

Writing Legally Sound Section 504 Plans

Illinois Alliance of Administrators of Special Education

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(1)

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Section 504

(2)

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Section 504 – Overview

- Purpose:
 - Section 504 is a federal law designed to protect the rights of individuals with disabilities in programs with activities that receive federal funds from the U.S. Department of Education
- Recipient:
 - Recipients of funds from the U.S. Department of Education include public school districts, institutions of higher education, and other state and local educational agencies

(3)

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Section 504 – Overview

- Applicability to schools:
 - Prohibits the denial of public education participation or enjoyment of benefits offered by public school programs because of a child's disability
 - Requires that the educational needs of disabled students are met as adequately as the educational needs of non-disabled students
 - Extends to preschool and adult education programs

(4)

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Section 504 – Overview

- Requirements:
 - Identification of students with disabilities
 - Evaluation of students with disabilities
 - Free appropriate public education (FAPE)
 - Least restrictive environment (LRE)
 - Procedural safeguards

(5)

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Section 504 vs. IDEA

- Disability:
 - IDEA is limited to 13 specific categories of disability
 - Section 504 takes a functional approach to disability determination
- Funding:
 - IDEA: A grant-in-aid program providing limited federal funds for school districts serving children identified under the statute as disabled
 - Section 504: A general civil rights statute with no federal funding attached to it by Congress

(6)

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What is a Disability Under Section 504?

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Section 504's Functional Approach

- To qualify as an individual with a disability, a person must:
 - Have an "actual disability"
 - A physical or mental impairment that substantially limits one or more major life activities
 - Have a "record of" an actual disability
 - A record (or past history) of a physical or mental impairment that substantially limits one or more major life activities
 - Be "regarded as" having an actual disability

(8)

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Section 504's Functional Approach

- Key Term: Major Life Activities
 - Include, but are not limited to: caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working
 - Note: Learning is not the only major life activity a school district must consider
 - Under the ADA, also includes: major bodily functions, including functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions

(9)

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Section 504's Functional Approach

- Key Term: Substantially Limits
 - An impairment is substantially limiting if it prohibits or significantly restricts an individual's ability to perform a major life activity as compared to the ability of the average person in the general population to perform the same activity
 - Under the ADA, the above definition of "substantially limits" is maintained, however, Congress directed the EEOC to broaden it
 - "Rules of construction" were adopted to use when determining if an individual is substantially limited in performing a major life activity

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Section 504's Functional Approach

- Substantially limits rules of construction include:
 - Impairment need not prevent nor severely nor significantly limit a major life activity to be considered "substantially limiting"
 - Lower degree of functional limitation than standard previously applied by the courts
 - Construed broadly in favor of expansive coverage
 - Requires an individualized assessment
 - Does not require extensive analysis
 - Usually will not require scientific, medical, or statistical analysis, but such evidence may be used if appropriate

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Section 504's Functional Approach

- Substantially limits rules of construction include:
 - Mitigating measures may not be considered
 - Examples: medication, hearing aids, medical supplies, prosthetics, learned behavioral or adaptive neurological modifications, etc.
 - Exception: eyeglasses and contact lenses
 - An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active

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Allergies as Disabilities

- Courts previously declined to recognize allergies as a disability under Section 504, instead holding that allergies are intermittent and, as such, do not substantially limit a major life activity
 - *Note:* These cases were decided prior to the ADA's changes to the definition of disability to include those conditions that, when not controlled, would be disabling
- The ADA's changes make it easier for a person with severe food or other allergy to qualify for protection under the ADA
- **OCR considers allergies to be a "hidden disability" and requires schools to provide accommodations for allergies**
- As a practical matter, most schools have, for many years, treated life-threatening allergies as disabilities

(13)

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Hypothetical

- Michael is a high school student who suffers from environmental allergies. He is allergic to all commercially used cleaning agents. Because his classes are in different rooms, there is no way the school can ensure he will not come into contact with the agents used by the janitorial staff.
- Can Michael's parents require that the school stop using all commercial cleaning products so that Michael can attend school?

(14)

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Hypotheticals

- If a student has a temporary impairment (e.g., a broken leg) can he/she be eligible under Section 504?
- If a student has episodic impairments (e.g., migraine headaches) can he/she be eligible under Section 504?

