

# Students with Disabilities and Section 504 of the Rehabilitation Act

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# Disclaimer

This presentation is intended for educational purposes and sharing of information. It should not be construed as legal advice and any responses to questions are based on general principles and for specific questions, you should consult with your legal counsel.

# Recent guidance from US DOE OCR and OSERS

- ▶ On July 19, 2022, the Office of Civil Rights (OCR) and Office of Special Education and Rehabilitative Services (OSERS) issued guidance regarding discipline of students with disabilities under Section 504 of the Rehabilitation Act (504) and the Individuals with Disabilities Education Act (IDEA).
- ▶ This presentation will focus on Section 504 and a school district's responsibilities under Section 504 and will briefly discuss the disciplinary provisions of IDEA.

# Supporting Students with Disabilities and Avoiding the Discriminatory Use of Student Discipline under 504 of the Rehabilitation Act of 1973.

- ▶ This document was issued by the US Department of Education Office of Civil Rights on July 19, 2022.
- ▶ The document can be found at <https://www2.ed.gov/about/offices/list/ocr/docs/504-discipline-guidance.pdf>

# Fact Sheet: Supporting Students with Disabilities and Avoiding the Discriminatory Use of Student Discipline Under Section 504 of the Rehabilitation Act of 1973

- ▶ This document released by OCR on July 19, 2022 can be found at <https://www2.ed.gov/about/offices/list/ocr/docs/504-discipline-factsheet.pdf>

# Questions and Answers: Addressing the Need of Children with Disabilities and IDEA's Discipline Provisions

- ▶ This document was issued by OSERS on July 19, 2022.
- ▶ This document can be found at <https://sites.ed.gov/idea/files/qa-addressing-the-needs-of-children-with-disabilities-and-idea-discipline-provisions.pdf>

# Positive Proactive Approaches to Supporting Children with Disabilities: A Guide for Stakeholders

- ▶ This document was issued by OSERS on July 19, 2022
- ▶ This document can be found at <https://sites.ed.gov/idea/files/guide-positive-proactive-approaches-to-supporting-children-with-disabilities.pdf>

# Key Policy Letters Signed by the Education Secretary or Deputy Secretary: Letter on School Discipline

- ▶ This document was issued on July 19, 2022 by the Secretary of the U.S. Department of Education.
- ▶ This document can be found at <https://www2.ed.gov/policy/gen/guid/secletter/220719.html>



# Section 504 and a Free Appropriate Public Education (FAPE)

- ▶ FAPE requires schools to provide students with disabilities regular or special education and related aids and services, that
  - ▶ 1. Are designed to meet the student's individualized educational needs as adequately as the needs of students without disabilities are met; and
  - ▶ 2. Satisfy 504's requirements for evaluation, placement, educational setting and procedural safeguards.
    - ▶ 34 C.F.R. § 104.33; 34 C.F.R. § 104.36

# OCR Enforcement

- ▶ OCR has broad enforcement authority over Section 504 including all students who are IDEA eligible or only 504 eligible.
- ▶ That is, all students who are IDEA eligible are also 504 eligible and OCR can investigate and enforce violations against IDEA eligible students who may not have a 504 plan.
- ▶ OCR has broad authority to investigate and remedy violations of Section 504

# Child Find and Section 504

- ▶ Child Find is an ongoing affirmative obligation under IDEA.
- ▶ Under Section 504, Districts also have an ongoing affirmative obligation to identify those students who have disabilities with educational impact.
- ▶ When a student is eligible under Section 504, the District has an obligation to provide FAPE.

# Standards for Child Find and Section 504 when Students have behavioral needs

- ▶ The standard for when to evaluate a student with behavior needs under Section 504 is whether the District has reason to believe that a student's behavior can be indicative of a disability even when the student is academically successful.
- ▶ That is, Districts may have a 504 Child Find obligation when students maintain adequate grade but have frequent office referrals, or excessive verbal outbursts or disrupt of instructional time.

