SECTION 504 UPDATE

Presented by:

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Purpose of Section 504

- The purpose of Section 504 is to eliminate discrimination on the basis of a student's disability.

Definition of Disability

- "Disability" means –
  - A physical or mental impairment that substantially limits one or more major life activities;
  - A record of such an impairment; or
  - Being regarded as having such an impairment.

Major Life Activities

- …include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, working and the operation of major bodily function (i.e. immune system, etc.)

Major Life Activities (cont.)

- Notice the words “not limited to.”
- What other activities may be included?
- Interacting with others.
- These are not exclusive. For example, some courts have held that interacting with others is a major life activity.

Substantial Limitation

- No definition, but Congress expressly rejected the interpretation "significantly restricts" as too high a standard.
- Measure the student against same age peers in the entire state or country.
- ADA intended for a "broad scope of protection."

Update From Circuit Court

- Although Congress lowered the standard, "merely having an impairment does not make one disabled for purposes of the ADA." A substantial limitation is still required.
- Anxiety disorder did not render student "unable to perform" a major life activity or "significantly restrict" a major life activity so student was not substantially limited.
- Mann v. Louisiana High School Athletic Association, 61 IDELR 186 (5th Cir. 2013), on remand 62 IDELR 87 (M.D.La. 2013)

Mitigating Measures

- "The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures…"
- Exceptions for ordinary eyeglasses and contact lenses.

Examples of Mitigating Measures

- Medication, medical supplies, equipment, or appliances, low-vision devices (not eyeglasses or contacts), prosthetics including limbs and devices, hearing aids or implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies;
- Use of assistive technology;
- Reasonable accommodations or auxiliary aids or services; or
- Learned behavioral or adaptive neurological modifications.

Episodic or in Remission

- A person has a disability if he/she has an impairment that is "episodic" or "in remission" which would substantially limit a major life activity when active.
- Consider the application of this to students with a seizure disorder, asthma, diabetes, allergies, etc.

Regarded as Having or Record of Having an Impairment

- OCR has made it clear that only students who actually have a physical or mental impairment are entitled to any special treatment under 504.
- Students who have a "record" or may be "regarded" as having a disability are not entitled to special treatment, but only passive non-discrimination.

504 v. IDEA: The Key Difference

- IDEA students have disabilities which result in an educational need for specially designed instruction.
- 504 students have disabilities which do not result in a need for specially designed instruction.

Laura A. Ind. and a/n/f J.O. v. Limestone Cnty. Bd. of Educ.

- The school determined that the student was not eligible due to a learning disability, but immediately referred him to 504 and determined that he was substantially limited in staying on task, concentrating and maintaining focus. The plaintiff argued that the immediate referral of the student to 504 after the IEP Team determined he was not eligible for special education undermined that determination. The court disagreed, noting that 1) the standards are different; 2) the 504 referral was based on ADHD and ODD rather than a learning disability; and 3) the 504 team also determined that the student did not require a 504 plan because existing mitigating measures were effective.
- 63 IDELR 166 (N.D. Ala. 2014)

Revocation of Consent for Special Education

- The courts are split on whether a student is entitled to Section 504 non-discrimination and/or services when the parent revokes consent for special education services:
  - Lamkin v. Lone Jack C6 Sch. Dist. (W.D. Mo. 2012) - an elementary school student with severe disabilities was not entitled to 504 services after his parents withdrew consent for special education. 58 IDELR 197
  - Kimble v. Douglas Cnty. Sch. Dist. RE-1 (D.C. Col. 2013) - a student was entitled to protection under 504/ADA even after the parent revoked consent for IDEA services. 60 IDELR 221

Revocation of Consent for Special Education (cont.)

- D.F. v. Leon County Sch. Bd. (N.D. Fla. 2015) - withdrawal of consent for services under IDEA does not waive or forfeit the right to non-discrimination and/or services under 504 and the ADA. The parent specifically requested services for the hearing impaired student under 504 when she withdrew consent for IDEA services.
- The Court also ruled, however, that due to the district court split on this issue, the district's reliance on Letter to McKethan was reasonable and didn't constitute disability-based discrimination or retaliation.
- 65 IDELR 134

504 Claims Are On The Rise

- The law has changed, giving broader coverage.
- Lawyers, advocates and parents are more aware of 504 than they were five years ago.
- Many lawsuits cite 504 in an effort to impose liability on districts—bullying, discrimination, etc.
- 504 a more attractive tool for plaintiffs than IDEA.

