

# **Spotlight On Special Education**

## **CABE LEGAL ISSUES WORKSHOP**

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## OVERVIEW

- I. IDEA and Section 504 Overview
- II. Unilateral Placements: The Impact of *Forest Grove School District v. T.A.*
- III. Special Education and Section 504 in Expulsion Proceedings

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## I. IDEA and Section 504 Overview

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## What is Section 504?

- Section 504 is a broad **anti-discrimination law**
- Specifically defined as:
  - "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 . . ."
- 504 Plans provide **accommodations** to students to allow participation

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### Eligibility for Services Under 504

- Section 504 is more expansive than IDEA in that it protects **all** persons (students, staff, parents, *etc.*), **regardless of age**, who:
  1. have a physical or mental impairment which substantially limits one or more major life activities;
  2. have a record of such an impairment; or
  3. are regarded as having such an impairment.

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### What is IDEA?

- The Individuals with Disabilities Education Act (IDEA) is the principal source for the legal responsibilities of boards of education with respect to providing special education services
- A **programmatic** statute that requires schools to provide specific, individualized educational programs

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### Eligibility for Services Under IDEA

- To qualify for special education and related services a student must generally be within the ages of 3-21 and must:
  - Meet the definition of one or more of the categories of disabilities
  - Must be in the need of special education and related services
  - The disability must adversely affect the child's educational performance

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**IDEA lists and defines the specific disabilities for eligibility. These are:**

■ Autism	■ Other health impairment
■ Deaf-Blindness	■ Serious emotional disturbance
■ Hearing Impairment (including deafness)	■ Specific learning disability
■ Mental Retardation	■ Speech or language impairment
■ Multiple Disabilities	■ Traumatic brain injury
■ Orthopedic impairment	■ Visual impairment

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**Comparison Between Section 504 and IDEA**

The diagram consists of three concentric circles. The innermost circle is yellow and labeled 'IDEA Children'. The middle circle is blue and labeled '504 Children', encompassing the yellow circle. The outermost circle is red and labeled 'All Children', encompassing both the inner circles.

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**Child Find/Evaluation**

- Like the IDEA, Section 504 requires that the school district locate, evaluate and determine eligibility for services
- Section 504 and IDEA both require that an Initial evaluation be conducted as soon as reasonably possible
- Section 504, however, does not give the parents the right to an independent education evaluation (IEE)

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## FAPE

- Both IDEA and Section 504 require school districts to provide a free and appropriate education
- A FAPE under IDEA, however, means **special** education and related services provided in accordance with the IEP
- Section 504, however, does not require an IEP and an "appropriate" education means an education comparable to that provided to students without disabilities. This may be **regular** or **special** education.

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## Least Restrictive Environment

- LRE means that a separate class setting may be appropriate **only** when a regular classroom placement cannot be achieved satisfactorily with the use of supplementary aids and services
- Both laws require that FAPE be provided in the least restrictive environment

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## Stay-Put

- Stay-Put means that parents have the right for their child to remain in the current placement during any due process proceeding filed by them
- Section 504 does not provide for "stay-put" but does require districts to conduct a reevaluation prior to any "significant change of placement"

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## Discipline

- Generally Section 504 and IDEA provide for similar discipline procedural safeguards (*i.e.*, manifestation determination, *etc.* )
- If a school district complies with the IDEA safeguards it will have complied with Section 504
- Disciplining students for drug and/or alcohol use is different. Under Section 504 students may be disciplined for drug or alcohol use in the same manner as their non-disabled peers because Section 504 does not protect current users

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## Section 504 and IDEA Accommodations are **MANDATORY**

- Both IDEA and Section 504 require that accommodations be made for individuals with disabilities
- Once the accommodation is identified and included in an IEP or 504 Plan, it **must** be implemented in all environments within the school

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## Civil Liability

- Under Section 504 parents can either file a complaint with the Office for Civil Rights (OCR) or may file a complaint in court.
- IDEA, however, requires that the parent exhaust all of its administrative remedies before proceeding with court (*i.e.*, parent must go through due process first)
- Under both Section 504 and IDEA, if parents are deemed to be prevailing parties, they can recover attorney fees

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## Documents and Data Must Be Preserved When Litigation Is Filed, Regardless of the Source

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## Documents and Data

- means not only hard copies of documents, but also emails, electronically maintained, received and created information stored on computers, databases, calendars, audio recordings, word processing documents and Internet usage files.

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## Source

- includes hard copy files, computer hard drives, removable media (*e.g.*, CDs and DVDs), laptop computers, PDAs, Blackberry devices and any other locations where hard copy or electronic data is stored. **This may also include personal computers you use or have access to at home or at other locations.** It also includes inaccessible storage media, such as backup drives and tapes, which may contain relevant electronic information that does not exist in any other form.

