



SECTION 504: Myths And realities

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SECTION 504: MYTHS AND REALITIES

I. FEDERAL LAWS RELEVANT TO OVERALL DISCUSSIONS

- A. Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 794.
- B. The Americans with Disabilities Act (ADA), 42 U.S.C. § 12101, et seq.
- C. The Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400, et seq.
- D. No Child Left Behind Act of 2001 (NCLB)

II. SECTION 504'S GENERAL PROVISIONS

A. The Student Assistance Team/Child Study Team Process

MYTH #1: “The SAT process is just the way to special ed.”

REALITY: All staff should be trained to recognize that the Student Assistance Team (or other alternative) process is not merely the “way” to get a student into special education. In fact, it is designed as the way to *never* get to the point of referral for special education in the first place! Since “early intervening” services are contemplated under NCLB, the 2004 IDEA Amendments and 2006 IDEA regulations to assist all students who are exhibiting academic or behavioral problems, it seems logical that this Team would serve as an appropriate group for addressing 504 issues as well.

B. The General Existence of Section 504

MYTH #2: “We don’t ‘DO’ Section 504 here.”

REALITY: Clearly, every public school system, in fact, *does* (or better) meet the requirements of Section 504. In fact, the Superintendent signs an “Assurance of Compliance” every year that is forwarded to the Secretary of Education as a condition to the receipt of federal funds. In addition, every school system must designate at least one person to serve as the Section 504 Coordinator for the system. Ensure that all staff is familiar with Section 504 and the system’s policies and procedures for addressing 504 issues.

MYTH #3: “Section 504 doesn’t really exist.”

REALITY: Section 504, as amended, provides in pertinent part, that:

No otherwise qualified individual with a disability in the United States ... shall, solely by reason of his or 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 29 U.S.C. § 794(a).

MYTH #4: “Section 504 provides more protections than IDEA.”

REALITY: Section 504 is an anti-discrimination statute that does not require affirmative action to be taken, as does the IDEA. Rather, Section 504 prevents discrimination solely on the basis of disability in the provision of all services, activities, and programs.

C. What May Constitute a Disability under Section 504

MYTH #5: “Sorry. It’s our School System’s policy that because he isn’t eligible for special education, there’s nothing more we can do for him right now.”

REALITY: The definition of “handicapped” person under Section 504 is broader than the definition of a “student with a disability” under the IDEA. Therefore, there may be students with disabilities that are protected under Section 504 against discrimination or are entitled to FAPE in the form of educational accommodations in the regular education classroom that do not qualify for specially-designed instruction or special education services.

1. Definition of “handicapped person”

A person is "handicapped" under Section 504 if he or she:

- a. Has a physical or mental impairment which substantially limits one or more major life activities;
- b. Has a record of such an impairment; or
- c. Is regarded as having such an impairment.

2. "Physical or mental impairment"

- a. Any physiological disorder or condition, cosmetic disfigurement or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine; or
- b. Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

3. "Major life activities"

Functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working.

- a. T.J.W. v. Dothan City Bd. of Educ., 26 IDELR 999 (M.D. Ala. 1997). The "ability to control one's behavior" is a major life activity.
- b. Toyota Motor Mfg. v. Williams, 122 S. Ct. 681 (2002). The relevant question in determining whether a person is disabled under the ADA is whether the person's impairments prevent or restrict her from performing tasks that are of *central importance* to most people's daily lives. To be substantially limited in the specific major life activity of performing manual tasks, an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives. The impairment's impact must also be permanent or long-term. It is insufficient for the person to merely submit evidence of a medical diagnosis of an impairment. In this case, repetitive work with hands and arms extended at or above shoulder levels for extended periods is not an important part of most people's lives. Household chores, bathing and brushing one's teeth, in contrast, are among the types of manual tasks of central importance to people's daily lives.

D. The Extent to Which the Condition Must Limit a Major Life Activity

MYTH #6: "She needs to be on a 504 Plan because she has ADHD and instead of making A's and B's, she could be making all A's."

