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# SECTION 504 AND SPECIAL EDUCATION LEGAL UPDATE

## 2024 MASS SPRING CONFERENCE

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## SECTION 504 AND EXTRACURRICULAR ACTIVITIES

Section 504 requires a school district to provide a "qualified" student with a disability "an opportunity to benefit from the school district's program equal to that of students without disabilities." *Dear Colleague Letter re: Extracurricular Athletics* (Jan. 25, 2013); 60 IDELR 167. The U.S. Department of Education's Office for Civil Rights (OCR) defines "qualified" as a "person (i) of any age during which persons without disabilities are provided such services, (ii) of any age during which it is mandatory under state law to provide such services to persons with disabilities, or (iii) to whom a state is required to provide a [FAPE] under [IDEA.]". *Id.* OCR continued in this letter:

> [S]imply because a student is a "qualified" student with a disability does not mean that the student must be allowed to participate in any selective or competitive program offered by a school district; school districts may require a level of skill or ability of a student in order for that student to participate in a selective or competitive program or activity, so long as the selection or competition criteria are not discriminatory.

*Id.* Thus, the issue is not whether a student is "qualified" as that term is defined but rather whether the student has the requisite level of skill or ability and can be accommodated without fundamentally altering the activity.

OCR has stated: "a school district may adopt bona fide safety standards needed to implement its extracurricular athletic program or activity. A school district, however, must consider whether safe participation by any particular student with a disability can be assured through reasonable modifications or the provision of aids and services." *Id.* It also stated:

> Schools may require a level of skill or ability for participation in a competitive program or activity; equal opportunity does not mean, for example, that every student with a disability is guaranteed a spot on an athletic team for which other students must try out.

*Id.* It reiterated this again: "34 C.F.R. § 104.37 requires that school districts provide students with disabilities an equal opportunity to participate in and benefit from the districts' nonacademic services, including their existing extracurricular athletic activities. This means that students with disabilities must he provided with equal access to those existing extracurricular athletic activities. It does not mean every student with a disability has the right to be on an athletic team, and it does not mean that school districts must create separate or different activities just for students with disabilities." *Id.*

This is notable because it makes it clear that just because a student has a disability does not mean that the student is guaranteed to be on an athletic team or have a right to play. Rather, it means that a school district must engage in an individualized assessment of whether there are reasonable modifications that exist that could permit the student to participate and, if such modifications do exist, whether they would fundamentally alter the activity. *Billings Sch. Dist. (MT)*, 119 LRP 1894 (OCR July 25, 2018). A district is required to make reasonable modifications and provide those aids and services that are necessary to ensure an equal opportunity to participate,

unless the district can show that doing so would be a fundamental alteration to its program. *Blissfield (MI) Comm. Schs.*, 62 IDELR 95 (OCR May 13, 2013).
A district should avoid making assumptions based upon the student's skills. Instead, it must engage in an individualized assessment of whether reasonable modifications exist that would enable the student to participate (including any requested by the parent) and then determine if any of these would result in a fundamental alteration of the activity. It should also want to consider specifying non-discriminatory criteria and the level of skill or ability needed for a student to participate in each different activity. For those with tryouts, these criteria should already exist. For those without tryouts, a district can still require basic criteria and skill/ability necessary to participate. The inquiry then is looking at the reasonable modifications and whether any result in a fundamental alteration of the specific activity.

## EXTRACURRICULAR ACTIVITIES: CASE STUDIES

The following cases provide examples of the application of Section 504 to Extracurricular Activities and Nonacademic Programs. This is not an exhaustive list.