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## "OHI" Under IDEA

To be eligible for services under the IDEA as "other health impaired" a child must:

- (1) have limited strength, vitality, or alertness due to a chronic or acute health problem that
- (2) adversely affects a child's educational performance.

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## Adversely Affect Education

- "Adversely affect" is not defined under IDEA
- The Office of Special Education Programs ("OSEP") has directed school officials to look at both academic and nonacademic skills and progress
- While the decision must be made on a case-by-case basis, the achievement of passing marks is one important factor in determining whether the disability adversely affects a student's education

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## What about AD(H)D?

- Students can qualify for IDEA under "OHI" if they qualify as AD(H)D
- The real question, however, is whether the AD(H)D student **requires** special education under IDEA
- If the child's needs can be met through a set of accommodations in the regular class under a 504 Plan, the student most likely does not qualify under IDEA

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### OHI Checklist

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. Does the student's limited strength, vitality or limited 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?

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### OHI Checklist (cont.)

4. Is the student's educational performance adversely affected by the limited alertness?
5. Does the disability create a need for special education services?
6. If yes to all questions, the student qualifies for special education services.

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### II. Unilateral Placements: Impact of *Forest Grove School District v. T.A.*

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### **Forest Grove School District**

#### **FACTS**

- California district found high school student ineligible for services.
- Parents consult private specialist two years later. Diagnosed ADHD and other learning/memory disabilities.
- Unilateral placement; filed request for due process for reimbursement.
- Pending decision, new psych evaluation: still ineligible.

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### **Forest Grove School District**

#### **DECISION**

- Hearing Officer: District failed to identify and is responsible for unilateral placement.
- District Court: Reversed—IDEA categorically bars reimbursement if student has never received services.
- Court of Appeals: Reversed—Consider equities of whether failure to request services affects right to reimbursement.
- U.S. Supreme Court: Affirmed—Denial of FAPE need not relate to a deficient IEP.

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### **Forest Grove School District**

#### **IMPLICATIONS**

1. In place but insufficient. Expands prior Supreme Court decisions on LEA obligation to reimburse for unilateral placements: *Burlington v. Department of Education* (1985); *Florence County School District v. Carter* (1993).
2. Holds that IDEA language does not create "categorical bar" on reimbursement.
3. Court persuaded by IDEA's remedial purpose: give parents relief when FAPE is denied. IDEA provides a remedy for failure to identify in the first place, not just where IEP

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### **Forest Grove School District**

#### **Predicted Impact on Identification and Tuition Reimbursement**

- Will encourage parents to make placements, increasing the amount of resulting litigation?
  - Supreme Court said no danger, because parents take the risk of getting stuck with the bill, should hearing officer decide that district made FAPE available.

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### **Forest Grove School District**

#### **Predicted Impact on Identification and Tuition Reimbursement (cont.)**

- Impact on RTI plans: parents may choose to make placements instead of waiting for evaluation of regular ed. interventions?
  - As we see a shift away from ability-achievement discrepancy model of identification in favor of teacher responsibility for introducing interventions early on, will parents become impatient with process and pull kids, out of fear that school is unlikely to provide sped?
  - Criticism from parents: RTI hinders identification process by requiring teachers to try regular ed. interventions before formal assessments can take place.

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### **III. Special Education and Section 504 in Expulsion Proceedings**

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## EXPULSION PROCEEDINGS

*Students receiving special education services at the time of misconduct:*

- Step One: Schedule expulsion hearing and manifestation determination PPT
  - Manifestation Determination: "Was the misbehavior a manifestation of the student's disability?"
    - Required for all special education students, not just those with behavioral disabilities.

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## EXPULSION PROCEEDINGS

- Purpose of Manifestation Determination PPT meeting:
  - If manifestation, IDEA requires the PPT to meet and decide appropriate course of discipline while ensuring that IEP goals are met to extent possible.
- When Necessary?
  - If discipline will result in removal from educational placement for more than 10 days (change in placement)

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## EXPULSION PROCEEDINGS

- Note: **Change in Placement** also results once student is removed for **more than a total of 10 school days during school year, IF** the behavior that caused the past removals is **substantially similar** to the current behavior.
  - Consider nature of misconduct; proximity in time.
- PPT must convene within 10 days following expulsion notice (and prior to expulsion hearing).