Reasonable Accommodations

- What is a reasonable accommodation?
- A necessary accommodation to allow the student access to the program/activity that does not fundamentally alter the program/activity.

Accommodation v. Material Alteration

- An Illinois court ruled for the school district in a case where a student sought an injunction to permit her to use a handheld calculator during a math test that would be used in determining her eligibility for certain selective high schools in the district. The math test was done on a computer, and for some of the questions, an on-screen calculator was available. For other questions, students were expected to do their own computation. The court held that allowing the plaintiff to use a calculator for the entire test would give her an unfair advantage and would invalidate her test results.
  - Key Quote: "That is not a reasonable accommodation but a substitution of artificial intelligence for the very skill the Test seeks to measure."
- K.P. v. City of Chicago Sch. Dist. #299, 65 IDELR 42 (N.D. Ill. 2015)

Homebound and Accelerated Courses

The facts:

- 17 year old student attended Center for Advanced Studies with heavy course load, including A.P. English, Japanese, Chinese, calculus, physics, European history, and biology.
- During her junior year she became ill with gastroparesis and required homebound services.
- 504 Plan included:
  - 2.5 hours/ week of instruction
  - Teacher not qualified in all academic areas
- School suggested K.K. drop all courses except those needed to graduate.
- K.K. dropped two classes.
- K.K. was diagnosed with anxiety associated with school work.
- 504 Plan was amended to include:
  - Instruction by qualified instructor in all areas
  - Communication with parents to coordinate make-up work
- Parent took a leave of absence from work to help K.K. complete assignments.

Homebound and Accelerated Courses (cont.)

- Held – for the District
- Even though the homebound program was less than ideal, it was adequate.
- Key Quote: "Our review of the record reveals that the District's homebound instruction policy was never intended to be a full substitute for in-class learning—but nor was it required to be. Instead, it is a stopgap procedure designed to give temporarily homebound students a reasonable opportunity to maintain pace with their coursework during a limited absence from the classroom setting."
- K.K. v. Pittsburgh Public Schs., 64 IDELR 62 (3rd Cir. 2014)

Service Dogs

- The DOJ found the school in violation of the ADA and ordered it to modify its policies and practices to permit the student to use the dog without providing her own handler or being able to handle the dog herself without some assistance from school staff.
- The facts:
  - D.P. had Angelman Syndrome, autism, epilepsy, asthma, and hypotonia.
  - The service dog was trained to detect seizures and alert others, prevent elopement, apply deep pressure during meltdowns, and disrupt stimming.
  - D.P. had a 1:1 aide throughout the day and there was a bus monitor and a nurse on the bus in addition to the driver.
  - The dog required minimal handling, and D.P. was making progress in learning to handle the dog.
    - Re: Gates-Chili Central Sch. Dist., 65 IDELR 152 (DOJ, 2015)

Service Dogs (cont.)

- A Florida District Court held that the school district had to provide an adult handler for the service dog of a 6-year-old student with multiple disabilities, including a seizure disorder. The court held that the handler was, itself, a reasonable accommodation.
- The Court also enjoined the district from requiring the dog be vaccinated and that the parents maintain liability insurance for the dog.
- Alboniga v. Sch. Bd. of Broward Cnty, Fla., 65 IDELR 7 (S.D. Fla. 2015)

Allergies

- A New York District Court denied the district's motion for summary judgment on the 504 claim for damages. The case was based on the district's failure to provide the seafood free environment that the IEP required for the student.
- Key Quote: "In this case, a rational juror could conclude that the Department's failure to recommend an alternative placement for E.B., or to at least contact [the parent] and explain that P188 [the recommended school] could potentially accommodate E.B.'s allergy, rose to the level of reckless indifference and/or gross misjudgment."
- D.C. a/n/f E.B. v. NYC DOE, 61 IDELR 25 (S.D.N.Y. 2013)

Allergies (cont.)