### Tryouts

A mother filed a complaint with OCR alleging that the school district discriminated against her daughter on the basis of disability by failing to afford her an equal opportunity to participate in the tryouts for the cheerleading squad. The mother indicated that the school district had refused her request to videotape the cheerleading practice. Most likely the district's refusal had been based on the privacy interest of other students. Nevertheless, the district and OCR entered into a resolution agreement where the district agreed to take the following actions:

1. The district will develop a procedure to ensure that qualified students with disabilities are afforded an equal opportunity to participate in the district's extracurricular activities and interscholastic athletic programs. The procedure will specify that students with disabilities are entitled to necessary related aids and services and/or program modification in order to accomplish the objective of equal opportunity to participate in extracurricular and interscholastic programs. The procedure will also ensure that the necessary related aids and services and/or program modifications are determined on an individual basis.
2. The district will conduct training on the new procedure with the appropriate staff and district officials.
3. The district will ensure that if the student tries out for the cheerleading squad, the district will provide the student with effective accommodations, including but not limited to, the opportunity to videotape the cheerleading sponsor's instructions and demonstrations.

   *Practice Pointer:* 34 CFR 104.37(a)(1) does not require that districts adopt a written policy with regard to equal opportunity for participation in non-academic and extracurricular services and activities. However, the effective result of this resolution was that the district was required to adopt a procedure to ensure that equal opportunity was afforded to students with disabilities. The other lesson from this resolution agreement is that districts, when faced with competing interests, such as

privacy interests and access issues should seek in the first instance to broach a balanced compromise. OCR frequently uses the complaint resolution process as an opportunity to see that district staff receive further training on Section 504. *See Marion County School District (FL)*, 37 IDELR 13 (OCR Nov. 21, 2001). For a similar result *see Moses Lake School District No. 161*, 36 IDELR 218 (OCR Feb. 7, 2002).

**Dismissal for unexcused absences**

In *Shelby County (AL) School District*, 37 IDELR 41 (OCR 2002), a parent filed a complaint with OCR alleging that the school district discriminated against her daughter on the basis of her disability ("Bipolar Rapid Recycler Depression" and ADHD) by not allowing her to participate on the high school volleyball team. The mother specifically alleged:

- That the district did not follow her daughter's IEP amendment which called for participation in athletics until after the district filed an eligibility form for the student;
- That the district dismissed the student from the team for unexcused absences that were due to her disability, and for unexcused absences that occurred during the time frame when she was ineligible for the team;
- That the varsity volleyball coach retaliated against the student because of a complaint that the parent had filed with the Alabama High School Athletic Association challenging its "no pass, no play" rule; and
- That the coach made embarrassing remarks about her daughter to the team and inquired about her attendance at school when she had an excused absence approved through the school office.

OCR found that the state code pertaining to athletics dictated the decision regarding a student with a disability's participation in extracurricular activities and that all students who compete on an interscholastic sports team in Alabama must file an eligibility form five days prior to the competition. As to the unexcused absences, OCR pointed to the fact that the team rules state that three unexcused absences from practices or meetings will result in dismissal from the team. OCR found that the student was suspended for three days for fighting, and that she missed three days of practice because of her suspension. As a result, the student was dismissed from the team. OCR also found that the team rule in regard to unexcused absences was applied uniformly and therefore, the district did not fail to provide the student with an equal opportunity for participation on the district's volleyball team and did not treat the student in a different manner than any other student in regard to this allegation.

OCR found that the filing of the complaint with the Athletic Association was a protected activity and that the district was aware of the complaint and thus, aware of the protected activity. OCR concluded that the alleged adverse actions, to wit the remarks about the student, even if true, did not constitute adverse actions. The actions did not result in any denial of benefits to the student in that they did not result in the student being dismissed from the team.

*Practice Pointer:* The lesson from this case is that school districts remain free to uniformly exercise and impose team rules in the context of athletics. The key points the district needs to demonstrate are that the team rules are uniformly applied and

that they do not result in disparate treatment of the disabled student. However, if a student's absences are related to and excused because of a disability, those absences cannot be used against the student to prevent participation.

*Practice Pointer:* Team rules, if applied uniformly, will generally not be deemed discriminatory. See *Little Axe (OK) Public Schools*, 37 IDELR 103 (OCR 2002).