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## EXPULSION PROCEEDINGS

- **Manifestation if:**
  - Conduct caused by or had **direct and substantial** relationship to the child's disability, OR
  - Behavior was a direct result of the school's failure to implement the IEP.
- **Review all pertinent information in student's file, including:**
  - IEP
  - Teacher observations
  - Parent information
- **Document PPT's decision.**

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## EXPULSION PROCEEDINGS

- **Step Two: *If no manifestation found—***
  - **Inform parents of procedural safeguards—right to challenge the decision by requesting a due process hearing**
    - Stay Put: student remains in current educational placement pending expedited hearing (within 20 school days; decision 10 days later) to review manifestation PPT's decision
    - Hearing Officer may return student to school, or order Interim Alternative Educational Setting for not more than 45 school days if student is substantially likely to injure self or others

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## EXPULSION PROCEEDINGS

- **Step Two: *If no manifestation found— (cont.)***
  - **Proceed to Expulsion Hearing**
    - Regular procedures. If expelled, must continue to provide FAPE in accordance with IEP.
    - PPT convenes to determine appropriate Alternative Educational Setting.
    - May be standard 2 hours per day tutoring, or something else necessary to meet IEP goals & objectives.

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## EXPULSION PROCEEDINGS

### ■ Step Two: *If manifestation found—*

- Administer Functional Behavioral Assessment (unless recently conducted) and develop Behavioral Intervention Plan.
- See if IEP or existing BIP needs to be modified. If no existing BIP, put one in place to address behavior based on results of FBA.

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## EXPULSION PROCEEDINGS

### ■ Step Two: *If manifestation found— (cont.)*

- Student must be returned to the placement s/he was in before removal, unless:
  - PPT decides to change the placement (i.e., parents in agreement), OR
  - School removes to Interim Alternative Educational Setting for up to 45 school days
- IAES is appropriate when:
  - Student had weapon, had or sold illegal drugs, or caused serious bodily injury to a person on school grounds or at a school-sponsored activity, OR
  - Student is found at a due process hearing to be "substantially likely" to injure himself or others.

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## EXPULSION PROCEEDINGS

### ■ Step Two: *If manifestation found— (cont.)*

- Student placed in IAES must continue to receive educational services that enable student to participate in general ed curriculum and progress toward meeting IEP goals.
- Student placed in IAES must receive, as appropriate, an FBA and BIP to address the problem behavior and prevent recurrence.
  - This happens regardless of whether the behavior is a manifestation of the disability.

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## EXPULSION PROCEEDINGS

### *Students not yet eligible for special education:*

- Same safeguards apply when student is not yet eligible, if school had knowledge that the student had a disability before the misconduct occurred.
- Deemed to have knowledge if parent or teacher expressed concern with student's progress or behavior, or if an evaluation was requested.
- Not deemed to have knowledge if PPT recently offered evaluation and parent declined, or if PPT already evaluated and found no disability.
  - *Caution: How recent was evaluation? For what type of behavior/performance issue? May be safer to reevaluate in some cases.*

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## EXPULSION PROCEEDINGS

### *Students not yet eligible for special education:*

- If school had knowledge of disability before behavior occurred, proceed with evaluation and hold Manifestation Determination PPT.
- If no knowledge, may discipline student using same measures applied to those students without disabilities who engaged in comparable behavior.
  - *Exception: If parent requests evaluation, conduct expedited evaluation and provide special education if identified as IDEA eligible. During evaluation process, student remains in the educational placement determined by school authorities.*

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## EXPULSION PROCEEDINGS

### *Section 504 Requirements:*

- The 504 team must hold a Manifestation Determination meeting for any student with an Individualized Accommodation Plan.
- If the student receives services under IDEA in addition to Section 504, compliance with the procedural safeguards requirements of IDEA is sufficient to meet the requirements of Section 504.

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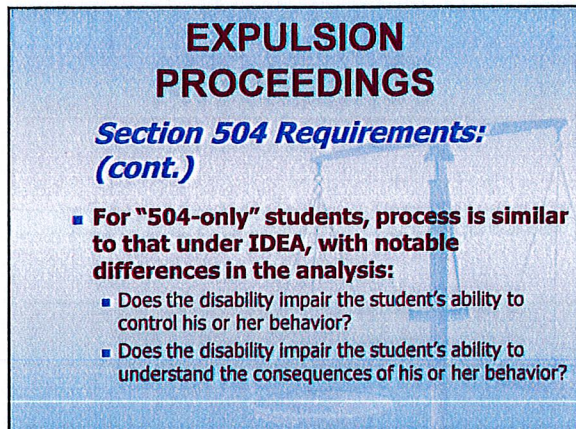
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## EXPULSION PROCEEDINGS

**Section 504 Requirements:  
(cont.)**

- For "504-only" students, process is similar to that under IDEA, with notable differences in the analysis:
  - Does the disability impair the student's ability to control his or her behavior?
  - Does the disability impair the student's ability to understand the consequences of his or her behavior?



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