

**“PROGRAMMING AND DISCIPLINE FOR THE  
BEHAVIORALLY-CHALLENGED STUDENT  
UNDER SECTION 504”**

Presented and Written by:  
Denise Hays  
Attorney at Law / Shareholder

Contributions by: Sydney Keller  
Attorney at Law

**CHILD FIND AND 504: A DISTRICT'S  
DUTY TO IDENTIFY AND EVALUATE QUALIFIED  
CHILDREN WITH DISABILITIES.**



## How to Identify a Student for 504 Evaluation

- ❑ Students should be identified for an initial 504 evaluation upon the following happening:
  - Parent requests a 504 evaluation
  - District or parent thinks because of a handicap, student needs or is believed to need special education or related services. 34 C.F.R. 104.35(a)
  - Parent gives school a doctor's note diagnosing student with a disability.
    - *\*Practice Tip\** An initial evaluation should still be conducted (with parent permission) even if the parent does not specifically request an evaluation. See *Valley Oaks (CA) Charter Sch.* (OCR 06/29/15)

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## Who is a Qualified Student with a Disability?

- ❑ Definition of disability in Section 504 and the ADA interpreted broadly. *Dear Colleague Letter* (OCR 2012).
- ❑ Temporary impairment qualifies: "severity is such that it results in a substantial limitation of one or more major life activities for an extended period of time." OCR, *Protecting Students With Disabilities: Frequently Asked Questions About Section 504 and the Educ. of Children With Disabilities* (2015).
- ❑ Episodic impairment (remission) qualifies if "it would substantially limit a major life activity when active." *Id.*
- ❑ Do not consider *mitigating measures* (except eyeglasses and contact lenses) when determining if a student has a disability. 28 CFR § 35.108 (d)(1)(viii)

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## Who Should be Notified for Child Find?

- ❑ A district must comply with its duty to notify (“undertake to identify and locate every qualified [student with a disability] residing in [the district’s] jurisdiction who is not receiving a public education”)
- ❑ This applies to all qualified children whether officially residents or homeless. *Questions and Answers on Special Education and Homelessness*. OSERS, February 1, 2008.
- ❑ This also includes students who are enrolled in private school or living in hospitals or universities.
- ❑ \*Do not forget\* Parents of qualified students should also be notified!

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## How does a district exercise its “Child Find” duty? Two important Texas cases.

- ❑ *Celina ISD*. OSR Southern Division, Dallas. 06-99-1395. February 4, 2000.
  - “OCR dismissed the allegations after the district submitted documentation showing . . . policy providing for a ‘comprehensive system of child find in which all individuals birth through 21 who may or may not be in school and who fall within our jurisdiction, regardless of the severity of the disability, will be located, identified and evaluated.’”
- ❑ *Garland ISD*. OCR Southern Division, Dallas (Texas). 06-99-1148. April 19, 1999.
  - “year-round advertising through television spots, newspaper articles, district-wide mailings, and wide distribution of written materials to . . . [providers] who work with young children.”

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## ***When does a 504 student need an evaluation for special education?***

- ❑ As soon as the District is “on notice of acts or behavior likely to indicate a disability.” *See Spring Branch Indep. Sch. Dist. v. O.W. by Hannah W.*, 961 F.3d 781, 794 (5th Cir. 2020).
- ❑ A District can, but does not have to try RTI or 504 before evaluating a student for special education.
- ❑ However, if a student’s disability is obvious and/or severe enough and/or the student is not responding well to RTI or 504, a referral for a special education evaluation should be made.

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## **SECTION 504 AND THE PROVISION OF A FREE APPROPRIATE PUBLIC EDUCATION (FAPE)**

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## Drafting Better Behavior-Related Plans & Accommodations

- Be sure any accommodation is educationally-related.
- Make certain they are consistent with the Section 504 disability.
- Do not exempt students from the Student Code of Conduct just because they fall under Section 504.
- Make sure all responsible for implementation understand the accommodations and any behavior plan.
- If a BIP is included, make it simple, and limit targeted behaviors.
- Any Section 504 plan that looks too much like Special Education, likely warrants a referral to Special Education.
- Campus Behavior Coordinator must follow Section 504 discipline procedures and be familiar with discipline-related 504 plans.
- Therapeutic behavioral programs or residential treatment centers are likely for students eligible under IDEA only.
- Watch out for private evaluations and psychiatric hospital visits.