**Attitude and teamwork requirements**

In *Kaneland Community Unit School District No. 302* (IL), 37 IDELR 287 (OCR Aug. 15, 2002), the high school basketball coach cut a student from the varsity baseball team on the final day of tryouts. The coach cited the student's attitude and teamwork skills as the reason for his decision to cut the student. The student's mother filed a complaint with OCR alleging that the district discriminated against her son on the basis of disability because her son was on the baseball team the previous year, was one of the best players on the team and his disciplinary record was no worse than some of the players who made the team. The district pointed to its extracurricular activities behavior code which governed student participation in any extracurricular activity. The code stated that "participation in these events at Kaneland is a privilege granted to students who can and do uphold the ideals of good citizenship, who abide by the rules and regulations of the school community and who commit themselves to academic success." Student participation in baseball was also governed by the baseball guidelines which established criteria necessary for participation in baseball. These criteria included attitude, ability, skills, teamwork and the ability to fit into the team's style and system. All students were provided a copy of those guidelines.

The district conceded that the student had the athletic ability and skills required to be a member of the team but contended that he did not meet the other important criteria. For example, the student had a hot temper, a bad attitude and was not a team player. The coach denied the allegation that the student's disciplinary record was the factor in his decision to cut him from the team and further indicated that he was unaware at the time he made the decision to cut the student from the varsity team that the student had a disability or that he was a special education student. OCR specifically noted that the student's IEP did not preclude him from being subject to the same requirements for making the baseball team as other students. OCR observed that "He is subject to the district's established disciplinary policies and does not have a behavioral management plan that would preclude application of either the code or the guidelines." On that basis OCR determined the complaint to be unfounded.

*Practice Pointer*: The result might have been different if the student's IEP contained a behavioral intervention plan which was inconsistent with the district's athletic guidelines. This decision gives comfort to school districts that, absent IEP statements to the contrary, they may uniformly apply their team conduct codes to students and that this uniform application may include behavioral considerations.

**Alcohol consumption at school events**

A student was disciplined for being under the influence of alcohol at a football game. OCR dispensed of the subsequent complaint noting that students without disabilities who committed the same offense were disciplined in the same manner. See *El Paso Independent School District* (TX), 35 IDELR 221 (OCR May 29, 2001).

*Practice Pointer:* Section 504 does not insulate students from disciplinary consequences when the discipline imposed does not constitute a change in placement. The review by OCR in such circumstances will be limited to whether or not the district acted in a non-discriminatory manner in disciplining the student.

**Band or Choir**

As a general premise, students should have access to and equal opportunity to participate in choir and band programs. For instance, a high school student with a disability participated in his school's marching band class and the marching band's home football game activities by playing his drum in the stands and with the other percussionists in front of the field at halftime. The student was not permitted, however, to participate in "high stakes events" like field show competitions. The student was also precluded from participating during a marching band trip to Disneyland in the recording session, march through the park, and group photograph. OCR concluded that such exclusion of the student amounted to disability discrimination. *Marana (AZ) Unified Sch. Dist.,* 53 IDELR 201 (OCR 2009).

However, accessibility and equal opportunity may be limited by legitimate safety concerns and ability concerns. See *Grosse Pointe Public Schools* (MI), 35 IDELR 225 (OCR May 7, 2001). In addition, a student's lack of talent may be a legitimate non-discriminatory reason for his exclusion from the band. See *Allegheny County (MD) Board of Education*, 40 IDELR 220 (OCR Sept. 4, 2003).

**Club Sports**

A disabled student was expelled from a school-funded intramural hockey club. The student had a disability and a behavior management problem. The hockey club did not implement the behavior management program during his participation in the club sport. OCR ruled that the district violated its obligation to ensure the ice hockey club to which it provided financial assistance complied with the requirements of Section 504 and the ADA. See *Rosetree Media (PA) School District*, 40 IDELR 188 (OCR Aug. 27, 2003).