(15)

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Assessment & Evaluation of Students Under Section 504

(16)

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Section 504 Evaluation

- Parental consent is required prior to an initial evaluation
 - *Letter to Durham, 27 IDELR 380 (OCR 1997)*
- Individual evaluation must occur before determining eligibility or drafting a 504 Plan, or before a subsequent significant change in placement
- “Any action” includes denials of placement
 - IDEA requirements are very specific regarding nature, content, and timing of case study evaluations, conferences, and individual education programs
 - Section 504 requirements are not

(17)

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Section 504 Evaluation

- Evaluation does not necessarily mean “test”:
 - Gathering of data or information from a variety of sources, including:
 - Student’s grades
 - Disciplinary referrals
 - Health information
 - Language surveys
 - Parent information
 - Standardized test scores
 - Teacher comments/recommendations
 - Physical conditions
 - Social or cultural background
 - Adaptive behavior

(18)

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Section 504 Evaluation

- Evaluation does not necessarily mean “test” (cont.):
 - For disabilities derived from medical issues, such as allergies, gather data directly from the student’s health care provider(s)
 - Ensures school is receiving complete and accurate information regarding nature and severity of the allergy
 - Allows for better understanding of appropriate accommodations
 - A district may find it useful to retain a consulting physician to advise it periodically and assist in understanding medical issues relating to students’ disabilities

(19)

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Section 504 Re-Evaluation

- A comprehensive re-evaluation is required periodically for each eligible student
- School districts are in compliance if re-evaluations are completed every three (3) years (as with IDEA)

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Section 504 Plan

(21)

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Developing a Section 504 Plan

- Modifies regular classroom so student has equal access to the educational benefits of the school's programs
- Modifying the essential elements of the curriculum not required
- *Note:* Although mitigating measures may no longer be considered when making a disability determination, once made, the student's use of mitigating measures could be relevant in determining his/her need for accommodations

(22)

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Developing a Section 504 Plan

- Parents must be invited to participate, but the extent of the accommodations provided is up to the District members of the 504 team
- Accommodations based upon available resources and a determination of what would be reasonable on a case-by-case basis
 - Required to incur costs only for accommodations necessary for FAPE

(23)

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Developing a Section 504 Plan

- Contain sufficient detail to allow both parents and school staff to understand exactly what is being provided and in which settings
- Discuss particular accommodations needed for each setting
 - Examples: classroom, recess, cafeteria, field trips, etc.
 - This is particularly important for students with allergies
- Include the protocol to be followed in case an emergency response is needed
- For medication administration, the 504 plan should address:
 - Who administers the medication;
 - How to handle situations when that person is not available; and
 - Any training necessary for staff

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Developing a Section 504 Plan

- School district must provide FAPE
- FAPE includes access to extracurricular programs and activities
- OCR Dear Colleague Letter (Jan. 25, 2013)
 - (1) Do not act on generalizations and stereotypes;
 - Make an “individualized inquiry”

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Developing a Section 504 Plan

- OCR Dear Colleague Letter (Jan. 25, 2013) *(cont.)*
- (2) Ensure equal opportunity for participation in existing extracurricular athletic programs; and
 - Reasonable modifications that do not fundamentally alter the nature of the activity
 - Do not have to:
 - Change essential elements that affect the fundamental nature of the game;
 - Give student with a disability an unfair advantage over other competitors;
 - Change the nature of selective teams—students with disabilities have to compete with everyone else and legitimately earn their place on the team; or
 - Compromise student safety

(26)

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Developing a Section 504 Plan

- OCR Dear Colleague Letter (Jan. 25, 2013) *(cont.)*
- (3) Create extracurricular athletic opportunities for students with disabilities
 - Not required to create, but may voluntarily provide (and must be equally supported)

(27)

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Developing a Section 504 Plan

- Tips for Extracurricular Activities:
 - Gauge student interest in extracurricular activities
 - Invite sponsors for extracurricular activities to Section 504 meetings
 - Document extracurricular activity related accommodations in Section 504 plans
 - Train extracurricular activity staff
- *Note:* It may be a violation of Section 504 to remove a child from an extracurricular activity without convening a meeting to determine whether additional supports would be necessary

(28)

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Developing a Section 504 Plan

- Least Restrictive Environment (LRE)
 - The setting that allows the disabled student the maximum exposure to non-disabled peers while still allowing him to receive an appropriate education
 - Section 504 presumes a regular education classroom
 - Stronger than presumptions in IDEA since the disabilities in Section 504 students are typically less severe

(29)

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Developing a Section 504 Plan

- Least Restrictive Environment (LRE)
 - Disruption to the regular education classroom is a factor in determining appropriateness of the regular education class
 - Absent a disruption, impact on the other students in the classroom is rarely a factor in developing a plan

