Spotlight On Special Education

CABE LEGAL ISSUES WORKSHOP

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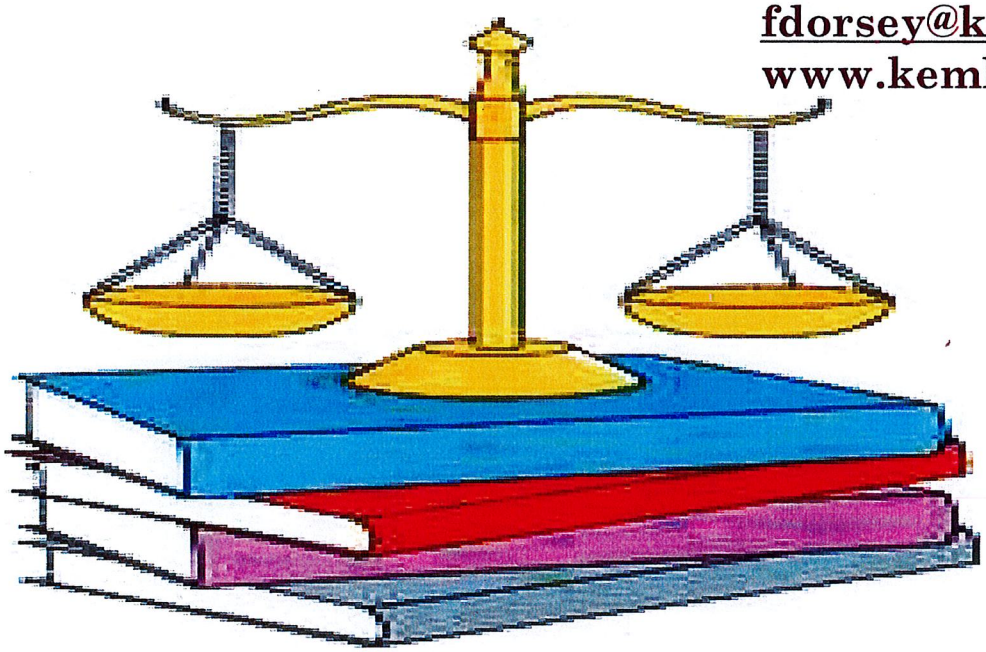

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I. AN OVERVIEW OF THE LAW

A. IDEA Is Special Education

Originally enacted in 1975, the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400, *et seq.*, now covers approximately five million children with disabilities in the country and has been successful in providing disabled children access to a free appropriate public education ("FAPE"). The general purpose of IDEA is to provide federal financial assistance to state and local education agencies to guarantee special education and related services to eligible children with disabilities. IDEA regulations specifically state that the Act's purpose is:

> (A) to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living;
>
> (B) to ensure that the rights of children with disabilities and parents of such children are protected . . .[1]

IDEA, therefore, is a programmatic statute that requires schools to provide specific, individualized special educational programs to students identified as having one of twelve (12) specific disabilities[2] that impact on the students' ability to be educated if schools wish to receive federal funding. Such programs must be free of charge and, to the extent possible based on the students' disabilities, provided in the regular school environment.

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[1] 20 U.S.C. § 1400

[2] "Disability" for purposes of the IDEA includes: mental retardation, a hearing impairment (including deafness), a speech or language impairment, a visual impairment (including blindness), serious emotional disturbance (referred to in this part as emotional disturbance), orthopedic impairment, autism, traumatic brain injury, an other health impairment, a specific learning disability, deaf-blindness, or multiple disabilities, and who, by reason thereof, needs special education and related services. 34 C.F.R. 300.8 (proposed June 21, 2005).

B. Section 504 Is Non-Discrimination

Section 504 of the Rehabilitation Act of 1973[3] prohibits discrimination on the basis of disability. Section 504 provides, in relevant part:

> No otherwise qualified individual with a disability shall, solely by reason of his/her disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under, any program or activity receiving federal financial assistance . . .[4]

Although we are concerned here with students, the anti-discrimination prohibition of Section 504 also applies to teachers, staff, parents of students, and even to the general school district population.