**Scholarships**

It is important to remember that access and equal opportunity extend to guidance counseling services and post-secondary opportunity. Therefore, districts should review the manner in which they disseminate scholarship information in order to ensure that students with disabilities have equal access to scholarship information. See *Garden Grove Unified School District (CA),* 37 IDELR 43 (OCR April 30, 2002).

**Age**

Most states have rules that prohibit students from participating in athletics more than eight semesters or after they reach the age of 19. The primary justification for such rule is reduction of an unfair competitive advantage of older athletes. Often, students are in danger of being deemed ineligible because of age due to a disability. In many of these cases, a student with a learning disability may have been retained early in his or her educational career, which has resulted in the student reaching the maximum age prior to graduation. There is no clear answer under Section 504 whether application of such age restrictions is discriminatory. It depends on the jurisdiction. For

instance, a Connecticut federal court issued an injunction against an interscholastic association from deeming a student with Down's Syndrome ineligible to compete in swimming. *Dennin v. Connecticut Interscholastic Athletic Conference, Inc.*, 23 IDELR 704 (D. Conn. 1996). Other courts have held that waivers of age-eligibility must be considered on a case-by-case basis because an individualized approach is consistent with Section 504 (and the ADA). *Cruz v. Pennsylvania Interscholastic Athletic Association, Inc.*, 34 IDELR 290 (E.D. Pa. 2001).

In 1996, the Montana Supreme Court addressed waiver of the Montana High School Association's age rule for a student who wanted to continue participating in football and wrestling after reaching the age of 19. *M.H. v. Montana High School Association*, 280 Mont. 123 (1996). M.H. had been held back twice and was diagnosed with a learning disability after he was retained for the second time. The school district did not implement a Section 504 plan until he had reached his senior year in high school, but mistakenly called it an "IEP." In that document, the district recommended continued participation in athletics and sought a waiver for the student to compete. MHSA denied the waiver and the student filed suit. Although the student succeeded at the district court level in getting an injunction, the Montana Supreme Court overturned the injunction and held that M.H. had no protected right to continued participation. The Court distinguished the case from that involving a student who qualified under IDEA and whose IEP included participation in athletics. In that situation, the Court held that the student had a protected right to participate. However, this same right was not protected by Section 504.

> *Practice Pointer*: It is a best practice for school districts to make individualized determinations for each student whether to seek a waiver of the age and semester rules from MHSA. In cases where the student has a disability and the disability has resulted in the student being in danger of being deemed ineligible, the school district should consider seeking a waiver of the age and semester rules from MHSA.

**Field Trips**

Section 504 clearly indicates that a student should not be excluded from attending a field trip on the basis of their disability. See *Accomack County (VA) Pub. Schs.*, 49 IDELR 50 (OCR Jan. 22, 2007) (excluding a student from an assembly and a field trip did not violate Section 504 because the student was not eligible for participation in those activities – participation was limited to students in certain courses, which the complaining student did not participate in). Similarly, a district cannot make the parents' presence mandatory at a field trip when a similar obligation is not imposed upon the parents of non-disabled students. Districts are required to provide Section 504-eligible students with the related aids and services they need to participate in such activities. *South Lyon (MI) Cmty. Schs.*, 54 IDELR 204 (OCR 2009); compare *id.* with *Stanwood-Camano (WA) Sch. Dist. No. 401*, 48 IDELR 261 (OCR Nov. 15, 2006) (no violation of Section 504 where "the district's requirement that the student's grandmother attend [a] field trip were based on concerns with the student's health and safety during the trip in question [specifically, the inability of district staff to be able to adequately address the student's behavior in a public setting and their belief that the grandmother would be able to address the behavior], and the trip was the only one identified by OCR during the period investigated").

