Section 504

Evaluation

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Definition of "Substantial Limitation"

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Question 1: When is the district required to make a 504 referral?

A student should be referred to 504 when the District believes that the student may be eligible, i.e., when the District believes that the student has a physical or mental impairment that substantially limits one or more major life activities, AND that the student is in need of either regular education with supplementary services or special education and related services. *Letter to Mentink,* 19 IDELR 1127 (OCR 1993).

Question 2: Do we evaluate and serve (1) students with a record of a disability or (2) students regarded as being disabled?

The definition of students protected under 504 includes those with a "record" of a disability or "regarded as" having a disability. 34 C.F.R. Section 104.3(j)(1). These provisions have led to much confusion among school districts. The main misconception is that even if currently not disabled, a child with a record of a disability, or regarded as having a disability, has to be evaluated and placed under 504 by a Section 504 committee. This is not so. Only children who currently suffer from an impairment substantially limiting learning or another major life activity are eligible for referral, evaluation, and educational services under 504. "Logically, since the student [qualifying under prong two or three] is not, in fact, mentally or physically handicapped, there can be no need for special education and related aids and services." *OCR Senior Staff Memo,* 19 IDELR 894 (Aug. 13, 1992) [bracketed material added]. Prongs two and three of the disability definition exist to protect children with a record of a disability and children regarded as having a disability, from disability-based discrimination.

Question 3: Do we have to refer to Section 504 every child who breaks a bone or sprains an ankle?

No. Schools only need to refer and evaluate those children who are suspected of needing Section 504 services due to a physical or mental impairment that substantially limits one or more major life activities. If a child breaks his right wrist, and he is left-handed, the school may legitimately not suspect that 504 services will be necessary. The referral question must be taken up on a case-by-case basis, depending on the physical impairment, whether it substantially limits a major life activity (which may depend on the type of classes or activities the child

is involved in at school), and whether it needs to be addressed with 504 services or accommodations of some kind.

Question 4: What about the parent who says that with 504, his child could get the straight A's that the parent knows the child should get? Does this child need to be referred to Section 504?

While parents may honestly believe that a child is not performing to his or her potential, that failure is not sufficient reason for referral and evaluation. For example, OCR has found no duty to qualify a child 504 despite his having ADD when the child had acceptable behavior and was making A's and B's in all of his classes. *Jefferson Parish (La.) Public Schools,* 16 EHLR 755 (OCR 1990).

"When the handicapped child is being educated in the regular classrooms of a public school system, the achievement of passing marks and advancement from grade to grade will be one important factor in determining educational benefit." *Hendrik Hudson District Bd. of Education v. Rowley,* 458 U.S. 176, 207 fn. 28 (1982). As a result, where the child is already passing his classes (without modifications) he is likely receiving educational benefit and in no need of Section 504 or IDEA services. "By definition, a person who is succeeding in regular education does not have a disability which substantially limits the ability to learn.... A student who is already succeeding in regular education would not need special education to obtain this level of benefit and, thus, would not meet the standards established for LD eligibility." *Saginaw City (MI) School District,* EHLR 352:413 (OCR 1987). Of course, an exception does apply.

Question 5: If we do the modifications for the student, do we have to refer the child and go through the procedural hassle of 504?

Yes. If the student qualifies for 504, doing the modifications without providing the procedural protections is a violation. That was the case where a school district provided a student who had undergone hip surgery with appropriate modifications, but failed to have procedures in place to document the deliberation of, or provision of accommodations [the regulations require no such documentation], or to inform parents of the procedure to follow should their student become disabled. *Temple (TX) ISD,* 25 IDELR 232 (OCR 1996). There can be few results as unpalatable as one where the district provides sufficient modifications to a qualified disabled student, but nevertheless is found in violation for not jumping through the procedural hoops.

Question 6: Does the school have to refer a student to 504 and conduct an evaluation if the student has been placed in a private or homeschool by his/her parents?

Once the District has offered the child a free appropriate public education, it has no duty to provide "educational services to students not enrolled in the public school program based on the personal choice of the parent or guardian." *Letter to Veir,* 20 IDELR 864 (OCR 1993); *Hinds Co. School Board,* 20 IDELR 1175 (OCR 1993). Note that the result is very different under the IDEA where a parent may unilaterally place the child in a private school and may be able to access OT, PT or

other special education or related service components.

Question 7: What is a 504 reevaluation?

Unlike its special education counterpart, the 504 evaluation does not mean "test," but instead, means a gathering of data from a variety of sources. No formal testing is necessary. *Letter to Williams,* 21 IDELR 73 (OCR 1994). In the §504 context, evaluation refers to a gathering of data or information from a variety of sources so that the committee can make the required determinations. Since specific or highly technical eligibility criteria are not part of the 504 regulations, common sources of evaluation data for 504 eligibility are the student's grades, disciplinary referrals, health information, language surveys, parent information, standardized test scores, teacher comments, etc. An evaluation is required, according to the regulations at 104.35(a), prior to initial evaluation, and prior to any significant change of placement. A reevaluation is also required "periodically" which the Appendix to the regulations defines as at least every three years.

The reevaluation is simply a re-gathering of information from a variety of sources to verify eligibility and to determine if additional changes are needed in the child's program. While the regulations require reevaluation every three years, the better practice is to conduct one at least at the end of every school year, looking forward to the next school year and changes to the child's schedule, teachers, and other issues that may require tinkering with the modifications and/or behavior management plan. Note that the manifestation determination meeting conducted by the 504 committee prior to a change of placement for disciplinary reasons of greater that 10 days, or when removals total 10 days during a school year is also a reevaluation.

Question 8: Can a student's absences trigger a 504 referral and evaluation?

Absolutely. If a district suspects that a significant number of absences is due to a disability that substantially limits a major life activity (for example, when the number of absences threatens the student's ability to receive credit for coursework or when it impacts significantly on grades), the district ought to refer and evaluate. For example, a junior high school student with severe allergies, asthma, and migraine headaches had a lengthy history of missing school due to her medical problems. In seventh grade, she was absent 132 times, and in eighth grade attended classes only three to ten times from September to November. The parents argue that the school failed to accommodate the student's absences. The only evaluations conducted by the district with respect to the child's absences were very recent attempts to find psychological causes, even though the district was aware for the past five years of the student's medical problems (the allergies, headaches, and asthma). OCR finds that the district failed to properly evaluate given the information that it had on the medical related absences. *Grafton (ND) Public School,* 20 IDELR 82 (OCR 1993).

Note, however, that the fact a student has a disability does not necessarily mean that each of his or her absences is disability-related. For example, the parent of a disabled student enrolled in a vocational training program complains when the student receives a low grade due to absences. The parent alleges that the grades are

discriminatory, and that the absences are related to disability. The program encouraged students to develop appropriate work habits, including regular attendance. Under a point system, a student who missed a day of school during the week could receive no grade higher than a "C" for the week. The student missed at least one day in each of the first five weeks. OCR finds that the grading policy is based on objective, nondiscriminatory factors. Further, OCR finds nothing in the IEP to indicate a disability or medical condition which would affect his regular attendance at school. No violation is found. *Dade County (FL) School District,* 29 IDELR 994 (OCR 1998). Each child's situation should be reviewed on its own merits.

