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## **U.S. Dept. of Ed. Issues Important IDEA and 504 Guidance Documents**

Schools need not choose between keeping their school community safe and complying with the law, Department Secretary Miguel Cardona said in a [letter](#) accompanying newly released guidance documents from the U.S. Department of Education. Schools can both protect students' rights and respond to safety concerns by providing behavioral supports and imposing discipline in a non-discriminatory manner.

On July 19, 2022, the Department released comprehensive guidance documents regarding the rights of students with disabilities and student discipline:

- The Office of Special Education and Rehabilitative Services (OSERS) issued [Questions and Answers Addressing the Needs of Children with Disabilities and IDEA's Discipline Provisions](#), which explains requirements that state educational agencies and public elementary and secondary schools must follow with regard to the discipline of students with disabilities under the Individuals with Disabilities in Education Act (IDEA). OSERS also issued a technical assistance document, [Positive, Proactive Approaches to Supporting Children with Disabilities: A Guide for Stakeholders](#).
- The Office for Civil Rights (OCR) issued [Supporting Students with Disabilities and Avoiding the Discriminatory Use of Discipline under Section 504 of the Rehabilitation Act of 1973](#), which explains the nondiscrimination requirements that public elementary and secondary schools must follow with regard to the discipline of students with disabilities under Section 504. OCR also issued a corresponding [fact sheet](#) with a brief overview of the guidance.

Key excerpts from the new guidance documents are below.

### **IDEA GUIDANCE**

#### **Behavior Impeding Learning and FAPE**

- “When a child with a disability demonstrates behavior that impedes the child’s learning or that of others, appropriate behavioral supports may be necessary to ensure that the child receives FAPE. The IEP Team must consider and when determined necessary for ensuring FAPE, include or revise behavioral supports in the child’s IEP.” (Question A-4, p 7)
- The failure to consider behavioral supports may lead to denial of FAPE. “In addition, an LEA’s failure to make behavioral supports available throughout a continuum of alternative placements, including in a regular education setting, could result in an inappropriately restrictive placement and constitute a denial of placement in the least restrictive environment.” (Question A-6, p 8)

## **School Safety**

“When appropriate, the LEA could seek an expedited due process hearing to seek a removal of the child to an IAES for up to 45 days if returning the child with a disability to the previous placement is substantially likely to result in injury to the child or to others.” (Question E-5, p 23)

## **Short-Term Removals**

“Frequent use of short-term disciplinary removals or informal removals of children with disabilities may indicate that the child’s IEP does not appropriately address their behavioral needs, which may result in a denial of FAPE. School staff should be aware of, and gauge the need for and effectiveness of, behavioral interventions when implementing exclusionary disciplinary measures that continually or significantly interfere with a child’s instruction and participation in school activities (e.g., a pattern of office referrals, repeatedly sending a child out of school on “administrative leave” or regularly requiring a child to leave the school early and miss instructional time).” (Question C-3, p 13)

## **Manifestation Determinations**

“[W]hile IDEA requires a manifestation determination to be conducted when there is a change of placement (see Question F-7), IDEA does not prohibit IEP Teams from conducting a manifestation determination review during other situations when a child’s behavior is inconsistent with the school’s code of student conduct. Information from such reviews can assist the IEP Team’s decision-making, including whether to conduct an FBA; whether to create, implement, or change a behavioral intervention plan (BIP); or in considering the need for, and implementation of, positive behavioral interventions and supports and other strategies to support any child with a disability whose behavior impedes their learning or that of others.” (Question F-2, p 24)

## **Virtual Placements**

“Removing a child from the regular education program [and placing the student in a home virtual program] without ensuring behavioral supports have been made available throughout a continuum of placements, including in a regular education setting, could result in an inappropriately restrictive placement and denial of FAPE.” (Question D-5, p 19-20)

## **SECTION 504 GUIDANCE**

### **Identifying and Evaluating Children with Behavioral Needs**

- “A student who has not been identified as a student with a disability and who is repeatedly referred for discipline following inappropriate verbal outbursts beyond the expected range of behaviors for students of a similar age may need an evaluation to determine whether the student is a student with a disability entitled to FAPE.” (p. 6)

- The fact that a student is doing well academically does not justify the school denying or delaying an evaluation when the district has reason to believe the student has a disability, including if the student has disability-based behavior resulting in removal from class or other discipline (e.g., afterschool detentions). (p. 9)

