



**April 26 - 29, 2015**  
Colorado Convention Center  
DENVER

**AS19: The Job Isn't Over  
When the School Day's Done:  
Serving Students With Disabilities Before  
and After the Bell**

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**April 28, 2015 - 3:00 – 4:15 pm**  
**April 29, 2015 - 8:00 – 9:15 am**

# Learning Objectives

- What laws govern before- and afterschool programs?
- What types of programs are covered by these laws?
- Which students are entitled to services and accommodations?
- How do you determine what services and accommodations must be provided?

# Applicable Laws

- Section 504 of the Rehabilitation Act of 1973.
- Americans with Disabilities Act.
- Individuals with Disabilities Education Act.
- State law.

## What Does Each Law Require?

- Section 504 requires “reasonable accommodations” for eligible students in eligible programs.
- ADA requirements are essentially the same as Section 504.
- IDEA requires before- and afterschool services only to the extent needed to provide FAPE.

## A Note on FAPE

- Both IDEA and Section 504 require districts to provide students with disabilities with a free appropriate public education (FAPE).
- FAPE is limited to enabling students to access and benefit from their *education*.
- Except in unusual circumstances, FAPE does not require provision of services outside the school day.
- Analysis for before- and afterschool activities is thus generally based upon *reasonable accommodation*, rather than FAPE.

# IDEA

- Generally, students can receive FAPE through services during the regular school day.
  - “I don’t want her to miss class” is not a basis for providing services outside the school day.
- When might students need services outside the school day to receive FAPE?
  - Transportation.
  - Social needs.
  - Use your imagination!

# Agencies Subject to Section 504

- School district programs.
- Other agencies receiving federal funding.
- Private agencies receiving “substantial assistance” from a covered agency.

# School District Programs

- What is a school district program?
  - Program funded and administered by the district.
  - Afterschool program administered by district but funded by parent fees?
    - Example: *Glendale (CA) Unified Sch. Dist.*, 4 ECLPR 101 (OCR 1998).
  - Band trip organized by parent group and privately funded, but used district letterhead and Web page?
    - Example: *Fairview Park (OH) City Sch. Dist.*, 114 LRP 16833 (OCR 02/13/14).



## Private or Independent Programs

- Private or independent programs must comply with Section 504 if they receive “substantial assistance” from the district.
- In such a case, the district’s obligation is to either ensure that the private agency is complying with Section 504 or to stop providing substantial assistance.

# Private or Independent Programs

Example:

Private program provides afterschool care to student on district school site and receives substantial assistance from district. Student wants to enroll in afterschool program but requires a one-to-one aide.

What must the district do?

# Private or Independent Programs

- Factors to consider when determining if a program receives “substantial assistance”:
    - Direct financial support.
    - Indirect financial support.
    - Provision of tangible resources such as staff and materials.
    - Intangible benefits such as the lending of recognition and approval.
    - The selectivity of the recipient's provision of privileges and resources.
    - Whether the relationship is occasional and temporary or permanent and long term.
- Irvine (CA) Unified Sch. Dist.*, 19 IDELR 883 (OCR 1993).

# Eligibility

- A student qualifies as an individual with a disability under Section 504 if he:
  1. Has a physical or mental impairment that substantially limits one or more major life activities.
  2. Has a record of such impairment.
  3. Is regarded as having such impairment.

See 34 C.F.R. Section 104.3(j)(1).

# Eligibility

(Continued)

- A student who qualifies under (1) is entitled to FAPE.
- A student who qualifies only under (2) or (3) is not entitled to FAPE, but districts may not discriminate against such students on the basis of the impairment, and they may receive accommodations if needed.

See 34 C.F.R. Section 104.33.

# Eligibility

- Physical or mental impairment that
- Substantially limits
- One or more major life activities

# Eligibility: Physical or Mental Impairment

- **Physical or mental impairment** means any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine.
- Any mental or psychological disorder such as an intellectual disability, organic brain syndrome, emotional or mental illness, or specific learning disabilities.

See 34 C.F.R. Section 104.3(j)(2)(i).

## Eligibility: Major Life Activity

**Major life activities** include, but are not limited to:

- “Caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, **reading, concentrating, thinking,** communicating, and working” (emphasis added).

42 U.S.C. Section 12102(2)(A).



## Eligibility: Substantially Limits

A person has a substantial limitation when one or more important life activities are “restricted as to the conditions, manner, or duration under which they can be performed in comparison to most people.”

*See, e.g.,* ADAAA Statement of Senate Managers; 29 CFR 1630.2(j)(1)(ii); and 29 CFR 1630.2(j)(4)(i).

## Eligibility: Mitigation Measures

When determining eligibility, districts *cannot* consider mitigating measures, such as accommodations, assistive technology, or behavioral modifications.

- Exception: ordinary eyeglasses and contact lenses.

42 U.S.C. Section 12102(4)(E).

Why can't mitigation measures be considered?

# Right to Equal Opportunity

- A school district may not:
  - Deny a qualified student the opportunity to participate in or benefit from an aid, benefit, or service.
  - Afford a qualified student an opportunity to participate in or benefit from an aid, benefit, or service that is not *equal* to that afforded others.
  - Provide a qualified student with an aid, benefit, or service that is not *as effective* as that provided to others.
  - Provide *different or separate* aids, benefits, or services except to the extent needed to provide aids, benefits, or services as effective as those provided to others.