Question 9: If a parent referral for 504 evaluation is refused by the public school, does the parent have any recourse?

Yes. The refusal to evaluate triggers the parents' rights to (1) request a 504 hearing before an independent hearing officer or (2) file suit in state or federal court or (3) file a complaint with the Office for Civil Rights.

While there is no right to an evaluation on parent demand under Section 504, *Letter to Mentink,* 19 IDELR 1127 (OCR 1993), districts should carefully consider the refusal to provide an evaluation. If the district believes that the child is not eligible (for example, the child is already receiving educational benefit) providing a 504 evaluation and making that determination properly through a 504 Committee makes the decision virtually bullet-proof against an OCR complaint. Remember, since OCR looks at procedural compliance issues, as long as the 504 Committee was properly constituted and asked the right questions based on proper evaluation data, the Committee's decision that the child was not eligible will not be disturbed by OCR. The parent's disagreement with the eligibility decision will not be reviewed by OCR, because that type of complaint is the territory of the independent hearing officer. *See for example, Virginia Beach City (VA) Public Schools,* 26 IDELR 27 (OCR 1996); *Temple (TX) ISD,* 25 IDELR 252 (OCR 1996).

"It is the policy of the Department that OCR will not, except in extraordinary circumstances, review the results of individual placement decisions as long as the District complies with the 'process requirements' of the Section 504 regulation.... OCR does not make an independent decision regarding the appropriateness of a particular education program or service for a specific child, if proper evaluation, placement, and due process procedures have been followed. In that the complainant has essentially alleged a disagreement with the results of an evaluation and not a failure to comply with the appropriate process requirements, OCR will not further investigate this matter. The proper forum for resolving such disagreements is the due process hearing." *Oak Ridge City (TN) School District,* 29 IDELR 390, 391 (OCR 1998.). By properly conducting a 504 evaluation, the district insulates itself from a potential OCR complaint.

Question 10: What's all the hoopla over the American Academy of Pediatrics guidelines on diagnosis of ADHD?

An ongoing struggle for many educators is the realization that **no medical**

diagnosis is required for 504 eligibility. "Section 504 does not require that a school district conduct a medical assessment of a student who has or is suspected of having ADHD unless the district determines it is necessary in order to determine if the student has a disability." *Williamson County (TN) School District, 32 IDELR 261 (OCR 2000).* In fact, the regulations do not require medical evaluations for any disability to qualify under 504. Of course, if the parents present the school with an outside medical evaluation, it must be considered as part of the district's evaluation process. This requirement has also been a concern to some educators, especially when the diagnostic practices of a local doctor result in a high number of ADD/ADHD students. Some relief arrived on that front last year.

The American Academy of Pediatrics, in response to public debate over the diagnostic practices used to determine ADD/ADHD, and concerns over possible over-diagnosis, issued a practice guideline in May of 2000 designed to provide uniformity and better diagnosis of ADD/ADHD in children. *Clinical Practice Guideline: Diagnosis and Evaluation of the Child with Attention-Deficit/Hyperactivity Disorder, 105* Pediatrics No. 5, p. 1159 (May 2000) *(hereinafter AAP Guideline).* In addition to determining that the DSM-IV criteria should be used, Recommendation 4 of the Guideline states:"The assessment of ADHD requires evidence directly obtained from the classroom teacher (or other school professional) regarding the core symptoms of ADHD, the duration of symptoms, the degree of functional impairment, and coexisting conditions. A physician should review any reports from a school-based multidisciplinary evaluation where they exist, which will include assessments from the teacher or other school-based professional." The requirement that physicians consider evidence from the school is based on facts educators have known for some time. "Children 6-12 years of age generally are students in an elementary school setting, where they spend a substantial proportion of waking hours. Therefore, a description of their behavioral characteristics in the school setting is highly important to the evaluation." *Id., at 1165.* An additional recommendation is that the physician receive the information directly from the school. While no explanation is given for this recommendation, it seems clear that information provided directly is more valuable (accurate) than information filtered through a parent or other person. Click here for the AAP Guideline at www.aap.org/policy/AC0002.html

504

Eligibilty

website-www.504idea.org/504mechanics.html/

Question 1: What if the major life activity impaired is not learning? Can the child still qualify under Section 504?

A common misperception in 504 is that a student must possess a physical or mental impairment that substantially limits the major life activity of learning in order to be 504 eligible. OCR's position is that while it "may be true in a practical sense that most impairments that would be of concern in an education setting would be those that impair learning," the major life activity of learning need not be the focus of the equation. "Students may have a disability that in no way affects their ability to learn, yet they may need extra help of some kind from the system to access learning. For instance, a child may have very severe asthma (affecting the major life activity of breathing) that requires regular medication and regular use of an inhaler at school. Without regular administration of the medication and inhaler, the child cannot remain in school." *Letter to McKethan,* 23 IDELR 504 (OCR 1994).

Question 2: Do we evaluate and serve (1) students with a record of a disability or (2) students regarded as being disabled?

The definition of students protected under 504 includes those with a "record" of a disability or "regarded as" having a disability. 34 C.F.R. Section 104.3(j)(1). These provisions have led to much confusion among school districts. The main misconception is that even if currently not disabled, a child with a record of a disability, or regarded as having a disability, has to be evaluated and placed under 504 by a Section 504 committee. This is not so. Only children who currently suffer from an impairment substantially limiting learning or another major life activity are eligible for referral, evaluation, and educational services under 504. "Logically, since the student [qualifying under prong two or three] is not, in fact, mentally or physically handicapped, there can be no need for special education and related aids and services." *OCR Senior Staff Memo,* 19 IDELR 894 (Aug. 13, 1992) [bracketed material added]. Prongs two and three of the disability definition exist to protect children with a record of a disability and children regarded as having a disability, from disability-based discrimination.

Question 3: What constitutes a "substantial limitation?"

The 504 regulations do not contain a definition of "substantially limits" and has declined to define the term. "Several comments observed the lack of any definition

in the proposed regulation of the phrase 'substantially limits.' The Department does not believe that a definition of this term is possible at this time." *Appendix A,* p. 419. OCR has ruled that the phrase is to be defined by the local educational agency, and not OCR. *Letter to McKethan,* 23 IDELR 504 (OCR 1994). Schools can reasonably adopt the definition provided in the Legislative History to the Americans With Disabilities Act. Under the ADA, a major life activity is substantially limited when "the individual's important life activities are restricted as to the conditions, manner or duration under which they can be performed in comparison to most people." *[House Report No. 101-485 (II), p. 52.]* For additional analysis, download the outline "What is a Substantial Limitation?" from the 504 Resources page.

Question 4: Can a temporary disability qualify a child for services under Section 504?

In various policy letters, the Department of Education has determined that a temporary disability can constitute a physical impairment that substantially limits a major life activity such that 504 services might be required. *See, e.g., Ventura (CA) Unified School District,* 17 EHLR 854 (OCR 1991). The proper inquiry "is not whether the impairment is temporary or permanent; rather the appropriate inquiry is whether the impairment substantially limits one or more major life activities." *Letter to Wright,* (OCR 1993). That determination must be made on a case-by-case basis, considering the "nature, severity, duration or expected duration and the permanent or long term impact resulting from the impairment." Id.

Question 5: Is there a list of disabilities that qualify a child for Section 504?