During the first few years following the enactment of Section 504, most school districts viewed the main thrust of the law as requiring appropriate physical access to public buildings. As a result, many ramps were installed, elevators were added in multi-level buildings, curbs were cut and bathroom stalls were enlarged.

Two years after Section 504 was passed, Congress enacted what has now become the Individuals with Disabilities Education Act (the "IDEA").[5] While Section 504 and the IDEA differ in scope and detail, the two laws have many similarities and often provide overlapping coverage. This often creates confusion between the two laws.

C. Special Education and Non-Discrimination

1. Nutshell comparison between IDEA and Section 504

Section 504 is a broad anti-discrimination statute, designed to ensure that covered individuals have equal access to all programs offered by a school district. The IDEA, however, provides for specialized programming and services that may go well beyond the normal course offerings of the general curriculum.

A significant difference between Section 504 and the IDEA is in the area of eligibility for coverage. Every student with a disability who is eligible for coverage under the IDEA is automatically covered under Section 504. The opposite, however,

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[3] 29 U.S.C. § 701 et seq.
[4] 29 U.S.C. 794(a).

is not always true. Students may be covered under Section 504, but not be eligible for special education and related services under the IDEA. This is because Section 504's coverage is much broader than IDEA's and consequently covers a larger number of students and even non-students.

In order to be eligible under the IDEA, a student must fall within one or more of the categories enumerated in that statute **and** must also require special education and related services because of the disability. By contrast, Section 504 does not enumerate specific categories of disabilities or require that the student need special education or related services. Instead, Section 504 broadly defines a disabled person as an individual with "a physical or mental impairment which substantially limits one or more major life activities."[6] Section 504 also covers students who are regarded as, or who have a record of, having such impairment.[7] For all of the foregoing reasons, the number of students eligible for coverage under Section 504 is larger than that under the IDEA.

Like the IDEA, Section 504 mandates child find by requiring that school districts locate, identify and evaluate all children with disabilities residing within their jurisdictions. The evaluation procedures under Section 504 are generally similar to those set out in the IDEA. For example, like the IDEA, Section 504 does not specify a time period within which an initial evaluation must be completed. Therefore, under both Section 504 and the IDEA, a district must conduct an initial evaluation as soon as reasonably possible after it recognizes that a student may be eligible for coverage, and without unreasonable delay. A substantive difference between Section 504 and the IDEA concerning evaluations, however, is that unlike the IDEA, Section 504 does not explicitly give parents the right to an independent educational evaluation (IEE) at public expense.

Like the IDEA, Section 504 requires school districts to provide every eligible student with a FAPE. A significant difference between the FAPE requirements of

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[5] 20 U.S.C. 1400, *et seq.*
[6] 34 C.F.R. 104.3. (caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working)
[7] *Id.*

the two laws, however, is that the IDEA describes FAPE as special education and related services provided in accordance with an individualized education program (IEP).

The regulations implementing Section 504, on the other hand, describe "appropriate education," as:

> [r]egular **or special education** and related aids and services that . . . are designed to meet the individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met.[8] (emphasis added)

FAPE under Section 504 may, therefore, consist of either regular or special education and related aids and services as implemented by any appropriate means, including, but not limited to, an IEP.

Section 504's differing FAPE requirement stems from the fact that, unlike the IDEA, Section 504 is based upon a general prohibition against disability discrimination. A fundamental principle of this prohibition, however, is that nondiscrimination involves more than simply providing disabled students with an education that is identical to that provided to nondisabled students. Instead, the unique and particular needs of each eligible student with a disability must be considered in the development of an appropriate educational program. Therefore, in practice, the substantive requirement to provide FAPE to eligible students under Section 504 is virtually identical to that of the IDEA, with the exception that Section 504 does not require an IEP.

Further, both Section 504 and the IDEA require that FAPE be provided in the least restrictive environment (LRE), and the standards under both are virtually identical. This means that both laws strongly favor the inclusion of children with disabilities in regular education programs. Unlike the IDEA's LRE provisions, Section 504 does not contain an express continuum of placements requirement. Nonetheless, the regulations implementing Section 504 state that eligible students must be educated "with persons who are not handicapped to the maximum extent

[8] 34 C.F.R. 104.33(b).

appropriate" and every such student shall be placed "in the regular educational environment . . . unless it is demonstrated . . . that the education of the person in the regular environment with the use of supplementary aids and services cannot be achieved satisfactorily."[9] Therefore, in practice, the LRE mandate of Section 504 should be considered identical to that of the IDEA.

