



Disciplining Disabled Students in Compliance with Section 504

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A. Disciplining Disabled Students in Compliance with Section 504

Section 504 requires school districts to consider a student's disability before disciplining the student under its generally applicable disciplinary policies. This includes considering whether it should exempt a disabled students from its disciplinary code and a requirement that public schools conduct manifestation reviews before suspending a student from more than ten consecutive days.

1. *Disabled Students Are Generally Subject to a School's Disciplinary Codes*

A student's disability does not necessarily mean the student is exempt from compliance with a school's disciplinary policies or code of conduct. To the contrary, students are obligated to comply with disciplinary policies and rules and may be disciplined for failure to do so in the same way a nondisabled student would be disciplined unless their 504 Plan specifically exempts them from the school's disciplinary code.¹

Practice Tip: School districts may wish to have their 504 Committees specifically consider whether a disabled student should be excepted from compliance with the school's code of conduct and, in cases where such an exemption is unjustified, specifically state in the student's Section 504 Plan that the Committee considered and decided against such an exemption. Doing so leaves no question in this regard and avoids later arguments about whether such an exemption was known to the parents and/or student.

In 2007, the OCR found that a Georgia school district did not violate Section 504 when it disciplined a thirteen-year-old student with ADHD because of the student's behavioral infractions, including tardiness, class disruption, and failing to complete work. The student had been assessed a number of in-school suspensions, which the OCR found to be the same disciplinary measures imposed on nondisabled students for similar behavior. The OCR noted that the misbehavior could be a manifestation of the student's disability, but noted that the

¹ See, e.g., *Cobb County (GA) School Dist.*, 46 IDELR 257 (OCR, Atlanta (GA) 2006).

student's 504 Plan did not exempt him from compliance with the school's disciplinary code. Therefore, the OCR concluded the student was obligated to comply with the code, and the parent's remedy was to seek a due process hearing to challenge the absence of an exemption and the student's 504 Plan.

2. *Manifestation Reviews*

Section 504's implementing regulations do not state specific procedural protections like IDEA, but they do require specific due process protections:

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 [20 U.S.C. § 1415(k)] is one means of meeting this requirement.²

Thus, while Section 504's implementing regulations do not mandate manifestation reviews before suspending a disabled student, they do specify that providing such reviews, as detailed in Section 1415(k) of IDEA, is one way to comply with the mandated procedural safeguards. However, it is not the only means of doing so.³

Section 504 does require school districts to conduct periodic re-evaluations of students with disabilities before making a significant change to the student's placement or terminating significant services. An out-of-school suspension for ten consecutive days or more is such a change in placement, and it requires an advance re-evaluation. The re-evaluation should

² 34 C.F.R. § 104.36.

³ *Centennial School Dist. v. Phil L.*, 559 F. Supp. 2d 634, 642-643 (E.D. Pa. 2008).

consider the student's disability, the misconduct at issue, the student's 504 Plan, and whether the 504 Plan is adequate. The evaluation committee may also need to consider the anticipated change in placement as a result of the misconduct and how the Plan should be modified to allow the student to attain an appropriate education in that placement.

It is important to note, however, that the OCR has maintained, in spite of judicial precedent to the contrary, that public school districts should provide students with manifestation determinations prior to suspending a student for more than ten consecutive days.⁴

3. *Alcohol and Drug Use*

Alcohol and drug addiction are bona fide disabilities under Section 504, and students suffering from such addictions cannot be subjected to discrimination on the sole basis of their addiction. However, it is plain from the language of Section 504 that active substance abuse is not shielded from discipline. Rather, disabled students may be disciplined for engaging in the illegal use of drugs or alcohol in the same manner as nondisabled students.⁵