No. The Department of Education did not provide a list of qualifying impairments as exists under the IDEA. The appendix to the regulations indicates that the absence of a list was entirely intentional. "The definition does not set forth a list of specific diseases and conditions that constitute physical or mental impairments because of the difficulty of ensuring the comprehensiveness of any such list. The term includes, however, such diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, and, as discussed below, drug addiction and alcoholism." *Appendix A,* p. 419.

Question 6: Are children with limited English proficiency disabled and eligible for 504?

Maybe. Limited English proficiency means that the child does not understand and/or speak the English language. It does not mean that the child has a language impairment, which would be evident even in his native tongue. Children recently arrived from Lithuania, for example, are generally perfectly capable of language—but probably not the English language. They do not have a language impairment problem, but rather a language proficiency problem. Of course, children from Lithuania are not immune from legitimate language impairments, such as articulation problems or aphasia. Limited proficiency alone, however, is not a disability. It may substantially limit learning, but it is not considered a physical or mental impairment. Because children with limited English proficiency (who are

otherwise nondisabled) do not have a physical or mental impairment in language production in general, they are not considered disabled under Section 504.

Question 7. Is every child who breaks a bone or sprains an ankle eligible under Section 504?

No. Schools only need to refer and evaluate those children who are suspected of needing Section 504 services due to a physical or mental impairment that substantially limits one or more major life activities. If a child breaks his right wrist, and he is left-handed, the school may legitimately not suspect that 504 services will be necessary. The referral question must be taken up on a case-by-case basis, depending on the physical impairment, whether it substantially limits a major life activity (which may depend on the type of classes or activities the child is involved in at school), and whether it needs to be addressed with 504 services or accommodations of some kind.

Question 8: What about the parent who says that with 504, his child could get the straight A's that the parent knows the child should get? Is that child eligible under Section 504?

While parents may honestly believe that a child is not performing to his or her potential, that failure is not sufficient reason for referral and evaluation. For example, OCR has found no duty to qualify a child 504 despite his having ADD when the child had acceptable behavior and was making A's and B's in all of his classes. *Jefferson Parish (La.) Public Schools,* 16 EHLR 755 (OCR 1990).

"When the handicapped child is being educated in the regular classrooms of a public school system, the achievement of passing marks and advancement from grade to grade will be one important factor in determining educational benefit." *Hendrik Hudson District Bd. of Education v. Rowley,* 458 U.S. 176, 207 fn. 28 (1982). As a result, where the child is already passing his classes (without modifications) he is likely receiving educational benefit and in no need of ß504 or IDEA services. "By definition, a person who is succeeding in regular education does not have a disability which substantially limits the ability to learn.... A student who is already succeeding in regular education would not need special education to obtain this level of benefit and, thus, would not meet the standards established for LD eligibility." *Saginaw City (MI) School District,* EHLR 352:413 (OCR 1987).

Question 9: Since 504 also applies to IDEA (special education) students, does that mean that a 504 committee has to meet to determine eligibility for services in addition to the ARD Committee (or IDEA IEP/Multidisciplinary Team)?

NO. While 504 provides nondiscrimination protection to IDEA students, the responsibility for the child's free appropriate public education comes from IDEA. It is that ARD Committee (IEP Team, etc.) that determines the educational services for the child. OCR has concluded that when a child qualifies under the IDEA, the District satisfies the provisions of Section 504 as to that child by developing and implementing an IEP under IDEA. *Letter to McKethan,* 25 IDELR 295, 296 (OCR 1996). Of course, the anti- discrimination protection provided by 504 does not

necessitate 504 Committee action, but instead, is accomplished through awareness and training of district personnel.

Question 10: Can the district base 504 eligibility on the results of a single IQ test?

NO. The District is not allowed to base eligibility on a single piece of evaluation data. When interpreting evaluation data and making placement decisions, the District is required to "draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior." Section 104.35(c)(1). Information obtained from all such sources is to be documented and carefully considered. Section 104.35(c)(2). "[This] paragraph requires a recipient to draw upon a variety of sources in the evaluation process so that the possibility of error in classification is minimized." *Appendix A,* p. 430.

Question 11: Can a student be dismissed from 504?

Absolutely. Once a student no longer meets eligibility requirements (that is, he no longer has a physical or mental impairment that substantially limits one or more major life activities), the 504 committee can dismiss him from 504. That child is no longer eligible for 504 services. However, since he is a child with a record of a disability, he continues to receive protection under 504 from discrimination by the district. No further 504 meetings are required for this child following his dismissal, unless the district believes that he is again eligible for services at some point.

Question 12: Do we need a diagnosis from a medical doctor in order to identify a child as disabled under 504?

No. Schools are sometimes reluctant to qualify a child under Section 504 because of ADD/ADHD unless they have a medical diagnosis which supports that eligibility. However, the 504 regulations include no requirement that the district must have a medical evaluation in order to determine a child eligible under 504. An OCR decision issued in 1992, on an IDEA (special education) student provides additional support for the notion that no medical diagnosis is required. *Letter to Parker,* 18 IDELR 965 (OCR 1992). Here, OCR indicates that for purposes of compliance with the IDEA (and in the absence of more specific state law requirements on eligibility) no medical evaluation by a licensed physician is needed to find that the child with ADD/ADHD qualifies as Other Health Impaired (OHI). "If a public agency believes that a medical evaluation by a licensed physician is needed as part of the evaluation to determine whether a child suspected of having ADD meets the eligibility criteria of the OHI category, the school district must ensure that this evaluation is conducted at no cost to parents. However, if a school district believes that there are other effective methods of determining whether a child suspected of having ADD meets the eligibility requirements of the OHI category under Part B, then it would be permissible to use other qualified personnel to conduct the evaluation, so long as all of the protection in evaluation requirements of 34 CFR Sections 300.530-300.534 are met."

In other words, if no medical evaluation is required under federal law for special

particular physical or mental impairment? That is, is it possible that for some impairments, we assume that the sufferer is eligible without any analysis of the severity of the disability?

No. The Fifth Circuit Court of Appeals was presented with that question in an ADA (Americans with Disabilities Act) case, and flatly rejected the idea. The plaintiff attempted to argue that having the physical impairment of seizures was per se, or by itself, enough to get ADA protection, and that no showing of substantial limitation was required. The Court wrote: "Due to this wide range of symptoms and causes, the term 'seizures' does not appear to describe a class of impairments that share sufficiently similar characteristics such that they should be treated as a single 'impairment' or 'disability' under the ADA. The result of accepting Deas' argument that 'seizures' constitute a disability per se would require courts to equate the impairment of an individual who experiences occasional 'tingling' in his fingertips due to mild seizures with the impairment of an individual who experiences frequent, prolonged, and potentially life-threatening convulsions due to severe grand mal seizures. We view this as a legally untenable position, and conclude that the determination of whether seizures are disabling for purposes of the ADA is best left to a case-by-case analysis." *Deas v. River West, L.P.,* 152 F.3d 471, 483 fn. 17 (5th Cir. 1998).

Question 16: Is it possible for a student to be 504 in one district and not eligible in another?

