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***Current and On-the-Horizon
Legal Issues: How to Spot and
How to Avoid***
Ohio School Psychologists Association

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What is one thing you hope is discussed during today's presentation?

Current and On-the-Horizon Legal Issues

Post-COVID World

Evaluations and IEEs

Regulation Changes

Student Discipline and MDRs

Child Find

504 Eligibility and Plans

Post-COVID World

(sort of)

IDEA Never Paused During COVID

IDEA requirements remained in full force and effect throughout the past two years

- Any missed services are potentially subject to complaint and compensatory education – this can be especially key for children who are at or near aging out
- US Dept. of Ed. continues to have published guidance encouraging schools to be prepared for possible future disruptions
- Federal guidance from Rehabilitation Services Administration encourages providers to identify virtual options, in-school substitutes (when employers are closed), and other workarounds for COVID disruptions

Clark County School District (Nevada SEA, December 8, 2020)

- 19-year-old student had community-based postsecondary transition services developed before COVID
 - 240 minutes weekly of community-based learning
 - The district failed to implement these services March-October 2020
 - Job sites were closed during this time
 - Community organizations halted work with the district during this time
- SEA found that the district should have investigated and implemented alternatives such as online opportunities, on-campus work experiences, etc.
 - “[R]egardless of the causation of an unprecedented national emergency and the fact that it was beyond the control of the [district], the [district] remained responsible for implementing the student’s IEP, even if by alternate methods of delivery.”

Toledo Public Schools (Ohio SEA, October 30, 2020)

- Formal complaint filed by an attorney/advocate
 - It appears the complaint is akin to a class action
- ODE took a random sample of students across different programs and investigated whether FAPE was denied during building closures
 - Allegation was a blanket and limited set of service was provided during closures (limited to one weekly contact with an IS)
 - District provided evidence of training for staff that quoted directly from Spring 2020 federal guidance (e.g. “Schools must ensure that, to the greatest extent possible, each student with a disability can be provided the special education and related services identified in the student’s IEP”).

The Toledo Rubric (*not really a thing*)

- The school-district rubric listed questions where each answer of a “Y” or “N/A” counted as 1 point:
 1. Documentation of SDI
 2. Documentation of Individual Student contact
 3. Documentation or Parent Contact
 4. Progress Report Submitted
 5. Specific Comments on Progress Report
 6. Data submitted on Progress Report
 7. Evidence of SDI based on IS Interview
 8. Evidence of SDI based on related service provider interview
 9. Evidence of SDI based on parent interview

The Toledo Rubric (*not really a thing*)

Green

7-9 Points

No corrective action
required

Yellow

4-6 Points

Half of missed
minutes
compensatory
education

Red

0-3 Points

Minute-for-minute
compensatory
education

U.S. Department of Education Issues IDEA / 504 Fact-Sheet Directed to Compensatory Education (February 2022)

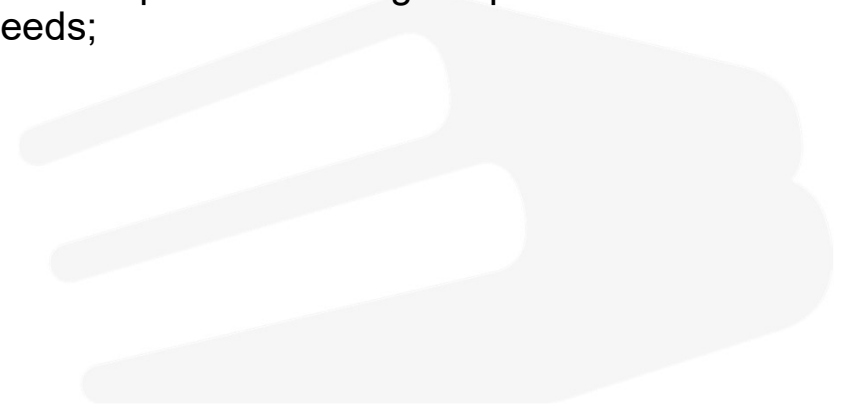
Fact Sheet: Providing Students with Disabilities Free Appropriate Public Education During the COVID-19 Pandemic and Addressing the Need for Compensatory Services Under Section 504:

<https://www2.ed.gov/about/offices/list/ocr/docs/factsheet-504.html>

Students with disabilities may be entitled to compensatory services if they did not receive appropriate evaluations or services during the COVID-19 pandemic.

USDOE points to the following factors may be relevant for the group of knowledgeable persons to consider in determining the appropriate type and amount of compensatory services:

- the frequency and duration of missed instruction and related services;
- whether special education and/or related services that were provided during the pandemic were appropriate based on the student's individual needs;
- a student's present level of performance;
- previous rates of progress;
- the results of updated evaluations;
- whether evaluations were delayed; and
- any other relevant information.





Masks Are Behind Us. Right?

Have you had any requests for mask-mandates to continue in some fashion in order to assist a student with coming to school?

1. Yes



2. No



3. Please No.



Mask Requirements – Uptick in Requests from Families

Short answer is this is becoming a 504 matter for school districts.

A Virginia Court recently ruled that the parents of 12 unrelated students with medical conditions will be able to seek universal indoor masking as an accommodation to allow their children to attend school safely during the COVID-19 pandemic.

The U.S. District Court, Western District of Virginia barred state officials from enforcing a newly enacted parental opt-out provision against the students' districts while the parents' Section 504 and ADA claims were pending.

The court did authorize the 10 involved school districts to “adopt universal indoor masking for one or more of the students in this case if doing so would be a reasonable modification of state law.”

The school districts' communications with the parents indicated that they declined to adopt mask mandates because state law prevented them from doing so. With that barrier gone, the districts can make fact-specific inquiries for each student to determine whether universal masking would be a reasonable modification.

Seaman v. Commonwealth of Virginia, 122 LRP 9359 (W.D. Va. 03/23/22).

Some Questions Should We Be Asking... (Post-COVID World)

WHAT are the specific needs of the student?

HOW is this request handled in the student / family's every day life?

WHAT is the scope of the request?



COVID-Specific Practical Tips

- Do not assume non-compliance will be overlooked/forgiven
 - Look to the Toledo Rubric for a sense of what can be done to increase or decrease liability
- Consider having contingency plans – perhaps in general, perhaps individualized
 - Consider triage of contingency planning to focus on those closest to aging out
- Beware overwhelming a student – especially one 18 or older – with excessive services to make up for “lost time”
- Whatever you adjust, document the rationale in a PR01
- Future-proof your transition services by building in longer-term virtual options to align with current trends
- Make decisions based on the individual student NOT based on state policy or district-wide policy; when in doubt, call legal



Regulation Changes

Ohio's Operating Standards for the Education of Children with Disabilities passed the State Board of Education in June 2021.

From there it was filed with the Common Sense Initiative on October 21, 2021 for public comment and review. The comment period ended on November 3, 2021.

There it has remained.

It has not been provided to JCARR yet.

No reports have been provided out to date. It is unclear when these updated regulations will be final.



Preschool Regulation Changes

OAC 3301-51-11 is
UPDATED.

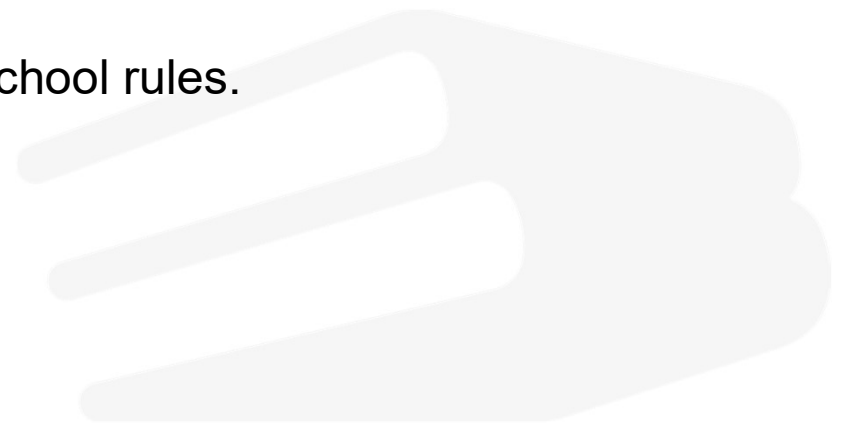
Preschool Rule Updates

BIG IDEAS

Framing for the new Preschool rules

- Inclusion of Preschool Students with disabilities into Community Programs
- Integrated class (50/50 model) is a more restrictive environment.
- OSEP letter:
<https://sites.ed.gov/idea/files/idea/policy/speced/guid/idea/memosdcltrs/preschool-lre-dcl-1-10-17.pdf>
- ODE alignment of school age rules to preschool rules.

Parent Choice



Preschool Rule Updates

BIG IDEAS

LRE

- Keeping children where they are found (childcare)
- Utilizing community settings for district placement
- Publishing a list of community settings to be considered for placement.
- District placing children into community settings for services.
- District pays for tuition for the community setting.
- Location of the community settings can not be limited by district boundaries.

Preschool Rule Updates

BIG IDEAS

No Universal Preschool

- Lack of access to preschool children versus school age.
- Prevents school age practices to fully align with preschool. Limits flow between programs.

Staff Licensing

- Integrated Class teacher will have to have to be dual licensed to be teaching in that program (ECE and EC Intervention Specialist). Grandfather option available this program year

Child Find Preschool Updates to Developmental Delay

(D) Child find. A school district who provides preschool special education shall comply with rule 3301-51-03 of the Administrative Code, except as otherwise specified in this paragraph.