A complaint to OCR alleged that a school district discriminated on the basis of disability by revoking permission for their son to go on a school-sponsored European trip. OCR concluded that the district had revoked permission because of concerns the student would violate trip rules rather

than because of his ADHD. See *Maine School Administrative District No. 1,* 35 IDELR 166 (OCR March 23, 2001).

School districts are also required to ensure that equal notice is provided about planned field trips to disabled and non-disabled students. In *Metro Nashville (TN) Sch. Dist.*, 53 IDELR 337 (OCR 2009), OCR concluded that students with disabilities were inappropriately denied participation in a class trip and grade-wide pizza party due to lack of appropriate communication about trip information by the special education homeroom teachers to the parents.

> *Practice Pointer:* The district's liability for excluding a Section 504 student from a field trip is contingent upon not only a demonstration by the plaintiff of his exclusion from participation in services and that such treatment was by reason of disability, but that also the school officials showed gross misjudgment or bad faith. For a similar result see *Miamisburg City Schools* (OH), 36 IDELR 217 (OCR Feb. 11, 2002). While a district may use the student's health or safety as a reason for not participating in a field trip, the district has the burden of demonstrating that the exclusion is essential to that child's health or safety. During the time period that the child does not participate in the field trip, the district has a duty to provide educational services.
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> *Practice Pointer:* A district can refute a charge of disability-based discrimination by demonstrating a legitimate non-discriminatory reason for its actions.

**Playgrounds**

Playgrounds must be fully accessible to students with disabilities. For example, the playground surfaces and access ways leading to the playground must be maneuverable by students in wheelchairs.

> *Practice Pointer:* Districts need to be careful when confronted with volunteer playground construction efforts. These types of volunteer efforts can produce safety and access issues. A district should reference the Playground Standards promulgated by the United States Access Board. While these guidelines have not become law, they are considered advisory by OCR. See *Shiloh Village School District* (IL), 37 IDELR 188 (OCR July 3, 2002).

**Graduation**

Students with disabilities who meet graduation requirements should be allowed to attend or participate in the graduation ceremony. Failure to afford such an opportunity is usually considered a violation of Section 504.

> *Practice Pointer:* Decisions to exclude a student from activities based on safety considerations must follow a process. In particular, the decisions must be based on current information and must be made by either an IEP team or a Section 504 team.

**Before- and After-School Programs**

School districts must also be cautious to avoid exclusion of students with disabilities from before- and after-school programs. Like in other activities, school districts must provide students with disabilities an equal opportunity to participate in such activities. Such access may require providing related aids and services to students with disabilities to ensure an equal opportunity of participation. OCR concluded that a school district improperly excluded a student from before- and after-school services to a student with a disability who needed toileting assistance. *Raytown (MO) C-2 Sch. Dist.*, 53 IDELR 239 (OCR 2009).

**Non-District Programs and Substantial Assistance**

Section 504 prohibits school districts from providing substantial assistance to entities that discriminate on the basis of disability in providing any aid, benefit, or service to beneficiaries of the program or activity. 34 CFR 104.4(b)(1)(v); see also *Rose Tree Media (PA) School District*, 40 IDELR 188 (OCR 2003) (District that provides substantial assistance to a private club must either ensure that the club complies with Section 504 and the ADA or sever its relationship with the club). OCR issued opinions in which it found that two districts had discriminated against qualified individuals with disabilities by "significantly assisting" after-school programs. In the first case, *Puyallup (WA) School District No. 3*, the parent filed a complaint with OCR, alleging that the district discriminated against a student by refusing to provide the student with accommodations during an after-school program. 49 IDELR 20 (OCR March 23, 2007). The parents enrolled the student in an after-school program operated by a religious organization and requested that the district provide the student, who was deaf, with an interpreter. The district refused to provide the interpreter because the after-school program was a non-district private program, run by several community groups. The parent then requested that the after-school program provide an interpreter; it attempted to locate a volunteer but was unsuccessful. As a result, the student was not able to participate in the after-school program. OCR found that the after-school program was not a district-operated program or activity. Nevertheless, the assistance that the district provided to the groups was deemed to be "significant."