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## FAPE and Section 504

- 34 C.F.R. § 104.33(a):
  - “A recipient that operates a public elementary or secondary education program or activity shall provide a free appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction, regardless of the nature or severity of the person's handicap.”
- 34 C.F.R. § 104.33(b):
  - “. . . [T]he provision of an appropriate education is the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of §§104.34, 104.35, and 104.36.”

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## 504 Plan Requirements

- ❑ Educational Setting (34 C.F.R. § 104.34):
  - Least Restrictive Environment: "A recipient shall place a handicapped person in the regular educational environment operated by the recipient unless it is demonstrated by the recipient that the education of the person in the regular environment with the use of supplementary aids and services cannot be achieved satisfactorily."
  - Nonacademic settings: "In providing or arranging for the provision of nonacademic and extracurricular services and activities, including meals, recess periods . . . a recipient shall ensure that handicapped persons participate with nonhandicapped persons in such activities and services to the maximum extent appropriate to the needs of the handicapped person in question."

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## 504 Evaluation and Placement

- ❑ A recipient . . . shall conduct an evaluation . . . of any person who, because of handicap, needs or is believed to need special education or related services before taking any action with respect to the initial placement of the person in regular or special education and any subsequent significant change in placement." 34 C.F.R. § 104.35.
- ❑ Must establish procedures for "periodic reevaluation"
- ❑ A generic '504 Plan' violates Section 504—must be based on a student's unique needs. *Laramie County (WY) Sch. Dist. #1* (OCR 2008).
- ❑ An unclear or ambiguously worded '504 Plan' violates Section 504. *Inglewood (CA) Unified Sch. Dist.* (OCR 2008).

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## **504 Plan Requirements**

- Procedural Safeguards (34 C.F.R. § 104.36):
  - . . . “with respect to actions regarding the identification, evaluation, or educational placement”
  - “a system of procedural safeguards that includes
    - notice
    - an opportunity for the parents or guardian . . . to examine relevant records
    - an impartial hearing with opportunity for participation by the person's parents or guardian and representation by counsel
    - a review procedure”

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## **CAMPUS BEHAVIOR COORDINATOR ESSENTIAL KNOWLEDGE: SECTION 504 & DISCIPLINE**

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## ***Designation of Campus Behavior Coordinator***

- ❑ The Texas Education Code requires a person at each campus in a district to be designated as the campus behavior coordinator. T.E.C. 37.0012
- ❑ This person is usually the principal, but it could be any other campus administrator as selected by the principal.
- ❑ The Campus Behavior Coordinator is primarily responsible for “maintaining student discipline.”

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## ***Campus Behavior Coordinator Duties for All Students***

- ❑ Promptly notify a student’s parent or guardian in person or via telephone if the student is placed into in-school or out-of-school suspension, DAEP, JJAEP, expelled, or taken into custody by a law enforcement officer.
- ❑ In addition to the phone call/in-person notice, a campus behavior coordinator must make a good faith effort to provide written notice of disciplinary action to the student, on the day the action is taken, for delivery to the student’s parent or guardian.
- ❑ If the parent cannot be reached via phone or in person by the end of the first business day following the incident, a written notice will be mailed to the home.

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## **Campus Behavior Coordinator Duties for 504 Students**

- ❑ Ensure that a Manifestation Determination Review is conducted before the student experiences a significant change in placement if:
  - The change in placement (DAEP, ISS, etc.) will last more than 10 days; or
  - The change in placement is part of a larger pattern of behavior that combined with other changes in placement constitutes more than 10 days total throughout the school year.

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## **TAKEAWAYS FOR MDRs**

- ❑ Develop BIPs: *Morgan v. Chris L.*, (6th Cir. 1997). Despite the student's long history of behavioral difficulties and failing grades, the district failed to create an intervention plan.
- ❑ Conduct multi-source MDRs: (1) info from a variety of sources, (2) include people knowledgeable about the child's disability and needs (parent), the evaluation data, & placement options. NOTE: Per OCR, information should be recent enough to provide a sufficient understanding of the student's current behavior.