A substantive language difference in the FAPE requirements under the two laws is that Section 504 does not expressly require the services provided by a district meet the standards of the state educational agency. Nonetheless, districts have been found to be in violation of Section 504 where the programming and services provided did not meet state educational standards.[10] Therefore, districts are well-advised to ensure that programs and services provided under both Section 504 and the IDEA meet the standards of the state department of education. Districts should be aware, however, that Connecticut hearing officers have found non-approved private special education facilities to be "appropriate" placements for students, even though the private school indicated that it did not follow IDEA procedures and practices. *See, e.g.*, S*tudent v. West Hartford Board of Education*, Dec. No. 05-257 (Feb. 3, 2006).

Regarding procedural safeguards, the requirements of the IDEA and Section 504 are similar. However, those imposed by Section 504 are generally considered less rigorous than those imposed by the IDEA. For this reason, the regulations implementing Section 504 provide that compliance with the IDEA's procedural safeguards is one means of complying with the procedural safeguards of Section 504. Therefore, if a district has complied with all of the procedural safeguards required by the IDEA, it will have necessarily complied with all of the procedural requirements of Section 504.

Another significant difference between the two laws is that, unlike the IDEA, Section 504 does not contain a "stay-put" provision. Section 504 does, however,

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[9] 34 C.F.R. 104.34(a).

[10] *See, e.g., Granite (UT) School District*, 16 EHLR 1217 (OCR 1990) (school district failed to provide FAPE under Section 504 based upon, among other deficiencies, a lack of properly certified personnel).

require districts to conduct a reevaluation prior to any "significant change of placement."[11] In light of Section 504's absence of stay-put, this requirement provides parents with substantial protection.

In the area of discipline, the Office of Civil Rights (OCR) has not adopted the IDEA's 1997 or 2004 amendments. However, disciplining students under Section 504 has traditionally been treated by OCR and the courts in essentially the same manner as disciplining students under the IDEA. One major difference, however, concerns disciplining disabled students for drug and/or alcohol use. Students covered under Section 504 may be disciplined for drug or alcohol use in the same manner as their nondisabled peers because Section 504 does not protect **current** users. Although alcoholism and drug addiction are not covered disabilities under the IDEA, students who are current users are not disqualified from coverage under the IDEA if they otherwise meet IDEA's requirements.

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[11] 34 C.F.R. 104.35(a).

D. A Comparison Chart: IDEA and Section 504

	IDEA	Section 504
Purpose	To insure that all children with disabilities have available to them a free, appropriate public education.	To prohibit discrimination on the basis of disability in any program receiving federal funds.
Who is Protected	Students who are eligible under the 12 categories of qualifying conditions.	Much broader. A student is eligible if s/he meets the definition of "qualified handicapped person," *i.e.*, has or has had a physical or mental impairment which substantially limits a major life activity, has a record of or is regarded as disabled by others. Parents and staff are also protected.
Duty to Provide A Free Appropriate Public Education	Both require the provision of a free appropriate education, including individually designed instruction, to students who qualify.	
	Requires the district to provide an individualized education program. "Appropriate education" means a program designed to provide "educational benefit".	"Appropriate" means an education comparable to the education provided to students without disabilities. An IEP is not necessary.
Special Education vs. Regular Education	A student is eligible to receive special education services only if a multidisciplinary team determines that the student has one of the handicapping conditions and needs special education.	A student is eligible if s/he meets the definition of "qualified handicapped person", *i.e.*, has or has had a physical or mental impairment which substantially limits a major life activity, or is regarded as disabled by others. The student is not required to need special education in order to be protected.