### **Behavioral Assessments and Plans**

- “If the school does not assess a student’s challenging behaviors during the evaluation process, including disability-based behaviors that pose a threat to the safety of the student or others, the Section 504 team would lack the information needed to design a program that will meet the student’s individual educational needs, and the student could be denied FAPE.” (p. 9-10)
- “Where a student’s evaluation shows that challenging behavior is caused by or directly and substantially related to the student’s disability or disabilities, the placement decision by the Section 504 team must identify individualized services, such as behavioral supports, to meet the student’s educational needs. Individualized behavioral supports may include, among other examples: regular group or individual counseling sessions, school social worker services, school based mental health services, physical activity, and opportunities for the student to leave class on a scheduled or unscheduled basis to visit a counselor or behavioral coach when they need time and space to ‘cool down’ or self-regulate.” (p. 10)
- “To be useful in addressing the behavior, a BIP should include information about: acceptable replacement behaviors, who will teach the student to use those behaviors and how, what staff should do to support the student if the behavior of concern recurs, and how the Section 504 team will monitor and measure the BIP’s implementation and effectiveness.” (p. 10-11)

### **Behavioral Needs and Least Restrictive Environment (LRE)**

- “The Section 504 team must consider whether additional or different services and supports would enable the student to remain in their current educational setting. For instance, a student’s Section 504 team could determine that, in order for a student with a disability who harassed a classmate to safely remain in the regular education program, the student with a disability needs more intensive school-based mental health counseling and an adjustment to their schedule to limit the student’s interactions with the classmate subjected to the harassment.” (p. 20)
- “The student’s Section 504 team may determine that the individual student’s needs cannot be met in the regular education environment because, even with supplementary aids and services, the student’s disability-based behavior significantly impairs the student’s ability to learn or the ability of other students to learn.” (p. 20-21)

### **Informal Exclusions and De Facto Suspensions**

“OCR is aware that some schools informally exclude students, or impose unreasonable conditions or limitations on a student’s continued school participation, as a result of a student’s disability based behaviors in many ways, such as:

- Requiring a parent or guardian not to send their child to, or to pick up their child early from, school or a school-sponsored activity, such as a field trip;
- Placing a student on a shortened school-day schedule without first convening the Section 504 team to determine whether such a schedule is necessary to meet the student’s disability-specific needs;
- Requiring a student to participate in a virtual learning program when other students are receiving in-person instruction;
- Excluding a student from accessing a virtual learning platform that all other students are using for their instruction;
- Informing a parent or guardian that the school will formally suspend or expel the student, or refer the student to law enforcement, if the parent or guardian does not: pick up the student from school; agree to transfer the student to another school, which may be an alternative school or part of a residential treatment program; agree to a shortened school day schedule; or agree to the use of restraint or seclusion; and
- Informing a parent or guardian that the student may not attend school for a specific period of time or indefinitely due to their disability-based behavior unless the parent or guardian is present in the classroom or otherwise helps manage the behavior (e.g., through administering medication to the child).

Depending on the facts and circumstances, OCR could find that one or more of these practices violate Section 504.” (p. 23-24)

### **Nondiscriminatory Administration of Discipline**

“Based on the facts and circumstances of the particular incident, OCR generally considers three questions when investigating a complaint of different treatment in student discipline: (1) whether there is evidence the school treated the student differently based on disability; (2) whether the school stated a legitimate, nondiscriminatory reason for the different treatment; and (3) whether the school’s stated reason was pretext for discrimination.” (p. 28)

### **CONCLUSION**

The above documents from OSERS and OCR provide helpful guidance to schools regarding the obligation to address the behavioral needs of students with disabilities under the IDEA and Section 504. The failure to address behavior that impedes the student’s learning or the learning of others may result in a denial of FAPE and/or violation of LRE requirements.

The new guidance is only part of the Department’s larger goal of examining discrimination as it relates to discipline. The Department is still reviewing its guidance for discipline as it relates to racial discrimination. No timeline has been provided for its release.

If you have any questions about this Legal Update, please contact Attorney Alana Leffler at [aleffler@buelowvetter.com](mailto:aleffler@buelowvetter.com) or (262) 364-0267, Attorney Kirstin Mathers at (262) 364-0251 or [kmathers@buelowvetter.com](mailto:kmathers@buelowvetter.com), or your Buelow Vetter attorney.