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Developing a Section 504 Plan

- Individual Health Plans
 - Continuing with a health plan developed prior to the ADAAA may not be sufficient to comply with FAPE requirements described in the Section 504 regulations if the student needs or is believed to need special education or related services because of his or her disability
 - Critical question: whether the district's actions meet the evaluation, placement, and procedural safeguard requirements of FAPE provisions set forth in the Section 504 regulations

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Developing a Section 504 Plan

- Reasonable Accommodations
 - For example:
 - Preferential seating
 - Extra set of textbooks
 - Enlarged print
 - Provisions for checking blood sugar levels or taking medication
 - Training staff on use of epipen or other emergency precautions
 - Testing accommodations, e.g., small group, oral reading, etc.
 - For students with allergies, generally focus on:
 - Precautions to avoid exposure to the allergen
 - Education/information to staff and other students
 - Responsive measures

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Developing a Section 504 Plan

- Reasonable Accommodations
 - Designate how or when students may access these accommodations.
 - "As needed" is not an appropriate explanation
 - *Tip:* Avoid stating accommodation implementation in the passive voice; identify the actor

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Developing a Section 504 Plan

- Controversial Accommodation Requests
 - Section 504 and implementing regulations do not define what types of accommodations are “reasonable”
 - Case-by-case basis determination by district
 - However, we do have some information describing circumstances where accommodations have been considered “unreasonable”

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Developing a Section 504 Plan

- An accommodation is unreasonable if it:
 - Alters the requirements that are essential to the instruction;
 - Causes fundamental alteration in the curriculum;
 - Imposes a significant financial or administrative burden on the district; or
 - Poses a threat to personal or public safety
- Examples of controversial requests:
 - Complete school-wide ban on an allergen when notifications could suffice;
 - School-wide schedule alterations; or
 - Full-time aide to monitor the student’s safety when adult staff already were fulfilling the necessary monitoring

(35)

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Hypothetical

- Mary attends an Illinois school district. She is enrolled in the gifted program at her school. She has recently been diagnosed with ADHD. The 504 team is meeting to discuss possible accommodations. Mary’s mother requests that one of Mary’s accommodations should be reduced homework assignments.
- Should the team include this as one of Mary’s accommodations?

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Hypothetical

- Brian is a tenth grade student attending an Illinois high school. He has been diagnosed with ADD. He participates in the general education program with accommodations and modifications through his Section 504 plan. He meets with his advisor and requests to take advanced placement classes next year.
- Is he allowed to take these advanced placement classes and maintain his accommodations and modifications?

(37)

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Running a Section 504 Meeting

- Tips for a successful meeting:
 - Have a solid understanding of the student's needs
 - Write and share draft 504 plans before the meeting
 - Be prepared and professional
 - Document, document, document
 - Determine if any further information is needed and create an action plan
 - Make decisions; do not leave the meeting with "recommendations" of accommodations

(38)

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Implementing a Section 504 Plan

- Make sure staff knows of plan
- Provide training
- Notify emergency responders, if needed

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Implementing a Section 504 Plan

- General education teachers must implement accommodations
- The school risks liability if teachers do not implement accommodations
- Maintain appropriate documentation

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Implementing a Section 504 Plan

- Periodic review
 - Annually is best
 - Also at key transition points

(41)

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Disagreeing with a Section 504 Plan

- Districts must establish a due process hearing system with impartial hearing officers to resolve Section 504 disputes
- Districts must have a grievance procedure to resolve Section 504 disputes

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Disagreeing with a Section 504 Plan

- Districts must provide a system of procedural safeguards that includes:
 - Notice
 - Opportunity for parent/guardian of the student to examine the relevant records
 - Impartial hearing with opportunity for participation by the student's parent/guardian and representation by counsel, and a review procedure
- Compliance with IDEA procedures is not necessary
 - But it is one means of meeting the procedural safeguards requirement under Section 504

(43)

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Disagreeing with a Section 504 Plan

- OCR is responsible for enforcing Section 504
 - Generally reviews claims for procedural, not substantive, errors
 - But see, *Gloucester County Public Schools*, 49 IDELR 21 (OCR 2007): "rare instance" in which OCR found "extraordinary circumstances" necessitated overruling a school's 504 eligibility determination

(44)

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Disagreeing with a Section 504 Plan