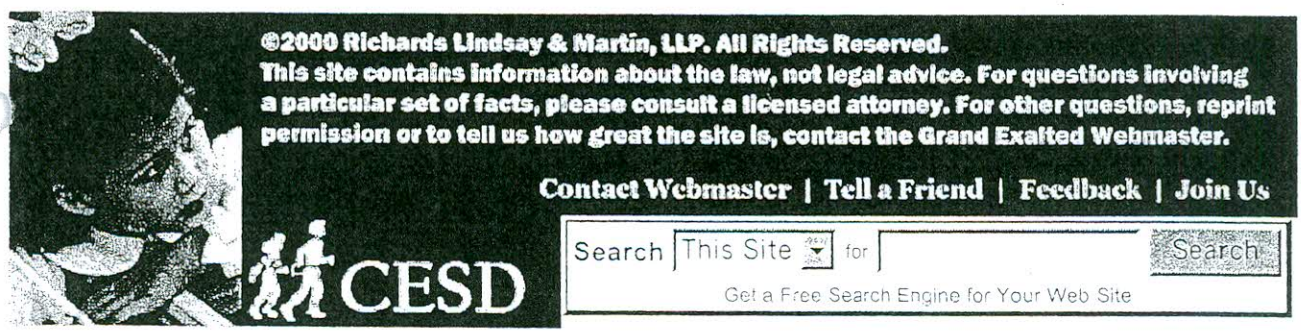
Yes. A natural result of the OCR position that no standard definition of "substantially limits" will be provided by the U.S. Department of Education *(Appendix A to the 504 Regulations, p. 419.)* is that eligibility will vary among districts. That result is further guaranteed by OCR's position that each district is responsible for determining what the phrase means. *Letter to McKethan,* 23 IDELR 504 (OCR 1994). Since the phrase "substantially limits" is the sticking point in eligibilty, and since every district can define the phrase for itself, it should be no surprise that a student eligible in one district might not be eligible in another.

Question 17: Can the parent's disability make the child eligible for 504?

No. The real question here is who has to have the physical or mental impairment? On occasion, inquiries are made into 504 services for a child due to the physical or mental impairment of his or her parent. Note that in addition to being "disabled" an individual must also show that he or she is "qualified" in order to be eligible under Section 504. For purposes of preschool, elementary and secondary education, "qualified" means the child has a legal right to education from the district (typically arising from state compulsory attendance laws) and is within the age range of students (both disabled and nondisabled) whom the school is legally obligated to serve (between the ages of 3 and 22 in Texas). 34 C.F.R §104.3(k)(2). As a result, the parent's impairment cannot make the child 504 eligible, because the child is not both disabled and qualified..

Question 18: When does a student's passing grades not constitute evidence of educational benefit?

When the passing grades hide a lack of progress on goals and objectives. Question 8 sets out the general rule that passing grades and advancement from grade to grade is evidence of educational benefit. That general rule is subject to exception. In a special education decision from Indiana, the hearing officer was faced with a claim for reimbursement for private placement. The school argued that the student had progressed from grade to grade, invoking *Rowley*. The hearing officer was less than impressed with the district's program, especially when she determined that although the student was being promoted, he could not read, and was not making progress to that goal. "The appropriateness of past services provided by the LEA is best judged by a review of objective evidence, such as a student being unable to read, lacking word attack skills, and being very deficient in decoding. The attainment of passing grades and regular grade advancement, although generally accepted by courts as indicators of satisfactory progress is only one factor..... Here, it is deemed a very small factor compared to the other evidence of the student's inability to do basic reading and being unable to properly decode words." *Duneland School Corp. (IN), 31 IDELR 222 (Special Education Hearing Officer 2000)*. Similarly, for the 504-only child, where passing grades are given merely to secure a social promotion (having little to do with the child's achievement), they will not evidence receipt of educational benefit. In short, for the grades and promotions to have value as evidence of educational benefit, they must be based on, and accurately reflect, the student's educational performance.



504

Placement

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CESD

Question 1: Do (1) students with a record of a disability or (2) students regarded as being disabled receive classroom modifications under Section 504?

The definition of students protected under 504 includes those with a "record" of a disability or "regarded as" having a disability. 34 C.F.R. Section 104.3(j)(1). These provisions have led to much confusion among school districts. The main misconception is that even if currently not disabled, a child with a record of a disability, or regarded as having a disability, has to be evaluated and placed under 504 by a Section 504 committee. This is not so. Only children who currently suffer from an impairment substantially limiting learning or another major life activity are eligible for referral, evaluation, and educational services under 504. "Logically, since the student [qualifying under prong two or three] is not, in fact, mentally or physically handicapped, there can be no need for special education and related aids and services." *OCR Senior Staff Memo,* 19 IDELR 894 (Aug. 13, 1992) [bracketed material added].

Question 2: What do kids who are eligible as having a "record of an impairment" or who are "regarded a" having an impairment get under 504?

Prongs two and three of the 504 disability definition exist to protect children with a record of a disability and children regarded as having a disability, from disability-based discrimination. Kids qualifying for 504 in this way (and in the absence of a current physical or mental impairment) do not get educational services under Section 504. Instead, they only receive anti discrimination protection.

For example, if a child suffered from bone cancer in his leg at age six, and went into full remission a year later with no subsequent relapses, the football coach may not prevent the child from trying out for the team simply because of the child's record of bone cancer. That would constitute discrimination based on the child's record of a past disability. The child has a right to equal participation in extracurricular activities under Section 504, past disability or not.

In another situation, a child from a family with a history of tuberculosis enrolls in school. Although the child does not have tuberculosis, his teacher, who knows the family history, sits the child in the back of the class and neither interacts with the child, nor allows other children to be in close proximity of the child. That teacher is

duty to provide "educational services to students not enrolled in the public school program based on the personal choice of the parent or guardian." *Letter to Veir,* 20 IDELR 864 (OCR 1993); *Hinds Co. School Board,* 20 IDELR 1175 (OCR 1993). Note that the result is very different under the IDEA where a parent may unilaterally place the child in a private school and may be able to access OT, PT or other special education or related service components.

Question 6: What can be done to teachers who refuse to implement modifications in a student's 504 accommodation plan?

Since physical violence is uncivilized and leads to nasty criminal penalties, the best "big stick" motivator for teachers who refuse to modify is adverse employment action against their contracts. The student's accommodation plan is what federal law requires to be done in the classroom. Should a teacher refuse to modify as required by the plan, the teacher is in violation of federal law. Most school district employment contracts contain language indicating that the employee agrees to abide by federal and state law and local school district policy. Failing to modify as required violates that contract provision, and should result in written directives, reprimands, and more serious employment action (including nonrenewal and termination) should the employee continue to refuse to serve the child. After all, the teacher's refusal to modify means that the district is not in compliance, and is exposed to OCR investigations, or 504 due process hearings.

While the big stick of employment actions exists to convince teachers to modify, some more practical considerations are also helpful. For example, it is an unfortunate fact that as the students moves from elementary to middle school to high school, the level of commitment to implementing modifications among faculty tends to decrease. In all likelihood, this decline in compliance is due to the large number of students being served by an individual teacher during the school day, and the difficulty of keeping up with a variety students who require different modifications. Committees would do well to remember this simple fact when creating accommodation plans. Keep plans simple. Only require the use of modifications that are necessary for the child to receive opportunity for educational benefit. That is, require only what is necessary, not "what might be nice." Second, make sure that classroom teachers provide input on modifications. They are in the best position to know the requirements they are placing on students, and will also know what modifications they have seen work for the child.

