

ADVANCED SECTION 504 AND ADA SCHOOL COMPLIANCE ISSUES

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I. BULLYING/HARASSMENT

Sources of Legal Authority

The Alabama Student Harassment Prevention Act
(May 20, 2009).

Office of Civil Rights – Letter of 10-26-10
Letter of 07-25-00

Federal Court Opinions

The Alabama Student Harassment Prevention Act

- Defines harassment as a continuous pattern of intentional behavior that takes place on school property, on a school bus, or at a school-sponsored function.
- Includes, but is not limited to, written, electronic, verbal or physical acts that are reasonably perceived as being motivated by any characteristic of a student, or by the association of a student with an individual who has a particular characteristic defined in the local board's model policy.

The Alabama Student Harassment Prevention Act

- States that it is the sole responsibility of the affected student, or parent or guardian of the affected student, to report incidences of harassment to the principal or his or her designee.

Disability Harassment Under Section 504/ADA

- Disability harassment under Section 504 and the ADA is intimidation or abusive behavior towards a student **based upon the student's disability** that creates a hostile environment by interfering with or denying a student's participation in or receipt of benefits, services, or opportunities of a school district's programs and/or activities.

“BULLYING” VERSUS “HARASSMENT”

- For purposes of Section 504 and the ADA, the terms “**bullying**” and “**harassment**” are different.
- Section 504 and the ADA do not utilize the term **bullying**. Instead, these laws prohibit unlawful **harassment**.
- Harassment exists when the misconduct at issue has been taken against a disabled student **because of the student’s disability status**.

OCR Disability Harassment Analysis

- 1. Was the student harassed based on disability?
- 2. Was the harassment sufficiently severe, persistent, or pervasive?
- 3. Did the school district have actual or constructive notice of the harassment?
- 4. Did the school district take prompt and effective action?

Additional OCR Obligations for Protected Classes


If bullying or harassment is directed towards a protected class as defined by Title VI (race, Color, national origin), Title IX (gender), **Section 504, IDEA, or the ADA (disability)**, school districts have additional obligations beyond state law requirements.

Additional OCR Obligations for Protected Classes

- School administrators are on “notice” of harassment that occurs in plain sight, is widespread, or well known to include harassment in hallways, academic or p.e. classes, extracurricular activities, recess, or on the school bus.

Additional OCR Obligations for Protected Classes

- School districts cannot rely on how victim labels the incident; but, must determine whether the nature of the incident implicates the student's federal civil rights.
- In addition to punishing the perpetrator and counseling the victim, a school district must take steps to prevent recurrence and eliminate any hostile environment.



Remember....School administrators failing to investigate and address disability harassment/bullying can be sued for money damages by the parent and student.

Recommended Practices to Address Harassment

- Provide policy, procedures, and practices that encourage the reporting and resolving claims of harassment. Revise if needed.
- Disseminate of existing policies and procedures as well as identification of school's Section 504 and ADA coordinator.
- Investigate all complaints and observations of potential disability based bullying/harassment.

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- Generate written findings of your interviews and investigation.
 - Provide staff, student, and parent training if needed as to recognizing harassment and responding to incidents of harassment.

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- Take steps to ensure that the bullying/harassment will not occur in the future.
 - Provide ongoing monitoring of the situation.
 - Update victim's parents as to findings.



II. ATTENDANCE/TRUANCY

COMMON FACT PATTERN

- Student has just missed his upteenth day of school without explanation.
- District's attendance policy requires school to refer parent to truancy court after ____ days of unexcused absences.
- Student is (again) in clear violation of policy.

COMMON FACT PATTERN

- The District's next step is clear..... **Right?**
- *Well not so fast*, if the student at issue has a disability (IDEA or Section 504) or is suspected of having a disability.
- Evaluating behavioral needs of disabled students to determine if absenteeism is related to a disability and if so providing behavioral supports and strategies prior to initiating truancy charges are necessary steps for a school district to avoid lawsuits.

TRUANCY AND THE DISABLED STUDENT

- Schools must be very cautious in facilitating truancy complaints against a parent when there is a suspicion that the student's excessive absences may be the result of a mental health or behavioral impairment.
- Schools that fail to investigate the reason for excessive student absences despite such a suspicion run the risk of IDEA/Section 504 lawsuits alleging a child find violation.

