

A photograph of a classroom scene from behind several students. They are sitting at desks, and their hands are raised high in the air, indicating they want to answer a question or participate. In the background, a green chalkboard displays multiplication problems:  $x4$ ,  $3 \times 4 = 12$ ,  $4 \times 4 = 16$ ,  $4 \times 5 = 20$ ,  $4 \times 6 = 24$ , and  $4 \times 7 = 28$ . The students are wearing various colored shirts, including a light blue one, a red one, and a green one. The lighting is bright, suggesting a well-lit classroom.

# Student Evaluations and Education Plans

Prepared by:  
James P. Evans  
*Barclay Damon, LLP*



## INTRODUCING

Lorman's New Approach to Continuing Education

# ALL-ACCESS PASS

The All-Access Pass grants you **UNLIMITED** access to Lorman's ever-growing library of training resources:

- ✓ Unlimited Live Webinars - 120 live webinars added every month
- ✓ Unlimited OnDemand and MP3 Downloads - Over 1,500 courses available
- ✓ Videos - More than 1300 available
- ✓ Slide Decks - More than 2300 available
- ✓ White Papers
- ✓ Reports
- ✓ Articles
- ✓ ... and much more!

Join the thousands of other pass-holders that have already trusted us for their professional development by choosing the All-Access Pass.



**Get Your All-Access Pass Today!**

# SAVE 20%

Learn more: [www.lorman.com/pass/?s=special20](http://www.lorman.com/pass/?s=special20)

Use Discount Code Q7014393 and Priority Code 18536 to receive the 20% AAP discount.

\*Discount cannot be combined with any other discounts.

# OPTIONS UNDER SECTION 504 OF THE REHABILITATION ACT

## A. Student Evaluations and Education Plans

Section 504 requires public school districts to identify and evaluate students who are suspected of having a disability to determine whether they have an impairment that qualifies as a disability under Section 504. School districts must provide students who are so impaired with special education, related services, and other accommodations that are necessary for the student to receive an “appropriate education” and to have appropriate access to the school’s extracurricular programs and benefits.

### 1. *Permissible Pre-Referral Strategies*

In its most recent guidance, the OCR advises that school districts “may always use regular education intervention strategies to assist students with difficulties in school.”<sup>1</sup> However, school districts must “refer a student for evaluation for possible special education or related aids and services or modification to regular education if the student, because of the disability, needs or is believed to need such services.”<sup>2</sup> While this guidance is less than definitive, it seems clear that school districts need not provide special education, related aids or services, or modifications to a student who can achieve an appropriate education through use of “regular education intervention strategies.” In this regard, the OCR has previously ruled as follows:

[Before referring a student for evaluation,] the district must have reason to believe that the student is having academic, social, or behavioral problems that substantially affect the student’s overall performance at school. A district, however, has the option of attempting to address these types of problems through documented

---

<sup>1</sup> Protecting Students with Disabilities, *supra*, ¶ 31.

<sup>2</sup> *Id.*

school-based intervention and/or modifications, prior to conducting an evaluation. Furthermore, if such interventions and/or modifications are successful, a district is not obligated to evaluate a student for special education or related services.<sup>3</sup>

## **2. *Student Evaluation by the 504 Committee and Parental Consent***

Once a school district suspects that a student is suffering from a disability and may need services, it must take affirmative steps to timely evaluate the student. A school district's 504 Committee should conduct that evaluation, but only after requesting and obtaining parental consent to do so. The OCR has repeatedly stated that a school district must obtain parental consent for an evaluation conducted under Section 504. Its Texas Office stated it this way:

OCR has determined, through policy clarification that the Section 504 regulation . . . requires parental consent prior to the conduct of initial student evaluation procedures . . . . Parental discretion in matters involving student assessment/evaluation is an inherent part of the regulation and parental discretion is an appropriate and necessary policy component at the initial evaluation stage.<sup>4</sup>

## **3. *Modalities of Evaluation***

The Department's regulations require school districts to use evaluation tools that are best suited to assessing each particular student's aptitude, or any other factor being assessed, and these tools must be administered in such a way that ensures an accurate assessment of aptitude or other quotient. The tests selected must include assessment modalities that are tailored to evaluate each student's specific areas of educational need – not just those designed to provide a

---

<sup>3</sup> *Karnes City (TX) ISD*, 31 IDELR 64 (OCR 1999).