(1) A school district may choose to use the term “developmental delay” under the following conditions, as defined in rules 3301-51-01 and 3301-51-03 of the Administrative Code, for children who are experiencing developmental delays and who, by reason thereof, need special education and related services:

(a) The applicability of the term shall be based upon the individual needs of the child as determined by the evaluation team or the IEP team and other qualified professionals;

(b) In addition to the assessments required in paragraph (G)(1) of this rule, results of appropriate diagnostic instruments and procedures may also be used to help make the determination that a child has a “developmental delay.” A developmental delay may be substantiated by a delay of two standard deviations below the mean in one or more of the areas of development or 1.5 standard deviations below the mean in two or more of the areas of development listed in paragraph (D)(1)(c) of this rule. The results shall not be used as the sole factor in making the determination that a child has a developmental delay.

Child Find Preschool Updates to Developmental Delay

(c) “Developmental delay” means a child who is experiencing a delay as determined by an evaluation team, IEP team, and other qualified professionals in one or more of the following areas of development:

- i) Physical development;
- (ii) Cognitive development;
- (iii) Communication development;
- (iv) Social or emotional development; or
- (v) Adaptive development.



Preschool Evaluations (OAC 3301-51-11)

(G) Evaluations. A school district who provides preschool special education shall comply with rule 3301-51-06 of the Administrative Code, except as otherwise specified in this paragraph.

(1) Eligibility. Sufficient information shall be obtained using a variety of information sources to confirm that a disability exists. Eligibility for special education and related services as a preschool child shall be determined on the basis of multiple sources of information, including, but not limited to:

- (a) Data from Part C for children transitioning from early intervention services and information from any current community or preschool program providers;
- (b) Observations in more than one setting and in multiple activities shall be conducted after obtaining parental consent for such observations;
- (c) Information provided by the parent or caregiver;
- (d) Results of at least one criterion-referenced assessment; and
- (e) Results of at least one norm-referenced assessment.



Preschool Evaluations (OAC 3301-51-11)

(G)(2) Based on the variety of sources of information listed in paragraphs (G)(1)(a) to (G) (1)(e) of this rule, a group of qualified professionals and the parent of the child shall determine if the child has a disability and is eligible for special education and related services as a preschool child.

(a) At a minimum, the group of qualified professionals must include two or more representatives of the school district who collectively meet the following requirements:

- (i) Qualified to provide or supervise the provision of specially designed instruction to meet the unique needs of the child;
- (ii) Qualified to provide or supervise the provision of instruction in the preschool general education curriculum;
- (iii) Authorized to make decisions about the use of school district resources for special education and related services; and
- (iv) Qualified to interpret the instructional implications of evaluation results.

(3) A school district must ensure that sufficient resources are available to conduct evaluations during the summer months and meet the timelines described in OAC 3301-51-06.

Eligible for Services (Age)

(G)(4) A preschool child eligible for special education services shall be at least age three and not age six, with the following exception:

(a) A child younger than three years of age may be eligible if the child will be three by October thirty-one of the current calendar year, and the child will receive special education and related services beginning the first day of the school year, unless an alternative start date is determined by the IEP team, which must include the child's parent.

(b) A child who is age eligible for kindergarten, but not compulsory school age, may remain in preschool special education through the completion of the school year despite turning six under the following conditions:

(i) School-age services must be considered during the IEP process for a child who will be age eligible for kindergarten in the following school year;

(ii) A child who is eligible for preschool special education under the category of developmental delay and turns six during the school year must have a preschool reevaluation prior to age six to determine eligibility under one of the other eligibility categories.

Legislation to Watch

HB 322 – it would prohibit teaching that an individual is inherently racist, sexist, oppressive. Would require educators to teach that slavery and racism aren't "anything other than deviations" of the founding principles of the U.S.

HB 327 – would require teachers to present a nonpartisan discussion about controversial aspects of history and "the historical oppression" of people based on race, color, religion, sex or national origin. Has had 12 versions.

HB 616 – combines the concepts of HB 327 with aspects of Florida's named "don't say gay" law. Would prohibit schools from teaching, using or providing any curriculum or instructional materials on sexual orientation or gender identify.

Legislation to Watch

HB 240 – would require venereal disease and teen pregnancy prevention education to teach risk avoidance and unhealthy behaviors, including alcohol, drugs, dating violence, bullying, gambling, pornography and human trafficking

HB 529 – would require public schools (and private schools that take vouchers) to post curricula and instructional materials online for each classroom course by July 1 each year.

HB 497 – would eliminate the requirement that 3rd graders repeat the grade based on their ELA assessment score. Still would be required to offer remediation for K-3 for students who are behind.

Child Find



Child Find Obligations / Basics under IDEA

- Child find is the affirmative, ongoing obligation to identify, locate and evaluate all children with disabilities within the jurisdiction who are in need of special education and related services.
- Must include:
 - Children who are suspected of being children with disabilities AND in need of special education, even if they are advancing from grade to grade; and
 - Highly mobile children, including migrant children.
- Section 504 contains its own, similar child find requirement. It is not identical to IDEA's child find requirement. Instead, it states a district must conduct an evaluation of students "who, because of handicap, need or are believed to need special education or related services."

Child Find Scenario

1

Student has been in district since K year. Received gifted programming elementary through middle school. Enrolled in multiple AP classes.

2

Freshman Year, parents report to academic counselor the students' increased anxiety. Counselor provides student with a pass to leave class as needed when anxiety is unmanageable.

3

Summer after freshman year, student exhibits self-injurious behavior and is placed in outpatient treatment facility. Student is not back in school until September. Counselor gives student schoolwork collected from teachers.

4

Returns September Sophomore Year. Student is failing pre-AP algebra, which is out of line with her normal academic performance and proficiencies.

5

November Sophomore year the parents and private therapists determine student need a high level of care. December 2nd they withdraw student for a private residential treatment facility (out of state).

When did the District's Child Find Obligation under the IDEA begin?

1. Step 1
2. Step 2
3. Step 3
4. Step 4
5. Step 5

Child Find Obligations

- Teen was designated as gifted. Took AP courses and maintained high academic performance. Historical diagnosis of ADHD and generalized anxiety.
- Beginning in 9th grade, she experienced increasing anxiety, was diagnosed the summer after 9th grade with major depressive disorder, and exhibited self-injurious behavior and suicidal ideations.
 - The initial responses aligned with 504 accommodations / modifications and supports (e.g. hall pass to leave when anxiety unmanageable).
- Parents placed her in an outpatient treatment facility (no education provide at this facility only daily therapy).
 - District still responded with 504-like accommodations / modifications and supports (e.g. worked with counselor and teachers to collect schoolwork for the student to complete and to adjust the student's workload).
- She returned to school and her grades declined. She withdrew and entered a residential treatment facility.
- Court stated that the school district had enough information to suspect (1) the parents alerted the school counselor and teachers that the student was in a residential facility for an extended time for treatment of anxiety and depression; (2) numerous absences related to outpatient treatment; (3) academic decline; (4) withdrawal(s) from school.
 - The "counselor was incorrect in presuming the student's high academic achievement made her ineligible for special education services."

RB and SRB v. North East Independent School District (W.D. Texas Feb 16, 2022)

Child Find Lessons

- Cannot rely solely on a student's academic success to justify a decision not to evaluate a student.
 - Child Find and FAPE obligations are not relieved or obviated by a student's high intelligence or academic performance.
- More accurate barometer is whether the student exhibits unusual behavior, academic achievement, or performance.
- Holistic view of the student's behavior, academic performance, and other indications.



Areas to watch for child find

Excessive absences

Parent pick up for behavioral problems

Ineffective Section 504 accommodations

Multiple hospitalizations

Severe persistent behavior

Receipt of private report of diagnosis



Child Find Pitfalls

Waiting for a student to complete RTI before evaluating.

If there is reason to suspect the student is eligible you are not required to complete the RTI process before evaluating

Assuming a student is unmotivated

Look at the whole circumstances around the student. Are there changes in behavior to consider? Signs of an impairment affecting the student's ability to engage?

Identification solely based on medical conditions

Need to look for the impact on the student's performance or behavior to determine if there is a need for special education and related services.



Child Find Pitfalls

Overlooking the Help a Student Receives

Is the performance based on excessive support at home or at school? What is typically provided in the general education setting?

Failing to Notify the Parents of the evaluation decision

Prior written notices are your best friend. PR01s are required at this decision point – even if the district is making the referral and the parent refuses to provide consent for the initial evaluation.

Some Questions Should We Be Asking... (Child Find)

- Have we trained our staff appropriately to know the warning signs to watch for?
 - Teachers?
 - Nurses?
 - Absence intervention teams?
- Have we looked globally at a student when considering a referral?



Practical Tips

Training all appropriate staff can assist in targeting students for evaluation appropriately.

Reviewing globally how a student is doing is recommended when considering whether an evaluation is appropriate – grades, state testing, district testing, nursing visits, counseling visits, discipline, absences, teacher reports, etc.

Be proactive in meeting child find obligations.



Initial Evaluations – OAC 3301-51-06 – *The Essentials*

Who?

Children residing within the district.

Children attending school within the district (including private).

When?

Either parent or “a public agency” may request an evaluation.

+ 30 days from referral: Secure consent *or* Issue PWN declining to evaluate.

+ 60 days from consent: Complete initial evaluation.

What?

Use a variety of assessment tools/strategies, ensure assessments are measuring what they're designed to measure, work to ensure chosen assessments can yield valid results (e.g. avoid language barriers, avoid cultural bias, ensure qualified administrators, ensure fidelity to assessment procedures, ensure impact of disabling condition(s) is considered, etc.).

Review assessment results as a team to:

1. Determine if child is “disabled” as defined by IDEA (requires SDI + fits a category).
2. If disabled, determine educational needs.

Suspicion of a Disability Occurs When?

When student began 1st grade, new to district, parents expressed concerns to the student's teacher about his foundational skills and whether he was prepared to begin first grade.

Four days into the school year, the parents asked if the student was eligible for a 504 program on account of academic difficulties.

Three days later in a conversation between the teacher and parents, the parents asked about whether the student should be tested for dyslexia.

September 29th the teacher emailed the dyslexia supervisor and submitted the required documents to have a screening conducted for the Student.

