investigate complaints, how they will be trained, and what to do if the investigator cannot be impartial. Just as importantly, “investigations must be completed in a ‘reasonably prompt’ [timeframe],” she said. “Policies that establish [timeframes] effectively set everyone’s expectations from the outset.” For example, the policy should establish a certain number of school days within which the process will be completed, Croyle said. Exceptions should be communicated to the parent or student in writing.

Districts must remember to allow student or parent participation since this ensures an “adequate” and “reliable” complaint process, said Croyle. Additionally, the 504 complaint investigation should involve questioning witnesses and collecting evidence suggested by parents. For example, if a parent alleges that a student’s 504 plan was not implemented, Croyle said the investigator should gather paperwork as evidence of accommodations provided.

Croyle stressed that “failing to communicate the result of the investigation can be as fatal as failing to investigate in the first place.” This is particularly important when a district faces directives to remedy a situation or take specific actions in the future. Simply implementing the corrections — for example, by changing how absences are coded — is not enough, she said. ■

Consider 504 plan even when eligible student doesn’t need accommodations

Imagine that a 504 team identifies a student as having a disability but then determines she does not need accommodations. Should the team still draft a 504 plan for her?

Maybe, said Cassie Black, a former school psychologist, school administrator, and now associate with Kriha Boucek LLC in Oakbrook Terrace, Ill. “There are

several advantages to identifying students and recognizing their eligibility even if they currently don't require any accommodations."

A "placeholder" 504 plan that's empty of accommodations still confirms discrimination protection and procedural safeguards for students with disabilities and their parents. Such a plan also holds the door open for future accommodation needs that arise due to conditions with temporary or fluctuating symptoms. Black reveals why it may make sense to write a 504 plan with no accommodations.

Offer legal protections

Placeholder 504 plans allow a district to implement a system for tracking eligible students, Black said. At the same time, the plans serve preemptive and legal purposes. They provide parents and students with "awareness of their procedural safeguards and general right to non-discrimination," said Black. These include the option to file a grievance, the right to a hearing, and the right to a manifestation determination review before a significant change in student placement.

Address temporary or changing conditions

No-accommodation 504 plans can also serve to note conditions that are generally well managed. Black explained, "We often see this with allergies, asthma, and ADHD when students regularly use medication to address their needs."

Placeholder plans can also help with impairments

whose symptoms are not consistently present, she said. "We might see this with a disease in remission, such as cancer, or one that is active only periodically, such as bipolar disorder, irritable bowel syndrome, migraines, etc." Black said when students' symptoms flare up, 504 teams can review "empty" 504 plans and update them with accommodations.

Describe impairment in case needs change

Black pointed out that 504 plans, even without accommodations, can help ensure a student's well-being by providing important details about his condition. She said: "For instance, what is the physical or mental impairment, what major life activity or activities are substantially limited, and how does this impact the student within the education program or activities?"

These details give school staff the necessary background to respond immediately to changes in student needs, Black said. A student with ADHD, for example, is technically eligible because the team must disregard the mitigating effects of medication on her major life activities of concentrating, thinking, and learning. *See Dear Colleague Letter*, 58 IDELR 79 (OCR 2012).

However, Black cautioned, maybe the student stops taking the medication or is growing at a rate such that the current dose is no longer effective. In that case, she said, the team should reconvene to discuss possible accommodations and adjust the 504 plan accordingly. ■

Don't assume IHP is enough without 504 plan

School teams have good intentions when developing an individual health plan for a student with medical needs. However, teams should be careful not to close the book on the student's needs too soon. It's important to take note of her possible eligibility for a Section 504 plan.

For example, in *Opelika City (AL) School District*, 111 LRP 47376 (OCR 03/18/11), the district had reason to believe the student had a disability, and the existence of an IHP did not mitigate the legal obligation to evaluate.

It is important to note that an IHP is not a substitute for fulfilling obligations under Section 504. 34 CFR 104.34. Students with an IHP should be considered for a 504 plan if their medical condition poses barriers to their education.

To ensure students with IHPs receive FAPE, educators and nurses must work together to meet these students' health and educational needs. Part of team

members' responsibility is knowing when to evaluate students for eligibility under Section 504. Reference the steps below to determine whether, in addition to an IHP, a student requires accommodations in a 504 plan.