- OCR guidance elaborates on Section 504 procedural safeguards:
 - Districts must have policies and procedures that identify a person to accept and investigate complaints, set timelines for process, and provide for prompt, thorough, and impartial investigations and hearings
 - Language suggesting a parent must exhaust complaint procedures before filing for due process hearing is prohibited
 - The party wishing to change the status quo bears the burden of proof
 - Districts must publish grievance procedures
 - E.g., distribute to parents; post on website

(45)

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Section 504: Legal Hot Topics

(46)

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Students with ADHD & Section 504

- OCR Dear Colleague Letter (July 26, 2016)
 - Addresses obligation of school districts to provide assistance to students with ADHD under Section 504
 - Stresses that an impairment can substantially impact any major life activity is considered a disability
 - Identifies examples of possible behavior of students who have an ADHD-related disability including:
 - Restlessness or inattention that is inappropriate for the student's age
 - Trouble organizing tasks and activities
 - Communication deficits

(47)

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Students with ADHD & Section 504

- OCR Dear Colleague Letter (July 26, 2016) (cont.)
 - Consider conducting an evaluation if the student demonstrates difficulty in beginning tasks, organizing or recalling information, and completing assignments
 - After the evaluation, consider whether the student needs special education or related services
 - Each child's needs may be different
 - The student's 504 plan should provide for the individual education needs that the team decides are appropriate
 - Parents must also be allowed to appeal decisions regarding the identification, evaluation, or educational placement of students with disabilities, including ADHD

(48)

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Hypothetical

- Abby is a student in third grade. She receives average grades and has no behavioral issues at school. Abby was recently diagnosed with ADHD and has started taking medication.
- Should the school conduct an evaluation?

(49)

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Diabetes Care Plan & Section 504

- *Care of Students with Diabetes Act*
 - Must work with parents to develop a “diabetes care plan” to serve as the basis of a student’s Section 504 Plan
- Diabetes Care Plan must include:
 - Instructions from student’s treating physician;
 - Services and accommodations in accordance with current standards of diabetes care;
 - Record of blood sugar readings and insulin administration;
 - Authorization for student to self-manage his/her diabetes at school, if applicable

(50)

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Hypothetical – Part 1

- Sam is a student with diabetes who requires insulin shots and blood testing daily. Sam is not able to give himself these shots on his own. Sam’s class is taking an overnight field trip and Sam’s teachers are concerned that Sam’s diabetes is going to interfere with the trip. Sam’s teacher tells his mother that because of the long duration of the trip, combined with the amount of activities the students will be participating in, members of the staff will be unable to give Sam the insulin shots or blood tests.
- Can Sam be prevented from going on the trip?

(51)

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Hypothetical – Part 2

- *Same facts:* Sam is a student with diabetes who requires insulin shots and blood testing daily. Sam is not able to give himself these shots on his own. Sam’s class is taking an overnight field trip and Sam’s teachers are concerned that Sam’s diabetes is going to interfere with the trip. Sam’s teacher tells his mother that because of the long duration of the trip, combined with the amount of activities the students will be participating in, members of the staff will be unable to give Sam the insulin shots or blood tests.
- Can Sam’s teacher permit Sam to go only if one of Sam’s parents goes as well?

(52)

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Restraint + Seclusion & Section 504

- OCR Dear Colleague Letter (Dec. 28, 2016)
 - Highlights that Section 504 prohibits the use of restraints and seclusion that results in discrimination against students with disabilities
 - Restraint and seclusion may be used in some circumstances, but it could violate Section 504 if:
 - Constitutes unnecessarily treating students with disabilities differently from students without disabilities;
 - Is based on a policy, practice, procedure, or criterion that has a discriminatory effect on students with disabilities;
 - Denies a student’s right to FAPE

(53)

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Charter Schools & Section 504

- OCR & OSERS Guidance (Dec. 28, 2016)
 - Addresses rights of students with disabilities in public charter schools
 - Specifically, that charter school students with disabilities have same Section 504 rights as other public school students at the elementary and secondary education level

(54)

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Racial Discrimination & Section 504

- OCR Dear Colleague Letter (Dec. 12, 2016)
 - Ensure all students have equitable access to general and special education
- To help prevent discrimination in referrals, remember:
 - Use evidence-based intervention strategies to provide help and support to students
 - Intervention framework cannot be a substitute or precondition for an evaluation
 - If District believes student has a disability and should receive services because of that disability, conduct a timely evaluation
- To help with evaluations, remember:
 - Treat all similarly situated students equally
 - Do not use evaluations that have a disproportionate adverse impact on a race or ethnic group

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Service Animals

(56)

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Service Animals

- Definitions of “service animal” differ under the *School Code* and Title II of the ADA
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- **ADA:** “Service animal” means a dog (or miniature horse in certain circumstances) individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability.
 - **School Code:** “Service animals such as guide dogs, signal dogs or any other animal individually trained to perform tasks for the benefit of a student with a disability shall be permitted to accompany that student at all school functions, whether in or outside the classroom.”