⁴ See, e.g., *San Francisco (CA) Unified School Dist.*, 33 IDELR 162 (OCR 2000) (school district's delay in convening a Section 504 meeting and conducting appropriate assessments of the student to determine his needs resulted in a delay of notice to parent of procedural safeguards. OCR also considered student's removal from school and placement in a counseling center to be a significant change in placement and expressed concern the district did not first conduct a manifestation review); *Redlands (CA) Unified School Dist.*, 38 IDELR 260 (OCR IX, San Francisco (CA) 2008) (OCR found that charter school applied wrong standard for manifestation determination, violating Section 504); *Cobb County (GA) School Dist.*, No. 04-08-1242 (OCR 2008) (although school district did not violate Section 504 by failing to provide manifestation determination, given the suspensions were not for ten days and were not close enough together to constitute a significant change in placement, disciplinary decisions resulting in exclusion from school for ten days or more require manifestation determinations); *Guilford County Schools*, OCR Case No. 11-07 1183, 2007 NDLR (LRP) LEXIS 560, 37 NDLR 79 (OCR S. Div. N.C. 2007); *San Jose Unified School Dist.*, 2006 NDLR (LRP) LEXIS 562, 34 NDLR 76 (OCR W.D. Texas 2006); *Aztec Mun. Schools*, 2006 NDLR (LRP) LEXIS 568, 34 NDLR 102 (OCR W.D. N.M. 2006); *Long-Term Suspension or Expulsion of Handicapped Students*, OCR (Oct. 28, 1998); *Suspension of Handicapped Students – Deciding Whether Misbehavior Is Caused by a Child's Handicapping Condition*, OCR (Nov. 13, 1989); *Response to Veir*, OCR (1993).

⁵ See 29 U.S.C. § 706(8)(C)(iv).

B. Section 504 and Extracurricular Athletics

As noted above, the Department's regulations promulgated under Section 504 require schools receiving federal assistance to provide disabled students an equal opportunity to participate in nonacademic and extracurricular services and activities.⁶ Such services and activities may include counseling services, physical recreational athletics, transportation, health services, recreational activities, student groups or clubs sponsored by the school district, which provide assistance to disabled individuals and employment of students by a school district.⁷

Advocacy groups for disabled individuals have, from time to time, stated an intent to increase the participation of students with disabilities in extracurricular athletic programs – vowing to make Section 504 the “Title IX” of students with disabilities. However, many courts shied away from making the types of required qualitative judgments to ensure safe participation. The issue has come to the forefront more recently in response to a report by the Government Accountability Office (“GAO”) about the extent to which students with disabilities participated in athletic programs.⁸ This study found that students with disabilities participated roughly at the same rates as nondisabled students in curricular physical education programs – with only minor deviations – but, in 2000, only 41% of the disabled students in grades 1-7 participated in community or school-based extracurricular athletic programs. In 2001, only 33% of the disabled students in grades 7-12 did so.

⁶ 34 C.F.R. § 104.37.

⁷ 34 C.F.R. § 104.37(a)(2); United States Dep't of Education, Office for Civil Rights, Dear Colleague Letter, dated January 25, 2013, p. 3, available at <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201301-504.pdf> (last accessed, August 28, 2017).

⁸ U.S. Government Accountability Office, *Students with Disabilities: More Information and Guidance Could Improve Opportunities in Physical Education and Athletics*, No. GAO-10-519, at 1, 31 (June 2010), available at <http://www.gao.gov/assets/310/305770.pdf> (last accessed, Feb. 19, 2013).

The GAO study concluded that the participation of students with disabilities in school-based extracurricular athletic programs varied widely among eleven school districts the study examined, with some school districts tolerating large discrepancies in the percentages of disabled and nondisabled students participating in such programs. It concluded that many school districts were unclear on the extent of their obligation to facilitate such participation by students with disabilities, particularly when considered in the context of safety and budget constraints. It recommended that the OCR and the Office of Special Education Programs provide additional guidance in this regard.

In response, the OCR published a “Dear Colleague” letter in 2013 that provides such guidance. While this guidance is more detailed than what had been previously available, it remains vague about the extent to which school districts must go to provide students with disabilities with such opportunities. Nonetheless, it does provide some important touchstones in this regard.

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