Differentiate between IHP, 504 plan

An IHP is a document that addresses the medical conditions and needs of a student. In contrast, a 504 plan prevents discrimination by providing accommodations that remove student barriers to their education. Both documents should be written to ensure they meet the student's needs.

See whether medical condition is disability

It's important to speak to all staff who interact with the student to determine if medical conditions are ongoing and substantially limiting to the extent that they warrant a 504 evaluation.

Short-term health conditions lasting six months or less are not considered disabilities. 28 CFR 35.108(d) (1). Students who fall under this category typically do not meet the child find or FAPE obligations of Section 504. In these cases, an IHP is adequate. A student's short-term health condition should be evaluated frequently, however, to verify that it is not a long-term health condition requiring accommodations.

The ADA Amendments Act defines a disability as a physical or mental impairment that substantially limits one or more major life activities. 28 CFR 35.108. Life-threatening allergies and other health conditions are considered disabilities under Section 504. Additionally, visual impairment issues are covered under Section 504. Conditions considered disabilities under Section 504 typically require accommodations to provide FAPE for entitled students.

Some school districts are apprehensive about the workload involved in switching students from IHPs to 504 plans. The good news is that the evaluation process for a 504 plan is not as intense as an evaluation for an IEP.

A 504 assessment may start with a nurse referral based on a student's health condition or life-threatening allergy. The 504 process can also begin when a parent comes to the district with a private diagnosis

and requests a 504 plan for their child. A team that knows the child well and understands evaluation data and placement options, will review the information, decide to evaluate, and examine assessment results.

Proper documentation is needed to ensure that the evaluation follows the 504 process. These documents include notice prior to evaluating the student, procedural safeguards, relevant state or district policies, notice of and consent for evaluation, an evaluation document, notice of eligibility, and an accommodation plan.

If the parent does not provide consent for evaluation, the student is not considered for disability protection and continues through the IHP process. However, evaluative information is included in the IHP if consent is given.

Take next steps based on eligibility

For students without a qualifying disability who only need an IHP, the nurse can note any changes in their medical condition annually or as needed.

For students who have a 504-eligible disability and need accommodations, districts should review the IHP and 504 annually and at least every three years to maintain appropriate supports. 34 CFR 104.35. ■



Special Ed Connection

Special Ed Connection® is the go-to online source for guidance on all your special education challenges — and the only source you need to keep current on education policy and legal developments. Relied on by more than 2,500 school districts, it's the fastest, easiest, most authoritative way to stay connected to everything happening in special education!

 IDEA	 Autism	 Behavior & Discipline	 Legal Research	 Early Childhood
 IEPs	 Section 504	 Specific Disabilities	 Transition	 Education Technology

LEARN MORE HERE

Or visit us at www.SpecialEdConnection.com

504 Checklist for Administrators

District Section 504 coordinators, building 504 coordinators, and case managers can use this checklist before, during, and after a student's 504 meeting.

Check Box After Completing Each Action	Before the Section 504 Meeting
<input type="checkbox"/>	Contact the child's parents or guardians to explain the purpose of the 504 meeting and to answer questions and concerns about the meeting.
<input type="checkbox"/>	Schedule a meeting with the parents and other meeting participants for a convenient time and place.
<input type="checkbox"/>	Prepare and send 504 meeting notice that includes the date, time, and location of the meeting.
<input type="checkbox"/>	Gather information to be reviewed at the meeting, including but not limited to assessments, medical/health information, and teacher observations.
<input type="checkbox"/>	Create and share the 504 meeting agenda with meeting participants at least a day before the scheduled meeting.
<input type="checkbox"/>	Arrange for accommodations needed by meeting participants, including interpreters.
<input type="checkbox"/>	Organize all current forms to bring to the 504 meeting.
During the Meeting	
<input type="checkbox"/>	Select seats for meeting participants. Parents should sit near the team leader.
<input type="checkbox"/>	Introduce all participants, including the notetaker. Explain their roles.
<input type="checkbox"/>	Lead group through the agenda items. Provide times for short breaks.
<input type="checkbox"/>	Prepare 504 plan and complete necessary forms.
<input type="checkbox"/>	Provide parents the notice of rights and explain when they will receive a final copy of 504 plan.
After the Meeting	
<input type="checkbox"/>	Add copies of all 504 documents to the student's file and distribute to staff who work with the student.
<input type="checkbox"/>	Confirm, in writing, that all teachers and staff who work with the student understand their roles in implementing the 504 plan.
<input type="checkbox"/>	Provide parents a final copy of the 504 plan.
<input type="checkbox"/>	Schedule implementation check-ins.
<input type="checkbox"/>	Calendar student's annual review date. ■

