



## ATTORNEY'S CORNER

**By Jack Feldman**

**MONTHS IN REVIEW: December 2016 and January 2017**

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***A Monthly Synopsis of Salient Cases in Special Education***

In this installment of the Attorney's Corner, while we anxiously await a decision from the Supreme Court regarding the level of educational benefit to which a disabled child is entitled under IDEA, we review two federal court decisions (including one from the Second Circuit Court of Appeals) and two Office of State Review (SRO) decisions. In addition, three Office for Civil Rights (OCR) documents are reviewed. This includes two *Dear Colleague Letters*, and an OCR recently published guidance on Section 504 compliance.

In the Second Circuit Court of Appeals decision, the Court reversed a district court decision (which upheld both the SRO and IHO decisions), and ruled that a child was denied FAPE where a "clear consensus" of evaluative data did not support the recommended placement. In one recent Eastern District Court case, we are reminded of the importance of having evaluative data at CSE meetings which supports the recommended placement. We are also reminded of the importance of ensuring that the IEP specifies how and why the recommendations are appropriate.

In the two SRO decisions, the SRO upheld the program and placement recommended by the respective school districts. In the first decision, the SRO upheld a finding that a school district provided FAPE through the related services that it offered for a dually enrolled student. The second decision explores the types of information which render an IEP and placement appropriate.

Last, we review three documents issued at the very end of 2016 by the United States Department of Education's Office for Civil Rights concerning Restraint and Seclusion of Students with Disabilities, Preventing Racial Discrimination in Special Education, and Section 504.

## ***Second Circuit Court of Appeals***

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### **I. Denial of FAPE Found Based on Evaluative Data.**

***A.M. v. New York City Department of Education (“DOE”), -- Fed. Appx. –, 117 LRP 979, 69 IDELR 51 (No. 15-4076) (2d Cir. Jan. 10, 2017)***

#### **SALIENT FACTS:**

E.H., the son of plaintiff A.M., was a six year old child diagnosed with autism. He suffered from global developmental delays, and substantial and significant language, communication and social impairments. A.M. placed E.H. unilaterally at Manhattan Children's Center (MCC), a private school for children with disabilities, where he was in a class with six teachers and six students (a 1:1 ratio), and received ABA therapy.

As of the May 2012 CSE meeting, neither the school district representative nor the school psychologist had observed E.H. nor had any evaluations been conducted in more than two years. Instead, the DOE relied on evaluations from MCC staff, and formulated an IEP which recommended a twelve month placement in the public school in a 6:1:1 classroom, together with related services. ABA therapy was not mentioned. The CSE recommended that a behavior intervention plan (BIP) be developed. The DOE did not conduct a functional behavior assessment (FBA), but instead, relied on a draft FBA submitted by MCC. The IEP also did not provide for parent counseling and training, or transitional support services for E.H. to move from the private school to the public school program.

#### **ADMINISTRATIVE DETERMINATIONS:**

Believing that the recommended program was inadequate both procedurally and substantively, A.M. continued E.H.'s enrollment at MCC, and filed a due process complaint seeking tuition reimbursement. A.M. claimed that: (1) the DOE failed to conduct an FBA; (2) the IEP failed to provide parent counseling and training and failed to offer transitional services; and (3) the IEP failed to provide placement in a 1:1 program which implemented ABA or a similar methodology. After a due process hearing, the IHO found in favor of the DOE. The parent appealed to the SRO, who affirmed the IHO's decision and dismissed the appeal.

### **DISTRICT COURT'S DECISION:**

The District Court for the Southern District of New York affirmed the SRO's decision in favor of the DOE, and ruled that the IEP was substantively appropriate. The district court held that it was sufficient for the CSE to reproduce MCC's draft FBA, that the failure to provide parent training was not fatal, and that the lack of a formal transition plan did not deprive E.H. of a FAPE, as there is no legal requirement that an IEP contain a transition plan. With respect to the recommended program, the district court deferred to the SRO and the testimony of the DOE witness, who indicated that the 6:1:1 setting would better facilitate E.H.'s goals. The court rejected the parent's claim that E.H. required a 1:1 classroom that guaranteed ABA therapy all day, and found that, although ABA therapy was not specifically included in the 6:1:1 setting as a specific methodology, it was not necessarily excluded.