<sup>4</sup> Letter to Durham, 27 IDELR 380 (OCR 1997) (Dallas Office).

single intelligence quotient – and they must be validated for the specific purpose for which they are used, and a school district must ensure that properly-trained personnel administer them.<sup>5</sup>

The selected evaluation tools and the amount of other information needed to determine whether a particular student is disabled must be determined by the 504 Committee, which is defined as a “multi-disciplinary” team composed of individuals with particular knowledge about the meaning of the evaluation data, the suspected impairment, and/or the student.<sup>6</sup> Unlike IDEA, Section 504’s regulations do not require that a student’s parents be part of the 504 Committee, although it is an unquestionably best practice to ensure that the parents are involved in the evaluation process and their opinions and the information provided by them are fully considered.

School districts must draw from a variety of sources in the evaluation process so that the risk of error is minimized. The information obtained from all such sources must be documented, and the Committee must consider all significant factors related to the student’s learning process. These sources and factors may include aptitude and achievement tests, teacher recommendations, physical condition, social and cultural background, and adaptive behavior.<sup>7</sup>

Under the Department’s regulations, school districts may use their policies under IDEA to comply with Section 504, but doing so will forfeit a degree of flexibility. For example, while IDEA specifies that parents are mandatory members of an IEP team, Section 504 does not specify that parents must be members of an evaluation team. Of course, parental input and

---

<sup>5</sup> 34 C.F.R. § 104.35(b); *see also Laddie C. v. Dep’t of Educ.*, Case No. 08-CV-00309, 2009 U.S. Dist. LEXIS 25618 (D. Haw. Mar. 27, 2009) (court remands case to hearing officer because the record is unclear that anyone other than the parent or the parent representative knew the child at the IEP meeting).

<sup>6</sup> 34 C.F.R. § 104.35(c).

<sup>7</sup> According to a recent Q & A published by the OCR, “Recipients must draw upon a variety of sources in the evaluation and placement process so that the possibility of error is minimized. All significant factors related the learning process must be considered.” *Free Appropriate Public Education for Students With Disabilities: Requirements under Section 504 of the Rehabilitation Act of 1973*, U.S. Dep’t of Educ., Sept. 2007, pp. 7-8, available at <http://www2.ed.gov/about/offices/list/ocr/docs/edlite-FAPE504.html> (last accessed, Aug. 15, 2017).

involvement is important, and the information parents provide should be fully considered by a 504 Committee in assessing whether a student has a qualifying impairment and, if so, the appropriate placement and services for the student, but the Department's regulations arguably leave school districts with discretion in this regard. Likewise, while IDEA requires reevaluations every three years, Section 504 only states that schools must conduct them at appropriate periods; and while IDEA requires evaluations be completed within sixty days of receipt of parental consent, Section 504 requires their completion within a reasonable time.

#### **4. *Consideration of Mitigating Measures***

As of January 1, 2009, school districts may no longer consider the ameliorative effects of mitigating measures – or supports, devices, or medications that allow a student with disabilities to compensate for the effects of an impairment, such as hearing aids, prosthetics, or medications. The ADAAA provides a non-exhaustive list of such measures, which includes: medication; medical supplies, equipment or appliances; low-vision devices (which does not include ordinary eyeglasses or contact lenses); prosthetics (including limbs and devices); hearing aids and cochlear implants or other implantable hearing devices; mobility devices; oxygen therapy equipment and supplies; use of assistive technology; reasonable accommodations or auxiliary aids or services; and learned behavioral or adaptive neurological modifications.<sup>8</sup>

Under the ADAAA, the ameliorative effects of ordinary eyeglasses or contact lenses should be considered when assessing an individual. These are defined as lenses that are intended to “fully correct visual acuity or eliminate refractive error.” By contrast, “low-vision devices” magnify, enhance, or otherwise augment a visual image.<sup>9</sup>

---

<sup>8</sup> 42 U.S.C. § 12102(4)(E)(i)(I); *Protecting Students with Disabilities, supra*, ¶ 21.