	IDEA	Section 504
Accessibility	Not specifically mentioned although, if modifications must be made to provide a free appropriate public education to a student, IDEA requires it.	Detailed regulations regarding building and program accessibility.
General Notice	Both require child find activities	
	Requires notification of parental rights.	Must include notice of nondiscrimination in employee, parent and student handbooks and, if more than 15 employees, must specify the district's 504 coordinator(s).
Notice and Consent	Both require specific notice to the parent or guardian about identification, evaluation and placement.	
	Requires written notice. Notice requirements are more comprehensive and specify what the notice must provide.	Requires notice. (A district would be wise to give notice in writing.)
	Written notice is required before any change in placement.	Requires notice before a "significant" change in placement.
	Requires consent before an initial evaluation and placement.	Consent not required, but if an IDEA handicapping condition is suspected, those regulations must be followed.

	IDEA	Section 504
Evaluations	The regulations are similar.	
	Requires consent before an initial evaluation is conducted. Reevaluations must be conducted at least every 3 years. No provisions	Requires notice, not consent. Requires "periodic" reevaluations. Require a reevaluation before a significant change in placement.
Determination of Eligibility, Program and Placement	Done by IEP Team	Done by a group of persons knowledgeable about the child, the evaluation data, and placement options. While parental participation is not mentioned in the regulations, parental notice is required.
Grievance Procedure	IDEA does not require a grievance procedure or a compliance officer.	Districts with more than 15 employees must designate an employee to be responsible for assuring district compliance with Section 504 and provide a grievance procedure (an informal hearing before a district staff member) for parents, students, and employees.
Due Process	Both require districts to provide impartial hearing for parents or guardians who disagree with the identification, evaluation, or placement of a student with disabilities.	
	Hearing conducted by a state hearing officer. Decisions may be appealed to court.	Hearings conducted at the local level by an impartial person not connected with the school district. Person need not be an attorney. Decisions may be appealed to court.

II. PRACTICAL APPLICATIONS

A. Section 504, Anti-Discrimination Statute

Section 504 is an anti-discrimination statute that prohibits discrimination based on disability. Disability discrimination is generally considered inferior treatment and/or the denial of privileges because of an individual's disability. Ill will or intent is not an express element of discrimination in Section 504 or the regulations. In this regard, the United States Supreme Court has stated that "[d]iscrimination against the handicapped was perceived by Congress to be most often the product, not of invidious animus, but rather of thoughtlessness and indifference - of benign neglect."[12] As such, Section 504 prohibits discriminatory actions and imposes affirmative obligations with no mention of thought-processes or feelings.

The Section 504 regulations specifically prohibit school districts from directly or indirectly engaging in the following discriminatory actions:

1. Denying a qualified handicapped person the opportunity to participate in or benefit from an aid, benefit, or service. This obligation is sometimes referred to as the "comparable opportunities requirement" and applies to all aspects of a district's operations, including nonacademic and extracurricular activities.
2. Affording a qualified handicapped person an opportunity to participate in or benefit from an aid, benefit, or service that is not equal to that afforded other nondisabled individuals. Section 504 disfavors separate treatment of disabled students unless such treatment is justifiable as a reasonable modification for comparable opportunity.
3. Providing a qualified handicapped person with an aid, benefit, or service that is not as effective as that provided to others. This requirement is sometimes referred to as the "commensurate opportunity standard" and applies to both services and facilities.
4. Providing different or separate aids, benefits, or services to handicapped persons or to any class of handicapped persons unless such action is necessary to provide qualified handicapped persons with aids, benefits, or services that are as effective as those provided to others. Although separate or different aids, benefits or services are not

[12] *Alexander v. Choate*, EHLR 556:293 (1985).

unlawful *per se*, OCR can require districts to justify any non-uniform treatment.

5. Aiding or perpetuating discrimination against qualified handicapped persons by providing significant assistance to an agency, organization, or person that discriminates on the basis of handicap in providing any aid, benefit, or service to beneficiaries of the recipient's program. This section was likely intended to extend Section 504 protections to recipient-related organizations not otherwise subject to Section 504 because they do not receive federal financial assistance. (Note that Congress addressed this issue comprehensively when it enacted the Americans with Disabilities Act in 1992.)