### **CIRCUIT COURT'S DECISION:**

The U.S. Court of Appeals for the Second Circuit reversed the district court's decision. First, the Court examined the DOE's procedural compliance with IDEA, finding that although the "barebones" BIP was deficient, it did not render the IEP inadequate. The Court reasoned that despite the deficient BIP and draft FBA, the IEP "adequately identifies [E.H.'s] behavioral impediments and implements strategies to address those behaviors."

The Court deferred to the SRO's analysis regarding the failure of the IEP to include parent counseling and training, which found evidence that parent counseling and training was explained at the CSE meeting as one of the "defining features" of the program, and was offered to the parents. As such, its omission from the IEP was "nothing more than an immaterial procedural violation."

The Court's analysis of the parent's claim that the IEP lacked a transition plan is perhaps more troubling. The Court acknowledged that IDEA does not require a formal transition plan in an autistic child's IEP. However, citing Section 200.6(c) of the Commissioner's Regulations, the Court found that "New York law imposes a separate requirement that, under such conditions, [i.e.: a child transitioning from a private to a public school program], *the IEP describe support services to be provided to the student's public special education teacher in the classroom.*" The Court relied on that section, which provides that where an autistic child "has been placed in programs containing students with other disabilities, or in a regular class placement, a special education teacher with a background in teaching students with autism shall provide transitional support services in order to assure that the student's special education needs are being met." However, in this case, because E.H. had the ability to transition without any problems, the failure to specify such transition services in the IEP, although a procedural violation, did not deprive the child of FAPE.

Regardless, the Court found that the DOE failed to offer FAPE, as the IEP was substantively inadequate. The Court reasoned that since every evaluation recommended

intensive ABA therapy in a one-to-one setting, the school district violated IDEA by offering a 6:1+1 placement with no specific methodology recommended. The three-judge panel explained that when the reports and evaluative data before the CSE "yield a clear consensus," the IEP must reflect that consensus. "This remains true whether the issue relates to the content, methodology, or delivery of instruction in a child's IEP." Accordingly, the CSE erred in relying on the DOE psychologist's recommendation for a 6:1+1 program that did not refer to a specific methodology.

The Second Circuit vacated the district court's decision that denied the parent's reimbursement request, and remanded the case for further proceedings to determine whether the private placement was appropriate.

### **WHY YOU SHOULD CARE:**

The takeaway from this case is that, although a CSE does not have to adopt all recommendations of outside evaluators, the CSE cannot disregard a "clear consensus" of evaluative materials which show that a child needs a particular service, methodology, or placement to receive FAPE. Important here is that the district did not conduct any of its own evaluations to contradict the opinions and evaluations of the private school staff and professionals. In situations like this, where the child's current service providers agree with the need for the child to be in a one-to-one placement with intensive ABA services to make progress, the CSE should conduct its own evaluations or must defer to the conclusions of the private evaluations and evaluators.

Further, the Court held that the Commissioner's Regulations require that an IEP developed for an autistic child "identify temporary transitional support services to be provided to an autistic student's new classroom teacher when that student is transferring from a private school to a public school program or to a less-restrictive classroom setting." This should be a caveat for CSEs when dealing with children with autism. While the law does not require a formal transition plan for children who move from one program to another, where the move is to a less restrictive program, the CSE should at least consider whether any services or supports should be provided.

### ***Federal District Court***

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## **I. District's Failure to Offer Proper Placement Warranted Tuition Reimbursement.**

*J.L. v. New York City Dep't of Educ.*, 69 IDELR 5 (15-Civ-1200) (E.D.N.Y., Nov. 22, 2016)

### **SALIENT FACTS:**

The child, classified as learning disabled, attended the Mary McDowell Friends School (MMFS), a private school for disabled students, during his second and third grade years in a 10:1 program. Relying on reports from the private school that the child made progress, the CSE recommended a 12:1:1 less restrictive program in the district's public schools for the fourth grade. The parent disagreed and indicated her intent to re-enroll the child at MMFS for fourth grade.

### **ADMINISTRATIVE DECISIONS:**

The IHO found that the CSE failed to offer FAPE, that the MMFS program was appropriate, and that equities favored the parent. The IHO noted that the child had difficulty in classes with ten or eleven students, and that the public school placement would not have afforded the child the "quiet, calm and focused environment" he required.

The SRO reversed the IHO and ruled in the district's favor. The SRO reasoned that the child made sufficient progress in a comparable classroom at MMFS, and therefore, the 12:1:1 program offered FAPE.