# Evaluations and Section 504

- ▶ In addition to a District's Child Find obligation under Section 504, Parents can request an evaluation of their child. These evaluations must be conducted at no cost to the Parents. 504 evaluations are not limited in number.
- ▶ 34 C.F.R. § 104.35 (a) and (b)

# 504 teams and Placement

- ▶ After an evaluation has been completed, the 504 team must meet to determine placement. 34 C.F.R. § 104.35(c)
- ▶ Placement can include behavioral supports needed for an individual student.
- ▶ Students on a 504 plan also must be educated with regular education students to the maximum extent possible. The principles of least restrictive environment (LRE) under IDEA also should be considered with Section 504 students.

# Disciplinary Removals under Section 504 and IDEA

- ▶ See 34 C.F.R. § 104.34; 34 C.F.R. § 104.33(a),(b); 34 C.F.R. § 104.35(a)(c) and 34 C.F.R. § 104.36.
- ▶ Disciplinary removals are removals for a violation of a school rule or code of conduct.
- ▶ Some examples of disciplinary removals include detention, ISS, OSS, bus suspensions, expulsions, disciplinary transfer to an alternative school, referrals to law enforcement.
- ▶ This is not an exhaustive list.

# Disciplinary Removals Under Section 504

- ▶ Shortened school days because of a student's behavior would be a disciplinary removal and must be counted even if the shortened school days is only minutes.
- ▶ Informal removals from a class or school also would count as a disciplinary removals. OCR considers the effect of the removal and not what the removal is called.
- ▶ **IMPORTANT CAVEAT:** Failure to document removals accurately may be considered a denial of FAPE by OCR.



# Manifestation determination and Section 504

- ▶ Section 504 does not use the term manifestation determination but it can be applied to Section 504.
- ▶ When a student has had disciplinary removals from class or school for 10 consecutive days or disciplinary removals totaling 10 days in the school year that would be a pattern requiring an evaluation or manifestation determination to ascertain whether the individual student's removals were based on the student's disability.
- ▶ The 504 team should meet and review all relevant information to determine what was the basis for the behavior that warranted a disciplinary removal.
- ▶ The 504 team must also consider where changes are needed to the 504 plan to ensure student continues to receive FAPE.

# Manifestation Determination Under Section 504

- ▶ The 504 team should review all relevant information from a variety of sources.
- ▶ One factor to consider is whether there was a failure to provide needed supports.
- ▶ When determining if the 504 plan needs to be changed, the team should consider the impact of student's behavior on the student and others within student's placement.
- ▶ There is no requirement to provide services if the violation was not a manifestation of student's disability.

# When Behavior is a Manifestation of Disability

- ▶ When the behavior is a manifestation of the student's disability, the student cannot be excluded from school.
- ▶ The 504 team must meet and when needed, conduct additional evaluations to determine what changes are needed to ensure provision of FAPE.
- ▶ This can include a functional behavior assessment (FBA) or behavioral intervention plan (BIP) or some other supports and services to allow the student to continue in the present placements.
- ▶ Sometimes, because of the student's behaviors, an alternative placement is required because additional supports and services will not remedy the student's behaviors that impact on student's and others' learning.

# When Behavior is not a *Manifestation* of Student's Disability

- ▶ When the behavior is not based on student's disability, then the student can be disciplined like any other non-disabled student.
- ▶ Unlike the obligations under IDEA, a District can provide but is not obligated to continue to provide educational services.
- ▶ However, if suspended students received packets of educational materials during their suspension, then the 504 disabled student must also receive appropriate educational materials.

# Discrimination Under Section 504

- ▶ Discrimination as defined by OCR includes excluding or denying benefits to or discriminating on the basis of a student's disability

# Discrimination Under Section 504

- ▶ Three factors are commonly considered by OCR when determining whether discrimination occurred
  - ▶ 1. Were reasonable modifications provided to student?
  - ▶ 2. Was the student subjected to discriminatory differential treatment?
  - ▶ 3. Were their discriminatory effects as a result of district's policies, practices and procedures?