(57)

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Service Animals

- Other differences between the ADA and *School Code*:
 - ADA regulations:
 - Require the work or tasks performed by the animal to be directly related to the individual's disability
 - Provide that "the crime deterrent effects of an animal's presence and the provision of emotional support, well-being, comfort, or companionship do not constitute work or tasks for purposes of this definition"
 - The *School Code* does not contain similar requirements

(58)

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Service Animals

- Service animals generally include a hearing animal, a guide animal, an assistance animal, a seizure alert animal, a mobility animal, a psychiatric service animal, or an autism service animal.
 - But does not require the District to allow an animal at school simply because it falls under one of these categories.
 - Likewise, an animal that does not fit into any of these categories may nevertheless be considered a service animal under the ADA or *School Code*

(59)

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Service Animals

- Controversial Service Animal Issues:
 - Emotional support dog vs. psychiatric service animal
 - Handler for service animal
 - When is one required?
 - Who serves as the handler? Student? District employee (e.g., aide)? Parent? Hired individual?
 - If an adult handler is needed, who pays for?
 - Require documentation re: service animal "certification" or training?
 - How does the service animal's presence in school affect others?
 - Two Illinois Appellate Court cases seem to hold that a school district may not bar a service animal because of health concerns of other students
- Department of Justice Service Animal FAQ (July 2015)

(60)

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Service Animals

- *Kalbfleish v. Columbia Community Unit School No. 4* (2009)
 - 5-year-old boy with moderate to severe autism filed preliminary injunction when the District banned the student's service dog
 - Illinois Appellate Court found that for the purposes of a preliminary injunction, the District was required to allow the animal in the classroom
 - It noted that the parents provided extensive testimony about the training the dog received to address the child's unique needs, and that the District failed to rebut that evidence

(61)

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- *K.D. v. Villa Grove Community Unit School Dist. No. 302* (2010)
 - Looking at the plain language of the School Code, the Illinois Appellate Court determined that the dog qualified as a service animal despite its alleged failure to respond to commands or provide the child with necessary assistance
 - The Court noted that "section 14-6.02 does not specify service animals must behave perfectly at all times"
 - Because the dog met the definition of a service animal under state law, the District could not exclude the dog from the child's classroom

(62)

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Service Animals

- However...
 - Federal law allows the removal of a service animal if:
 - (1) the animal is out of control and the animal's handler does not take effective action to control it; or
 - (2) the animal is not housebroken
 - This guideline applies the understanding that school districts must protect the health and safety of all students

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Service Animals

- Practical Tips:
 - Modify current board policies to reflect state law requirements allowing service animals
 - Make parent/guardian aware of federal regulations that allow service animals to be excluded from school property in certain instances
 - Never exclude service animal outright without considering the specifics of the student's situation

64

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Service Animals

- *Fry v. Napoleon Community Schools*
 - Heard by the U.S. Supreme Court this term
 - Parents brought a claim for monetary damages for alleged violations of Section 504
 - They allege their student suffered social and emotional harm due to the school district's refusal to allow the student to bring his service dog to school
 - Claims below were dismissed for failure to exhaust administrative remedies, as required by IDEA
 - If the Supreme Court rules in favor of the Parents, school districts will be open to more lawsuits

65

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Other Interesting Section 504 Cases

- *P.P. v. Compton Unif. Sch. Dist.* (C.D. Cal. 2015)
 - One of the first cases to consider whether students may qualify under Section 504 based on a traumatic experience
 - District Court rejected the idea that a traumatic experience by itself is a disability in its own right, but noted that physical or mental effects of trauma could amount to a substantial impairment on a major life activity

66

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Other Interesting Section 504 Cases

- *Beam v. Western Wayne Sch. Dist.* (M.D. Pa. 2016)
 - The court found the parents of a 16-year-old boy who killed himself because of his poor academic performance sufficiently alleged discrimination by a Pennsylvania school district by failing to implement his Section 504 plan
 - Court held the parents could seek damages under Section 504 for the failure to implement the Section 504 plan

(67)

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(68)

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