REALITY: In order for a disability to exist under Section 504, the identified physical or mental condition must *substantially limit* the major life activity of learning for purposes of Section 504's protections or for the provision of a "504 Plan."

1. Definition of "substantially limits"

There is no definition within the Section 504 regulations of the term "substantially limits." The Office for Civil Rights (OCR) has attempted to define the term. In addition, the regulations promulgated under the ADA contain a definition of the term that, by analogy, arguably applies under Section 504. Finally, a couple of courts have attempted to define what is a "substantial limitation."

a. Pinellas County Sch. Dist., 20 IDELR 561 (OCR 1993). The term "substantially limits" has been interpreted to require an "important and material" limitation. One of the purposes of Section 504 and Title II of the ADA is to improve opportunities for individuals with disabilities, who because of a generally acknowledged disabling condition, have been excluded from or experienced significant difficulty in obtaining the necessary education to be self-sufficient. The term "substantially limits" must be interpreted within that context.

b. ADA Regulation 29 C.F.R. § 1630.2(j) defines "substantially limits" as:

Significantly restricted in the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner or duration under which the average person in the general population can perform that same major life activity.

c. Price v. National Bd. of Medical Examiners, 1997 WL 323998 (S.D. W. Va. 1997). A student does not have a disability under the ADA simply because the student's impairment keeps the student from reaching his or her potential.

d. Wong v. Regents of the Univ. of California, 2005 WL 1331126, 410 F.3d 1052 (9th Cir. 2005). A person who has a "learning disability" is not necessarily "disabled" under the ADA and Rehabilitation Act. Rather, the Acts use the term "disabled" in a narrower fashion and to cover only those persons who have an impairment that substantially limits one of the major life activities. Thus, dismissed medical student was not substantially limited by his learning disability as a whole, for purposes of daily living, as compared to most people, as required to establish that he was disabled under the ADA. He had completed the first two years of the medical school program, the academic courses, on a normal schedule, with a grade point average slightly above a "B," and he passed the required national board examination at that point, both without the benefit of any special accommodations.

e. T.J.W. v. Dothan City Bd. of Educ., 26 IDELR 999 (M.D. Ala. 1997). The student's learning ability must be compared to the average student. The fact that the student made passing grades is a factor to consider and while receiving "D"s in spelling and deficiency reports regarding failure to do work may indicate that the student's ability to perform academically was affected, it does not indicate that his ability to learn was limited so that he was not

able to learn as well as the average student. Thus, student cannot recover on the basis of his condition substantially limiting the major life activity of learning.

E. Whether Learning is the only Major Life Activity to Consider

MYTH #7: “She might be in a wheelchair, but she’s not protected under Section 504 because she’s making all A’s.”

REALITY: School personnel must understand that Section 504 prohibits *discrimination solely on the basis of disability*. For instance, a student in a wheelchair whose only limited major life activity is walking, may not need a Section 504 Plan (which is not even specifically required under Section 504) but can not be excluded from recess simply because the playground cannot accommodate the wheelchair. Such an exclusion would be discrimination under Section 504.

F. Discrimination Based upon a “Record of an Impairment”

MYTH #8: “Every student who has ever been in special education is automatically covered because the student has a ‘record of’ a disability.”

REALITY: The “record of” portion of the disability definition protects individuals from *discrimination* based upon a recorded past impairment. However, in order to be entitled to educational accommodations under Section 504 and, therefore, a 504 Plan, a student must have a *present* impairment that is *presently* substantially limiting the student’s learning.

1. Regulatory definition of “has a record of such an impairment”

Has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

2. OCR guidance

a. OCR Senior Staff Memorandum, 19 IDELR 894 (1992). Unless a person actually has a disabling condition, the mere fact that he/she has a "record of" or is "regarded as" disabled is insufficient, by itself, to trigger 504's protections that require educational accommodations.

MYTH #9: “He can’t be on the basketball Team because I just found out that he was treated for cancer in the past.”

REALITY: Such a statement would be considered discrimination based solely upon a “record of” a disability.

G. Discrimination Based upon being “Regarded as having an Impairment”

MYTH #10: “A student whose doctor has diagnosed ADHD is automatically covered by Section 504 because the parents now regard the student as disabled.”