6. Denying a qualified handicapped person the opportunity to participate as a member of planning or advisory boards. This marginal provision has received very little attention.

7. Otherwise limiting a qualified handicapped person in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving an aid, benefit, or service. This requirement can be considered the "catch-all" provision of Section 504.

Finally, harassment based on a disability also constitutes discrimination in violation of Section 504. OCR has stated that harassing conduct, such as disparaging remarks made to a student about his or her disability, may constitute a violation of Section 504. Further, a district may be found to be in violation of Section 504 based upon peer harassment if the district was aware of and condoned such harassment.[13]

OCR has stated that once a school district is put on notice that a disabled student is a victim of disability-based harassment, it should take steps to address and eliminate such harassment. Steps should include an investigation and the development of a method to enable the student to communicate complaints of further harassment to district staff. The district should then maintain a record of such complaints, along with its responses. Districts are also well advised to take systemic preventive action, such as providing staff training as well as staff and student educational programs, to address disability harassment.

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[13] *See, e.g., Willamina (OR) School District 30-J*, 27 IDELR 221 (OCR 1997).

B. Section 504, Scope: From Academics To Athletics

Section 504 is a broad statute that prohibits discrimination in "any program or activity receiving federal financial assistance."[14] Therefore, students with disabilities may not be excluded from a school district's extracurricular activities. Further, all the protections and obligations of Section 504 apply to extracurricular activities as they to do academics with equal force. The regulations implementing Section 504 make this clear, providing that:

> [a school district] shall provide non-academic and extracurricular services and activities in such a manner as is necessary to afford handicapped students an equal opportunity for participation in such services and activities.[15]

Perhaps the most common concern regarding non-academics is in the area of athletics. Section 504 regulations specifically address physical education and athletics, extending the LRE mandate to both:

> 1. In providing physical education courses and athletics and similar programs and activities to any of its students, a [school district] may not discriminate on the basis of handicap. A [district] that offers physical education courses or that operates or sponsors interscholastic, club, or intramural athletics shall provide to qualified handicapped students an equal opportunity for participation in these activities. (2) A [district] may offer to handicapped students physical education and athletic activities that are separate or different from those offered to nonhandicapped students only if separation or differentiation is consistent with the requirements of [the LRE mandate] and only if no qualified handicapped student is denied the opportunity to compete for teams or to participate in courses that are not separate or different.[16]

Another common area of concern regarding extra-curricular activities is field trips. Districts must furnish reasonable accommodations in order to enable students with disabilities to participate in curricular and extra-curricular activities. Further, although a district may invite parents to accompany their children on field trips, making acceptance of such invitation a condition to students' participation

[14] 34 C.F.R. 104.4(a).
[15] 34 C.F.R. 104.37(a).
[16] 34 C.F.R. 104.37(c).

constitutes unlawful disability discrimination. A district may, however, exclude a student with a disability from a particular field trip if such participation presents an unacceptable risk to the student's health or safety. Districts should proceed with extreme caution in this area, however, because the exclusion of students with disabilities from school activities is scrutinized very closely by both OCR and the courts.

Finally, Section 504 also applies to non-educational programs sponsored by school districts such as day care, after-school care and summer recreational programs. Therefore, in operating such programs, districts must not exclude or discriminate against students with disabilities.

C. Civil Liability, Section 504 & IDEA

Parents who feel that a school district has discriminated against their child in violation of Section 504 and who wish to pursue a claim against the district usually file a complaint with OCR. However, Section 504 does not require that parents file a complaint with OCR prior to initiating a lawsuit. Therefore, parents generally have a choice between pursuing a Section 504 claim administratively or in court.

However, if the parents' Section 504 claim also encompasses a claim under the IDEA, exhaustion of administrative hearings under the IDEA is required prior to filing suit in court. There are limited exceptions to this exhaustion requirement. For example, exhaustion of administrative hearings under the IDEA is not required where the claim is a class action alleging widespread, systemic violations of the IDEA, the claim concerns purely legal issues making any fact-finding totally unnecessary, or immediate access to the court is necessary in order to avoid serious, irreparable harm.[17] Fortunately for school districts, such exceptions are generally construed narrowly.