Question 7: How can a school ensure that modifications are being implemented in the classroom?

Nothing can replace periodic walkthroughs by campus administrators and watching the child's progress. Successful supervision requires both elements. Unannounced walkthroughs provide a true (although brief) view of classroom activity. More importantly, they send the message that at any time, an administrator could come into the classroom to observe. That reminder encourages compliance. Periodic checking of the student's grades and behavior is also important. We want to ensure not only that the modifications are being done, but that they are the right modifications (they are effective). By watching student performance and behavior, the committee can see whether the child is improving, and if not, focus its attention

on what else (if anything) should be done to modify.

Question 8: Does 504 contain a Least Restrictive Environment (LRE) requirement?

Yes. The LRE Mandate under Section 504 (paraphrased from the regulations, [§104.34(a)(1)].) is to educate each qualified handicapped person with persons who are not handicapped to the maximum extent appropriate to the needs of the handicapped person. The least restrictive environment is defined as the setting that allows the disabled student the maximum exposure to nondisabled peers while still allowing him to receive an appropriate education. Both IDEA and 504 create the presumption that each disabled child can be educated in the regular classroom. This presumption should be even stronger in 504 since the disabilities encountered in 504 students are typically less severe. If the District believes that some setting other than the regular classroom is necessary for the child to receive educational benefit (meaningful progress on appropriate goals and objectives), the District must be ready to show that it has provided support services and aids to assist the child in the regular classroom, and that such efforts have failed, before determining that a more restrictive placement is necessary. Section 104.34(a).

Question 9: Are there any special rules for PE & Athletics?

Disabled students must be given an equal opportunity to participate in physical education classes, interscholastic, club and intramural athletics. Section 104.37(c)(1). "Most handicapped students are able to participate in one or more regular physical education and athletics activities. For example, a student in a wheelchair can participate in a regular archery course, as can a deaf student in a wrestling course." *Appendix A,* p. 431. Where a disabled student cannot participate in the PE activities, an alternative activity, consistent with his abilities, should be provided. Separate or different physical education and athletic activities may be offered to disabled students "only if the separation or differentiation is consistent with the requirements of [LRE] and only if no qualified handicapped student is denied the opportunity to compete for teams or to participate in courses that are not separate or different." Section 104.37(c)(2).

With regard to interscholastic teams which utilize performance criteria in determining who will participate, disabled students must be given the opportunity to compete for a spot on the team. For example, parents of a student with Tourette's Disorder claimed discrimination when the student was not picked for the baseball team. They alleged that the coach knew of the child's disability and resulting behavior problems, and discriminated against the student for those reasons. The coach was able to demonstrate that the student failed to meet regular performance criteria to participate on the team. Students wanting to join the team participated in a series of drills which the coach observed and analyzed. The coach ranked the students on a variety of performance criteria: speed, balance, coordination, hand-eye coordination, sprint speed, lateral movement, and softness catching the ball. Out of fourteen students trying out for two openings, the claimant finished eighth, and did not receive a position on the team. OCR found no violation as the "student was given an equal opportunity to compete for a position." *Maryville City (TN) School District,* 25 IDELR 154 (OCR 1996).

Question 10: Is it possible for a 504 program to be appropriate when the student fails a class?

Yes. A problem sometimes encountered by Section 504 coordinators is concern over a child who even with accommodations has failing grades. A question often asked is what do we do if we know the accommodation plan is appropriate and is being implemented in the classroom and the child still fails? As the following cases demonstrate, school officials need to be able to articulate and demonstrate the reason for the failure. Presumably, the reason cannot arise from disability unless it has been accommodated, and the student rejects the accommodation.

A disabled student fails because he didn't turn in work—he didn't try. The parent complains to OCR that the student's IEP has not been implemented causing the student to fail in keyboarding and Spanish class. The student is learning disabled. Classroom modifications included extra time for written work, the chance to redo work deemed unacceptable by the teacher, and verbal clarification of instructions and assignments. The student failed keyboarding when he failed to complete, print, or turn in work. In the Spanish class (where no accommodations were required) the student nose-dived after the third 9-week session when he failed to make up three tests, a vocabulary poster and a major composition. The student left his final exam blank. When given the opportunity to redo papers or make corrections on assignments for a new grade (something the teacher did for all students), the student chose not to participate. OCR finds no violation. "Student B's failure to pass keyboarding and Spanish was not related to the District not implementing his IEP. The District tired [sic] to implement his IEP, however, the student would not attend make up or tutoring sessions and did not retake exams when the opportunity was available." *Beaufort County (SC) School District,* 29 IDELR 75 (OCR 1998). *See also, Spartanburg #4 (SC) School District,* 29 IDELR 252 (OCR 1998).

An important lesson emphasized by this case is that disability is but one potential contributing factor in a child's ability to perform at school. Another important factor in these two cases is the districts' good faith and clean hands. In these cases, there was no question that school officials were concerned for the child and his performance. There was also a level of extra attention and effort in each case, and procedural compliance. Since OCR will typically not second-guess educational decisions made following the proper procedures, and the good faith of the school officials deflected any other concerns, the districts were found in compliance.

Question 11: Who bears the responsibility for implementing the 504 plan and for providing a free appropriate public education (FAPE)?

While parents and the public schools are often referred to as partners in education, the ultimate legal responsibility for FAPE under Section 504 rests with the school. 34 C.F.R. Section 104.33(a).

Question 12: Can a principal or other administrator veto a 504 Committee decision because it is too expensive, even if the modification is necessary for a free appropriate public education?

No. The Section 504 regulations require that decisions about a child's educational

placement be made a "group of knowledgeable people" which we refer to as the "504 Committee." Inherent in that requirement is the prohibition on a single person making the placement decision instead of the required group, and a prohibition on a single person overruling the 504 Committee. That being said, a principal or other administrator's concerns about the cost of a program cannot be overlooked (especially when Committee members are subject to employment actions by the principal). Cost can certainly be a factor, but the regulations do not allow a district to omit a modification required for FAPE simply because it is costly. Unlike the ADA's application in the employment context, there is no "reasonable accommodation" requirement under Section 504 for the public schools when FAPE is at issue. *OCR Response to Zirkel,* June 28 ,1993. So, if an expensive modification is needed, the sheer cost does not mean that the modification can be rejected by the Committee. Note that, just like in special education, a more expensive modification is never required when a less expensive alternative is also appropriate.

Of course, should expensive programming or services be required to provide a student with FAPE, the Committee should consider whether 504 is the appropriate program to provide services. After all, 504 students are generally educable in the regular classroom with fairly routine and inexpensive modifications. If more serious programming or services are required (resource classes, a one-on-one aide, occupational therapy, physical therapy, speech, etc.) the Committee should consider whether special education eligibility is possible, thus opening up the resources of the IDEA for the child.

Question 13: Can a 504 Committee change a student's grade?

No. A student's grade ought to be the teacher's determination of the child's progress/performance in the class. A child's grade is not a free appropriate public education (FAPE) issue, that is, the right to a free appropriate public education (and the resulting right to opportunity for educational benefit) is not tied to the grade, but to the student's progress. Since the grade itself is not a FAPE issue, it is not controlled by the 504 Committee.