October 6th, a dyslexia screener was conducted, and later the supervisor indicated the student did not have markers of dyslexia and did not need additional testing (but did not report this to the teacher / parent).

November 2nd, the teacher asked about the screening results internally and asked if she needed to provided any accommodations or modifications for the Student. No response and teacher followed up November 30th.

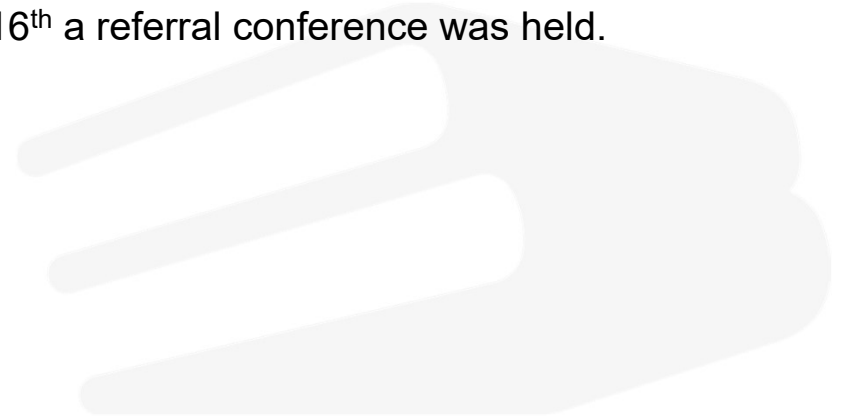
Suspicion of a Disability Occurs When?

January 21st, the teacher wrote this email to the dyslexia supervisor:

“I know I am a broken record, but I wanted you to see [Student's] test. The five words didn't do anything for his grade, unfortunately. You can see that he is still struggling/stuck on three letter words/sounds. I am just kind of at a loss. I am trying to do everything I can to help him, but I feel like I am struggling. I know he is in the WIN group, but I feel like he needs more. I understand that this may not happen, I just want to make sure I advocate for him as much as I can. Thank you for your help. I really do appreciate it.”

Student was placed in an intervention group in January of that school year.

Parents requested an IEP in May of that school year. June 16th a referral conference was held.



When should the district have initiated an evaluation under IDEA?

1. In the first two weeks. The parents expressed concerns and asked for a 504.

0%
2. In September when the dyslexia screener was provided to the student.

0%
3. In October when the teacher is following up with the screener.

0%
4. In January when the teacher expresses her need for help.

0%
5. When the parents requested the IEP in May.

0%

Suspicion of a Disability Occurs When?

Court stated:

“Certainly, it is reasonable that District did not immediately schedule a special education referral conference and have Student evaluated during the first week of school, particularly given that Student had transferred into District and his academic deficits were not well established. However, Petitioners' request, combined with District's knowledge of Student's academic deficits after the first two months of school, was sufficient to trigger a special education referral and comprehensive evaluation of Student. By October 2020, Student's academic deficits in the classroom had reinforced Petitioners' concerns and justified action on the part of the District.

....

Considering all of these issues, it is apparent that District was placed on notice many times that Student might have a learning disability and be in need of special education services. Between Petitioners requests, [the teacher's] communications with the dyslexia supervisor, and Student's academic performance on schoolwork and progress assessments, it was apparent as early as October 2020 that Student may have a disability that was impacting his ability to be successful at school. District ignored all of these triggers and, therefore, violated its child find obligations with regard to Student.”

Palestine-Wheatley Sch. Dist., 80 IDELR 87 (SEA AR 2021)

Some Questions Should We Be Asking... (Initial Evaluation Thoughts)

ARE the parents withholding important information?

- Explicitly acknowledge hesitation some families have with sharing private medical information and explain how you carefully guard such information.

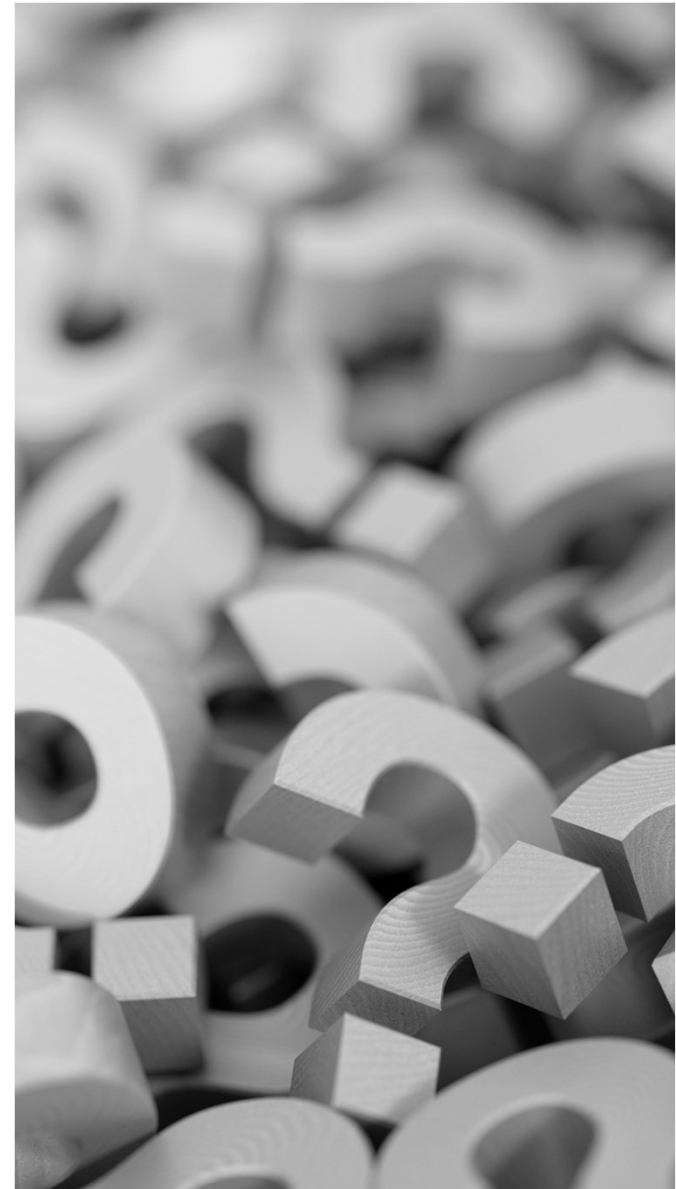
HOW will we explain any deviations from “normal” administration of a particular assessment?

- It can make sense to not administer the full battery of a test but be clear in PR01 on this decision.
- Same is true of any accommodations, etc. during testing

ARE we prematurely determining that an area of reported need doesn't impact education?

- Make such determinations in the right order – often in the context of a full evaluation.

What does our school nurse know?



Some Questions Should We Be Asking... (Initial Evaluation Thoughts)

WHO needs to be a part of the decision (i.e. who should we leave out)?

- “A group of qualified professionals and the parent.”
- Don’t let staff availability unnecessarily delay completion.
- Do not invite private evaluators unless they work for you.

WHAT would IEP services look like if we identify this student?

- This informs “Description of Educational Needs” and “Implications for Instruction.”
- It is not enough to fit into one of the categories of disability.
- Pay attention to this question, or risk overidentification and IEPs that are divorced from the child’s actual needs.
- In some cases, related services on their own can be “special education.”



Practical Tips

- Always come back to question of what would “special education” be if the child is identified.
 - i.e. what would we do for this student? What would SDI look like?
- Do not be afraid of or elevate private evaluations over school assessments.
- Be prepared to revisit eligibility decisions.
 - This goes both ways – to exit from services or to bring back after exiting.
- Strategically structure timelines and the composition of the ETR team – not to alter outcomes, but to address practical concerns.



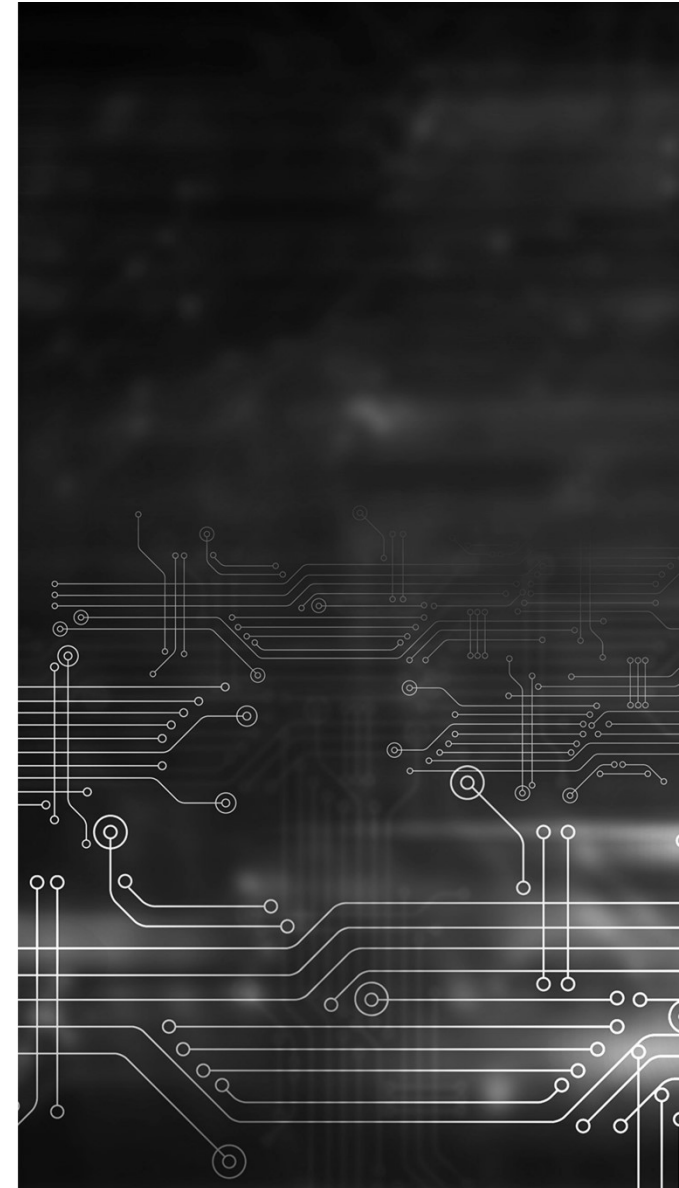
What is the Purpose of a Reevaluation?