REALITY: The “record of” and “regarded as” portions of the definition are not relevant to SAT determinations regarding instructional modifications and accommodations. In addition, a medical diagnosis, in of itself, does not mean a student is disabled under Section 504. Rather, the school is entitled to propose and conduct its own evaluations. The school must have clear documentation/evidence of an *actual existing disability* in order for Section 504 to apply. Where there are questions, the SAT should request additional evaluations by school staff or other professionals or, where appropriate, an outside independent professional or physician. Medical documentation may be required by the SAT if needed to determine appropriate reasonable accommodations or modifications but is not necessary.

Just as a school system may not discriminate based upon a record of an impairment, it cannot discriminate because it “regards” someone with an impairment in such a way that they are treated differently or excluded from services. This would include someone who has a condition but it does not substantially limit a major life activity but he/she is treated by others as if he/she does. It could also include someone who has an impairment that does substantially limit a major life activity but only because of the attitudes of others toward that impairment. Simply because someone “regards” a student as disabled, however, does not necessitate a Section 504 Plan, unless the student truly is disabled in learning.

1. Regulatory definition of “is regarded as having an impairment”
 - a. Has a physical or mental impairment that does not substantially limit major life activities but is treated by a [school system] as constituting such a limitation;
 - b. Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment;
 - c. Has no impairments but is treated by the recipient as having such an impairment.

MYTH #11: “She did the best job during the auditions, but her acne is so bad that I don’t think we can choose her to play Cinderella.”

REALITY: This would be discrimination in the form of treating someone as if they are disabled, when they are not, and making a determination that she not participate solely on that basis.

MYTH #12: “I know they’re not sick yet, but their mother just told me that they tested positive for HIV. I’ve got to send those boys home before someone else catches it.”

REALITY: “Regarding” someone as if they have an impairment, whether they do or they do not, could substantially affect a major life activity if the school system excludes him/her from a school activity as a result of that regard or attitude. This constitutes discrimination under Section 504 but would not necessitate the development of a Section 504 Plan.

MYTH #13: “Where a student is referred for a special education evaluation and did not qualify, the student is automatically covered under Section 504.”

REALITY: It is true that because the student was referred for an evaluation for an IDEA evaluation and eligibility determination, a Team must have **suspected** a disability or “regarded” the student as disabled. However, a finding that a student does not qualify for special education services does not automatically mean that the student is disabled under Section 504. As a matter of best practice, however, a referral should be made back to the Student Assistance Team for *consideration* of whether the student’s difficulties are or could be caused by a disability under Section 504. Clearly, the evaluative information collected as part of any evaluation to determine eligibility for special education under the IDEA can and should be used by the Team considering 504 eligibility, in addition to other relevant information.

- a. Letter to Veir, 1 ECLPR ¶ 363 (OCR 1993). Students who do not meet IDEA's eligibility criteria may or may not fit within the definition of Section 504 eligibility. 504 eligibility is not automatically bestowed upon a student who has been referred for an IDEA evaluation.
- b. N.L. v. Knox County Schs, 315 F.3d 688 (6th Cir. 2003). The similarity between the substantive and procedural frameworks of the IDEA and Section 504 is such that if a disabled child is found ineligible for placement under the IDEA, he is also ineligible under Section 504. Thus, N.L.’s Section 504 claims were dismissed when her IDEA claims brought on the theory of denial of FAPE were also dismissed.

H. Provision of Funding (or Not) for 504 Services

MYTH #14: “Congress does not provide money to comply with Section 504, so a school system can not be punished if it does not comply.”

REALITY: Although Congress does not provide any funding for obligations that may arise under Section 504, the OCR can/will seek to remove all federal funding from a school system that refuses to comply with Section 504.

III. SPECIFIC CONDITIONS PROTECTED UNDER SECTION 504

A. Students Who *MAY* Be Protected Under Section 504

1. Students who are disabled under IDEA and are receiving special education services.

MYTH #15: “A student in special education can not be a 504 student.”