- In another case, the Third Circuit held that a request for tuition reimbursement is, in effect, a claim for damages, rather than an equitable remedy. Therefore, the plaintiff was required to prove intentional discrimination. The plaintiff in this case failed to do so, and in fact, would have also failed under a "denial of FAPE" claim. The parties met four times in an effort to come to agreement on a 504 plan to address the student's peanut allergy. The district refused to accept a proposed 19-page plan offered by the parents, in part because it reiterated district policy and was too long and cumbersome to be used in an emergency. Over the course of the four meetings, the district agreed to several changes requested by the parents, but the parents withdrew the student from public school before the plan was finalized.

Allergies (cont.)

- The plan offered by the district included:
  - Tree-nut-free lunch and snacks
  - Emergency care plan for teachers and staff
  - Training for staff to recognize identify symptoms of anaphylaxis and to administer epinephrine
  - School nurse for field trips
  - Tree-nut-free table during lunch
  - "Treat box" could be provided by T.F.'s parents for special celebrations
- T.F. v. Chapel Area Sch. Distr., 64 IDELR 61 (3rd Cir. 2014)

A Case of Bad Faith?

- The Facts:
- K.D. began receiving 504 services in 5th grade due to ADHD.
- Her accommodations were increased over the years.
- In 6th grade, K.D. was diagnosed with a mixed receptive/expressive language disorder.
- Despite an increase in accommodations, K.D.'s parents hired a private tutor to assist K.D.
- In 8th grade, the District removed an accommodation without reason.
- After K.D.'s parents sent multiple emails and requests complaining that K.D.'s accommodations were not implemented consistently, her teachers began requiring K.D. to personally ask for her accommodations, despite her difficulty with self-advocacy.
- Her parents enrolled her in a private school.

A Case of Bad Faith? (cont.)

- The Court's holding:
- The allegations were sufficient for the parents to avoid dismissal on their claims that the district acted in bad faith and with gross misjudgment.

A Case of Bad Faith? (cont.)

Key Quotes:

- "[A]lthough MCPS initially provided accommodations to address K.D.'s needs and added certain new accommodations when requested by the Parents or warranted by medical recommendations, there came a point during K.D.'s eighth grade year at which MCPS's diligence in addressing her needs appears to have declined markedly. Specifically, in January 2012, MCPS rescinded an accommodation it had previously provided -- K.D.'s "read to" accommodation -- without reason, over the Parents' protests, without any indication that MCPS notified them beforehand, and despite the early recommendation of one of K.D.'s doctors and the knowledge that evaluators were continuing to find additional areas of weakness."

A Case of Bad Faith? (cont.)

- "In the same time frame, certain teachers, again for no proffered reason, required K.D. to advocate for her own testing accommodations despite being aware that her language difficulties significantly hindered her ability to do so, thereby depriving her of those accommodations. This practice is particularly problematic because it would unnecessarily require K.D. to take steps that her disability made particularly difficult in order to receive the very accommodations that addressed those concerns. Plaintiffs also alleged that, up to and during that school year, teachers consistently failed to honor the agreed-upon accommodations, such as by failing to deliver to K.D. teacher notes (required before class) and study guides (required three days prior to tests) in a timely manner or, in some cases, at all. MCPS argues that this constitutes negligence at best, but when viewed among the other failures, it could indicate something more troubling. Taken together, these facts could reasonably support the conclusion that MCPS was no longer acting in good faith in seeking to address K.D.'s needs fully."
- K.D. v. Starr, 64 IDELR 107 (D.C. Md.2014)

Accommodations in Extracurriculars

Four key points:

- Schools are not required to create separate or different activities just for students with disabilities;
- The "individualized inquiry" that is required to determine how to accommodate a student does not necessarily mean that the 504 Team must meet—it may be sufficient to confer with a coach;
- OCR is not saying that IEPs must address extracurriculars; and
- Schools are not required to create separate or different activities for those students who are unable to participate in existing activities.
- Dear Colleague Letter, 62 IDELR 185 (OCR 2013)

Pro-Active Steps

- Review your policies and procedures for school health care, extracurricular activities, and service animals.
- Involve the parents.
- Request consent to exchange confidential information with the student's physician when appropriate.
- Meet and review the plan when it's not working, keep an open mind to changes in the 504 plan when needed, but don't change a plan arbitrarily or without a 504 meeting.
- Include accommodations for extracurricular activities and field trips.