Discover how the student's special education needs evolve over time so that the IEP team can make informed decisions and changes to the special education program.

Reevaluation Conducted – 34 CFR 200.303

The Essentials

- District determines that a reevaluation is necessary based on the needs of the student.
 - A substantial change in academic performance.
 - A significant discrepancy between an IEP's description of the student's academic abilities and his/her performance.
 - Evidence that indicates a student may qualify under a different identification.
 - Significant escalation in student's behavior.
- The child's parent or teachers request it.
- Prior to a change in placement.
- Prior to determining that the student is no longer eligible for SPED.
 - Exceptions: reevaluation not needed if services are being terminated because of graduation or because student's age exceeds eligibility for FAPE, although there are a few additional procedural steps involved.



Are There Any Limits?

- May not occur more than once a year, **unless** parents and school district agree otherwise.
- Must occur at least once every 3 years, **unless** parents and the school district determine otherwise.
 - Is skipping an evaluation a good idea?



Consent for Reevaluations

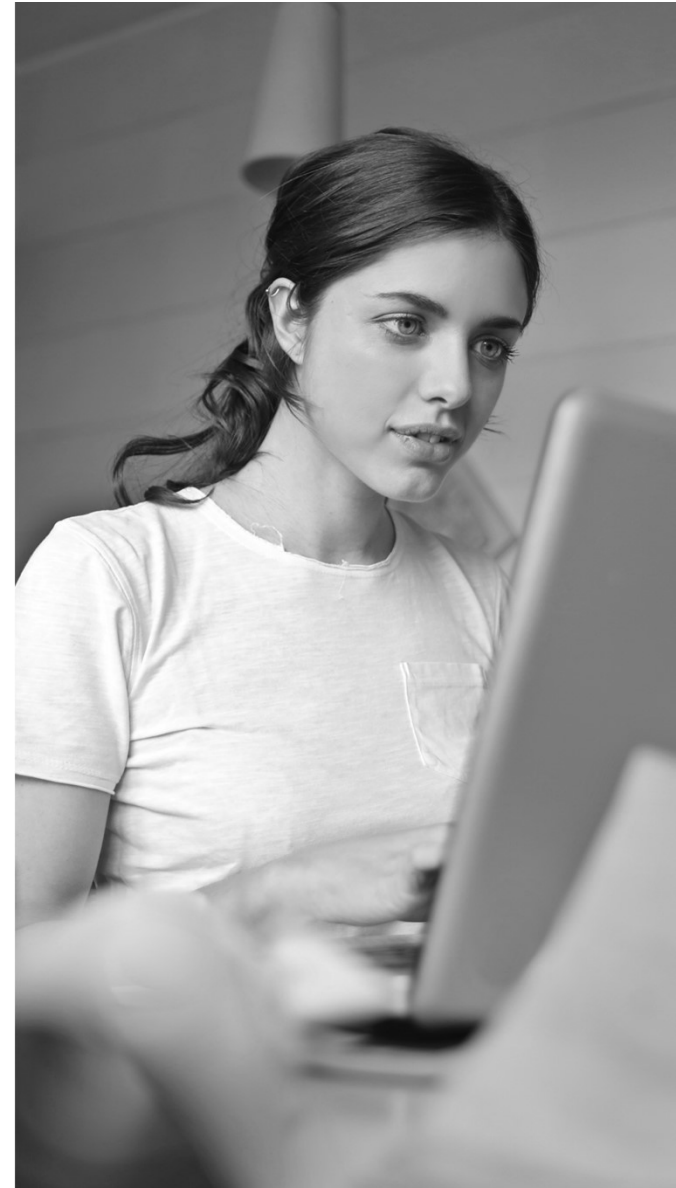
- Must obtain informed parent consent prior to conducting any reevaluation of a child with a disability – OAC 3301-51-05(C)(4).
 - If parent refuses consent; may use consent override procedures in IDEA.
- Consent not needed when:
 - Reviewing existing data as part of an evaluation or reevaluation;
 - Administering a test or other evaluation that is administered to all children (unless you require parents of all children to consent); or
 - If district can show that it made reasonable attempts to obtain consent and parent has failed to respond.
 - OAC 3301-51-05(C)(4) &(5).



Details, details, details.

Do I really have to include everything from all past history?

No, but... history can be important. Use your sound professional judgment to consider how much historical information and data you include on an ETR.



Evaluation and Placement Decision Scenario

After multiple suicide attempts, Student is identified on an IEP under the category of ED in February of 2016 (diagnosed with bipolar disorder January 2016).

Immediately, student is placed in an out-of-district placement that provided therapeutic, mental health, emotional and educational supports. District agreed to this placement through the student's IEP.

- Full emotional supports are provided throughout the day at the out-of-district placement.

Out-of-district school requires an IEP and psychiatric evaluations for admittance.

By May 2016, the student and the parent met with the IEP team, and the student stated she wanted to return to the school district not the out-of-district placement for school and field hockey.

School agreed to the change in placement based on student/parent request.

Did the District appropriately change the placement for the student?

1. Yes



2. No



Evaluation and Placement Decisions

Court held:

- A school district cannot green-light a change in placement that would dramatically alter an IDEA-eligible student's programming simply because the parent asked it to do so.
- If a parent seeks a less restrictive environment, the district should reevaluate the student and reconvene the IEP team to discuss whether the less restrictive environment is appropriate.

A.T. v. Oley Valley School District, 80 IDELR 46 (E.D.PA December 7, 2021)

Appropriateness of an Evaluation

OAC 3310-51-06 states (in part):

In conducting the evaluation, the school district must:

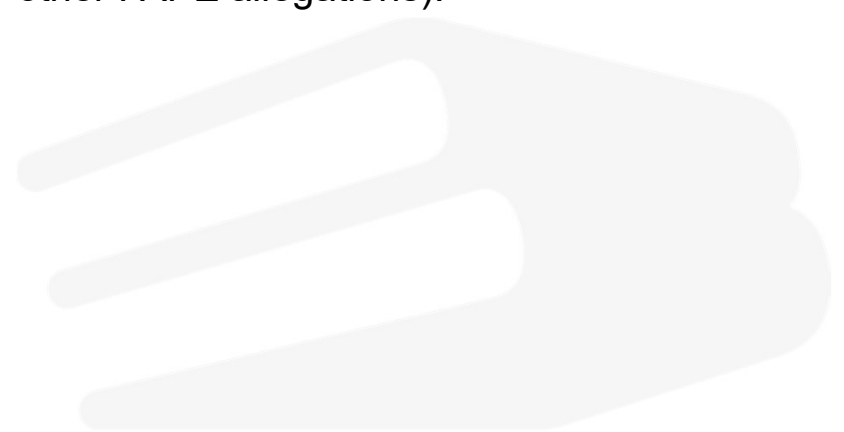
- (a) Use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent, that may assist in determining:
 - (i) Whether the child is a child with a disability as defined in paragraph (B)(10) of rule 3301-51-01 of the Administrative Code; and
 - (ii) The content of the child's individualized education program (IEP), including information related to enabling the child to be involved in and progress in the general education curriculum (or for a preschool child to participate in appropriate activities);
- (b) Not use any single source of information, such as a single measure or score, as the sole criterion for determining whether a child is a child with a disability and for determining an appropriate educational program for the child; and
- (c) Use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.

Appropriateness of an Evaluation

Parents argue in a reevaluation for their child that your district should have evaluated the student for dyslexia instead of evaluating for SLD, and failure to do so violates the district's obligation to evaluate student "in all areas of suspected disability."

District conducted a battery of assessments to evaluate the student's reading and writing skills and determined that the student needed special education services to address deficiencies in those areas. The District also considered and incorporated an IEE obtained by the parent at public expense that tested for difficulties in phonological processing.

However, the parents file for due process alleging that the educational difficulties faced by the student were vastly different than "SLD" could capture (in addition to other FAPE allegations).



Did the District properly evaluate the student under IDEA?

1. Yes, the evaluation was appropriate because it identified needs in reading and writing.



2. No, because it did not conduct a more targeted assessemtn for dyslexia.



Appropriateness of an Evaluation

Court found in this case that a school district did not violate IDEA when it evaluated the student for SLD instead of conducting a more targeted assessment for dyslexia.

The District conducted an appropriate evaluation. While districts are free to use the term “dyslexia” in evaluation reports, nothing in IDEA requires this. The District conducted a “battery of assessments” of the student’s reading and writing skills, both of which could be impacted by dyslexia.

IDEA’s definition of SLD expressly states that the term includes dyslexia.

An evaluation is appropriate so long as it address all areas of suspected disability and identifies all of the child’s needs.

*****NOTE Ohio’s new Dyslexia Guidebook may have some impacts on how this case would play out IRL. Set for Review / Approval April 28, 2022, before the State Board of Education, Teaching, Leading & Learning Committee. *****

Crofts v. Issaquah Sch. Dist. No. 411, 80 IDELR 61 (9th Cir. 2022)

Some Questions Should We Be Asking... (Evaluations)

- What are our areas of concern from the District and from the parents?
- Are there new areas we need to consider based on emergent behaviors, needs, gut checks, etc.
- Do the parents have any outside evaluations or reports they want the District to consider?
 - Any new medications?