Lifting of pandemic-era precautions fast-tracks 504 suit over mesh mask

Case name: *Doe v. Franklin Square Union Free Sch. Dist.*, 124 LRP 13128 (2d Cir. 04/25/24).

Ruling: A New York district will have to defend claims that it failed to accommodate a student's asthma when it required her to wear a mesh face mask following the return to in-person learning. The 2d U.S. Circuit Court of Appeals reversed a District Court's ruling at 83 IDELR 23 that the IDEA's exhaustion requirement barred the parent's Section 504 and ADA Title II claims.

What it means: It's well-established that parents can head straight to court with their Section 504 and ADA claims when they only seek money damages as a remedy. This ruling indicates that parents also can bypass the IDEA's exhaustion requirement when the equitable relief they originally sought is no longer available. Here, the district noted that the parent's complaint initially included a request for a court order exempting her daughter from its mask mandate. The court's inability to issue such an order after the mask mandate ended allowed the parent to fast-track her remaining request for money damages.

Summary: A parent's inability to secure a court-ordered exemption to a New York district's mask mandate after the district lifted its COVID-19 precautions helped revive her Section 504 and ADA claims against the district. Holding that the IDEA's exhaustion requirement did not apply to the parent's remaining request for money damages, the 2d Circuit reversed the District Court's dismissal of the parent's "failure to accommodate" claims.

The 2d Circuit questioned the District Court's conclusion that the district reasonably accommodated the student, who had asthma, by allowing her to wear a mesh mask. The 2d Circuit acknowledged that the parent initially agreed to the proposal. However, it pointed out that the student developed rashes from the mesh mask and still had difficulty breathing.

"Accepting these allegations as true, ... [the parent] plausibly alleges that the mesh mask accommodation was not effective," U.S. Circuit Judge Maria Araújo Kahn wrote. As such, the 2d Circuit held, the District Court erred in holding that the parent could only seek relief for the district's alleged failure to accommodate before she agreed to the mesh mask.

Turning to the exhaustion argument, the 2d Circuit recognized that parents generally must seek relief in an IDEA administrative proceeding before suing their child's district in court for an alleged denial of FAPE. Still, it rejected the district's argument

that the parent's failure to accommodate claims under Section 504 and the ADA were FAPE claims in disguise. Noting that the student could have pursued a similar claim against a public library or theater, the court determined that the parent was seeking relief for disability discrimination.

Even if the parent was seeking relief for a denial of FAPE, the court explained, her choice of remedy allowed her to bypass the IDEA's administrative process. The court explained that the IDEA's exhaustion requirement does not apply when a parent only seeks money damages as a remedy. *See Perez v. Sturgis Pub. Schs.*, 82 IDELR 213 (U.S. 2023). Although the parent's original complaint included a request for a court-ordered exemption to the mask mandate, the 2d Circuit observed that the district's lifting of the mask mandate made that request moot.

"Accordingly, the only claims remaining are for damages," Judge Kahn wrote. Determining the IDEA's exhaustion requirement did not apply, the 2d Circuit remanded the parent's Section 504 and ADA claims for further proceedings. It upheld the District Court's dismissal of the parent's 14th Amendment claim. ■

Failing to offer evening services doesn't add up to bad faith, 504 discrimination

Case name: *A.J.T. v. Osseo Area Schs., Indep. Sch. Dist.* No. 279, 124 LRP 9023 (8th Cir. 03/21/24).

Ruling: The 8th U.S. Circuit Court of Appeals held that a Minnesota district did not discriminate against a student with epilepsy and a seizure disorder when it declined to offer evening instruction. It affirmed a District Court's decision at 82 IDELR 158 dismissing the parents' Section 504 and ADA Title II claim.