Is Protection Against Bullying Covered by Section 504?

- Probably, if the victim is a student with a disability.

D.L. and T.L. v. Murray County Sch. Dist.

- 11th grader with Asperger syndrome was subjected to disability based bullying and committed suicide.
- Parents failed to meet the high standard to show deliberate indifference.
- Evidence showed the district promptly responded to reported bullying incidents.
- Based on the district's communications with the parent and the absence of reported incidences of bullying during the last semester of the Student's 10th grade year and the first semester of his 11th grade year, it was reasonable for the district to believe the efforts to address the bullying were effective.
- 61 IDELR 122 (11th Cir.) (June 18, 2013)

Estate of Montana Lance v. Lewisville ISD

- In a bullying/suicide case, the court ruled in favor of the district due to the lack of evidence of deliberate indifference.
- Key Quote: "Judges make poor vice principals, and as Davis instructs, 'courts should refrain from second-guessing the disciplinary decisions made by school principals.'"
- 62 IDELR 282 (5th Cir. 2014)

Eskenazi-McGibney v. Connetquot Central Sch. Dist.

- Parents alleged the district discriminated against JEM by "turning a blind eye" to multiple incidents of physical assault and a death threat by a peer and retaliated against the parents by banning them from the school after they complained to district officials.
- The District Court dismissed the case on the merits because there was no allegation that the bullying was based on JEM's disability.

Eskenazi-McGibney v. Connetquot Central Sch. Dist. (cont)

- Key Quotes:
- "Simply because a disabled person was bullied does not, without more, compel the conclusion that the bullying was 'based on [the student's] disability.'"
- "…even if students with disabilities are more likely to be bullied than students without disabilities, both based on their disabilities and based on other factors, a plaintiff nevertheless does not state a claim under the ADA and Section 504 absent some factual allegation linking the disability and the bullying. To hold otherwise would convert the ADA and Rehabilitation Act into generalized anti-bullying statutes."
- "Why did the fellow student and bus driver bully [the student]? Was it based on [his] disability? Or was it based on some other reasons, such as personal animus?"
- 65 IDELR 8 (E.D. N.Y. 2015)

J.R. v. New York City Dep't. of Educ.

The alleged facts:

- J.R. was repeatedly bullied and harassed at school and on the bus due to his perceived femininity and speech. He was slapped in the face and, in one instance, had his pants pulled down in the presence of DOE employees.
- J.R. complained of being depressed, wrote a suicide note, and was hospitalized twice for depression.
- DOE employees did nothing to intervene.
- The principal told J.R.'s parents that, due to the violent student population, the bullying would continue.
- The DOE didn't grant the parents' request for a change of bus.

J.R. v. New York City Dep't. of Educ. (cont.)

- Holding: The principal's lack of action and statement that the bullying would likely continue meets the deliberate indifference standard.
- Key Quotes: "The allegations of repeated and unwanted physical contact by other students, such as pulling down J.R.'s pants and attempting to kiss him, support plausible inference of 'severe and pervasive' harassment."
- Although the "deliberate indifference" standard does not require that teachers and school administrators successfully prevent or eradicate all bullying behavior, surely some effort to discourage that conduct and announce its unacceptability is required.
- 66 IDELR 32 (E.D.N.Y. 2015)

Proactive Steps

- Take all allegations of bullying seriously.
- Follow your District's policies and procedures for the investigation of bullying claims.
- Take prompt and appropriate action designed to end bullying, prevent its recurrence, and remedy its effects.

Discipline & Manifestation Determination Review

Change of Placement

- A Section 504 student is entitled to the same protections as a student in special education.
- Except a change based on the student's illegal use of drugs, or use or possession of alcohol, a change of placement (more than 10 consecutive days or series of short-term removals that constitute a pattern and total more than 10 days in any one school year) cannot be made for disciplinary reasons if the conduct is a manifestation of the student's disability.