REALITY: All students who have been identified as disabled under the IDEA are also protected under Section 504. Clearly, though, the IEPs for these students *are* their “Section 504 Plans” and the services received under the IDEA are the specialized instructional services that 504 would require. However, IDEA provides much more in terms of the provision of FAPE and contains much more extensive and specific protections. Students receiving special education services are also protected against discrimination under Section 504.

2. Students who are disabled under Section 504 are not necessarily disabled under IDEA.

MYTH #16: “Even where a student is failing, if the student has been tested for special education and found ineligible, we can not provide any special assistance. If we wait a couple of years though, he’ll be so far behind then he’ll qualify for special education.”

REALITY: There is an obligation to ensure that a student is not disabled under Section 504, even if the student is not IDEA-eligible. Some examples of conditions that might not necessarily qualify a student for special education but may very well result in Section 504 protections are:

- a. Alcoholics/drug addicts
 - i. In 1990, the ADA amended Section 504's definition of individual with a disability to exclude persons currently engaging in illegal use of drugs. However, the term does include:
 - (a) former users;
 - (b) successful participants in rehab programs;
 - (c) persons regarded erroneously as current users.

In addition, the amendment allows for students engaged in the illegal use of drugs at school to be tested for such use and allows for students who are using drugs and alcohol at school to be disciplined as non-disabled students for such behavior.

b. Students with diseases

i. HIV-positive/AIDS

ii. Tuberculosis

iii. Hepatitis-B

c. Students with medical conditions

i. Juvenile rheumatoid arthritis

ii. Asthma

iii. Severe allergies

(a) Smith v. Tangipahoa Parish Sch. Bd., 46 IDELR 282 (E.D. La. 2006). Student with an allergy to horses is not disabled under Section 504 or the ADA because the allergy was not shown to “substantially limit” the major life activity of breathing or learning. In addition, all of the accommodations that the school was making pursuant to the demands of the parent and through a Section 504 Plan were unnecessary. Ensuring that the student took her medications and making an EpiPen readily available were the only accommodations necessary and banning horses from campus, wiping off equipment and spraying down the street with water or bleach were not necessary.

iv. Diabetes

v. Heart disease

vi. Epilepsy

MYTH #17: “Every student on medication must have a 504 Plan.”

REALITY: Not every student taking medication during the school day needs to have a Section 504 Plan. However, a Health Plan may need to be developed to ensure that the “accommodation”

of storage and administration of medication is provided in order to ensure the student's equal access to school. Only if the medical condition substantially limits learning does there need to be a 504 Plan in place.

- vii. Sickle cell anemia
- viii. "Clinical depression"
- ix. Chronic fatigue syndrome
- x. Tourette syndrome
- xi. Pregnancy
- xii. Obesity
- xiii. Attention Deficit Hyperactivity Disorder (ADHD)

MYTH #18: "Every student diagnosed with ADHD needs a 504 Plan."

REALITY: Again, a diagnosis of a medical condition is not sufficient, by itself, to constitute a disability under Section 504.

- (a) Joint Memorandum from U.S. Department of Education, 18 IDELR 116 (September 16, 1991). A student diagnosed with ADD may be disabled under IDEA (as LD, SED or OHI); may be disabled under Section 504; or may not be disabled at all.
- xiv. Oppositional Defiant Disorder (ODD)/Conduct Disorder and/or Social Maladjustment
 - (a) Irvine Unified Sch. Dist., 353 EHLR 192 (OCR 1989). Social maladjustment *might* be a disability under Section 504 and the determination of the presence of "social maladjustment" under IDEA is not dispositive of whether one is disabled under Section 504.
- d. Students who are physically disabled but not in need of special education
 - i. Cerebral palsy
 - ii. Students who need catheterization or other health-related services
- e. Students with temporary disabilities

- i. Broken leg confined to wheelchair
- ii. Students injured in accidents

B. Students Who Are *PROBABLY NOT* Covered Under Section 504

MYTH #19: “Because the student is clearly a slow learner, he is covered under Section 504.”