What it means: A district may not be able to prevent every federal action alleging disability discrimination. That said, districts in the 8th Circuit, including those in Minnesota, should have little to fear from parents' Section 504 claims if they make a good-faith effort to address a student's disability-related needs. Here, the district appropriately updated the student's IEP every school year and offered her a variety of services, including one-on-one instruction. These efforts demonstrated that the district didn't act in bad faith or intentionally discriminate against the student when it declined to provide the evening instruction requested by the parents.

Summary: While a Minnesota district may have improperly refused to provide a student evening instruction to accommodate her epilepsy and seizure disorder, its actions did not amount to intentional discrimination. Finding no Section 504 or Title II violation, the

8th U.S. Circuit Court of Appeals upheld the dismissal of the parents' discrimination claim at 82 IDELR 185.

To successfully assert a federal Section 504 and Title II claim, the parents had to show the district intentionally discriminated against the student by acting with bad faith or gross misjudgment. They failed to satisfy this standard, the 8th Circuit's three-judge panel ruled.

In this case, the parents requested that the district provide the student evening instruction to give her a school day equal in length to that of her peers.

The 8th Circuit noted that the district's decision to deny the request may have violated the student's educational rights and amounted to negligence or deliberate indifference. It also acknowledged that the district's director of student services appeared to be unaware of policies permitting at-home schooling as an accommodation.

Nonetheless, the district did not ignore the student's needs or delay its efforts to address them, the 8th Circuit concluded. It highlighted that the district appropriately met with the student's parents and updated her IEP every school year. Importantly, the student's IEP included a variety of services, including intensive one-on-one instruction and a 15-minute extension of the school day. Additionally, the district offered to provide the student 16 three-hour instructional sessions at home each summer.

"Regardless of whether these actions were enough to provide meaningful access, they do not show wrongful intent," the U.S. Circuit Judge Jonathan A. Kobes wrote on behalf of the three-judge panel. The panel affirmed the District Court's dismissal of the parents' Section 504 and Title II claim. ■

Teacher ties negative reviews to his attempts to secure students' services

Case name: *Hill v. South E. Sch. Dist.*, 124 LRP 15578 (M.D. Pa. 05/17/24).

Ruling: A Pennsylvania district and a school principal failed to secure the dismissal of a former teacher's Section 504 retaliation claims. The U.S. District Court, Middle District of Pennsylvania held that the teacher stated plausible claims that the district and principal retaliated against him for advocating on behalf of students with disabilities.

What it means: Districts engage in retaliation if they take adverse employment action against an educator because the educator advocated on behalf of students with disabilities. To limit Section 504 retaliation claims, districts should separate the process of responding to such advocacy and addressing an employee's performance problems. This teacher com-

plained to his principal about his students receiving inadequate special education services. This district might have avoided litigation if it had not utilized the principal to both respond to the advocacy and evaluate the teacher's performance.

Summary: The teacher of a co-taught classroom may proceed with his Section 504 retaliation claims against a Pennsylvania district and a school principal who allegedly reprimanded, reassigned, and negatively evaluated him. A District Court declined to dismiss claims that the educator experienced retaliation after he complained about the district's failure to provide services to support students with disabilities in his class.

The District Court explained that to state a retaliation claim under Section 504, the teacher had to allege: 1) that he engaged in protected activity; 2) that the district took adverse employment action against him; and 3) a causal connection between the two. Further, the court added, an employee generally can show a causal link between his protected activity and an employer's adverse action by alleging either an unusually suggestive temporal proximity between the two events or a pattern of antagonism coupled with timing.

Here, the teacher's alleged complaint about the insufficient academic and emotional supports his students with disabilities received constituted protected activity, the court stated. Next, the court pointed out that the district's actions, including negative reviews and reprimands, constituted materially adverse actions that would dissuade a reasonable employee from complaining. Finally, the court pointed out that the negative actions began promptly after the teacher started complaining about lack of special education services in his

504 quick quiz

Q: Will OCR waive timeline for filing discrimination complaint because complainant was unaware of deadline?