The district provided the groups with:

- Organization and coordination assistance;
- Publicity on its website;
- Free use of space in district facilities after regular school hours;
- Office space;
- Computer services;
- A small grant to assist with program implementation.

However, the district did not:

- Exercise control over the content of the program;
- Provide direct funding to the groups that operated the program;
- Control or provide the staff for the after-school program activities; or
- Determine what students attended the programs, or whether students participated in the programs.

Similarly, in *Capistrano (CA) Unified School District*, parents filed a complaint with OCR, alleging that the district violated Section 504 by providing significant assistance to an after-school program that discriminated against students with disabilities. 108 LRP 17704 (OCR Oct. 10, 2007). The program was operated by the YMCA as an independent contractor under a five-year contract. However, the district allowed the YMCA to rent one of its facilities at less than the market rate and promoted the programs by distributing literature to parents one time per year and by providing a link to the YMCA website. The district did not provide the YMCA with any direct financial support, staff materials or oversight. OCR found that the district significantly assisted the YMCA's program by permitting it to use district facilities at a discounted rate and by promoting the YMCA program to parents. Therefore, the district was obligated to end its relationship with the YMCA or to ensure that the YMCA did not discriminate.

> *Practice Pointer:* Based on these opinions, it appears that OCR will find that a district has provided a private program with significant assistance when the district allows the organization to use its facilities without charge, or at a reduced rate, and when the district provides the program with publicity. It is important to remember that if your district provides substantial assistance to an organization, a district must ensure that the organization complies with Section 504 and the ADA.

Another case was resolved without an OCR investigation when the District agreed to take voluntary action. *School Union 49 (ME)*, 108 LRPP 63079 (OCR Aug. 15, 2008). In that case, the parents alleged that the District discriminated against their daughter on the basis of disability by denying or giving her limited access to the Lincoln Academy school building, because of icy sidewalk/pathway conditions leading from the parking lot to the school. At the outset, OCR noted that the Academy was not subject to its jurisdiction under Section 504 or the ADA because it did not receive federal funds and was not a public entity. However, the District was subject to the provisions of Section 504 and the ADA, and the District had placed the student at the private school and was paying for her tuition. Thus, the District had an obligation to ensure that it was not perpetuating discrimination against the student by providing a significant aid, benefit, or service to an entity that discriminates on the basis of disability.

With regard to snow removal, the parents alleged that the Academy removed the snow before school but did not address snowfall that occurred during the day. As a result, student occasionally missed classes in two school buildings because she was unable to navigate her wheelchair through the snow. The District entered into an agreement with the Academy whereby the Academy agreed to construct a wheelchair ramp, and agreed to have members of its maintenance department clear the walkway so that the student could transition from class to class.

> *Practice Pointer:* A private placement by a district may constitute "substantial assistance."

## SPECIAL EDUCATION LEGAL UPDATE

**Montana Cases**

**FR 2023-06- September 29, 2023**

A Parent filed a complaint on behalf of her son alleging the district violated the IDEA, FERPA, and Montana law. The investigation considered whether the district provided the parent with the opportunity to inspect and review education records relating to her child that were collected, maintained, or used by the district under Part B of the IDEA.

The parent had asked the district to provide the Student's educational record. The district excluded test protocols from the photocopy of the record sent to the Parent due to copyright concerns. The district did not offer the Parent the opportunity to come in and view the test protocol until 83 days after they had received the complaint. The investigator found the district was in violation because they failed to provide the Parent with the opportunity to inspect and review test protocols that were part of the educational record within the 45-day requirement imposed by law. The district was ordered to submit an explanation of their practices and policies in providing parents the opportunity to inspect and review education records.

> *Practice Pointer:* Do not copy test protocols but when you send out records give the parents the chance to come review them in person.