### **COURT'S DECISION:**

The District Court examined the case under the *Burlington-Carter* test and reversed the SRO decision. The court held that the DOE failed to prove that the recommended 12:1:1 class was appropriate, entitling the parents to tuition reimbursement for the unilateral placement in a private school. The court found that neither the IEP nor the evidence introduced at the hearing supported the CSE's recommendation for a less restrictive setting. Further, testimony introduced at the hearing from the child's teachers indicated the child would struggle in a larger setting, and that his difficulties and gradual progress in the smaller private school setting supported the more restrictive placement.

### **WHY YOU SHOULD CARE:**

The court examined the SRO decision and found it devoid of analysis, or supporting documentary evidence or testimony to explain why a 12:1:1 classroom would offer the child "an opportunity greater than mere 'trivial advancement.'" The court explained that, although the SRO found the IEP sufficient, there was no independent analysis of why the IEP was appropriate. Accordingly, the SRO decision was not entitled to deference.

Further, the court noted that at an impartial hearing, the District must demonstrate that its proposed placement is appropriate, at least through introduction of evaluative data that formed the basis for the recommendation. Further, that data must have been introduced at the CSE meeting for the team to consider before making a recommendation. Therefore, where a child is not attending a public school program, it is essential that the CSE have its own

evaluations and, if possible, a classroom observation, to support its recommendation.

## **Office of State Review**

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### **I. SRO Finds For District in A Case Involving a Dually Enrolled Child.**

#### ***Appeal of a Student with a Disability, Appeal No. 16-054 (2016)***

#### **SALIENT FACTS:**

The CSE met to discuss transition of a CPSE child (who attended a non-public pre-school) to the CSE, and to develop an Individual Education Services Program (IESP). The child was classified as having an other health-impairment, based in part on disruptive behaviors. For the 2015-16 school year, the CSE recommended that the child continue to receive five hours per week of direct individual special education teacher support services (SETTS), to be provided in the general education classroom of the private school, and related services of occupational therapy and group counseling. Subsequently, the parent requested that the CSE reconvene to review a private developmental pediatric evaluation, which diagnosed the child with autism spectrum disorder. The parent was also interested in a more intensive special education program, including ABA therapy. The CSE recommended additional evaluations of the child. At a follow-up CSE meeting, it was determined that the child should be classified as autistic, and receive five periods per week of SETTS, and additional related services. The parent filed a due process complaint alleging both procedural and substantive violations. The parent sought an increase in the SETTS services in school, and the addition of five hours of home instruction to enable the child to generalize skills. The IHO ruled that the district provided FAPE, and the evidence established that the student was performing well academically and found that the recommendation for five hours of SETTS was appropriate.

#### **SRO'S DECISION:**

The SRO upheld the IHO's decision and denied the parent's claims for relief. The SRO found that the child had demonstrated progress with the same level of SETTS services the prior year, and that there was nothing in the record to warrant additional in-school services.

In discussing the parent's request for home-based services, the SRO found that IDEA does not require school districts to design programs to address a student's difficulties in generalizing skills to settings outside of school,

“particularly in cases such as here, where it is determined that the student is otherwise likely to make progress at least in the classroom setting.”

### **WHY YOU SHOULD CARE:**

The SRO refused to consider testimony and evaluative data which either post-dated or was not made available at the CSE meeting at which the IEP in question was drafted. This case is also one of the few which address services under Education Law Section 3602-c to dually enrolled students. The SRO noted that there is no authority to support the claim that generalization of skills is required by that statute.

The SRO also noted that with respect to pendency, unless the parent and the school district otherwise agree, a student’s pendency entitlement arises “as of the date of the parent’s due process complaint notice, and if the parent appeals from [the SRO decision]... during the pendency of any judicial proceedings.”

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## **II. SRO Reverses IHO Decision Which Ordered Tuition Reimbursement for Eagle Hill.**

### ***Appeal of the Board of Education of the Yorktown Cent. Sch. Dist., Appeal No. 16-058 (2016)***

### **SALIENT FACTS:**

The student was classified with a learning disability, and had diagnoses of ADHD, developmental coordination disorder, and Tourette’s Syndrome. The student attended district programs in integrated co-taught and special classes with related services. For the 2015-16 school year, the CSE again recommended a 12:1:1 special class, with related services and assistive technology, but added a 5:1 special class for reading, a 12:1 skills class three times per six day cycle, assistive technology, and other related services. On June 1, 2015, the parents enrolled the child at Eagle Hill, and filed a demand for due process, alleging that the child had made “limited to no progress” since the 2013-14 school year. The parents claimed that the district failed to develop a research-based program which provided the academic and language support that the student required. In addition, the parents alleged that the IEP failed to address the student’s social/emotional needs, which resulted in the student experiencing bullying.