<sup>9</sup> 42 U.S.C. § 12102(4)(E)(iii)(II); *Protecting Students with Disabilities, supra*, pp. 7-8.

## 5. *Time Limits in Which Districts Must Complete Evaluations*

A 504 Committee must conduct its own evaluation of disability-related educational needs and that evaluation must be in reasonable temporal proximity to a determination in this regard or the development of a student's 504 Plan. The OCR has found school districts out of compliance by virtue of having accepted a physician's evaluation or some other entity or person's appraisal of a student without conducting its own evaluation. For example, the OCR found a school district non-compliant because its 504 Committee relied exclusively on the report of a student's neurologist although it did not address the student's educational needs or how the student's condition impacted his education.<sup>10</sup>

Section 504 does not impose a specific deadline for the completion of evaluations. Instead, the OCR states that they must be completed "within a reasonable time."<sup>11</sup> However, if State law imposes a deadline for the completion of evaluations, the OCR will adopt that deadline and find an evaluation untimely if it fails to meet it.<sup>12</sup> For example, in one case, the OCR found a district in violation of Section 504 because it had failed to complete a student's evaluation until 3½ months after it had received parental consent for the evaluation, although the applicable State law required school districts to complete evaluations within thirty days of receiving parental consent.<sup>13</sup>

---

<sup>10</sup> *Cle Elum-Roslyn (WA) School Dist. No. 404*, 41 IDELR 271 (OCR 2004). In this case, rather than conduct its own evaluation of the student, the district relied on an outside neurologist's report provided by the parents to determine that the student was a student with disabilities under Section 504 based on the neurologist's diagnoses of Tourette Syndrome and Attention Deficit Disorder, and it created an education plan under Section 504 on that basis. However, the neurologist's report failed to address the student's required placement or the student's disability-related educational needs, and the district's placement team did not review any data other than the neurologist's report. Given the dearth of information available to the district on the student's educational needs, the OCR found the 504 Plan deficient and ruled that the district deprived the student of a FAPE. *Id.*

<sup>11</sup> 34 C.F.R. § 104.35(a).

<sup>12</sup> *Walled Lake (MI) Consol. Schools*, 39 NDLR 107 (OCR XII, Cleveland (MI) 2008).

<sup>13</sup> In *Walled Lake*, the school district argued that it should have been given more time to complete the evaluation because the parent had not yet obtained her own evaluation, but the OCR rejected this justification. It also found

Likewise, a school district must complete an evaluation of a student suspected of being a student with disabilities who transfers into the district within a reasonable time after the transfer. The OCR found a school district to have unreasonably delayed a student's evaluation when it failed to complete the evaluation until six months after a student transferred into the district.<sup>14</sup>

School districts will not be held accountable for delays caused by a parent's delay in providing, or refusal to provide, consent for an evaluation.<sup>15</sup> Nor will relatively short delays in completing an evaluation result in a finding of non-compliance. For example, a delay of two weeks to complete an evaluation and develop a 504 Plan was found reasonable because the district had undertaken "a series of steps, each corresponding to new information or the student's changing behavior, and each consistent with a district's obligation to develop a plan designed to meet the student's individual education needs[.]"<sup>16</sup>