REALITY: Obviously, any student experiencing behavioral or academic problems should be getting extensive help through the Student Assistance Team process. To label a student “504 disabled” in order to get that help is unnecessary and could lead to over-identification or mis-identification issues.

1. Students who are "slow learners"
 - a. Northshore Sch. Dist. No. 417, 20 IDELR 1266 (OCR 1993). Student with "learning deficits" that do not constitute a specific learning disability may be protected under Section 504.

MYTH #20: “When students do not do well on standardized assessments, we should make them 504 students so we can include testing accommodations and modifications.”

REALITY: Section 504 Plans should not be written for the sole purpose of providing for accommodations on standardized testing. Practice is clear that if the student does not need educational accommodations during the school day *to address a disabling condition*, then a Section 504 Plan is not appropriate.

2. Students who are not performing well because of environmental, cultural or economic disadvantage
3. Students whose primary language is not English

C. The Preschool, Elementary and Secondary Regulations

1. "Qualified Handicapped Person"

A handicapped person of an age during which nonhandicapped persons are provided services. 34 C.F.R. § 104.3(k)(2).

2. Location and Notification

A school system is required annually to undertake to identify and locate every qualified handicapped person residing in its jurisdiction *who is not receiving a public education* and to take appropriate steps to notify

handicapped persons and their parents or guardians of the school system's duty. 34 C.F.R. § 104.32 (emphasis added).

MYTH #21: “Where a student is so out of control, the school system should have known he was ADHD and had him on a 504 Plan.”

REALITY: There is no affirmative “child-find” requirement under Section 504 like there is under the IDEA. The language of the 504 regulations merely requires that school agencies identify students with disabilities that are receiving *no public education at all*. This is reflective of the educational opportunities available to students with disabilities at the time the regulations were promulgated in 1977.

a. T.J.W. v. Dothan City Bd. of Educ., 26 IDELR 999 (M.D. Ala. 1997). There is no duty to identify the disabilities of students who are receiving public education. Furthermore, upon a comparison of the 504 regulation with IDEA, the court finds that they are not sufficiently similar to imply that the § 504 regulation intended to place a duty to identify disabilities upon schools, even if the IDEA regulation does imply such a duty. To adopt the requirement argued by the student would mean that a school receiving federal funds potentially could be held liable any time a student in a class is diagnosed by a professional outside of the school with a disability which the teachers failed to recognize. The court does not find support for such a duty in either the Rehabilitation Act or the interpretive regulations.

3. "Free Appropriate Public Education" (FAPE) is required by the regulations

"Appropriate education" is the provision of regular or special education and related services that

- i. are designed to meet *the individual educational needs* of handicapped persons as adequately as the needs of non-handicapped persons are met and
- ii. are based upon adherence to procedures that satisfy the requirements of 104.34, 104.35. 34 C.F.R. § 104.33(b).

4. IEP requirement

An actual written IEP is not required under the regulations, but the regulations note that developing such a document would satisfy the requirements of the 504 regulations. 34 C.F.R. § 104.33(c)(2).

5. Transportation

If a school system places a handicapped person in a program not operated by the school system as its means for carrying out the requirements of 504, the school system shall ensure that adequate transportation to and from the program is provided at no greater cost than would be incurred by the person or his or her parents or guardian if the person were placed in the program operated by the recipient. 34 C.F.R. § 104.33(c)(2).

6. **Residential placement**

If placement in a public or private residential program is necessary to provide a free appropriate public education to a handicapped person because of his or her handicap, the program including non-medical care and room and board, shall be provided at no cost to the person or his or her parents or guardian. 34 C.F.R. § 104.33(c)(4).

7. **Least restrictive environment**

A school system shall educate, or shall provide for the education of, each qualified handicapped person in its jurisdiction with persons who are not handicapped to the maximum extent appropriate to the needs of the handicapped person. A school system shall place a handicapped person 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. Whenever a school system places a person in a setting other than the regular educational environment, it shall take into account the proximity of the alternative setting to the person's home. 34 C.F.R. § 104.34(a).