Section 504 does not specify a time period within which a court action must be brought. Therefore, the courts generally borrow the statue of limitations period

[17] *See, e.g., Emma C. v. Eastin*, 26 IDELR 1279 (N.D. Cal. 1997).

from an analogous state law. The Second Circuit has held that state personal injury statutes of limitations apply to Section 504 claims.[18] Therefore, a two-year limitation period generally applies to Section 504 claims in Connecticut.[19]

Although Section 504 and the accompanying regulations do not include intent as an element of unlawful discrimination, the courts have nonetheless struggled with the issue of whether bad faith or intent to discriminate is a required element of a Section 504 cause of action. The general prevailing judicial opinion is that in order to succeed in court on a Section 504 claim, parents must demonstrate bad faith or gross misjudgment on the part of school officials. However, some courts have held that such a showing is not necessary. Therefore, it is generally difficult to predict how a court will rule on this issue in a Section 504 case.

Finally, like the IDEA, attorney fees are recoverable to prevailing parties in Section 504 cases.[20] Therefore, a district that loses a Section 504 case will likely be liable for the parents' attorney fees. Punitive damages, however, are not typically awarded in Section 504 cases, unless specific intent to discriminate is found.

D. Discipline Issues – Section 504 & IDEA

Generally, suspension and expulsion of students with disabilities have been treated the same way under both the IDEA and Section 504. In addition to providing a FAPE, districts must follow specific procedures in order to comply with Section 504 and the IDEA. These specific procedures include: an opportunity for the parents or guardian to examine relevant records; an impartial hearing with opportunity for participation by the parents or guardian and representation by counsel; and a review procedure.

Both Section 504 and IDEA require manifestation determinations prior to serious discipline of disabled students. Such determinations are specifically

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[18] *Morse v. University of Vermont*, 3 NDLR ¶ 66 (2d Cir. 1992).

[19] Connecticut General Statutes, Section 52-584 provides that personal injury actions must be brought within two years from the date when the injury is first sustained or discovered or reasonably should have been discovered, except that no such action may be brought more than three years from the date of the act or omission complained of.

[20] 29 U.S.C. 794a(b).

provided for under the IDEA and Connecticut General Statutes.[21] Section 504 does not expressly mention manifestation determinations, but the very nature of Section 504 demands such deliberations. Section 504 is a discrimination statute that prohibits discrimination based on a covered individual's disability. If a disability causes a behavior, *i.e.*, is a manifestation of the behavior, discipline for that behavior would be an adverse consequence based on the disability, a classic discriminatory act. Even if IDEA did not provide for manifestation determinations, since Section 504 also covers all IDEA students, manifestation determinations would be required of special education students. Similarly, functional behavioral assessments (FBA) and behavioral intervention plans (BIP) could be "related aids and services that . . . are designed to meet the individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met."

While the range of Section 504's procedural safeguards are similar to those imposed by the IDEA, Section 504's requirements are generally considered less rigorous. Therefore, the regulations implementing Section 504 provide that compliance with the procedural safeguards of the IDEA is one means of complying with the procedural safeguards of Section 504. In other words, if a district has complied with all of the procedural safeguards required by the IDEA, it will have complied with all of the procedural requirements of Section 504. As such, the OCR recommends that districts adopt IDEA's procedures when dealing with a Section 504 student, even if the student is not eligible under the IDEA. Districts should take care, however, to clearly distinguish between IDEA-based IEPs and Section 504 accommodation plans. While the District can use IDEA procedures, it is better practice not to use IDEA forms for Section 504 students.

E. Other Health Impaired ("OHI") - Section 504 & IDEA

In recent years, schools have faced increased pressure from parents to qualify their children as eligible for IDEA services as "other health impaired" ("OHI"). OHI

[21] *See*, 20 U.S.C. § 1415(k)(E)(i) and C.G.S. § 10-233d(i).

has also become a catchall for many students to be identified as eligible for IDEA services who do not necessarily meet the qualifications for other, more clearly defined, disability classifications or who have a specific medical diagnosis, such as attention deficit disorder (ADD) or attention deficit hyperactivity disorder (ADHD). In order to placate parents, some school districts have simply wilted to parental demands instead of clearly applying the eligibility determination criteria. To avoid over qualifying students, school districts should carefully look to the definition of OHI and strictly apply the two-prong test definition in their eligibility analysis.