# Right to Equal Opportunity

(Continued)

- Aid or perpetuate discrimination against a qualified person by providing *significant assistance* to an agency, organization, or person that discriminates on the basis of disability in providing any aid, benefit, or service to participants in the program.
- Otherwise limit a qualified person in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving an aid, benefit, or service.

See 34 C.F.R. Section 104.4(b).

# Right to Equal Opportunity

*However*, school districts are not required to produce identical results or levels of achievement for individuals with and without disabilities.

Instead, districts must provide *equal opportunity* to obtain the same result, gain the same benefit, or reach the same level of achievement.

Opportunity must be provided “in the most integrated setting appropriate to the person’s needs.”

34 C.F.R. Section 104.4(b)(2).

# Regulation Governing Nonacademic Services

School districts must provide nonacademic and extracurricular services and activities in such manner as is necessary to afford students with disabilities an equal opportunity for participation in such services and activities.

See 34 C.F.R. Section 104.37(a).

# Nonacademic Services

Nonacademic services and activities may include:

- Counseling.
  - Physical recreational athletics.
  - Transportation.
  - Health services.
  - Recreational activities.
  - Special interest groups or clubs sponsored by the district.
  - Referrals to agencies that provide assistance to individuals with disabilities.
  - Employment opportunities.
- See 34 C.F.R. Section 104.37.

# Considering Requests for Accommodations or Services

- Undertake an *individualized* analysis.
  - Never say, “We don’t do that for anybody.”
- Consider whether, given the student’s unique needs, the student can participate in the program with accommodations and services.
- Consider whether the accommodations and services would fundamentally alter the activity.



# Considering Requests for Accommodations or Services

- Gather lots of information from:
  - Parents.
  - The student.
  - District staff (teachers, individuals managing the program at issue, professionals such as psychologists).
  - Records, such as past assessments.
  - Private service providers (e.g., doctors).

# Examples of Accommodations

- Any number of different accommodations may be appropriate depending upon the circumstances.
- Some accommodations that have been recognized as necessary include:
  - Providing a one-to-one behavioral aide.
  - Providing a nurse to administer medication.
  - Allowing the use of a golf cart in golf tournaments.

# Athletics

- Must make individualized determination of whether student can safely participate without fundamentally altering program.

“A school district ... may not rely on generalizations about what students with a type of disability are capable of — one student with a certain type of disability may not be able to play a certain type of sport, but another student with the same disability may be able to play the sport.”

*Dear Colleague Letter*, 60 IDELR 167 (OCR 2013).

# Athletics

## Example

- Student has a hearing impairment, but otherwise qualifies for track team.
- Student wants a visual cue to be used simultaneously with the starting gun.
- Must the district provide this accommodation?

*Dear Colleague Letter, 60 IDELR 167 (OCR 2013).*

# Athletics

## Example

- Student with ADHD wants to join the varsity baseball team.
- Due to impulsivity, the student swings at every pitch, and constantly strikes out.
- Therefore he did not make the team.
- Is the district required to provide accommodations, such as a fourth strike or telling the student what type of pitch to expect?

# Athletics

## Example

- Student wants to play on the football team but has a prosthetic leg. The district is concerned for the safety of the student and other players.
- What should the district do?

## Before- and Afterschool Programs

- Section 504 right to equal access applies to before- and afterschool activities.
- School districts may not require parents to assume the cost of necessary accommodations.
- School districts may not require parents to personally provide accommodations (e.g., attend field trips).

# Before- and Afterschool Programs

## Example:

Kindergartner in district afterschool child care program. Behavior problems posed threat to safety of student and others. The district said student could only remain if parents procured one-to-one aide for the student. OCR held that the *district* was obligated to provide the aide at the district's expense.

*Hayward (CA) Unified Sch. Dist., 50 IDELR 289 (OCR 2008).*



## Field Trips

School districts must provide accommodations, including a nurse if necessary, on field trips.

### Example:

Parent complained that student couldn't go on field trip unless parent or nurse accompanied student to potentially administer glucagon. District showed that if nurse was unavailable, it would reschedule the trip so the student could attend. OCR found that the district complied with the law.

*Westwood (NJ) Reg'l Sch. Dist.*, 49 IDELR 78 (OCR 2007).

## Field Trips

- What if a student cannot be safely accommodated?
- If the district can show, based upon an individual analysis, that it is not possible to provide accommodations that would keep the student safe, then the student can be excluded from the trip.
- Example: *North Hunterdon/Voorhees Reg'l (NJ) High Sch. Dist.*, 25 IDELR 165 (OCR 1996).

## Key Take-Aways

- Students are generally entitled to accommodations, but not FAPE, in before- and afterschool programs.
- In district programs, district must provide accommodations.
- In private programs receiving substantial support from district, district must ensure that the private program provides accommodations.

## Key Take-Aways

- Parents may not be required to provide or pay for accommodations.
- Determination of accommodations must be *individualized*.
- Students may be excluded from programs or activities if they cannot be safely accommodated or accommodations fundamentally alter the program. Be prepared to back up these findings.

# **Serving Students with Disabilities Before and After the Bell**

Thank you for attending!

# Serving Students with Disabilities Before and After the Bell

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