8. **Evaluation and placement**

a. A preplacement evaluation

A school system that operates a public elementary or secondary education program shall conduct an evaluation of any person who, *because of handicap, needs or is believed to need special education or related services* before taking any action with respect to the initial placement of the person in a regular or special education program and any subsequent significant change in placement. 34 C.F.R. 104.34(a) (emphasis added).

MYTH #22: “If a parent requests an evaluation under Section 504, the school system must conduct it.”

REALITY: Under the 504 regulations, the duty to evaluate arises when school staff believes or has reason to believe that the student needs specialized services because of a disability.

- i. Letter to Veir, 19 IDELR 876 (OCR 1993). Only where the school district suspects that the student has a disability that would result in 504 eligibility is the district obligated to conduct an evaluation of the student. However, when an evaluation is refused, notice must be given to the parent of the refusal to evaluate, along with their 504 due process rights.

b. Evaluation procedures

A school system shall establish standards and procedures for the evaluation and placement of persons who, because of handicap, need or are believed to need special education or related services which ensure that:

- i. Tests and other evaluations materials have been validated for the specific purpose for which they are used and are administered by trained personnel in conformance with the instructions provided by their producers;
- ii. Tests and other evaluation materials include those tailored to assess specific areas of educational need and not merely those which are designed to provide a single general intelligence quotient; and
- iii. Tests are selected and administered so as best to ensure that, when a test is administered to a student with impaired sensory, manual, or speaking skills, the test results accurately reflect the student's aptitude or achievement level or whatever other factor the test purports to measure, rather than reflecting the student's impaired sensory, manual or speaking skills (except where those skills are the factors that the test purports to measure). 34 C.F.R. § 104.35(b).

c. Placement procedures

In interpreting evaluation and in making placement decisions, a school system shall:

- i. Draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations,

physical condition, social or cultural background, and adaptive behavior;

- ii. Establish procedures to ensure that information obtained from all such sources is documented and carefully considered;
- iii. Ensure that the placement decision is made by a group of persons including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and

MYTH #23: “A 504 Team meeting can not be held, unless the parent is in attendance.”

REALITY: The 504 regulations do not require that parents be a part of the “knowledgeable” team. However, most school systems have incorporated into their procedures the requirement to invite parents to participate in 504 decisions. It is within the school system’s discretion as to how parents are to be invited, how many attempts should be made to ensure their attendance and other such details.

- iv. Ensure that the placement decision is made in conformity with Section 104.34. 34 C.F.R. § 104.35(c).

d. Reevaluation

MYTH #24: “A school system is required to do a re-evaluation under 504 every three years, just like it does under IDEA.”

REALITY: A reevaluation need only be conducted “periodically” under Section 504. In addition, formal testing may not be required as part of an “evaluation” under Section 504.

i. The regulations

A recipient shall establish procedures for periodic reevaluation of students who have been provided special education and related services. A reevaluation procedure consistent with IDEA is one means of meeting this requirement. 34 C.F.R. § 104.35(d).

MYTH #25: “Once a student is on a 504 Plan, there is no way to get them off of one.”

REALITY: Clearly, if a teacher or other member of the 504 Team no longer sees evidence of a disabling condition in the educational environment, the Team can reconvene, conduct a re-evaluation by examining all relevant documentation and other information and suggest “change in placement” in the form of the discontinuation of services. Of course, because this is a proposed “change in placement,” parents must be provided notice of the proposed change and a copy of their Parent Rights under Section 504.

9. **Procedural safeguards**

A school system that operates a public elementary or secondary education program shall establish and implement, with respect to actions regarding the identification, evaluation or educational placement of persons who, because of handicap, need or are believed to need special instruction or related services, a system of procedural safeguards that includes:

- a. Notice;
- b. An opportunity for the parents or guardian of the person to examine relevant records;
- c. An impartial hearing with opportunity for participation by the person's parents or guardian and representation by counsel; and
- d. A review procedure.

MYTH #26: “School systems should use the IDEA rights as the 504 Rights.”

REALITY: Because the procedural safeguards are much less extensive than those required under the IDEA, it is not suggested that the same rights be used. Although the 504 regulations state that compliance with the procedural safeguards of IDEA is one means of meeting the requirements under Section 504, such is not necessary and a very shortened version (as suggested as an attachment hereto) is appropriate. 34 C.F.R. § 104.36.