A: No. OCR will generally take action only with respect to those complaint allegations that have been filed within 180 calendar days of the date of the last act of alleged discrimination or within 60 days of the conclusion of the recipient's internal grievance process unless the complainant is granted a waiver. While a complainant can obtain a waiver in certain circumstances, a lack of knowledge of the timeliness standard is not one of them. In *Montgomery County (MD) Public Schools*, 70 IDELR 50 (OCR 2016), the complainant requested a waiver explaining that she did not file sooner because she did not know the deadline. OCR wasn't persuaded and administratively dismissed the allegations.

classroom. “Those actions then continued for over a year and a half,” U.S. District Judge Christopher C. Conner wrote.

At this early stage of the litigation, the court held, these facts were sufficient to demonstrate a pattern of antagonism coupled with timing. It denied the district’s motion to dismiss the claim. ■

Teacher grabs, rebukes 5-year-old for throwing toy, not for having autism

Case name: *Stratton v. Oroville City Elem. Sch. Dist.*, 124 LRP 15582 (E.D. Cal. 05/15/24).

Ruling: The U.S. District Court, Eastern District of California held that the parents of a 5-year-old with autism failed to state an ADA Title II or Section 504 claim. The court dismissed their claim with leave to amend.

What it means: To state a discrimination claim under the ADA and Section 504, a plaintiff must allege discrimination that is based on disability. This district established that the parents alleged that the teacher had an obvious ill will toward the child and her actions were motivated by that animus, not the child’s disability. It also pointed out that parents conceded that the teacher allegedly restrained the child to discipline him for throwing a toy at an aide, not because he has autism.

Summary: The parents of a kindergartner with autism could not show that a California teacher’s discipline of the child was related to his autism. To pursue their ADA and 504 claims, the parents will have to amend their complaint.

On one occasion, the child threw a toy at an aide, hitting her in the eye. The teacher allegedly took the child outside, grabbed him by the wrists, held him tightly, rebuked him, and then dragged him back to the classroom.

The parents alleged that the district discriminated based on the child’s disability, denied him equal access to educational services, and subjected him to a hostile educational environment. The parents alleged that the district failed to provide the behavior supports the child needed to enjoy meaningful access to the benefits of a public education, the state ED noted. And, they claimed staff often refused to implement recommended behavioral intervention strategies. The parents asserted that the teacher’s actions were motivated by an obvious animus towards him as a child with a disability.

ADA Title II and Section 504 prohibit districts from discriminating against students based on their disabilities, the court explained. The parents had to show that the child had a qualifying disability and

was excluded from participation in or denied the benefits of the district’s services, programs, or activities, it added. And, they had to show that the child was discriminated against or excluded by reason of his disability.

The district contended the parents failed to satisfy the fourth prong.

The court held that the parents failed to state ADA and 504 claims. They didn’t allege that any district employee discriminated against the child based on his autism, it concluded. While they alleged that the teacher’s actions were motivated by an obvious animus toward the child, those allegations only demonstrated that the child had a disability, the teacher had ill will toward him, and her actions were motivated by her ill will, the court observed. It didn’t necessarily follow that her actions were motivated by reason of the child’s disability, the court reasoned. The parents conceded that the teacher allegedly restrained the child to discipline him for throwing a toy at an aide, not because he has autism, the court pointed out.

It dismissed the parents’ claims. ■

‘Clustering’ students who need ASL interpreters discriminates

Case name: *Lincoln Pub. Schs.*, 124 LRP 5181 (DOJ 02/14/24).

Ruling: The U.S. Department of Justice found that a Nebraska district discriminated against students with deafness and hearing impairments in violation of ADA Title II and Section 504. It directed the district to withdraw its blanket policy and instead make individualized placement decisions, adopt a non-discrimination policy, train staff, designate a compliance coordinator, and pay compensatory damages to students who were harmed.

What it means: Blanket policies that place students based on disability rather than their individual needs are discriminatory. Here, the district’s blanket policy of placing all students who required ASL interpretation in a “cluster” school violated Section 504 and the ADA. Instead, the district should’ve made an individual determination for each student, based on the student’s needs, regarding placement. An individualized assessment would have placed students in cluster schools only if they required the services provided by the cluster school and those services couldn’t be provided at the neighborhood school.