Practical Tips

- Make sure you are communicating with in-district mental health providers for “child find” obligations.
- Watch attendance as absence reasons may give clues to child find.
- There are times when it is appropriate to evaluate sooner than every three years.
 - What clues us in to this? Progress monitoring, of course!
- Make sure teams have mindful discussions about what should be involved in each student’s reevaluation. Understand that this process provides you with a critical opportunity to gather data that supports any proposals for change in identification, placement, etc.
- Talk with legal counsel before deciding which route to take if you receive an IEE request. These are costly battles but may be worth it!



Independent Educational Evaluations

Independent Educational Evaluations (IEEs)

- An IEE is an evaluation conducted by a qualified examiner who is not an employee of the school district
 - Think of this as a second opinion
 - Independent evaluator must generally be given the same access to the child as publicly funded evaluators (e.g. classroom observations)
- Districts should have a policy in place that provides reasonable criteria for IEEs (applicable to **both** those that are paid for by parents and those at public expense
 - Criteria under which the evaluation is obtained, including location of evaluation and qualifications of examiner, must be the same as the district uses when initiating its own evaluations (to the extent consistent with parent's right to an IEE)
 - No other conditions or timelines can be imposed
 - Best to have such criteria set prior to getting a request for an IEE or a parent showing up at a meeting with an IEE



IEEs – OAC 3301-51-05(G)

IEE requirements are found under “Procedural Safeguards,” not the “Evaluation” regulations.

IEEs are evaluations conducted by qualified examiners who are not employed by the school.

Who pays for it has nothing to do with whether it is an IEE.

All IEEs can be required to comply with District criteria.

Parents only get one publicly funded IEE per school evaluation (ETR or FBA) with which they disagree.

Only defense against public funding is for the school to file due process to establish that the school evaluation is “appropriate.”

IEEs must be “considered” by the IEP team.



IEEs

Parent's Right to an IEE

- Parents always have the right to obtain an IEE at their own expense
- If parents disagree with an evaluation conducted by the district, they have the right to an IEE at public expense, unless through a due process hearing the district can demonstrate that:
 - Its own evaluation of the child was appropriate or
 - The evaluation obtained by the parents did not meet the criteria established by the district
- A parent is only entitled to one IEE at public expense per evaluation conducted by the district with which the parent disagrees
- If a hearing officer requests an IEE as part of a hearing on a due process complaint, the evaluation must be at public expense



IEEs – District Response to Requests

If a parent requests an IEE at public expense, the district must, without “unnecessary delay,” either:

- Provide the IEE at public expense or
- Request a due process hearing to show that its evaluation of the child was appropriate or that the IEE did not meet the district’s criteria
 - If the hearing officer determines the district’s evaluation is appropriate, the parent still has a right to an IEE, but not at public expense

If a parent requests an IEE, the district must provide information about where the parents may obtain an IEE, as well as the district criteria for IEEs

- Require that the selected evaluator contact the district prior to beginning the evaluation

A district may ask for the parent’s reason for objecting to the public evaluation

- However, the district may not require the parent to provide an explanation and may not unreasonably delay either providing the IEE at public expense or filing a due process complaint to request a due process hearing to defend the public evaluation



Determining IEE criteria

- An IEE policy must meet the unique needs of the district
- Additionally, the IEE policy should clearly establish the district's criteria for obtaining an IEE at public expense and the district's guidelines for accepting an IEE at public and parental expense
- Districts should consider the following:
 - Reasonable Geographic Area
 - Reasonable Expense
 - Impartiality
 - Testing Validity
 - Completeness of report
 - Observation and meeting participation



Determining IEE Criteria

- Application of IEE Policy
 - Be very clear about the application of criteria to both publicly funded IEEs and IEEs obtained at parental expense
- Evaluator Qualifications
 - Qualified to perform the evaluation
 - College Degree
 - Appropriate license, certificate, or credential
 - Experience and/or training working with children with disabilities
 - Impartial
 - Not a regular employee of the district



Determining IEE Criteria

- Geographic Location of the Evaluation: Radius of Miles, contiguous counties, etc.
- Cost of the Evaluation: Reasonable, set a presumed reasonable cost; Allow exceptions upon approval of the District
- Obligation to observe child in educational setting (\$): Consider providing the same requirement as district evaluation to observe the child in the area of suspected disability
- Obligation to Interpret Evaluation (\$): Consider requiring the evaluator to interpret the evaluation at an IEP meeting; At minimum require the report to be provided directly to the school
- Require consultation with school staff (\$): Perhaps just require parents to sign a waiver allowing communication
- Waiver of Requirements for Clinical Diagnosis: Consider waiving certain requirements if the evaluation is for the sole purpose of determining a clinical diagnosis (i.e., not for providing educational recommendations, etc.)



We have provided the parents with a publicly-funded IEE. Now what do we do with it?

1. Schedule a meeting to review the IEE as a team
2. Have district staff review the IEE
3. Open up the ETR and include the IEE in its entirety
4. Put it in the file and forget it
5. Amend the IEP to incorporate all recommendations

Some Questions Should We Be Asking... (IEEs)

What areas are the parents asking for an IEE in?

How solid do we believe our evaluations are?

What do we believe is behind their IEE request?

- Is this to build expert opinions for a to-be-filed due process?
- Is this because we have lost trust?
- Have we miscommunicated something to the parents?
- Can we rectify this miscommunication?



Practical Tips

Send the IEE to your staff members involved so that they can read it in advance of any meeting and discuss what they agree with from the IEE; what they already may do; what may be beneficial for the student to amend the IEP for; etc.

- The district is required to consider the IEE not to accept everything from the evaluator.
- Document everything in the PR01 of the discussion when the team meets to discuss the IEE and where the staff have considered their applicable aspects of the IEE.

Try not to take the IEE request personal (easier said than done).



Children Services

Mandated Reporters

ORC 2151.421 states (in part):

No person ... [who is a licensed school psychologist] ... who is acting in an official or professional capacity and knows, or has reasonable cause to suspect based on facts that would cause a reasonable person in a similar position to suspect, that a child under eighteen years of age, or a person under twenty-one years of age with a developmental disability or physical impairment, has suffered or faces a threat of suffering any physical or mental wound, injury, disability, or condition of a nature that reasonably indicates abuse or neglect of the child shall fail to immediately report that knowledge or reasonable cause to suspect to the entity or persons specified in this division.

Except as otherwise provided in this division or section 5120.173 of the Revised Code, the person making the report shall make it to the public children services agency or a peace officer in the county in which the child resides or in which the abuse or neglect is occurring or has occurred.

But what if it looks like retaliation to report?

Parents of a student with autism who missed several days of school for unspecified medical reasons sued a school district and its employees claiming retaliation. The parents had filed against the school district in court for allegations of violating the parents' and student's 1st, 4th and 14th Amendment rights. The parents alleged that the next day the school district and employees retaliating against the parents by reporting the parents to the child welfare authorities.

Concerns from the school arose because the medical absences were from a walk-in clinic and not from the student's pediatrician. The school also had prior concerns of hygiene with the student.

Surina v. South River Bd. Of Educ., 80 IDELR 93 (3d Cir. 2022)



Did the school district retaliate against the parents when they called children services due to the student's absences?

1. Yes



2. No



Practical Tips

Follow the law when it comes to reporting suspected abuse or neglect. When in doubt, report.

Do not “hold” on to a report until a situation spirals out of control and as an employee or a school district you are angry or frustrated at a parent.

Waiting to file can be considered retaliation in some cases. Educators need to be able to demonstrate that reports are made in good faith.



Student Discipline

Join: vevox.app ID: 125-128-097

What is student discipline? At its most basic, fundamental level.

Enter Text
and Press
Send

Fundamentally, student discipline is a change in placement.



Overview

1st 10 Days:

- No requirement for services, FBA, BIP, MDR

11th day plus:

- Provide services during discipline (regardless of change of placement)
- Determine if placement has changed (either 11+ consecutive days OR pattern involving 11+ days total)
- If there is a change of placement, generally must conduct MD and provide FBA and BIP as appropriate

Exceptions*:

- Offenses involving weapons, drugs, or serious bodily injury. Also for a child who poses a “substantial risk” of injury to self/others

An agreed upon change of placement can avoid all of the above

Suspension and Expulsions

Students on IEPs and 504 Plans can be suspended or expelled – subject to the following:

- **Rule 1:** The normal disciplinary procedures should be followed – IDEA & 504 do not allow districts to ignore procedures for discipline.
- **Rule 2:** Students may not be disciplined for having a disability (not nearly as simple as it sounds).
- **Rule 3:** Discipline does not eliminate the responsibility to provide FAPE, though it might alter what services look like and where they happen.
- **Rule 4:** Whether discipline constitutes a “change of placement” is what prompts many IDEA protections.

When Exactly Does a Disciplinary Change in Placement Occur?

Always

Removal is for more than 10 consecutive school days

Sometimes

Removal is substantially similar behavior to previous incidents that resulted in a series/pattern of removals or more than 10 cumulative days

To determine a pattern, consider additional factors such as length of each removal, total amount of time the child has been removed, and the proximity of the removals to one another.

Manifestation Determination Review Process

Must be performed within 10 days of any decision to change placement for discipline reasons.

A meeting between the **parent(s)** and **relevant members of the IEP team** (as determined by the parent and the district) to review all relevant information in the student's file to determine:

1. If the conduct in question was caused by, or had a direct and substantial relationship to, the student's disability; or
2. If the conduct in question was the direct result of the school district's failure to implement the IEP.

The conduct must be determined to be a manifestation of the student's disability if the school district, the parent(s), and relevant members of the IEP team determine that one of the two conditions was met.

Manifestation Determinations

“The intent of Congress in developing section 615(k)(1)(E) was that, in determining that a child’s conduct was a manifestation of his or her disability, it must be determined that “the conduct in question was caused by, or had a direct and substantial relationship to, the child’s disability, and ‘was not an attenuated association, such as low self esteem, to the child’s disability.’ (Note 237–245 of the Conf. Rpt., p. 225). The regulation, which follows the statutory language, thus accurately reflects the manner in which the Act describes the behavior of the child is to be considered in the manifestation determination.” (August 14, 2006 Analysis of Comments and Changes).