***Practice Tip:*** Keeping comprehensive and detailed 504 meeting minutes can be instrumental in verifying a school district has complied with Section 504. In one recent case, the OCR concluded a parent's complaint that her child's school district had neglected to conduct a proper 504 meeting was disproven by the district's detailed minutes from that meeting, which showed the 504 Committee was properly composed of members familiar with the student, the disability, and placement options. The minutes also demonstrated that the committee discussed and decided the student's placement, and the 504 Coordinator circulated a draft plan among the Committee members, resulting in at least one change to the 504 Plan. The OCR found the meeting fully compliant with 34 C.F.R. § 104.35(c)(3). (*School Admin. Unit No. 24 (NH)*, 39 NDLR 237 (OCR I, Boston (NH) 2009)).

(..continued)

that the district had failed to provide the student with an appropriate placement for nearly two semesters, which did not help its case any. *Id.*

<sup>14</sup> *American Samoa (AS) Dep't of Educ.*, 38 NDLR 261 (OCR X, Seattle (AS) 2008). In this case, the student's parents had notified the district prior to the beginning of the school year that their son would be transferring, but the district still failed to complete evaluations until halfway through the school year. It also failed to provide the parents with a due process hearing.

<sup>15</sup> *See, e.g., Whittier City (CA) Elementary School Dist.*, 50 IDELR 109 (OCR IX, San Francisco (CA) 2007); *Schwartz v. The Learning Center Academy*, Case No. 4:00-CV-4234, 34 IDELR 3 (W.D. Mich. Jan. 17, 2001).

<sup>16</sup> *Spokane (WA) School Dist. No. 81*, 2001 U.S. Dist. LEXIS 563, 47 IDELR 272 (OCR Seattle 2006).



## 6. *Re-evaluations Under Section 504*

Section 504 requires school districts to periodically re-evaluate students with disabilities and to do so before making any significant change in such a student's placement.<sup>17</sup> As noted above, school districts may comply with this obligation by adopting IDEA's three-year timeframe to conduct reevaluations unless a district and the parents of a student with disabilities agree otherwise or circumstances indicate that a more frequent re-evaluation is necessary. However, the Department's regulations only require re-evaluations to be conducted "periodically" and before a significant change in placement. Under Section 504's timeline, compliance is determined on a case-by-case basis. Whichever standard a district adopts, it must ensure that it conducts a reevaluation before making any significant change in a student's placement or terminating a significant service or placement.

According to the OCR, school districts are not obligated to re-evaluate disabled students annually even if their policies indicate otherwise.<sup>18</sup> School districts need only ensure that their disabled students classified under Section 504 receive re-evaluations with reasonable frequency and before a significant change in placement. As stated by the OCR, it "considers an exclusion from the educational program of more than 10 school days a significant change of placement[,] and consider[s] transferring a student from one type of program to another or terminating or significantly reducing a related service [to be] a significant change in placement"<sup>19</sup> (which includes an out-of-school suspension for ten consecutive days or more or) or if there is a significant change in the child's condition or circumstances.

---

<sup>17</sup> 34 C.F.R. § 104.35(d).

<sup>18</sup> *Hillsboro County (FL) School Dist.*, 46 IDELR 201 (OCR IV, Atlanta (FL) 2006).

<sup>19</sup> *Protecting Students with Disabilities*, *supra*, p. 8, ¶ 30.

The material appearing in this website is for informational purposes only and is not legal advice. Transmission of this information is not intended to create, and receipt does not constitute, an attorney-client relationship. The information provided herein is intended only as general information which may or may not reflect the most current developments. Although these materials may be prepared by professionals, they should not be used as a substitute for professional services. If legal or other professional advice is required, the services of a professional should be sought.

The opinions or viewpoints expressed herein do not necessarily reflect those of Lorman Education Services. All materials and content were prepared by persons and/or entities other than Lorman Education Services, and said other persons and/or entities are solely responsible for their content.

Any links to other websites are not intended to be referrals or endorsements of these sites. The links provided are maintained by the respective organizations, and they are solely responsible for the content of their own sites.