However, if, for example, the teacher has failed to implement required modifications for an exam, and a child fails the exam, the 504 Committee has the authority to order the teacher to re-test with the required modifications. As a result, the student gets the modifications that were required and the proper grade can be determined. Resist the urge as a 504 Committee to simply replace a teacher's grade with what you think the student would have received had the student received the proper modifications.

Question 14: When a 504 student moves into the district with an existing 504 plan, what is the new district's duty?

When a 504 student moves into a new school district, is eligible to attend and enrolls, the new district is obligated to provide a free appropriate public education (FAPE). That may prove a bit difficult since the new district has no experience with the student. The safe course is to replicate the student's services received in the previous district while the new district's personnel gain experience with the

child. After a few weeks, the new district should conduct a 504 reevaluation and make changes to the accommodation plan as necessary. If the student's program from the former district cannot be replicated in your district, approximate it as closely as you can, and during the evaluation process, pay special attention to the student's needs that were met by that portion of the plan which you could not duplicate. The Committee may find that other programs or services might meet the need.

It is also possible that the newly-arrived student, despite eligibility elsewhere, is not 504-eligible in your district. Since every district determines for itself the definition of "sbustantial limitation" that it will use, differences in district approaches to the same student are very likely. For additional analysis, download the outline "What is a Substantial Limitation?" on the 504 Resources page.

Question 15: Can the 504 Committee order accommodations to the ACT/SAT?

Not with any real authority. The testing services will review the modifications a student is receiving under 504 or IDEA, and then will make their own independent determination of whether modifications to college entrance exams will be allowed. Understandably, a student who receives modified testing in the school setting seems a more likely candidate to receive modifications on college entrance exams. Likewise, the longer the student has received the modifications, the more likely they will be considered favorably. As might be expected, a few juniors and seniors claim disability each year for the sole purpose of receiving extra time on these critical exams. The independent review by the testing services apparently is calculated to prevent that abuse.

Question 16: What is the school district's duty to transport students under §504?

With respect to transportation, the district's duty to 504 students is two-fold. First, is the basic 504 nondiscrimination duty. Simply stated, a disabled student should not be denied access to transportation a similarly situated nondisabled student can access. In other words, a student should not be denied transportation for which he is otherwise eligible because he is disabled. If the district provides transportation to students who live a certain distance from the school or who must cross a dangerous road to get to school, that service must be offered equally to disabled and nondisabled students who meet the eligibility criteria.

Second, even if transportation services are not available to a population of students (because they live too close to school, for example), a disabled child's physical or mental impairment may require the district to provide transportation services so that the disabled child can access education at the school. "Under Section 504, a recipient is required to offer transportation services in such a manner as is necessary to afford students with disabilities an equal opportunity for participation in such services and activities." *Whitman-Hanson (Ma) Regional Sch. Dist.*, 20 IDELR 775, 779 (OCR 1993). For example, a student whose asthma is aggravated by certain climates/seasons may be unable to walk to school during certain times of the year without experiencing severe breathing problems. Similarly, a student who

used to be able to walk to school but cannot do so now (due to broken leg or similar mobility impairment) may require transportation to school as a 504 accommodation. Note that in neither case would a special bus be required (unless the mobility impairment resulted in the temporary use of a wheelchair). Giving both students access to the regular bus (which they could not access earlier due to the short distance to school) is an appropriate accommodation.

Question 17: Is a District required to provide transportation under 504 for students in private or homeschools?

Typically No. In 1998, parents of a student unilaterally placed in a homeschool by the parents complained to OCR that the district refused to provide transportation to the student for a one hour class in the district each day. In its rejection of the parent's complaint, OCR reiterated the rule.

> "Under the Section 504 regulation, a recipient may be required to provide transportation services or the costs of those services to get a qualified student with a disability to and from school in the District; the District may also be required to get a qualified student with a disability to or from a program other than its own, when the recipient places the student in the program.... However, if a recipient offers a free appropriate educational program to a student with a disability, and the parent chooses to place the student in an alternative educational placement, the recipient has no obligation under the Section 504 and ADA regulations to provide transportation services for the student to attend a program or class at a school, even within the district, except to the extent it provides such services to similarly situated students without disabilities (i.e., to students without disabilities whose principal educational placement is not with, or sponsored by, the recipient)." *Spencer County (Ky) Sch. Dist., 31 IDELR 38 (OCR 1998).*

Since the District did not provide transportation services to nondisabled students who attended private or homeschools, OCR found no obligation to do so for a similarly situated 504 student. *See also, Westhampton Beach (NY) Union Free Sch. Dist.,* 28 IDELR 996 (OCR 1998)(By policy the district provides transportation to children attending nonpublic schools within 15 miles and on currently existing district routes. Parent submitted request after the required deadline, for a school outside the 15 mile limit and not on a current route. OCR finds no violation for the district's refusal to transport the student.)

Question 18: Can a 504 student ride a special ed bus if regular transportation is not appropriate (that is, the student needs a monitor or a lift)?

Yes. But strings attach. The Office for Special Education Programs has concluded that in limited circumstances, it is possible for a non-IDEA qualifying child to access an IDEA-B funded school bus. The question arose from a situation in Nebraska where the state desired to transport Head Start students together with Early Childhood Special Education students on the same IDEA-B funded buses. OSEP concluded that the arrangement "would be permissible without a cost allocation from other funding sources only under very strict circumstances. First, the vehicle would have to make the same trip and incur the same expense whether

or not the Head Start children were also riding. Secondly, the Head Start children could not displace a child with disabilities from the vehicle." *Letter to Lutjeharms,* 20 IDELR 180 (OSEP 1993). Finally, the district can't get tricky and use IDEA-B funds "to purchase or operate vehicles that are too large for the intended purpose of providing transportation to children with disabilities in order to provide seating capacity on those vehicles for non-disabled children, thereby avoiding cost allocations from other sources of funds." *Id.*

Question 19: Does LRE (the least restrictive environment requirement) apply to transportation?

Yes. The regulations prohibit the district from providing different or separate aids, benefits or services unless such action is necessary to provide qualified disabled students with aids, benefits and services that are as effective as those provided to nondisabled students. §104.4(b)(1)(iv). Further, students with disabilities must be educated with nondisabled students to the maximum extent appropriate to the needs of the disabled student. §104.34. In other words, when the students' transportation needs can be met on the regular education bus, the student should not be placed on the special education bus simply because he or she is disabled. *Kenai Peninsula (Ak) Borough Sch. Dist.,* 20 IDELR 673 (OCR 1993).

Question 20: Do we have to maximize a student's potential under 504 or IDEA?

No, that would be the Army. Neither IDEA nor 504 requires the school to help the child "be all that he or she can be." A few federal court decisions provide some wonderful language on maximizing potential. "The IDEA 'does not secure the best education money can buy; it calls upon government, more modestly, to provide an appropriate education for each disabled child.' *Lunceford v. District of Columbia Bd. Of Educ., 745 F.2d 1577, 1583 (D.C.Cir. 1984).* "There is 'no requirement that services be sufficient to maximize each child's potential commensurate with the opportunity provided other children.' ....The IDEA guarantees an 'appropriate' education, 'not one that provides everything that might be thought desirable by loving parents.'" *Weixel v. Board of Education of the City of New York,* __ F.Supp. ___, 33 IDELR 31 (S.D.N.Y. 2000). On a 504 claim, the Second Circuit provided this great language. "The heart of J.D.'s opposition to the proposed accommodation is that it was not optimal. However, Section 504 does not require a public school district to provide students with disabilities with potential-maximizing education, only reasonable accommodations that give those students the same access to the benefits of a public education as all other students." J.D. v. Pawlet School District, __ F.3d. __ , 33 IDELR 34 (2d Cir. 2000).