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- IDEA and Section 504 both contain a “child find” mandate for schools to locate, identify, and evaluate students suspected of having a disability.
 - Significant absences along with suspicion by school personnel that the student may have a mental health or behavioral impairment possibly resulting in the absences means that the child find duty is triggered.

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- For the IDEA/504 eligible students who refuse to regularly attend school, the service team must address this issue through the “use of positive behavioral interventions and supports and other strategies, to address the behavior.” 34 CFR 300.324(a)(2)(i).
 - Once a student is IDEA/504 eligible, this requirement exists regardless of whether the behavior arises from the student’s disability. 71 Fed. Reg. 46,547 (2006).

Broward Co. Sch. Dist., 61 IDELR **265 (OCR 2013).**

- 1st grade student exhibited ongoing absences thru out the school year which exceeded the number of absences allowed by the school district's attendance policy.
- Absences had occurred over the previous 6 months.
- Evidence established that school district was aware of student's psychological diagnosis of bipolar.
- OCR held that excessive absences and notice of bipolar condition triggered duty to refer/evaluate under IDEA.

District of Columbia Pub. Schools, **114 LRP 11740 (2014).**

- 9th grade special education secondary to an Other Health Impaired classification began to exhibit excessive and unexcused absences.
- School had never evaluated or addressed the attendance issue thru the student's IEP.
- Parent pursued a due process complaint upon school's pursuit of truancy charges.
- Parent prevailed.
- Hearing officer held school should have conducted a reevaluation and provided a placement/program appropriate to curb the student's extreme truancy. ²³

Maine Sch. Administrative Dist., 20 **IDELR 298 (SEA ME 1993).**

- Student had accumulated 92 days of absences during the previous school year.
- School district evaluated the student for eligibility under IDEA. The evaluation did not address behavior despite the district's knowledge of ongoing behavioral issues with the student. The student did not qualify for services.

Maine Sch. Administrative Dist., 20 **IDELR 298 (SEA ME 1993).**

- The hearing officer ruled in favor of the parent ordering the district to reevaluate the student to include evaluations in the area of behavior.
- The hearing officer noted that without evaluations in the area of behavior the school could not properly determine if any of the absences at issue were disability based.

Larimer Co. Sch. Dist., 113 LRP 17986 (2013).

- Truancy is a behavior that impedes learning.
- Truancy problems related problems of special education students must be evaluated and addressed thru the IEP process.
- Appropriate IEP services may include addressing missed instruction, providing supports such as counseling, parent supports, and online learning opportunities. Seek input from student's private psychologists and physicians.

Detroit City Sch. Dist., 60 IDELR 235 (2013).

- Parents of student with chronic absenteeism and other behavioral issues enrolled the student in a private residential facility.
- School district had not previously inquired as to the reason for the absenteeism nor had it attempted to evaluate the student for special education eligibility.
- Parents prevailed upon subsequent lawsuit against school district for residential placement reimbursement.

Strategies for Schools and IEP Teams for Addressing Truancy

- Ensure that IEP teams act quickly in response to excessive behavior related absences of IDEA eligible students. Behavior Intervention Plans, counseling, communication system with parents, provision of daily contact person to deter skipping, etc. are common IEP interventions.
- Consider facilitating family counseling services to address home issues that may be contributing to the student's truancy.

Strategies for Schools and IEP Teams for Addressing Truancy

- Train staff on child find and referral obligations under the IDEA and Section 504.
- Ensure that attendance officer alerts appropriate school personnel of attendance issues that could be disability related.
- Ensure that school attendance policy and procedures are implemented in a non-discriminatory manner.

Strategies for Schools and IEP Teams for Addressing Truancy

- Timely and thoroughly respond to private school or residential placement requests by a parent. The IEP team should meet to review and intensify the IEP services currently being provided to the student.
- Ensure that attendance officer alerts appropriate school personnel of attendance issues that could be disability related.



III. SECTION 504 PLAN vs. HEALTH CARE PLAN

Section 504 Plan vs. Health Plan

- Many schools use individual health care plans (IHP) or similar plans to document the health-related need of students with health impairments, without considering Section 504 referral or eligibility.
- OCR's position is that an IHP created outside of the Section 504 process may not suffice to meet the school district's child-find and FAPE obligations under Section 504.