Manifestation Determinations – OLD language

NOTE: The updated regulations on MDRs do not require that the IEP team consider the appropriateness of the child's IEP and placement when making a manifestation determination. The old law read:

~~“IEP team would determine that behavior was not a manifestation of disability if all of the following were answered in the affirmative:~~

- ~~a) IEP/placement and services were appropriate and consistent;~~
- ~~b) the child's disability did not impair the child's ability to understand the impact and consequences of the child's behavior; and~~
- ~~c) the child's disability did not impair his/her ability to control the behavior.”~~



MDRs—Considering All the Facts

Rarely do all the facts line up; therefore, the MDR team should look at all the evidence presented and make a reasonable determination based on information available.

- Specific facts about behavior can be important.

MDR team should consider any information provided by the parent, including medical opinions.

- The team must take it into consideration, but this does not mean the team has to accept any medical opinion.

MDR team should take into consideration the student's unique disability and conduct.

- Generic information about what a particular disability label “is” is of limited value.



The manifestation determination is conducted by a team including the district, the parent, and “relevant” members of the IEP team.

- Determined by the district!

While parents have a right to invite additional participants to the MD review, they do not have the right to veto the district’s choice of team members.

No requirement for a vote, nor does the parent have veto power over the decision, nor must we have consent to impose a disciplinary change of placement.

- Be careful when parents make the “rounds” around a table asking for opinions.

MDR Process (cont'd)

- If the conduct **was** a manifestation of the child's disability:
 - Immediately return the child to the placement from which the child was removed
 - Conduct an FBA, unless the district had conducted an FBA before the behavior that resulted in the change of placement occurred, and implement a BIP (or review)
 - Rescind the discipline and remove it from the student's records.
- If the conduct **was not** a manifestation of the child's disability:
 - Continue with normal student discipline processes
 - Provide interim alternative educational services (allow the child to progress on IEP goals and participate in general education)

45 Day Rule Interim Alternative Educational Setting

May remove to an IAES for 45 days even when behavior is a manifestation when:

Drugs

- Knowing possession or use of illegal drugs, selling a controlled substance, soliciting the sale of a controlled substance.

Weapons

- Carries or possesses a weapon at school, school event, on school premises
Weapon: a device/instrument/material/substance used for or is readily capable of causing death or serious bodily injury, but not a pocketknife with a blade less than 2.5 inches.

Serious bodily injury

- Has inflicted serious bodily injury while at school, on school premises, or at a school function.

Substantial Likelihood of Injury to Self or Others

- Need to file for due process to access this IAES; it is ordered by IHO.

What is a serious bodily injury?

An injury of a mild concussion to one student and a broken nose to another did not involve serious bodily injury. - *Tehachapi Unified Sch. Dist.*, 106 LRP 22450 (SEA CA 02/07/06)

Where a student followed another student into the restroom and broke the other student's nose, there was no infliction of serious bodily injury. While it might be injurious, frightening and intimidating, a broken nose does not fit into IDEA's definition of infliction of serious bodily injury. – *Pocono Mountain Sch. Dist.*, 109 LRP 26432

When a teacher was kicked by the student and it resulted in her toes and shins becoming red and irritated, there was no serious bodily injury. She had no bruises, no bleeding, did not experience extreme pain, and required no medical care. – *in re: Student with a Disability*, 108 LRP 45824 (SEA WV 06/04/08)

Although a paraprofessional experienced pain, discomfort and disorientation after being hit by a student, there was no basis for sending the student to an IAES. – *in re: Student with a Disability*, 54 IDELR 139 (SEA KS 2010)

What is a serious bodily injury?

Where a principal was kicked and claimed extreme physical pain, his statements and actions following the incident revealed otherwise. He stated that he felt a “sharp pain” and went home for the rest of the day. However, he did not seek medical attention, drove 200 miles the next day, and waited three weeks to receive a cortisone shot. – *Bisbee Unified Sch. Dist. No. 2*, 54 IDELR 39 (SEA AZ 2010)

After the teacher asked the 6-year-old student to clean up, he ran at her with all his force, hitting her in the chest with his head. Doctors diagnosed her with an internal chest contusion. She was prescribed two medications that failed to resolve the pain and saw a physician three times in one week after her initial doctor’s visit due to her pain. She had to curtail her daily activities, missed a week of work, and described her pain as a “10.” **This was serious bodily injury.** – *Westminster School District*, 56 IDELR 85 (2011)



Are these weapons?

Scissors that have dull blades, rounded tips, and could only cut paper when the blades came together when the scissors were pointed at a classmate during a fit of anger?

A pencil used to stab a classmate?

Metal awls/spikes just under two inches in length?

Cigarette lighter with a retractable blade?



A note about drugs

"Controlled substance" means a drug or other substance identified under schedules I, II, III, IV, or V in Section 202(c) of the Controlled Substances Act (21 USC 812 (c)). 34 CFR 300.530 (i)(1).

"Illegal drug" means a controlled substance.

It does not include a controlled substance that is legally possessed or used under the supervision of a licensed health care professional or that is legally possessed or used under any other authority under that Act or under any other provision of federal law.

It also **does not** include alcohol.



Some Questions Should We Be Asking... (MDR)

- Is there a **nexus** between student's disability and misconduct?
 - Was the conduct caused by or did it have a **direct and substantial relationship** to the child's disability?
- Are we considering the the student's **individual disability** as opposed to the textbook definition of that disability?
- Was the conduct caused by the district's **failure to implement** the IEP?

Only consider the exceptions AFTER you've gone through the steps.

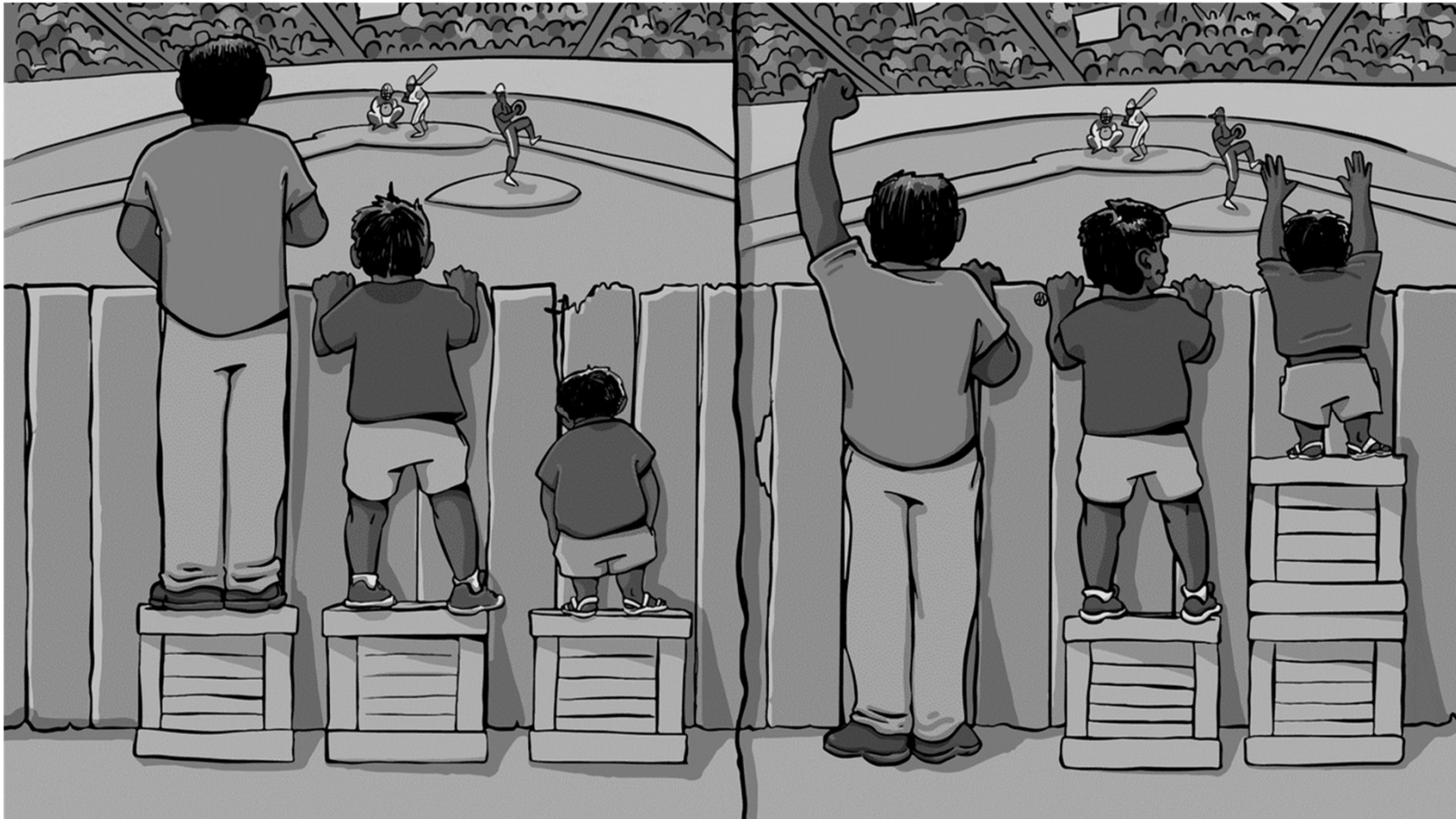


Practical Tips

- Understand how critical documentation is. The more specific we are in detailing student needs, behaviors, manifestations, the more likely we can distinguish behavior that **are** manifestations vs. behaviors that are not, and thus subject to discipline.
 - The real work is to be done in creating the ETR: give detailed descriptions of what a diagnosed disability looks like for this child, break down individual responses on behavior inventories
- Train administrative staff on procedures of MDRs, including what documents should be reviewed.
- Choose your team members/experts carefully and consider parent experts fairly (or the IHO, SLRO, court will).
- DO NOT take a vote (but also make sure meeting leaders know how to respond when the team appears split).