Steps for an MDR

- Prior to a change of placement, the 504 committee must conduct an Manifestation Determination Review.
- Notify the parent of the meeting.
- Answer the following two questions:
  - Did the student's disability directly cause the misconduct or does it have a direct and substantial relationship to the misconduct?
  - Was the student's misconduct the direct result of a failure by the school district to implement the student's Section 504 Plan?
- If the answer to either of the questions is "yes", the student's behavior is a manifestation of the student's disability, and the student must be returned to the placement from which the student was removed.

Avenues of Complaint

- Parents are entitled to a “504 hearing” if they want to challenge a decision about the identification, evaluation, placement or services provided to a student.
- Other complaints should be handled as per district policy.

504 Hearings

- A parent who disagrees with the decisions of the Section 504 Committee is entitled to challenge the decision. The federal regulations include a section entitled "Procedural Safeguards" which reads as follows:
  - "A recipient that operates a public elementary or secondary education program or activity shall establish and implement, with respect to actions regarding the identification, evaluation, or educational placement of persons who, because of handicap, need or are believed to need special instruction or related services, a system of procedural safeguards that includes notice, an opportunity for the parents or guardian of the person to examine relevant records, an impartial hearing with opportunity for participation by the person's parents or guardian and representation by counsel, and a review procedure. Compliance with the procedural safeguards of section 615 of the Education of the Handicapped Act [now IDEA] is one means of meeting this requirement." 34 C.F.R. 104.36.

504 Hearings (cont.)

- Section 504 doesn't provide specific timelines or procedures for hearings or the appointment of an independent hearing officer, but at a minimum:
  - "If a state does not permit its 'IDEA hearing officers' to decide cases under Section 504, recipient school districts must afford parents an opportunity for a hearing under Section 504."
  - If an individual is denied their right to a 504 hearing, they may file a complaint with OCR.
  - OCR adheres to "a standard of fundamental fairness" and looks to the IDEA case law to determine what is reasonable and fair.
  - OCR applies "judicially recognized principles of fairness" to the selection of hearing officers. This means that the hearing officer cannot be an employee of the school district or of a district that shares a contractual agreement with the school district. Nor can the hearing officer be a school board member of the district in question.
- Letter to Anonymous, 18 IDELR 230 (OCR 1991)

504 Hearings (cont.)

- Many school districts have adopted a policy to address Section 504 hearings. A typical section of a common policy reads as follows:
  - "Parents shall be given written notice of their due process right to an impartial hearing if they have a concern or complaint about the District's actions regarding the identification, evaluation, or educational placement of a student with disabilities. The impartial hearing shall be conducted by a person who is knowledgeable about the issues involved in Section 504 and who is not employed by the District or related to a member of the Board in a degree that would be prohibited under the nepotism statute. The impartial hearing officer is not required to be an attorney."

504 Hearings (cont.)

- Additional written procedures are recommended to establish timelines and the manner in which the hearing will be conducted.
- In 1996, OCR investigated the Houston ISD's process for Section 504 hearings. Houston ISD, 25 IDELR 163, 25 LRP 4094 (OCR 1996). The parent complained that she was not allowed to cross-examine witnesses at the hearing, and was not allowed to have a court reporter present. OCR concluded that these restrictions were permissible and did not deprive the parent of the fair and impartial hearing she was entitled to. OCR noted that the district's procedures required that the hearing be conducted in an "informal and nonadversarial manner" without the application of the formal Rules of Evidence or Rules of Procedure. The custom was to make an audio tape of the hearing, but not a written transcript. The hearing officer rendered a brief written decision, but was not required to enter formal "findings of fact" or "conclusions of law." The hearing officer was paid by the district as an independent contractor.

504 Hearings (cont.)

- OCR concluded that the "district's Section 504 due process hearing procedures are nondiscriminatory and are consistent with the Section 504 regulation requirement to establish and implement a system of procedural safeguards that includes an impartial hearing with opportunity for participation by the parents or guardian and representation by counsel."

Pro-Active Steps

- Check your District's policies and procedures for Section 504 hearings.

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