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## **TAKEAWAYS FOR MDRs**

- ❑ **Placement:** If misconduct is caused by the disability, the student may not be disciplined and the 504 team must determine whether the student's current educational placement is appropriate; otherwise, the district may discipline the student per general rules.
- ❑ **Greenville (TX) Indep. Sch. Dist. (OCR 04/11/13)** 504 team members' statements that school disciplinary code "supersedes 504," the AP's assertions that the meeting was just a formality, and 504 team's use of inappropriate standards were evidence that the 504 team was unable to properly determine whether the student's conduct was a manifestation of a disability.

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## **Campus Behavior Coordinator Duties for 504 Students**

- ❑ Consider the creation of a disciplinary alternative for students in 2nd grade and younger who engage in a violation of the student code of conduct that is not a suspendable offense. T.E.C. 37.0013
- ❑ This program must be age appropriate, research-based, provide models for positive behavior, promote a positive school environment; provide alternative disciplinary courses of action that do not rely on ISS, OSS, or placement in a DAEP, and provide behavior management strategies including: PBIS, trauma-informed practices, social and emotional learning, a referral for services as necessary, and restorative practices.

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## ***504 and "Stay Put"?***

- ❑ 504 has no specific "stay-put" requirement to invoke to stay a disciplinary action. However, because districts must reevaluate students with disabilities prior to a significant change in placement, OCR has opined that "a fair due process system *would encompass the school district waiting for the results of the process before making the change.*" *Letter to Zirkel* (OCR 1995)(emphasis added).

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## **SECTION 504 & DISCIPLINE: RESTRAINT, CORPORAL PUNISHMENT, & AVERSIVE TECHNIQUES**

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## ***Use of Restraint***

- Neither the IDEA nor Section 504 expressly address the use of restraint with respect for students with disabilities. The use of restraint is dictated by state law. TEC 37.0021
- Restraint means the use of physical force or a mechanical device to significantly restrict the free movement of all or a portion of a student's body. 19 TAC 89.1053
- There are special reporting requirements for each use of restraint of a student, including when a student is restrained by a SRO.

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## ***Use of Restraint***

- A school employee, volunteer or independent contractor may use restraint only in an emergency when a student's behavior poses a threat of imminent serious physical harm to the student or others or imminent, serious property destruction. 19 TAC 89.1053(b)(1)
- Each school campus should have at least a core team of people trained on the proper use of restraint.

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## ***Use of Restraint***

- ❑ Additionally, all restraints must be
  - Limited to the use of such reasonable force as is necessary to address the emergency
  - Discontinued at the point at which the emergency no longer exists
  - Implemented in such a way to protect the health and safety of the student and others; and
  - Must not deprive the student of basic human necessities.

19 TAC 89.1053 (c)

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## ***Use of Corporal Punishment***

- ❑ Corporal punishment means the deliberate infliction of physical pain by hitting, paddling, spanking, slapping or other physical force used as a means of discipline.
- ❑ Corporal punishment is allowed if the School Board has approved a policy for such, unless that student's parents specifically opted-out of the corporal punishment policy for that school year.

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## ***Use of Aversive Techniques***

- ❑ A school district or school district employee or volunteer or an independent contractor of a school district may not apply an aversive technique, or by authorization, order, or consent, cause an aversive technique to be applied, to a student
- ❑ **\*Exception\*** An Aversive technique can be used if the technique is executed in a manner that:
  - (1) does not cause the student discomfort or pain; or
  - (2) complies with the student's individualized education program or behavior intervention plan.

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## ***New Law Alert!***

- ❑ The 87<sup>th</sup> Texas Legislature passed HB 785, and it went into effect on June 4, 2021.
- ❑ HB 785 puts in many more restrictions regarding the use of time-out, restraint notification, and updating BIPs for special education students, but none of these changes apply to 504 students...yet.
- ❑ Courts could rule differently when interpreting this new law.... Stay tuned for more updates on how courts interpret this law and if the courts think this law is inclusive of 504 students.

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## SECTION 504 AND PARTICIPATION IN EXTRACURRICULAR ACTIVITIES

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### *Extracurriculars: Not FAPE but . . .*

- Extracurricular activities, because they are *extra*, are not a necessary component of an appropriate education. *Board of Educ. v. Rowley* (SCOTUS 1982). BUT Section 504 guarantees that students with disabilities must have an equal opportunity for participation in extracurricular and nonacademic services to the same extent as their nondisabled peers. 34 CFR § 104.37 (a)(1).
  - Title II of the ADA provides that a public entity, in providing any aid, benefit, or service, may not directly or through contractual licensing or other arrangements deny on the basis of disability a qualified individual the opportunity to participate in or benefit from the aid, benefit, or service.
    - 28 CFR § 35.130 (b)(1)(i).