504 Eligibility and Plans



ennisbritton.com



You conduct an initial evaluation for a student under IDEA. Student is not eligible under IDEA, but could be under 504. What do you do?

1. Wait for the parent to request a 504.



2. Offer a 504 evaluation.



3. Offer a 504 plan.

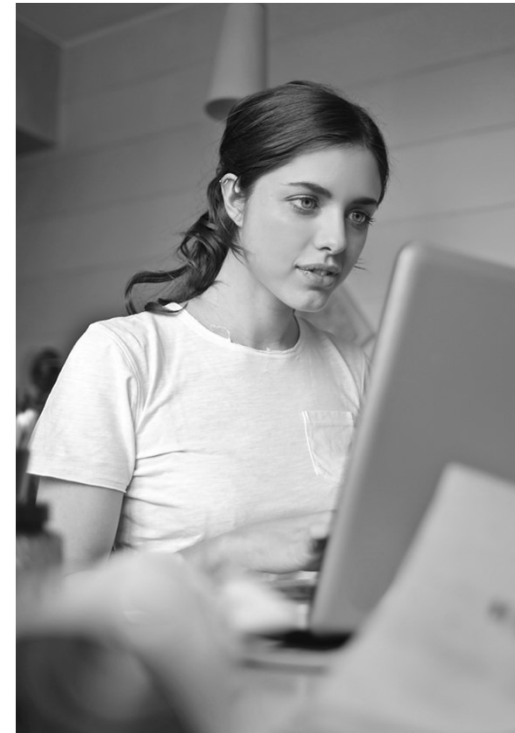


The Rehabilitation Act of 1973

The Rehabilitation Act prohibits discrimination on the basis of disability in programs conducted by federal agencies, in programs receiving federal financial assistance, in federal employment, and in the employment practices of federal contractors.

Section 504 of the Rehabilitation Act of 1973

“No otherwise qualified disabled individual in the United States ... shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”



Title II

Title II applies to State and local government entities, and, in subtitle A, protects qualified individuals with disabilities from discrimination on the basis of disability in services, programs, and activities provided by State and local government entities.

Title II **extends the prohibition on discrimination established by section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 794, to all activities of State and local governments** regardless of whether these entities receive Federal financial assistance.



Section 504 and the Americans with Disabilities Act

Section 504 was law for nearly 2 decades before the Americans with Disabilities Act

- However, because the ADA has such broad application, it gets a lot of attention with formal guidance, regulations, litigation, investigations, etc.
- Most recent significant revisions to the ADA came in 2009 with the ADA Amendments Act

The Office for Civil Rights and courts will look to the ADA to guide interpretations of Section 504



The ADA Amendments Act in More Detail

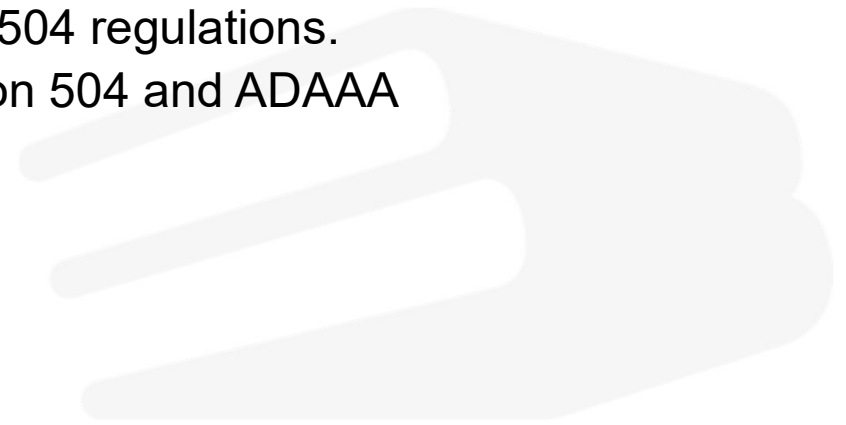
January 2009: ADA Amendments Act (ADAAA)

- Greatly expanded the meaning and interpretation of *disability* under ADA (and Section 504)
- EEOC drafted regulations for ADAAA – effective May 24, 2011

The ADAAA and final regulations make it much easier for an individual to establish that he or she has a disability protected by the Act.

The ADAAA included a conforming amendment to the Rehabilitation Act of 1973 that affected the meaning of *disability* in Section 504 regulations.

- Definition of *disability* – same under Section 504 and ADAAA



Disability under Section 504

Definition of disability

- Has, or has a record of having, or is regarded as having a **physical or mental impairment** that **substantially limits** one or more **major life activities**

“Has a record of having”

- Has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities

“Is regarded as having”

- Has a physical or mental impairment that does not substantially limit major life activities but that is treated by a recipient as constituting such a limitation
- Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment
- Has none of the impairments defined in paragraph (j)(2)(i) of this section but is treated by a recipient as having such an impairment

Our school tells parents that without a doctor's note a student will not qualify for a 504. Parent then turns in a doctor's script ordering a 504. Are we required to follow this order?

1. Yes

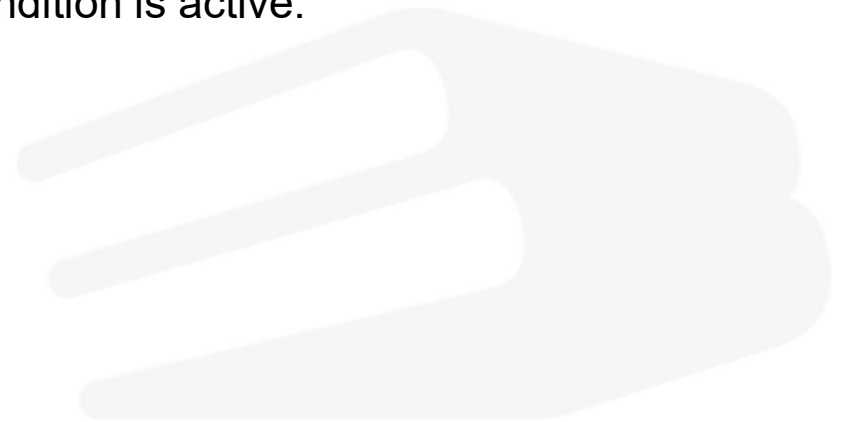


2. No



Substantial Limitation

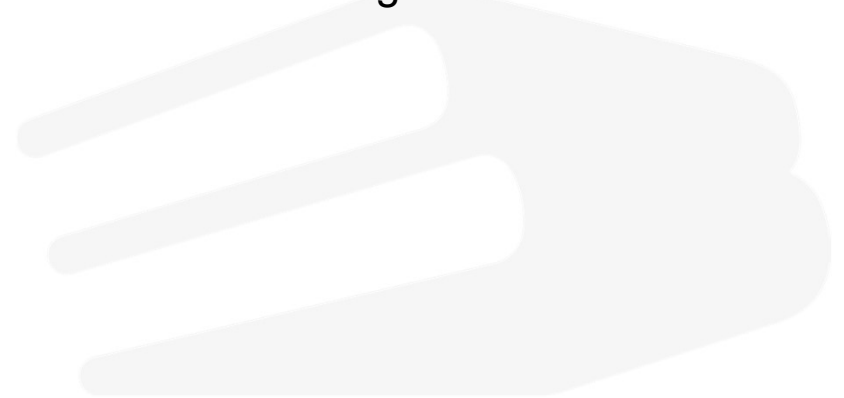
- What does this mean?
- ADAAA explicitly addressed the heavy burden imposed by the “substantially limited” precedents in its “findings and purposes” section.
- Congress found the case law interpreted this phrase too restrictively.
 - Now ADAAA instructs courts to construe this requirement more liberally, “in favor of broad coverage.”
- An impairment that is episodic or in remission is now considered a disability if it substantially limits a major life activity when the condition is active.



A Note on Temporary Disability under Section 504

Students with temporary disabilities are eligible for services under Section 504 if the severity of the disabilities are such that they result in a substantial limitation of one or more major life activities for “an extended period of time.”

- OCR did not define “extended period of time” but pointed out that the ADAAA states that an individual is not “regarded as” disabled if the impairment is transitory or minor.
- ADAAA defines a **transitory** impairment as one with an actual or expected duration of **six months or less**.
- OCR may be hinting that “an extended period of time” must be longer than six months.



Mitigating Measures

School districts cannot consider the ameliorating effects of mitigating measures that the student is using when determining whether a student is eligible to receive accommodations under Section 504.

- Medication
- Medical equipment and devices
- Prosthetic limbs
- Low-vision devices
- Hearing aids
- Mobility devices
- Oxygen therapy equipment
- Use of assistive technology
- Reasonable accommodations
- Learned behavioral or adaptive neurological modifications
- Psychotherapy
- Behavioral therapy
- Physical therapy

Exception: Ordinary eyeglasses or contact lenses



Non-exhaustive List of Life Activities

Caring for one's self

Performing manual tasks

Bending

Walking

Seeing

Hearing

Speaking

Breathing

Learning

Reading

Concentrating

Thinking

Working

Operation of major bodily functions

- Functions of immune system
- Normal cell growth
- Digestion
- Neurological
- Respiratory
- Circulatory
- Reproductive
- Bowel and bladder functions.

Section 504 Evaluations

An evaluation must be done on any student who, because of a known or suspected disability, might need special education or related services.

- What are we looking for in an evaluation?
 - Physical or mental impairment
 - Evidence of such impairment substantially limiting a major life function
 - QUESTION: Must a student's learning be impaired to qualify for special education services under Section 504? Answer – NO!

The evaluation must be administered to ensure results will accurately reflect a student's achievement level and not the student's impairments, unless the impairments are the factors that need to be measured.