Section 504 Plan vs. Health Plan

- OCR has held that IHPs developed outside of Section 504 procedures for a student otherwise eligible for Section 504 can deprive parent/student of nondiscrimination protections and procedural safeguards provided by Section 504.

Section 504 Plan vs. Health Plan

- School districts should use a multi-factor process in determining whether a student with a medical condition needs a 504 evaluation and/or 504 plan as opposed to only an IHP.

504 Versus Health Care Plan

- 1. Frequency of HCP services. (A student is less likely to require an evaluation and/or Section 504 plan when services are not often needed during the school year.)
- 2. Intensity of HCP services. (Student who self administers insulin is less likely to require a Section 504 evaluation and or plan than a student who relies on the nurse for daily medication.)

504 Versus Health Care Plan

- 3. Complexity of HCP services. (The more a student requires constant monitoring and exchange of information among various individuals and in different environments the more likely an evaluation and/or 504 plan is required.)
- 4. Health and safety risk if HCP services are not provided or are provided incorrectly.

504 Versus Health Care Plan

- 5. Student's need for other non-health related services and accommodations.

See, Florida Dept. of Ed., *Guiding Principles for Section 504 Committees on Students with Health Care Plans*. (2012)



IV. Section 504 Team's Referral to Special Education

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- An ongoing responsibility of the Section 504 team is to determine if the needs of a currently eligible Section 504 student have progressed to the point where a referral is due to be made for an evaluation for special education eligibility.

Simmons v Pittsburg Unified Sch. Dist., 63 IDELR 158 (N.D. Cal. 2014)

- A Section 504 student diagnosed with Multiple Sclerosis transferred into school district.
- The school adopted the student's previous Section 504 plan that only provided some classroom accommodations.
- Student missed 54 days of school during the school year due to complications from her MS.

Simmons v Pittsburg Unified Sch.

Dist., 63 IDELR 158 (N.D. Cal. 2014)

- Section 504 team placed the student on partial days and provided some additional classroom accommodations. Student's performance still did not improve.
- Student failed the school year, became ineligible for honor classes which she had previously attended, and began to have panic attacks.
- The parent filed an IDEA child find due process complaint due to the Section 504 teams failure to refer the student for an IDEA evaluation. The parent prevailed.



V. Parent of Students with Disabilities and Classroom Visits

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- Parents of students with disabilities initially have the right to some degree of access to their child's educational program/classroom. They have a right to to ascertain if required accommodations and services are being provided.
 - This right is not absolute.
 - Parents cannot disrupt the learning process nor demand lengthy or frequent classroom observations.⁴³

Traverse City Area (MI) Pub. Schs., 63 IDELR 172 (OCR 2013)

- Parent of disabled student filed a complaint alleging retaliation by school district secondary to district's enforcement of its parent observation policy/procedures.
- Policy required parent to make observation request in advance, limited the observation to 30 minutes, required the parent to check-in at office before going to the classroom, etc.
- OCR found the policy to be equally applied to all parents and that the district had a valid reason for the requirements of the policy.



VI. HOMEBOUND SERVICES

Charlotte-Mecklenburg (NC) Sch., 63 IDELR 268 (2014).

- School district violated § 504 by its “one size fits all” homebound policy. The number of hours any student received in the district was predetermined.
- OCR held that in regard to students with disabilities the number of homebound hours provided must be an individualized decision by the IEP or § 504 team.

Logan Co. (WV) Sch., 55 IDELR 297 (OCR 2012).

- OCR found that school's homebound policy categorically denying disabled students on homebound due to their disability the right to participate in any extra-curricular activities was in violation of Section 504.
- OCR held that school must make an individualized analysis of each student's particular disability and the extra-curricular activity at issue.



VII. SERVICE ANIMALS

28 CFR Part 35

- Amended ADA regulations require public entities (including public schools) to allow individuals with disabilities to use service animals in public facilities..
- Not specifically addressed by IDEA or Section 504.

28 CFR Part 35

- A public entity shall modify its policies, practices, or procedures to permit the use of a service animal by an individual with a disability. 28 CFR 35.136(a).