# Section 504 Prohibition of Discrimination

- ▶ Section 504 prohibits discrimination against “a qualified person with a disability” (29 U.S.C. 794 (a) and 34 C.F.R. §104.)
- ▶ “on the basis of disability in the recipient’s Federally assisted program or activities.” (34 C.F.R. § § 104.3 (k) (1-4).
- ▶ This applies to policies, procedures and practices related to disabled students’ discipline.
- ▶ Districts must ensure that contractors or employees through other licensing agreements do not discriminate against disabled students.

# Section 504 Discrimination Protections and IDEA

- ▶ IDEA eligible students have rights and protections under Section 504.
- ▶ OCR has enforcement authority for any discrimination of disabled students whether they are 504 only students or are IDEA eligible.
- ▶ OCR has broad authority to investigate and impose sanctions against Districts that discriminate against disabled students or deny those students FAPE.



# 504 Only Eligibility

- ▶ All IDEA students would be eligible under 504 but an IEP should address all of the student's needs so there is no need for an IEP and 504 plan.
- ▶ 504 only eligible students are those students that may need accommodations or supplemental aids and services but do not need the specialized instruction required for an IDEA eligible student.
- ▶ 504 only students may need behavioral supports or services when their disability based behaviors interfere with their own or other students' learning.
- ▶ 504 only student's plans must be individualized and cannot rely on stereotypes or other improper criteria for determination of needed services.

# Needs of 504 only students

- ▶ The need for services is determined by the 504 team. Although not required, it is appropriate to have a written 504 plan for an individual student.
- ▶ The needs for a 504 only student may change over time, which may trigger additional evaluations or additional data to determine an individual student's needs.
- ▶ Needed evaluations must be completed in a timely manner and lack of qualified evaluators cannot justify a delay in the evaluation.
- ▶ Also, delays in evaluation should not happen because a student is performing well academically.

# Behavioral Supports for 504 only Students

- ▶ If needed, the District must provide the behavioral supports to ensure a student receives FAPE.
- ▶ These behavioral supports can include school based counseling, social work or mental health services, physical activity and self regulation or cooling down period.
- ▶ In some instances, a BIP is needed and developed.

# Behavioral Intervention Plan (BIP)

- ▶ A BIP should include
  - ▶ 1. Replacement behaviors for the negative behaviors that the team is trying to eliminate.
  - ▶ 2. Who will teach the replacement behavior and how will that happen.
  - ▶ 3. What will happen if the negative behaviors continue.
  - ▶ 4. How will the student's behavior be monitored and how will it be determined when BIP is not effective.

# When BIP is not effective

- ▶ A BIP should be subject to change as the replacement behavior increases or negative behavior does not change.
- ▶ When the BIP needs to change, it is responsibility of the appropriate team.
- ▶ Behavioral supports through the BIP or 504 plan should address academic, nonacademic and extracurricular activities as needed

# Risk or Threat Assessments

- ▶ Nothing in Section 504 prohibits a District from completing risk or threat assessments but those assessments must not discriminate against the disabled student
- ▶ Coordinate the risk or threat assessment with the 504 team to understand and consider the individual student's disabilities and needs.
- ▶ Students on a 504 plan may be placed at an alternative setting if the 504 team determines that placement ensures the safety of student and others.

# Discipline of 504 Only Students for Drug or Alcohol Use

- ▶ There is an exception and 504 only students can be subject to discipline if they are currently engaging in the use of illegal substances including alcohol.
- ▶ Previous use or treatment does not justify disciplinary action.

# Reasonable Accommodations

- ▶ 504 eligible students may require reasonable accommodations because of the Student's disabilities and needs.
- ▶ These accommodations should be determined by the 504 team.
- ▶ Failure to provided reasonable accommodations may be a denial of FAPE



# Differential Treatment Under Section 504

- ▶ When OCR suspects differential treatment, they will follow a three part test
  - ▶ 1. Was there differential treatment?
  - ▶ 2. Was there a legitimate, non discriminatory reason for the differential treatment?
  - ▶ 3. Was the stated reason a pretext?

# Examples of Discriminatory Effects

- ▶ These can include denying student access to activities or items available to non-disabled students
- ▶ This can also include excluding students based on their disability.