If the District determines, based on the facts and circumstances of the individual case, that a medical assessment is necessary to conduct a Section 504 evaluation in order to determine whether a child has a disability under Section 504 and needs special education or related services because of a disability, the District must ensure that the student receives this assessment **at no cost** to the student's parents.

- Either way, the evaluation must be aimed at assessing specific and particular areas of need.

Timing of Evaluations

- The Regulations do not specify a time period permitted for evaluations.
- However, OCR has concluded that regulations implicitly require evaluations to be completed within a reasonable period of time.
- Likewise, the regulations do not give specific reevaluation timelines.
- IDEA may guide decisions about reasonableness and frequency of reevaluations.



No Entitlement to Independent Evaluations at Public Expense

- Unlike IDEA, Section 504 does not include a parental right to seek an independent evaluation at the public's expense if they disagree with the evaluation results.
- If a parent does get an independent evaluation at his/her own expense, it should be considered by the Section 504 team.



Student has had enough absences to warrant an AIT. During the AIT meeting parent presents the team with information regarding medical diagnoses. Reviewing the absence report, most absences are labeled "doctor." Do we have an evaluation issue under 504?

1. Yes
2. No
3. Maybe

Absences and Evaluations

Medical problems and a high number of medically related absences are likely notice of a suspected disability requiring the district to evaluate for Section 504, even if general education interventions and accommodations are effective.

- Districts should have a process in place to identify students with health needs who are not referred to intervention teams.

Knowledge of mental health diagnosis, high number of medical absences, and difficulty completing grade-level work should prompt an evaluation.

- Even when you suspect that absences are primarily due to truancy, be sure to carefully document which absences are due to a medical condition. Use caution before stating that the district can't "rule out absences/lack of instruction" before evaluating a student for a disability.

Student receives medication from the school nurse daily due to ADHD and asthma. Student has typical grades and is otherwise not on administration's radar. Does this student need a 504 plan?

1. Yes

0%

2. Maybe

0%

3. No

0%

Health Care Plans and Nurses

Failure to identify and evaluate students on Individual Health Care Plans (IHCPs) may violate Section 504.

- Districts should train school nurses regarding signs of suspected disability and establish a referral procedure for identifying students on health plans that are suspected of having a disability under Section 504.
- Districts must evaluate a student's eligibility for a Section 504 plan and related aids and services, rather than automatically writing a health care plan.



Good Grades Do Not Equate to No Eligibility

Districts cannot assume that high-achieving students are not eligible for Section 504.

- Train teachers regarding the expanded eligibility under Section 504.
- Additionally, teachers should be required to inform the Section 504 coordinator and/or school psychologist of any parental request (including verbal requests) for an evaluation, regardless of whether the teacher suspects a disability.



Next Steps after Identification

- If we as a team have identified a student as having a disability (i.e., yes, the student has a physical or mental impairment that substantially limits one or more major life activities), then the **student is 504-eligible**.
- Then we need to consider as a team if/what accommodations, modifications or services the student needs in order to receive FAPE under 504 (i.e., develop a 504 plan).
 - Clearly, these decisions will be student specific.
 - We can consider the student's use of mitigating measures at this time.
- A 504 plan is merely a description of regular and special education and related aids and services, including any needed accommodations and/or modifications, to be provided to the student.

Section 504 & FAPE

Standard of FAPE : Section 504's FAPE standard **compares** whether the provision of general and special education and related aids and services are designed to meet the individual needs of students with disabilities as **adequately** as the needs of nondisabled students are met.

- An aid or service must afford disabled persons equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement, in the most integrated setting appropriate to the person's needs.
- It does **not** require the aid or service to produce the identical result or level of achievement for disabled and nondisabled persons.

Are there any Limits?

- Team determination that a modification/accommodation is not necessary
- Fundamental alteration of program
- Anything else?



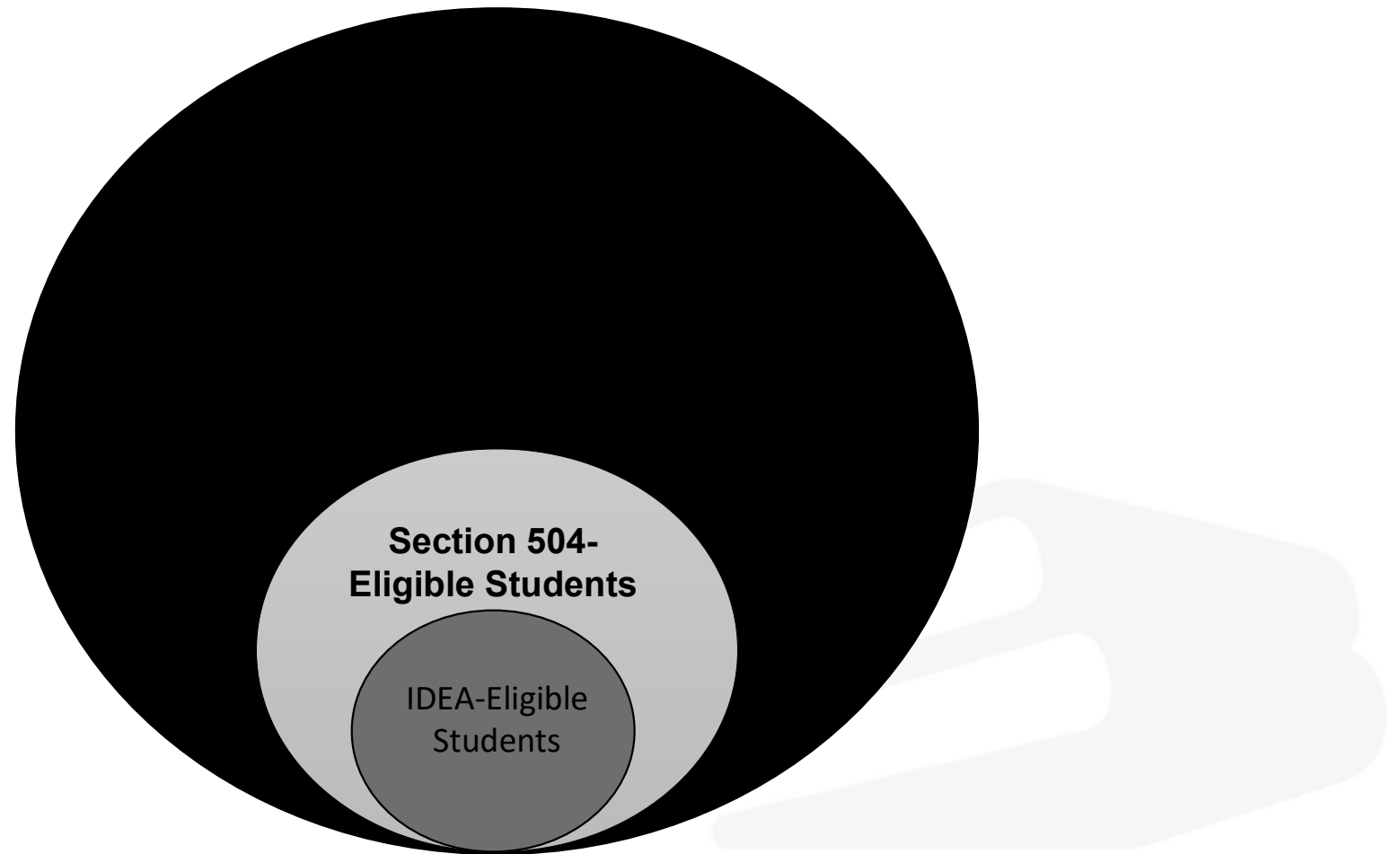
Distribution of 504 Plans

- Parents or guardians should receive a copy of the 504 plan. Student should be offered one as well.
- All staff working with the 504 plan should be provided a copy of the plan.
 - This can include teachers, nurses, counselors, coaches.
 - Consider if all parts of the 504 plan are necessary to share with all staff or if you want to provide it piecemeal to certain staff.
- The building 504 coordinator or compliance officer should keep a copy of the 504 plan in a designated location.



Final Note: Let's Compare Section 504 and IDEA

Let's Compare IDEA and Section 504 Eligibility . . .



Eligibility: Section 504 vs. IDEA

Students who qualify for IDEA generally qualify for Section 504.

- Generally, satisfying obligations under IDEA satisfies obligations under 504

Eligibility questions under IDEA

- Does the student have a disability in an IDEA eligibility category?
- Does the student **require** special education and related services?

Eligibility questions under Section 504

- Does the student have a physical or mental impairment?
- Does the impairment substantially limit a major life activity?

Comparing Section 504 and IDEA

Compliance

- IDEA – Monitored by ODE
- Section 504 – Monitored by Office for Civil Rights
- Both provide for administrative hearings and complaint processes. 504 allows a parent to go directly to court without exhausting administrative remedies.

Funding

- IDEA – \$
- Section 504 – No \$

Section 1983 claims for money damages

- IDEA – Probably not
- Section 504 – Allows

FAPE during disciplinary removal

- IDEA – Required
- Section 504 – Not required (but cannot discriminate)



Some Questions Should We Be Asking... (504s)

- Is the impact of the physical or mental impairment substantial?
- Is a 504 plan necessary to allow the student access to the educational program?
- Do we have data to support the use of accommodations / modifications?
 - What does THIS student need to have equal access?
 - What about to remove any from a prior 504 plan?



Practical Tips

- Beware of universal supports and overreliance on these. If a student needs specific supports in order to receive equal access to the educational program, then we cannot state that universal supports are available to all.
- Keep coming back to the distinction that 504 is an anti-discrimination law, while IDEA is more about building up students with disabilities. 504 is more about opportunity, and IDEA is more about outcomes.



*Current and On-the-Horizon
Legal Issues: How to Spot
and How to Avoid*

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Thank You!

The information in this handout and presentation was prepared by Ennis Britton Co., L.P.A. It is intended to be used for general information only and is not to be considered specific legal advice. If specific legal advice is sought, please consult an attorney.

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