The IHO ruled in favor of the parents and ordered the school district to reimburse the parents for the cost of tuition at Eagle Hill for the 2015-16 school year. Notably, the IHO found that at the time of the parents’ unilateral placement of the child at Eagle Hill, the setting was reasonably calculated to provide meaningful educational benefit. In observing that the student made little progress

during 2015-16, the IHO concluded that continued placement in the current setting was not appropriate.

The IHO found that parents' claim that the district did not address their bullying allegations was without merit. The IHO ruled that the district addressed any alleged claims "properly and quickly." As such, there was no need for the CSE to review the claims of bullying.

The school district appealed.

The parents cross-appealed from that portion of the decision which found the district's program for 2014-15 and a portion of 2013-14 to be appropriate, and from the denial of the parent's request for compensatory education.

### **SRO'S DECISION:**

The SRO dismissed the parents' claim that the child did not make progress as not being dispositive of the case. The SRO set forth the specific details and supports which were contained in each section of the IEP, i.e., the present levels of performance, the student's needs, the 17 measurable annual goals in study skills, reading, writing, math, speech-language and motor skills, the specific and detailed supplementary aids and services, the program modifications and accommodations, and the assistive technology and testing accommodations. The SRO found the special class placement to be appropriate for this "high needs" student with weak academic skills, and difficulty maintaining focus and attention. Taken together, the SRO found that even if the student did not make progress during the 2014-15 school year, the IEP offered special education and related services and supports to meet the student's needs. Further, the SRO noted that the student had achieved 11 of 17 annual goals, and testimony at the hearing from the student's teachers who worked with the student on a day-to-day basis indicated that the student had made progress. The SRO found this evidence more persuasive than the results of standardized tests.

The SRO again found that the 2015-16 IEP addressed the student's needs and developed new or modified goals based on the student's then current skills and needs. Further, the special class reading, the area of primary deficit, provided instruction in a 5:1 ratio.

The SRO dismissed the parents' claim that the district failed to address bullying. To the extent that the incidents cited by the parents constituted bullying, the SRO found that the district took steps to address the incidents of which it had received notice, by, *inter alia*, speaking to the students involved, adding counseling to the IEP, and adding social emotional goals. The SRO held that the alleged incidents did not interfere with the student's ability to receive educational benefit, substantially restrict her learning opportunities, or prevent her from making progress.

Since the SRO found that the school district offered FAPE for the school years at issue, the SRO did not address the appropriateness of Eagle Hill.

### **WHY YOU SHOULD CARE:**

This case highlights the importance of developing a thorough IEP, as well as the need for a school district to conduct its own testing. After receipt of private speech language evaluations in the spring 2014, the school district conducted its own evaluation. As a result of the new evaluations, the CSE recommended speech services for the 2014-15 school year. However, because the student was otherwise making progress toward her IEP goals, the district did not violate IDEA by failing to recommend speech services the prior year. The SRO noted “Once the parents raised their concerns about the student’s speech-language needs, the district acted promptly to evaluate... [and recommend] speech-language therapy... However, this recommendation for the subsequent year does not cast aspersion retroactively on the district’s actions in the prior school year.”

The SRO credited the school district for continuing to be responsive to the student’s lack of progress as reflected in standardized testing, by increasing the amount of academic supports and special education services over time. The district wisely addressed the bullying issue, thus avoiding the problems identified in the *T.K.* case. If you recall, in *T.K.*, the CSE had refused to discuss the parents’ concerns that the child was being bullied, claiming that such was not an appropriate subject to discuss at CSE meetings. The Court found that the CSE’s refusal to provide the parents “the opportunity to discuss bullying during the creation of [the student’s] IEP,” not only potentially impaired the substance of the IEP but also prevented them from assessing the adequacy of their child’s IEP.

## ***Office of Civil Rights - Guidance***

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### **I. OCR Guidance Clarifies How Restraint and Seclusion in Schools May Violate Federal Law.**

***Dear Colleague Letter: Restraint and Seclusion of Students with Disabilities, 116 LRP 53792 (OCR, Dec. 28, 2016)***

#### **INTRODUCTION:**

The U.S. DOE’s OCR recently issued an advisory letter which offers information on the use of restraint or seclusion of students with disabilities. The letter is intended to assist school districts in meeting the need of students with disabilities, including the need to address the underlying causes of the behavior that give rise to the conduct which may necessitate restraint or seclusion. The

letter seeks to clarify situations in which a school district may impose restraint or seclusion, and provides examples of how the use of restraint or seclusion may result in discrimination or disability based harassment in violation of Section 504 and Title II of the Americans with Disabilities Act of 1990 (Title II). The *Dear Colleague* Letter (posted in the “Informational Documents” section of this website), is intended as a follow-up to the DOE’s May 12, 2012 *Restraint and Seclusion: Resource Document*.