Summary: A Nebraska district’s policy of “clustering” students with deafness and hearing impairments who require ASL interpreters in central schools discriminated. The district will have to withdraw the policy, ensure placement decisions are based on students’

individualized needs, and pay compensatory damages to any students who were harmed.

The DOJ initiated a compliance investigation. It explained that ADA Title II and Section 504 prohibit districts from excluding students based on disability from participation in its services, programs, or activities. They must afford students with disabilities the opportunity to participate in or benefit from services equal to that afforded to nondisabled students, the DOJ added.

The district maintained a blanket policy that required all students believed to need ASL interpreting services to attend cluster schools servicing similar students, it observed. The policy discriminated by denying those students the opportunity to attend their neighborhood school or school of their choice, the DOJ found. Further, it denied them an equal opportunity to access benefits of district programs, denied them effective communication, and didn't amount to the equal access enjoyed by nondisabled students, it added.

The policy was unnecessary to ensure that district services were as effective as those provided to others, the DOJ remarked. And there was no valid reason why students cannot have their ASL interpreter needs met at their neighborhood schools, it added.

The blanket policy didn't consider the students' individualized needs, the DOJ explained. Rather, the district adhered to the policy for perceived administrative convenience, not the specialized services offered at cluster schools or the content of a student's IEP, it remarked.

Finally, the DOJ pointed out that the enrollment requirement harmed students by subjecting them to new burdens, including a 90-minute additional commute and costs. And some were denied the social-emotional benefit of attending their neighborhood school with siblings and friends. ■

Holding 'pre-504' meeting doesn't satisfy duty to timely evaluate

Case name: *Andover (MA) Pub. Schs.*, 124 LRP 9107 (OCR 12/12/23).

Ruling: A Massachusetts district resolved a complaint that it violated Section 504 and Title II of the ADA by not reevaluating a child with an unspecified disability. The district signed a voluntary resolution agreement to address the parent's allegations that the district discriminated against the student. It pledged to convene a 504 team to review the student's 504 plan and to consider the student's need for compensatory services. It also promised to conduct staff training, review and revise its 504 policies,

and determine whether it had neglected to evaluate other students in the district.

What it means: A district must evaluate a student within a reasonable period of time after a parent requests an evaluation. Its other option is to notify the parent that it is declining to evaluate and inform the parent of her procedural safeguards. After this parent requested an evaluation, the district convened a few staff members on multiple occasions to discuss how to address the child's academic needs. It should have either convened the full 504 team to evaluate the student, provided notice of its decision not to evaluate, or explained that it was postponing the evaluation while it gathered needed data.

Summary: OCR expressed concerns that a Massachusetts district attempted to address a child's academic challenges outside the 504 process instead of timely evaluating the student. To resolve a parent's claims that the district violated Section 504 and Title II of the ADA, the district agreed to train its staff and take other steps outlined in a voluntary resolution agreement.

The parent claimed that the district failed to respond to her request to evaluate the newly enrolled student, despite the fact that he had an existing 504 plan.

When a parent requests a 504 evaluation, OCR noted, the district must respond by either evaluating within a reasonable period of time or providing notice of its decision not to evaluate.

OCR acknowledged that the district conducted meetings with a few staff members to consider how to support the student. It did not, however, convene the full 504 team, OCR indicated, or document that it drew on information from a variety of sources. In fact, according to the parent, she was told that one of the meetings was a "pre-504" meeting, OCR remarked. Further, the district didn't notify the parent that it was declining to evaluate the student or adequately justify its delay.

OCR conceded that a district may take time to collect data needed to evaluate a student before convening the 504 team. It may also provide the student supportive measures while it completes the evaluation. "It is not, however, an option for a school district, once on notice that a student, because of disability, may need services under Section 504, to operate outside of the Section 504 process," OCR wrote.

Before OCR completed its investigation, the district committed to taking the steps outlined in a resolution agreement, including determining whether the student required compensatory services. ■

Skiping small-group testing in Spanish program impedes access, FAPE

Case name: *Comal (TX) Indep. Sch. Dist.*, 124 LRP 7263 (OCR 10/17/23).