MYTH #27: “A student can not be placed on a 504 Plan unless the parent consents.”

REALITY: As mentioned previously, best practice would dictate that parents be invited to 504 eligibility and placement meetings and be a participant in such meetings. However, parental consent is not needed for 504 eligibility. If a student is deemed eligible, the school system must

provide notice of the determination to the parent, along with a copy of Parent Rights under Section 504.

MYTH #28: “If the parent wants a student dismissed from a 504 Plan, the school system must dismiss the student.”

REALITY: A school system does not need parental consent to begin or end services under Section 504. As a result, parents do not have the right to “revoke” consent to the delivery of services under a Section 504 Plan. However, if a parent demands that a student be taken off of a 504 Plan and the Team refuses, notice of any refusal to end the services must be provided to the parent in addition to the Parent Rights.

10. **Nonacademic/Extracurricular services**

MYTH #29: “Accommodations needed so that a student can play football must be included on a Section 504 Plan. In fact, the actual activity must be included on the Plan.”

REALITY: As discussed previously, Team members responsible for developing 504 Plans must remember that “free appropriate public education” under 504 is defined as “the provision of regular or special education and related services that are designed to meet the individual *educational* needs” of a disabled student as adequately as the needs of non-disabled students are met. Therefore, a Section 504 Educational Plan is to address *instructional* and *educational* modifications and accommodations, not extracurricular and nonacademic activities, unless those activities are *necessary* for a student to benefit from his/her educational program. Although not an issue of FAPE, a school system cannot discriminate against an “otherwise qualified” student with respect to extracurricular and other nonacademic activities and it should be made clear to parents that all students with disabilities will be provided the equal opportunity to try out for and be judged under the same criteria as nondisabled students for participation in nonacademic and extracurricular activities.

a. **The 504 regulations**

A school system shall provide nonacademic and extracurricular services and activities in such a manner as is necessary to afford handicapped students an equal opportunity for participation in them. These services and activities may include:

- i. counseling services;
- ii. physical recreational athletics;

- iii. transportation;
- iv. health services;
- v. recreational activities;
- vi. special interest groups or clubs sponsored by school systems;
- vii. referrals to agencies which provide assistance to handicapped persons; and
- viii. employment of students, including both employment by the school system and assistance in making available outside employment. 34 C.F.R. § 104.37.

D. Issues Investigated and Enforced by OCR

1. Determination of Eligibility

MYTH #30: “Even where a student is making all A’s, if the parents have filed a complaint with OCR, we better just go ahead and make him eligible.”

REALITY: The Office for Civil Rights has stated that it does not have the authority to overrule a decision regarding eligibility, as long as the decision was made in accordance with established and appropriate procedures. Thus, as long as the school Team followed an appropriate procedure for determining that the student is not disabled or otherwise not eligible for a 504 Plan, OCR will not overrule the decision of the Team.

- a. OCR Senior Staff Memorandum, 19 IDELR 891 (OCR 1992). Where a school district has found a child ineligible for 504 services and the parent files an OCR Complaint, OCR is to investigate only whether the school district conducted an evaluation under 504 and made a determination, as a result of that evaluation, that the child was not disabled under 504.

2. Retaliation

MYTH #31: “Mrs. Jones, I know you’re concerned about the students in your class but if you don’t stop putting your concerns in writing, you could lose your job with the school system.”

REALITY: Section 504 and the ADA prevent retaliation against those who are advocating on behalf of a student with a disability. This includes parents, family advocates and school teachers and other staff.