**FR 2023-05-September 29, 2023**

A parent filed a complaint on behalf of her high school daughter alleging the district violated the IDEA by expelling the student in November of 2022 and not providing the student with educational services for the remainder of the 2022-2023 school year. There were no formal documented disciplinary removals of the student, and the record did not indicate or support that the student was expelled from school as alleged by the parent. There is no information to support the contention that the student was removed from school for disciplinary reasons. The student may have been removed for a 4-day period in November 2022, but the IDEA did not require the district to provide services during this time because the removal did not exceed 10 days. The student continued to receive services after the student returned in November 2022. The investigator found no violations on the part of the District, the Student was not expelled and continued to receive services after November 2022.

> *Practice Pointer*: Documentation of discipline is critical.

**DP OSPI 2023-2E- October 26, 2023**

This was a corrected Decision and Order to provide a complete version of an Order issued after a Due Process Hearing in September 2023. Parents, on behalf of their son, a request for Expedited Due Process alleging the district failed to provide FAPE by (1) their son not being least restrictive setting with his peers and not being provided the least restrictive environment; (2) their son not being provided a "research core curriculum" modified despite recommendations from OPI required evaluations; (3) the district was unwilling to allow parents any meaningful participation or mediation;

and (4) the district would not let their son go to Friday school despite being below grade level. The request for expedited hearing was not supported by the evidence because the student was not subject to discipline and the and the hearing officer "bifurcated" the matter and let it go forward as a regular due process request.

At the hearing, after the parents presented their case, the HO determined that parents had failed to show the student had not been in his least restrictive environment and failed to show the academic benefits of placement in regular education setting, the parents failed to address any supplementary aids and services that might be appropriate in a regular education setting, the non-academic benefits of such a placement, and the negative impacts on the student's presence on non-disabled peers in the class.

At the hearing, after the parents presented their case, the HO determined that the parents had failed to show the student met the criteria to attend Friday school because he was not failing any of his classes. After the District called two of their witnesses, the HO found the parents could not show they were not allowed meaningful participation in the creation of the IEP because the district provided ample evidence of the parents being allowed opportunities to participate.

After the district called a special education consultant as a witness, the HO dismissed the last issue of whether a modified core curriculum had been provided. The HO determined that the evidence showed that a modified core curriculum was not in the best interest of the student based on the evidence. All issues were dismissed during the hearing.

**FR 2023-07 (1)- December 6, 2023**

A complaint was filed by a parent on behalf of her daughter alleging the district violated the least restrictive environment (LRE) requirements of the IDEA by removing the Student from the regular education environment and not allowing the student to have lunch with same age peers. The complaint was received by OPI on September 28, 2023. OPI did not have authority to investigate violations of IDEA beyond the one-year investigatory timeline. The student no longer attended school in the District after October 7, 2022. Since the allegations were outside the one-year investigatory timeline and beyond the authority of OPI, they did not investigate. Since they did not investigate the claims, OPI could find no violations on the part of the District.

**FR 2023-08- December 6, 2023**

A parent filed a complaint on behalf of the student alleging the district did not provide the parent with the opportunity to inspect and review education records relating to her child that were collected, maintained, or used by the district under Part B of the IDEA. The parent also alleged that the District violated the IDEA by refusing to provide the Student service at home when the District had been provided a medical note that allowed the student to learn from home.

The parent requested the student's special education records on June 20, 2023. The special education director emailed the parent and explained that the student's records would be available for the parent to review at the district office and requested parent let her know when she would be coming. The parent responded that she wanted the records sent to her house. The director told her the fees that would need to be paid in accordance with the district's policies. The district waived the copying fee for the records and notified the parent they were available for pick up. The parent

insisted she wanted them to be sent to her home, and the director told her that because the record was over 360 pages, the parent would have to pay postage for them to be sent. Delivery attempts were made to the parent twice and were unsuccessful because the parent could not pay the delivery fees for the mail. The investigator found there was nothing in the record showing that charging the parent a fee for copies would have prevented her from exercising the right to inspect and review the records. She knew of the fee and did not complain about it until after the copies were sent. OPI still found the district in violation because while the IDEA allows for a fee to be charged for copies, the District's correspondence and policies only included a per page copy fee and did not contain notice of a postage fee.