### **OCR OPINION:**

The *Dear Colleague* Letter provides clear definitions as follows:

**Mechanical restraint:** “the use of any device or equipment to restrict a student's freedom of movement. The term does not include devices implemented by trained school personnel, or utilized by a student that have been prescribed by an appropriate medical or related services professional and are used for the specific and approved purposes for which such devices were designed, such as:

- Adaptive devices or mechanical supports used to achieve proper body position, balance, or alignment to allow greater freedom of mobility than would be possible without the use of such devices or mechanical supports;
- Vehicle safety restraints when used as intended during the transport of a student in a moving vehicle;
- Restraints for medical immobilization; or
- Orthopedically prescribed devices that permit a student to participate in activities without risk of harm.”

**Physical restraint:** “a personal restriction that immobilizes or reduces the ability of a student to move his or her torso, arms, legs, or head freely. The term physical restraint does not include a physical escort. Physical escort means a temporary touching or holding of the hand, wrist, arm, shoulder or back for the purpose of inducing a student who is acting out to walk to a safe location.”

**Seclusion:** “the involuntary confinement of a student alone in a room or area from which the student is physically prevented from leaving.” OCR clarifies that seclusion *does not* include a timeout, “which is a behavior management technique that is part of an approved program, involves the monitored separation of the student in a non-locked setting, and is implemented for the purpose of calming.”

The Guidance explains that: “OCR would likely find it to be a justified response to restrain or seclude a student with a disability where the student’s behavior poses imminent danger of serious physical harm to self or others.” OCR warns that the “repeated use of restraint and seclusion” would not be a justified response “where alternative methods also could prevent imminent danger to self or others.” OCR makes it clear that where a student’s behavioral challenges lead to restraint, that may be an indicator that the student has a disability and needs

special education, or at the least, needs to be referred for an evaluation. If the student is already identified as a student with a disability, the use of restraint or seclusion could be an indicator that the services provided to the student are not addressing the student's needs. Finally, OCR states clearly that under certain circumstances, the use of restraint or seclusion may also result in the denial of FAPE under IDEA.

### **WHY YOU SHOULD CARE:**

Although OCR guidance is nonbinding, and not intended to provide additional legal requirements, it is significant. The Guidance in this letter applies specifically to students with disabilities, as OCR is not vested with authority to enforce laws other than antidiscrimination laws, such as Section 504. Therefore, the *Dear Colleague* letter is meant to clarify and address the circumstances under which restraint and seclusion might result in or be perceived as discrimination of students with disabilities under Section 504.

The *Dear Colleague* Letter provides an important resource for educators, and includes a "Fact Sheet: Restraint and Seclusion of Students with Disabilities," as well as an easy reference question and answer document (also posted in "Informational Documents"). The Guidance also provides a list of "persuasive [behavioral] indicator(s) that a student's needs are not being met appropriately," including new or more frequent emotional outbursts, an increase in the frequency or intensity of behavior, a change into withdrawn behavior, and/or an increase in missed classes. OCR also makes clear that restraining or secluding a student with a disability for behavior that would not result in such restraint or seclusion of a child without a disability would constitute discrimination under Section 504. Finally, and most important, if it is believed that the student has been adversely affected by the use of restraint or seclusion, the school has an affirmative obligation to remedy the denial of FAPE through the provision of additional services or interventions.

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## **II. OCR Issues Clarifies the Civil Rights of Students With Disabilities.**

***Dear Colleague Letter on Preventing Racial Discrimination in Special Education, 116 LRP 51497 (OCR, Dec. 12, 2016)***

### **INTRODUCTION:**

In another *Dear Colleague* letter (posted in the "Informational Documents" section of this website), OCR seeks to clarify the requirements of preventing discrimination under Title VI of the Civil Rights Act of 1964 (Title VI), IDEA and Section 504. Specifically, through analysis and examples, OCR discusses the

mandate that all students, regardless of race, color or national origin, be afforded: (a) equitable access to general education interventions; (b) timely referrals for evaluations; (c) equitable treatment in the evaluation process, and the special education services and in the supports which they receive; and (d) programs in the least restrictive setting. The Guidance is intended to assist school districts in preventing over-identification, under-identification and belated evaluation of students based on their race, color or national origin. The Guidance applies equally to English learner (EL) students.