CESD

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Question 1: If we do the modifications for the student, do we have to go through the procedural hassle of 504?

Yes. If the student qualifies for 504, doing the modifications without providing the procedural protections is a violation. That was the case where a school district provided a student who had undergone hip surgery with appropriate modifications, but failed to have procedures in place to document the deliberation of, or provision of accommodations, or to inform parents of the procedure to follow should their student become disabled. *Temple (TX) ISD,* 25 IDELR 232 (OCR 1996). There can be few results as unpalatable as one where the district provides sufficient modifications to a qualified disabled student, but nevertheless is found in violation for not jumping through the procedural hoops.

Question 2: What will the Office for Civil Rights (OCR) look at if they investigate my district's actions under Section 504?

Procedural Compliance is the key. "In assessing whether a school has complied with the requirements of Section 504, OCR takes a process oriented approach when conducting complaint investigations and compliance reviews." *Equal Educational Opportunity and Nondiscrimination for Students with Disabilities: Federal Enforcement of Section 504, Equal Educational Opportunity Series, Vol II., Report of the U.S. Commission on Civil Rights, September 1997, p. 98.* As a general rule, OCR will not second-guess the substantive decisions made by the district in determining, for example, a student's 504 eligibility or classroom modifications as long as the proper questions were asked by the 504 committee and the proper procedures were followed in making the determinations. In other words, the proper forum for resolution of disputes involving the appropriateness of a Section 504 plan is the 504 due process hearing, as OCR primarily investigates procedural compliance with 504. *Virginia Beach City (VA) Public Schools,* 26 IDELR 27 (OCR 1996).

Although rare, OCR analysis of substantive educational decisions does occur. "For example, OCR generally does not rely on its own opinion to conclude that a student needs a certain kind or amount of educational services to meet the student's educational needs. Instead, it relies on factual findings that a school system's staff had knowledge of a student's unmet educational need and that the school system took no action to address the concern." *Commission Report at 98.*

Question 3: Is my district in trouble with OCR if we no longer have a self-evaluation on file?

No. On occasion, a district will be challenged for its failure to have a Section 504 Self-Evaluation on file, pursuant to 34 C.F.R. Section 104.6 (c). That provision requires that within one year of the effective date of the regulation, the district must conduct a self-evaluation of its policies and practices (and the effects thereof) to determine whether the district is in compliance. Section 104.6(c)(1)(i). Corrective action is to be taken where needed. Section 104.6(c)(1)(ii)&(iii). The district is then required to keep the self-evaluation document on file for a period of three years. OCR reminds us that the time to keep those documents on file had passed, and that it will not even investigate the allegation. *Maine School Administration District #40,* 29 IDELR 624 (OCR 1998)("OCR did not investigate the allegation relating to the Section 504 self-evaluation because districts are no longer required to keep these evaluations on file.")

Question 4: Can a student ever be subject to both an ARD Committee (IEP Team or Multidisciplinary Team under IDEA) and a Section 504 Committee at the same time?

No. Such a result defies logic. For example, once a student has become eligible under the IDEA, he and his parents receive substantial rights under federal law. The IEP is created which outlines his educational program and is designed to convey educational benefit. Should a 504 Committee also act, what could it possibly do but interfere in the programming and decisions already made by the ARD Committee under IDEA? After all, action taken by the 504 Committee would carry with it fewer rights and procedural safeguards than actions taken under IDEA. As long as a child is eligible under the IDEA, the IDEA controls his free appropriate public education and the 504 Committee does not meet on the child. The child, however, does enjoy 504's nondiscrimination protection, but no 504 Committee meeting is necessary for that protection to be extended the student. *(See also OCR's decision denying a parent's*

demand for an IDEA IEP through 504 once the child is IDEA-eligible, discussed briefly in 504 Eligibility, Question 9 and in greater detail in the 504 Overview.)

Question 5: Do parents have a right to be members of the Section 504 Committee?

No. A 1999 OCR decision from Oklahoma resolves the question. After a meeting was held to introduce the student to his new principal and teachers in an Oklahoma school district, the parent complained to OCR that he was not invited to the introductory meeting in violation of 504. The student's IAP (completed at a prior meeting attended by the parent) indicated that the parent would attend the introductory meeting as well. The district alleged that the failure to invite the parent arose from the parent's refusal to allow the high school campus to keep a copy of the accommodation plan and the parent's demand that the campus only contact the parent by mail. These factors, and the fact that no one was given responsibility at the IAP meeting to contact the parent resulted in no invitation to the introductory meeting. No educational decisions were made at the introductory meeting.

OCR found no violation, largely because 504 does not require the attendance of parents at 504 meetings. "There is no requirement under Section 504 that parents physically participate in all placement procedures, only that placement decisions are made by a group of knowledgeable persons *who may include the parent." (emphasis added.)* Note further that once the school became aware of the parent's concern about not being invited to the introductory meeting, administrators made "numerous" attempts to schedule meetings with the parent, and provided written notice by certified mail of those attempts. *Edmonds (OK) Public School,* 31 IDELR 242 (OCR 1999).

A bit of commentary: The physical participation language unfortunately gives the impression that parents are required under the regulations to physically participate in *some* 504 meetings. The regulations contain no such requirement. Nevertheless, the CESD position is that parental involvement in the 504 process should be encouraged through district requests for parent information that will be used by the 504 committee, and by opening avenues of communication with parents and members of the committee. Communication and cooperation can occur without parent attendance at 504 meetings. Whether to invite parents or not is a decision to be made by the district. Once made, it must be consistently implemented.

Question 6: Does every failure to implement a modification or

provide a required service result in a 504 violation?

No. Accommodation plans sometimes include modifications or services which are nice or helpful but are nevertheless not necessary to ensure that the student has an opportunity to benefit. In those situations, should the district not implement a "nice but unnecessary" modification– even though it is included in the child's IEP or 504 accommodation plan– is the failure to implement a 504 violation? After all, the IEP or 504 plan was created by the group of people empowered by federal law to make educational choices for the child. The failure to do what that group specified would seem an obvious procedural violation (for someone other than the authorized group made the decision to not implement). According to the Fifth Circuit, that simple analysis is incorrect. In Houston ISD v. Cauis, the court dealt with the issue of whether failing to provide a few required services violates FAPE if despite the failures, the student nevertheless receives educational benefit. *Houston ISD v. Cauis,* __ F.3d ___ , 31 IDELR 185 (5th Cir. 2000). After seven years in public school, the student's parents moved him to a private school and demanded reimbursement arguing that the district's program denied him FAPE. In his most recent IEP, Cauis was to receive alphabetic phonics training, speech therapy and a variety of classroom modifications. Due to lack of personnel, the student did not receive two months of AP training. The parents rejected the district's offer for compensatory time and unilaterally placed the student in a private school.