1. What is "OHI"?

Under the IDEA, "other health impairment" is defined as:

> having limited strength, vitality or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the education environment, that (i) Is due to chronic or acute health problems such as asthma, attention deficit disorder or attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, and sickle cell anemia; **and** (ii) **Adversely affects a child's educational performance.**

34 C.F.R. § 300.7(c)(9). (emphasis added)

To be eligible for services under the IDEA as OHI, therefore, a child must (1) have limited strength, vitality, or alertness due to a chronic or acute health problem that (2) adversely affects the child's educational performance. The second prong of this test is often at the center of dispute. If the student's condition does not adversely affect his/her educational performance, he/she is not eligible for IDEA coverage, though accommodations could still be required under Section 504.

2. When does the condition adversely affect a child's educational performance?

To qualify a child as OHI, the student's disability must adversely affect his or her educational performance and create a need for special education services. *Letter to Sawyer*, 30 IDELR 540 (OSEP 1998). The term "educational performance" is not defined in IDEA or in the regulations, and the Office of Special Education Programs ("OSEP") has consistently chosen not to define it, but, rather, has directed school officials to consider both academic and nonacademic skills and progress in

determining whether a child's impairment adversely affects his or her educational performance. OSEP has stated that even students who are making progress within the regular educational environment may still require special education services. *Letter to Pawlisch,* 24 IDELR 959 (OSEP 1995). Ultimately, the terms "educational performance" and "adversely affect" must be defined on a case-by-case basis in light of particular facts and circumstances.

The issue of whether a student qualifies under OHI arises frequently in cases of children with poor socialization skills who exhibit behavioral problems. *See, e.g., Leslie B. by and through John C. v. Winnacunnet Coop. Sch. Dist.,* 28 IDELR 271 (D.N.H. 1998). For example, in one case a student diagnosed with ADHD scored in the average to superior range on almost all standardized tests, but experienced social problems. *Lyons v. Smith,* 829 F. Supp. 414 (D.D.C. 1993). In this case, the parents challenged the hearing officer's decision that their son was not OHI because the parents argued he suffered from social emotional problems. The District Court, however, affirmed the hearing officer's decision holding that "the achievement of passing marks is one important factor in determining educational benefit" and the student did well. Such a holding does not, however, preclude a finding that the student's socialization and behavioral problems did not represent a disability protected from discriminatory treatment by Section 504

In looking at Section 504 specifically, one Oregon case addressed the student's 504 plan in finding against the parents' request that the student be deemed eligible for special education services. *Corvallis Sch. Dist.*, 28 IDELR 1026, (SEA Or. 1998). In this case, the student was diagnosed with Asperger's syndrome and earned above-average grades in her academic subjects and demonstrated "satisfactory" progress in social skills, work, and study habits. Her achievement test scores indicated that she was at or above grade level in all areas and significantly above grade level in reading and math. Her overall cognitive level was in the average range. In finding that the student did not qualify for special education services, the hearing officer found that the student's accommodation and related services 504 plan within the regular education setting allowed the student

to make progress within the regular educational environment, as indicated by grades and performance on academic achievement tests. The disability, therefore, did not adversely affect her educational performance and she was not eligible for IDEA coverage.

3. Summary

School officials, in deciding whether a child qualifies for special education services as OHI, can begin by asking the following questions:

1. Does the student have a chronic or acute health problem?
2. Does the student have limited strength, vitality or alertness? If not, does he or she have heightened alertness to general environmental stimuli?
3. If so, does the student's limited strength, vitality or alertness reduce his or her alertness in the educational environment? Or does the child's heightened alertness to the surrounding environment limit his or her alertness to the educational environment? If so, is the limited, or heightened, alertness due to a chronic or acute health problem?
4. If so, is the student's educational performance adversely affected by the limited/heightened alertness?
5. Finally, if so, does the disability create a need for special education services?

If so, the student qualifies for special education services.