### **OCR OPINION:**

Under Title VI, a school district's conduct may result in unlawful discrimination based on race where a student is subjected to different treatment on account of racial stereotypes. It also applies where a policy which is race-neutral on its face, and administered in a fair manner, has "an unjustified adverse disparate impact or disproportionate and unjustified effect on students of a particular race." In other words, a student with a disability may only be treated differently than a student without a disability, if such treatment is necessary to provide FAPE or aides, benefits, or services to that student.

School districts can prevent racial stereotyping in the referral, evaluation or identification process by examining data seeking unusual racial disparities, and by developing and consistently implementing written procedures for staff on when to refer students. Districts can also prevent discrimination by implementing evidence-based strategies to help and support students within the general education settings, by ensuring that testing procedures do not have a disproportionate adverse impact on a racial group, and through staff training.

### **WHY YOU SHOULD CARE:**

Often times, OCR investigations involve a lengthy and time-consuming process for the school district. The *Dear Colleague* letter sets forth a broad array of information which it will review when conducting an investigation, including district policies, disciplinary referrals, student files, data and interviews. The Guidance makes clear: "data that shows racial disparities in the impact of certain policies and practices [i.e., provision of special education services], might be an indicator of potential violations. . . ." School districts can collect and examine this same data to review the impact of its policies and procedures before it receives discrimination complaints. For easy reference, a summary Fact Sheet (posted in the "Informational Documents" section of this website), has been issued by OCR explaining the ways that referral, evaluation and special education services can act to prevent racial discrimination in special education.

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### **III. OCR Provides Guidance on Section 504.**

#### ***Parent and Educator Resource Guide to Section 504 in Public Elementary and Secondary Schools (Dec. 2016)***

##### **INTRODUCTION:**

OCR issued a 47 page Resource Guide (posted in the “Informational Documents” section of this website), for both school districts and parents in an effort to provide a broad overview of Section 504, and to “increase understanding” of the requirements imposed thereunder. Section 504 is an anti-discrimination statute which provides a broad array of protections to students who meet the definition of an individual with a disability under Section 504. In essence, Section 504 levels the playing field and eliminates barriers to access to education. The Resource Guide provides a step-by-step technical guidance outline of a school district’s duties under Section 504, including child find, evaluation, development of appropriate plans, implementation of those plans, the provision of equal opportunities in extracurricular activities, protection against bullying and harassment, establishment of grievance procedures and prohibition against retaliation.

The Guide sets forth detailed definitions of the term disability, physical or mental impairment, together with specific examples of major life activities, mitigating measures, substantial limitations, episodic impairments, and being regarded as having a disability (i.e., minor and transitory impairments of six months or less). Included is the specific process for determining if a student is eligible for Section 504 services. A comparison of a school district’s obligations under the ADA and IDEA is also included.

OCR encourages a written 504 plan, but reiterates that for those students who are also covered by IDEA and have an IEP, a separate 504 Plan is not necessary. With regard to IDEA, the Guide clearly states: “All students with disabilities who are eligible for special education and related services under IDEA are protected by Section 504 and Title II. The inverse, however, is not true. Not all students protected by Section 504 and Title II are IDEA-eligible students.

##### **WHY YOU SHOULD CARE:**

The Guide clarifies a number of points, including that a student who exhibits only behavioral challenges (i.e., a high number of discipline referrals), must be evaluated under Section 504 to determine whether that student has a disability. That evaluation may necessarily include a medical assessment.

OCR reiterates prior guidance that a student with average or better than average classroom grades may still be found to have a disability under Section 504

if the student is substantially limited in a major life activity due to a student's impairment.

OCR clarifies that in addition to periodic reevaluations, a reevaluation is necessary prior to a significant change in placement, including an out of school suspension of more than 10 consecutive days, a series of short term exclusions which total more than 10 school days and create a pattern of removal, or a transfer from one program to another which terminates or significantly reduces related services.

Finally, the Guide provides eleven specific school-based scenarios with respect to Section 504 eligibility which may be useful for training staff. These scenarios range from situations involving issuance of procedural safeguards, suspected disabilities, evaluations student testing and retaliation.

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This publication is intended to provide general information and is not meant to be relied upon as legal advice. If you have questions about anything discussed, we urge you to contact your school.