The student was in a virtual learning program offered by the district, and the parent took her out of the program to homeschool. OPI found the district was not in violation because they were willing and ready to provide FAPE through her current IEP and permitting her to participate in the virtual learning process. The district urged and reminded the Parent to complete the required processes for the Student to participate in virtual learning, and the parent did not do any of this. The parent failed to work with the district and chose to withdraw her.

> *Practice Pointer*: Parents are bringing records claims against districts. Make sure you are sending complete records and beware of charging fees. If you are going to charge any fees, you must tell the parent up front. There cannot be any barriers for the parent to review records. Also, make sure you document your attempts to make FAPE available.

**Federal Cases**

*Zachary J. v. Colonial Sch. Dist.*, 2024 WL 366180 (3d Cir. Jan. 31, 2024). The Third Circuit agreed with the HO and the district court and upheld the actions of the school district. The parents wanted to use a private evaluation to show that the student was not receiving FAPE. The district countered this by, in part, relying on the student's good grades to show the student's meaningful progress. The student's progress reports also demonstrated he was making progress. The district considered the evaluation but did not wholly adopt it as the parents wanted, but they were not required to do that. The Third Circuit agreed the district provided FAPE and did not violate the IDEA.

*Alex W. v. Poudre Sch. Dist. R-1*, No. 22-1236, 2024 WL 973470 (10th Cir. Mar. 7, 2024). The Tenth Circuit found for a school district in a case involving a student with down syndrome, autism, and hearing and vision loss. The dispute between the parents and district arose after a reevaluation resulted in a reduction in some speech and OT direct services to consultative services. The parents requested an independent educational evaluation for speech and OT after the reevaluation, which the district provided. Six months later, the parents were still unhappy and requested a neuropsychology IEE, which the district denied as they had already paid for the OT and speech IEEs. The parents ultimately filed a request for due process alleging a denial of FAPE for several years, many of which were dismissed as being outside of the statute of limitations period of two years. Parents claimed that the district violated IDEA by failing to conduct a FBA and develop a behavior intervention plan to address the student's behavioral challenges. The court noted that these are just "examples of tools" that can be used and are not required in the absence of disciplinary removals. The district was addressing the student's behaviors. The court also found that the district demonstrated that the use of a consultative approach providing collaboration between staff rather than just direct services of speech and OT was appropriate. The court rejected the parents' argument that the district's determination that the student did not require extended

school year services was not necessary was not appropriate. Finally, the court upheld the district's denial of the parent's request for the neuropsychology IEE. Because the district had previously funded the OT and speech IEEs after the reevaluation, this was the "one" IEE to which the parents were entitled. They did not get to come months later and request an additional assessment.

*Los Angeles Unified Sch. Dist. v. A.O. by & through Owens*, 92 F.4th 1159 (9th Cir. 2024). The Ninth Circuit ruled in favor of parents who challenged the proposed IEP offered by a school for their child. The child was born with profound hearing loss but had cochlear implants. When she was going into preschool, the school district proposed a program which would have primarily placed her in a classroom with other hearing-impaired students and would have only placed her with hearing peers once per week for 30 minutes for music, art, and library, once per day at recess, and occasionally for parties. The district also proposed imprecise services of speech language of 1-10 times per week for 30 minutes and audiology of 1-5 times per month for 20 minutes. The court found that the proposed placement for the student was not the least restrictive environment. It also found that the proposed services did not actually provide the frequency and duration of the proposed services to proposed for the student. The district was found to be in violation of the IDEA.