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## ***Necessary Assistance Required***

- Districts must provide the necessary assistance to permit a student to equally participate in an extracurricular activity, even if the activity is not included in the student's IEP or Section 504 plan. *Winooski (VT) Sch. Dist.* (OCR 2006).
  - *Berkeley Unified Sch. Dist.* (OCR 08/19/14)("participation in an ... extracurricular program need not be required by the student's IEP or Section 504 plan ... for the student to receive ... aids, supports, services, and/or modifications")

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## ***Reasonable Modifications?***

- When a student cannot participate in an activity even with reasonable accommodations, a school district can deny the child participation in the activity.
  - *Dear Colleague Letter*, (OCR 2013); and *In re: Dear Colleague Letter of Jan. 25, 2013* (OCR 2013).

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## ***Ysleta ISD (OCR 2013)—Equal Access***

- ❑ A Texas district resolved an OCR complaint that it discriminated against students with disabilities in behavioral unit by agreeing to ensure that these students participate in all nonacademic and extracurricular services. The district was required to take remedial action to address its alleged failure to allow the students to have access to the cafeteria for meals, go outside for recess, or attend field trips. *Ysleta Indep. Sch. Dist.* (OCR 2013).

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## ***Cheerleading ISD (OCR 2014)***

- ❑ “The complainant informed OCR that the Student tried out for a spot on the High School cheerleading squad on March 21, 2014, but was unsuccessful. He stated that the Student has a disability, and that he therefore requested that the Student be permitted to participate in some limited capacity on the cheer squad, despite the result of the tryout, but that the request was denied.”

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## ***Cheerleading ISD (OCR 2014)***

- ❑ ISSUE: “Whether [ISD] discriminated against the Student on the basis of disability by excluding her from participation in, or denying her the benefits of, [ISD's] extracurricular programs and activities, in violation of Section 504 and Title II and their implementing regulations, at 34 C.F.R. §§ 104.4 and 104.37, and 28 C.F.R. § 35.130, respectively.”

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## ***Cheerleading ISD (OCR 2014)***

CONCLUSION: “OCR has determined that the Student , although she did not make the squad, was afforded an equal opportunity to participate in cheerleading through the modifications to the try out process that were implemented by [the District].”

- Therefore, there was “insufficient evidence” of discrimination under 504/ADA.



*“OCR policy states that modification would be a fundamental alteration if it would give a particular student with a disability an unfair advantage over others and, for that reason, fundamentally alter the character of the competition.” (Parent wanted changes to the scoring requirements)*

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## TAKEAWAYS FOR 504 & EXTRACURRICULARS

- Services & Assistance: Districts must provide a student with a disability the related aids or services necessary for the student to equally participate in all school programs, including field trips. *South Lyon Cmty. Schs.* (OCR 2009).
  - A district, on an individual basis, may prohibit a student from attending a field trip if his participation presents an unreasonable health risk to himself or others and there are no reasonable accommodations. *Donegal Sch. Dist.* (OCR 2015)
  - Decisions about a student's ability to participate in a field trip must be made by a group of people knowledgeable about the child and the meaning of any evaluation data. 34 § CFR 104.35.

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## TAKEAWAYS FOR 504 & EXTRACURRICULARS

- Athletics:
  - Reasonable modifications that are necessary to ensure students with disabilities have an equal opportunity to participate in athletic programs.
  - May deny participation in an athletic program when the district shows that the modification would represent a fundamental alteration to the athletic program.
  - Fundamental alteration = changes such an essential aspect of the activity or game that it would be unacceptable even if it affected all competitors equally (like an extra base in baseball). *Dear Colleague Letter* (OCR 2013).

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**Denise Hays**  
dhays@wabsa.com



**WALSH GALLEGOS**  
TREVINO KYLE & ROBINSON P.C.

**Centennial Towers**  
505 E. Huntland Dr.  
Suite 600  
Austin, TX 78752  
(512) 454-6864

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