# Discipline under IDEA

- ▶ When a change of placement has occurred, then a manifestation determination must be held with the members of the IEP team.
- ▶ Change of placement is when there has been a removal for disciplinary 10 consecutive days, or a series of removals that constitute a pattern such as:
  - ▶ A. series of removals is more than ten days;
  - ▶ B. behavior is substantially similar to behavior in previous incidents;
  - ▶ C. additional factors such as length of removal, total time child removed and proximity of removals.

# In school suspension (ISS)

- ▶ An ISS counts as part of the ten days unless:
  - ▶ 1. Student is afforded the opportunity to appropriately participate in the general curriculum;
  - ▶ 2. Student continues to receive the services specified in the IEP; and
  - ▶ 3. Student continues to participate with nondisabled children to the extent they would have in the child's current placement.
- ▶ Must meet all three factors and continued ISS would trigger need for an IEP meeting to determine what additional services and supports are needed

# Examples of Disciplinary Removals

- ▶ If transportation is a related service on the student's IEP, removal from the bus would count as part of the ten days.
- ▶ If transportation is not a related service then removal from the bus would not count as part of the ten days.
- ▶ Removals from extra-curricular or nonacademic activities may be part of the ten days for a change of placement.
- ▶ Disciplinary removals from a class or program on a regular basis count as part of the ten days even if it is for a brief period of time.
- ▶ Sending a student home early because of behavior would count as part of the ten days.

# Manifestation determination

- ▶ A manifestation determination must occur whenever there is a change of placement.
- ▶ The MD is conducted by parents, District personnel and relevant IEP team members.
- ▶ The team must consider all relevant information to determine if the conduct that gave rise to the violation of the code of conduct was caused by, or had a direct and substantial relationship to the child's disability or
- ▶ The behavior was the direct result of the District's failure to implement the IEP.

# Actions following MD

- ▶ If the behavior was a manifestation of the disability then an FBA must be conducted and implement an BIP as needed or modify the BIP if already developed.
- ▶ The student returns to the same placement unless the parent and District agree to a change of placement.
- ▶ Special rules when the removal is for weapons, drugs, alcohol or serious bodily injury.
- ▶ If the behavior was the result of failure to implement the IEP, then District must remedy the deficiencies.
- ▶ If not a manifestation, may discipline student as would discipline non-disabled students but must continue to provide educational services.

# When Student is danger to self or others

- ▶ Risk or threat assessment: Should involve the IEP team so that the student's disability and other relevant information is considered
- ▶ IAES are options when the student had used drugs, alcohol, has weapons or has caused serious bodily injury.
- ▶ The IEP team should meet to determine if additional supports or services are needed or a more restrictive placement is justified.
- ▶ While LRE must be considered by the IEP team, the District also has an obligation to consider the risk to other students as well as the student that is dangerous.



# Comparison of IDEA vs 504

	IDEA	504
Procedural Safeguards	Yes, dispute resolution and SEA enforcement	Yes, OCR enforcement
Services	Specialized instruction and related services  Has to be written down	Accommodations including a BIP, FBA, and/or special classroom  Not required but recommended
Eligibility	Have one of 13 disabilities and needs specialized instruction	Disability that limits one or more major life activities which can include education
Child Find	Yes, ongoing affirmative	Yes, ongoing affirmative

# Comparison of IDEA vs 504

	IDEA	504
Discipline	<p>Has ten day change of placement triggering MD</p> <p>After ten days if behavior is a manifestation cannot impose punishment and modify IEP</p>	<p>Has ten day change of placement triggering MD</p> <p>After ten days if behavior is a manifestation cannot impose punishment and modify 504</p>
Manifestation Determination	<p>Standard: was caused by, or had a direct and substantial relationship to, the child's disability, or if the behavior in question was the direct result of the LEA's failure to implement the IEP</p>	<p>Called an evaluation but is essentially a MD</p> <p>Standard: caused by or directly and substantially related to the student's disability or disabilities</p>
Continued provision of services	<p>Yes, while subject to disciplinary removal</p>	<p>No, unless services are provided to nondisabled students</p>

Questions?

Thank You