28 CFR 35.104

- To be a “service animal” under the ADA, the animal must be individually trained to perform work or a task for the benefit of an individual with a disability.
- A pet or comfort /support animal is not a service animal for purposes of the ADA. The animal must perform a task.

■ Although the definition of a “service animal” is limited to dogs, Title II requires public entities to permit the use of miniature horses if the horse has been trained to do work or perform tasks for the individuals benefit.

28 CFR 35.136(i)(1).

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- Schools may develop policies placing requirements upon the use of service animal such as vaccinations, grooming, care, housebroken, etc.

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- Assist individuals who are blind or have low vision with navigations and other tasks.
 - Alert individuals hard of hearing as to presence of people or sounds.
 - Pull a wheelchair.

- Assist persons with psychiatric and neurological disabilities by preventing or interrupting impulsive or destructive behavior.
- Assist during a seizure.
- Alert as to presence of allergens.
- Provide support as to balance and stability.

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- Interrupt self-mutilating or other improper activities.
 - Remind individual to take medication.
 - Interrupt and stop “runners”.

IDEA FAPE CONSIDERATIONS

- Student may independently request an animal as part of the IDEA or Section 504 services provided by a school district.
- In this situation, team must meet to determine if student requires the animal for FAPE.

103 LRP 57802; 50 IDELR 169; 16 IDELR 597



VIII. DISCIPLINE

Disciplinary Rules Divide Removals into Two Separate Sets of Rules or Limitations

- **Short Term Removals:** (10 days or less)
 - No “change of placement”
- **Long Term Removals:** (More than 10 days)
 - “Change of placement”

In-School Suspension?

- ISS will not count towards the 10 day total as long as the student continues:
 - to have an opportunity to progress in the general curriculum;
 - to receive Section 504 services; and
 - to continue to participate with non-disabled peers,
 - and remains on his or her campus.

Dunkin (MO) Sch. Dist., 52 IDELR 138 (OCR 2009).

A. SHORT TERM REMOVALS

- School personnel may remove a disabled student without services for *not more than 10 school days each school year* for the violation of a disciplinary rule (to the extent such removals are applied to students without disabilities).

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- The school system is not required to provide educational services for the *first 10 school days* in a school year that a student is removed, if services not provided to students without disabilities.

- Short term removals appropriate even if related to student's disability.
- No requirement for a manifestation determination review or any other procedural safeguard.

B. LONG TERM REMOVALS

- Long term removals (greater than 10 days) trigger the more elaborate procedural protections such as the **requirement for a manifestation determination hearing.**

Section 504 Alcohol/Drug Exception

- Section 504 students lose the right to a manifestation determination and due process hearing if they violate drug or alcohol rules and are determined to be “current users”.
- Mere possession of drugs or alcohol would not fall under this exception.

17 EHLR 609 (OCR 1991).



C. MANIFESTATION DETERMINATION

- A manifestation determination conference is procedurally required if a proposed disciplinary sanction constitutes a long-term removal/change of placement.

- If the misconduct is deemed a manifestation of the student's disability, the school must return the student to his regular placement unless the parent and school decide on a different placement.

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- If the misconduct is not found to be a manifestation of the student's disability, a school may apply its regular discipline rules in the same manner it would do so for a nondisabled student.

Two Questions for M.D. Team

1. Did the conduct bear a direct and substantial relationship to the student's disability?
2. Was the conduct the direct result of the LEA's failure to implement the student's Section 504 Plan?

Question One

How should Team determine whether the conduct bore a **direct and substantial** relationship to the student's disability?

The commentary to the final IDEA regulations states:

“The revised manifestation provisions in section 615 of the Act provide a simplified, common sense manifestation determination process that could be used by school personnel....The Conferees further intended that “if a change in placement is proposed, the manifestation determination will analyze the child’s behavior **as demonstrated across settings and across time** when determining whether the conduct in question is a **direct and substantial result** of the disability.”

34 C.F.R. § 300.530(e).

Question Two

How does team properly determine whether conduct was due to District's failure to implement plan?

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- Failure to implement must be related to the conduct at issue.
 - The appropriateness of the student's current plan **is not** an issue in a manifestation determination.

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