Ruling: A Texas district may have violated Section 504 and Title II when it allegedly failed to implement the Section 504 plan of a grade schooler with an undisclosed disability, OCR found. It also determined that the district may have improperly excluded the student from its Spanish immersion program. To remedy the compliance concerns, the district pledged to provide the student any necessary compensatory services, among other corrective actions.

What it means: Districts that offer different academic programs must ensure that staffers working in those programs are trained on Section 504 requirements. This will ensure that students with disabilities have equal access to those programs and consistently receive FAPE. When this third-grader enrolled in the district's Spanish immersion program, the district should have trained teachers how to implement classroom accommodations. This training, along with a review of the student's 504 plan, may have equipped teachers with the knowledge they needed to implement the small-group testing required by the student's 504 plan.

Summary: Because a third-grade student enrolled in a Spanish immersion program allegedly never received the small-group testing required in his Section 504 plan, a Texas district couldn't refute allegations

of discrimination. OCR closed the parent's Section 504 and Title II complaint once the district promised to take corrective measures outlined in a resolution agreement.

Under Section 504 and Title II, a district must ensure that students with disabilities have an equal opportunity to participate in and benefit from its programs, services, and activities. Additionally, the district must ensure that it provides FAPE to all eligible students with disabilities in its jurisdiction. The district may have violated these federal requirements, OCR determined.

It noted during SY 2022-23, the student was enrolled in the district's Spanish immersion program. The parent contended that the program consistently failed to provide the student the small-group testing required by his Section 504 plan. She also alleged that the district improperly removed the student from the Spanish immersion program without following appropriate placement procedures under Section 504.

Before OCR could make a compliance determination, the district executed a resolution agreement to resolve the parent's complaint. In the agreement, the district promised to invite the student to reenroll in its Spanish immersion program and to provide the student any necessary compensatory or remedial services. It also pledged to review its policies and procedures regarding the removal of students from the Spanish immersion program and to conduct staff training regarding its Section 504 obligations. OCR closed the complaint. ■

SUBSCRIPTION OFFER

☐ **YES!** Please start my one-year electronic subscription to **Section 504 Compliance Advisor** for only \$330 for 12 issues.

5 EASY WAYS TO ORDER

Call toll-free 1-800-341-7874 Fax 561-622-2423

Online www.shoplrp.com Mail in this order form

E-mail custserve@lrp.com



TTY: 561-799-6633

SOURCE CODE: LR9704-15

Sales Tax: Add percentage applicable to your state or county. If tax exempt, please provide certification.

I understand that I may be shipped, on 30-day approval, future editions, updates, cumulative digests, and/or related products. I am free to change or cancel my order for upkeep services at any time and any update issued within three months of my initial purchase will be sent to me at no additional charge.

☐ I do not want the additional upkeep service.

CUSTOMER INFORMATION:

NAME:	TITLE:	
ORGANIZATION:		
STREET ADDRESS:		
CITY:	STATE:	ZIP:
PHONE: ()	FAX: ()	
E-MAIL:		
Your e-mail is used to communicate with you about your purchase(s). Please check here to also receive:		
<input type="checkbox"/> Special discounts, offers & new product announcements from LRP Publications.		
<input type="checkbox"/> Offers from carefully selected relevant businesses.		

PAYMENT INFORMATION:

CHARGE MY CREDIT CARD #: <input type="checkbox"/> VISA <input type="checkbox"/> MASTERCARD <input type="checkbox"/> AMEX <input type="checkbox"/> DISCOVER	
CARD #:	EXP. DATE:
SECURITY CODE: (3-digit code on back of Visa, MasterCard, Discover or 4-digit code on front of AmEx)	
NAME: (as it appears on card)	
CREDIT CARD BILLING ADDRESS: / STREET:	
CITY:	STATE: ZIP:
CARDHOLDER'S PHONE:	CARDHOLDER'S SIGNATURE:
<input type="checkbox"/> CHECK OR MONEY ORDER PAYABLE TO LRP PUBLICATIONS.	
<input type="checkbox"/> CHARGE MY LRP ACCT. #:	<input type="checkbox"/> BILL ME. P.O. #: (ENCLOSED)

LRP Publications • 360 Hiatt Drive, Dept. 150F
Palm Beach Gardens, FL 33418