The parents argued that the school failed to provide a substantial portion of the child's IEP by not providing speech therapy for a substantial portion of one school year, missing two months of AP training, and inconsistent provision of highlighted and taped textbooks required by the IEP. The district took the sensible position that not every failure to provide an IEP-required service constitutes a denial of FAPE. The Fifth Circuit agreed. While recognizing that the parents' demand for reimbursement was originally granted by a hearing officer (who found that the compensatory services did not cure the earlier failure to implement problem) the court found that approach too inflexible. According to the court, local school districts should retain flexibility in scheduling services and when necessary, providing compensatory services. Looking to the Sixth Circuit for guidance, the court concluded that "a local education agency's failure to provide all the services and modifications outlined in an IEP does not constitute a *per se violation of the IDEA."* As long as significant portions of the IEP are followed and the child receives educational benefit, there is no violation for a missed service or modification. *(See also, Gillette v. Fairland Bd. Of Education, 725 F.Supp. 343 (S.D. Ohio 1989), rev'd on other grounds,* 932 F.2d 551

(6th Cir. 1991)).

The proper analysis is not looking at the "trees" of individual services and modifications to determine violations, but to look at the forest, and decide if overall there has been educational benefit. According to the district, the student did in fact benefit from the school's program. He had received passing grades and had advanced from grade to grade with his peers (which according to the Supreme Court in *Rowley* is good evidence of educational benefit) and had shown improvement on the Woodcock-Johnson as well. Parents lose.

Question 7: Is there a violation if the district failed to implement a modification or a required service and the child failed?

The failure to implement coupled with the child's failing grades is likely to be viewed as a violation. In an Arlington, Texas school, a disabled student's microcomputer teacher accepted late assignments, gave the student special instructions and extended deadlines, but the teacher did not use all of the modifications provided for in the accommodation plan. The student received a final grade of 68. OCR found a violation and the district agreed to resolve the allegation. *Arlington (TX) ISD, 31 IDELR 87 (OCR 1999).*

Some commentary: It would have been nice in the *Arlington* case to see what accommodations the teacher failed to implement, and to know specifically why the child failed (failure to turn in work, poor grades on major assignments, etc). That type of analysis should be a part of determining whether the student's failure is the school's fault (for failure to implement modifications) or the student's fault for failure to do his part. It makes little sense educationally to pass a student whose efforts in class do not justify passing, simply because the district failed to implement a modification unrelated to his failure.

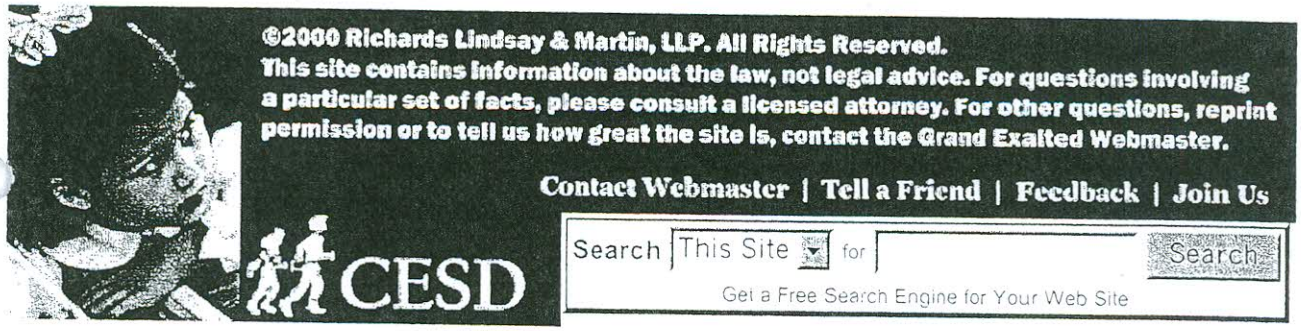
Question 8: Can the campus or district administration overrule 504 or special education evaluation and placement decisions?

No. Such meddling is asking for a violation. In *Modoc County,* OCR dealt with a troublesome problem: school administration exercising coercive control over committees, resulting in students not receiving the services determined necessary for FAPE. "The complainant, other parents of disabled students, and former staff told OCR that they have observed or directly experienced ongoing manipulation of the IEP process by MCOE officials in an effort to forego providing services and cutting costs. Many situations involve MCOE officials controlling IEP team decisions, disapproving requests or suggestions with with no explanation,

imposing procedural delays, intimidating staff and parents, and instructing staff to generalize IEP's.... [These officials] presented no educational justification for their decisions and accepted no arguments." *Modoc County (CA) Office of Education,* 24 IDELR 580 (OCR 1996). This is an easy one: evaluation and placement decisions made by anyone other than the appropriate ARD Committee or IEP team are in violation of 104.35(c).

Question 9: Is it a 504 violation when a district violates its own 504 procedures?

Not necessarily. A school district's 504 policy required that it keep a written or electronic verbatim record of section 504 hearings. Both the complainant and district agree that the audio recording made of the hearing is of such poor quality as to be inaudible. Nevertheless, OCR finds no violation. "Although this is not an OCR requirement, the District is obligated to consistently implement its internal policies and procedures, as written." *Weldon Valley (CO) School, 31 IDELR 82 (OCR 1999).*



504

Discipline

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Question 1: Does the 45-day rule still apply to Section 504 students bringing weapons to school?

While originally an Amendment to the IDEA, the Jeffords Amendment (which allowed a school to change the placement of a disabled child for up to 45 days when the child brings a gun to school even if the behavior is related to disability) was applied by OCR to the Section 504 child. As a result, for 504 students who brought guns to school (or who possessed guns at school) a 45-day change of placement could occur, even if the behavior was related to the child's disability. *Response to Zirkel* , 22 IDELR 667 (OCR 1995).

The reauthorization of IDEA has nullified the Jeffords Amendment (as the statute to which the amendment was made has now been replaced). In its place is a 45-day rule applying to drugs and other weapons that is much broader than Jeffords, but which applies only to IDEA students. Until OCR determines that the 45-day rule also applies to Section 504 student (and we believe it eventually will make that determination), schools should not assume that the new 45-day drugs and weapons rule applies to Section 504 only students.

Question 2: Isn't it true that disruption of the regular classroom by the 504 child is a factor in determining the appropriateness of the regular class?

Yes. the Appendix to the regulations makes clear that the 504 child's impact on the regular classroom is a factor. "[I]t should be stressed that, where a handicapped student is so disruptive in a regular classroom that the education of other students is significantly impaired, the needs of the handicapped child cannot be met in that environment. Therefore, regular placement would not be appropriate to his or her needs and would not be required by Section 104.34." Appendix A, p. 429. Note, however, that if supplementary aids and services have not been tried, or a behavior

management plan is not in place, disruption by the student does not mean that he cannot be educated in the regular classroom. His disruption may mean that the District needs to modify appropriately, and then make the determination.

An additional complicating factor is that since 504 is an unfunded mandate, there may not be another placement for the child. Content mastery and resource classes or more restrictive settings funded with IDEA-B dollars are not accessible for the 504 child. Thus, while behavior may suggest that a more restrictive setting is necessary, the district may have no appropriate setting, outside of the classroom, for the child.