- a. Settlegoode v. Portland Pub. Schs., 371 F.3d 503 (9th Cir. 2004). Where a jury found for special education teacher on all claims, awarded her \$500,000 in non-economic damages and \$402,000 in economic damages and awarded \$50,000 in punitive damages against both the special education director and school principal under Section 1983, verdict is upheld. The jury was more than reasonable in finding that the interests served by allowing the Settlegoode to express herself outweighed any minor workplace disruption that resulted from her speech. Furthermore, it is well-settled that a teacher's public employment cannot be conditioned on her refraining from speaking out on school matters.
3. Residential placement
4. Extended school year services
5. Comparable facilities, services, classrooms, materials
6. Length of school day
7. Length of bus rides
8. Provisions of IEPs
9. Accessibility of facilities/parking spaces
10. Access to programs
 - a. Extracurricular activities
 - b. After-school programs

MYTH #32: “If it would require a one-to-one aide for a student to attend the after school program, he can not attend.”

Of course, a school system cannot discriminate against disabled students with respect to any activities operated by, on behalf of or with the sponsorship of the school system. OCR has held that one-to-one aides may be required to allow participation. OCR Senior Staff Memo, 17 EHLR 1233 (1990). Section 504 applies to noneducational programs such as daycare, after-school care and summer recreation programs. Such programs cannot exclude severely disabled children, require the parents to provide their own aides and babysitters or charge them more for participation.

- c. Magnet programs

11. Procedural safeguards/notice of grievance procedures
12. Least restrictive environment
13. Provision of related services

MYTH #33: “Service animals are not allowed to attend school with students!”

In order to afford equal access, allowing seeing-eye or service dogs to attend school with a disabled child may be required.

- a. Response to Goodling, 17 EHLR 1027 (OCR 1991). Barring a seeing-eye dog or service dog from the classroom is a violation of 504 where it would effectively deny the student the opportunity, or an equal opportunity, to participate in or benefit from the educational program.
- b. Cave v. East Meadow Union Free Sch. Dist., 47 IDELR 162 (E.D. N.Y. 2007). Parents of hearing impaired student not entitled to injunctive relief to force district to allow student to bring his service dog to high school classes. First, the parents failed to exhaust administrative remedies under the IDEA, since the relief they seek is “in substance a modification of [the student’s] IEP.” In addition, the parents could not prevail under Section 504 or the ADA because those statutes entitle students to “reasonable accommodations,” not all accommodations demanded. Because other individuals in the student’s classrooms had severe allergies to dogs and the student would have to drop two classes as a result, the disadvantages of the dog’s presence outweigh the potential benefits to the student.

IV. OCR's COMPLAINT INVESTIGATION PROCESS

- A. Complaint filed (must be filed within 180 days of alleged discriminatory action)
- B. Written Notice of Complaint to School System/Superintendent
- C. On-Site Investigation
- D. Finding of Violation/No Violation
- E. If a Violation is Found:
 1. Voluntary compliance with letter of finding

2. Non-compliance with formal hearing for fund termination

V. **COURT REMEDIES UNDER SECTION 504**

MYTH #34: “Nothing can really happen to school staff who do not choose to implement a 504 Plan.”

REALITY: Section 504 and the ADA are frequently used as bases for money damages claims in situations where a school person has willfully refused to accommodate a student’s disability.

- a. Doe v. Withers, 20 IDELR 422 (W. Va. Cir. Ct. 1993). A jury returned a verdict in favor of the parents of an LD student against a high school teacher for \$5,000.00 in compensatory damages and \$10,000.00 in punitive damages for teacher's refusal to provide their son with oral testing as required by an IEP.
- b. Punitive damages: Before 2002, courts were generally unanimous that parents and/or students with disabilities could sue and obtain money damages for intentional discrimination or retaliation under Section 504 and the Americans with Disabilities Act (ADA). However, the Supreme Court issued the extremely significant case of Barnes v. Gorman, 122 S.Ct. 2097 (2002)(overturning Gorman v. Easley, 257 F.3d 738 (8th Cir. 2001)). The Court reversed the 8th Circuit Court of Appeals and held that because punitive damages may not be awarded in private suits brought under Title VI of the Civil Rights Act of 1964, such damages are not available under the ADA or Section 504. Title VI and other constitutional Spending Clause legislation (such as ADA and Section 504) is “much in the nature of a contract: in return for federal funds, the [recipients] agree to comply with federally imposed conditions.” It appears, however, that compensatory damages are still available.