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Section 504: What's New and What's Next

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This spring was a busy season for the United States Supreme Court with regard to special education cases. One case decided by the Court in February 2107, *Fry v. Napoleon Community Schools*, (137 S.Ct. 743) may have an impact on the number of Section 504 claims we see in the future. Therefore, it is a good time to review and examine our Section 504 policies, procedures, and practices, to be prepared for what's next in this area of the law.

Section 504 of the Rehabilitation Act of 1973 ("Section 504") is a nondiscrimination law that provides, in pertinent part, that "no otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his 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). Section 504 was the first federal civil rights protection for persons with disabilities. It was amended via the ADA Amendments Act, signed into law by President George W. Bush on Sept. 25, 2008, and is currently going strong. The U.S. Department of Education's Office for Civil Rights (OCR), which oversees and investigates complaints filed under Section 504, reported that it received more than 10,000 complaints in the year 2015 – which was double the number of annual complaints received a decade before. While changes are currently being made to the Office for Civil Rights under the new administration, and it is yet to be seen if the number of OCR complaints filed will slow down, based on the recent Supreme Court case, *Fry v. Napoleon*, more parties may elect to skip right over the OCR investigation process and file disability discrimination complaints directly in federal court.

Fry was a case initially about the right of a student to bring a service animal to school, however, the main issue that the Supreme Court addressed was whether students who allege that they have been discriminated against based on their disability must first exhaust their remedies and go through the Individuals with Disabilities Education Act ("IDEA") due process procedures prior to asserting a discrimination lawsuit seeking monetary damages under Section 504 in court. In *Fry*, the Court considered the IDEA's exhaustion requirement and confirmed that exhaustion under the IDEA is required when the gravamen of plaintiff's suit is the denial of a "free appropriate public education." The Court confirmed that some claims for a violation of Section 504 or the ADA must first be exhausted pursuant to the IDEA administrative process prior to filing a civil action. However, it's not necessary to first seek relief under the IDEA when the essence of the complaint does not involve FAPE. The Court offered two hypothetical questions to ask to determine whether exhaustion is necessary in a particular action:

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- 1) Could the plaintiff have brought essentially the same claim if the alleged conduct had occurred at a public facility that was *not* a school—say, a public theater or library?
- 2) Could an *adult* at the school (an employee or visitor) have pressed essentially the same grievance?

If the answer is yes, that's a clue that the case wouldn't be subject to IDEA exhaustion and a complainant could take their matter directly to court to seek relief, including the potential for monetary damages. In summary, *Fry* opened the door for Section 504 claims by clarifying that claims asserting disability discrimination under Section 504 that are not at their essence related to the provision of FAPE, may be filed directly in federal court without going through the IDEA process first.

While the full impact of *Fry* is yet to be seen, there are some steps you can take now to ensure that you have the best practices and procedures in place to protect student rights and limit discrimination claims in the future.

First, if you are looking to brush up on the legal requirements of Section 504, in December 2016, the Office for Civil Rights, issued a ***Parent and Educator Resource Guide to Section 504 in Public Elementary and Secondary Schools*** which can be found on the OCR website.¹ This guide reviews the basics of Section 504 and includes some helpful scenarios.

Next, Section 504 requires that school districts appoint a compliance coordinator. 34 CFR 104.7(a). This person is responsible for ensuring compliance with Section 504 for the district. Every district must determine what works best with regard to who is in charge of overseeing Section 504 compliance. If your Section 504 coordinator is someone different than your special education director, the special education director and the 504 coordinator should meet frequently to discuss procedures and referral between special education and Section 504. Section 504, like the IDEA has its own “child find” procedures and requires districts to “undertake to identify and locate every qualified [individual with a disability] residing in [the district's] jurisdiction who is not receiving a public education,” 34 C.F.R. 104.32(a) and also requires districts to evaluate students “who, because of handicap, need or are believed to need special education or related services.” 34 CFR 104.35(a).

Additionally, it is advisable to check your notice of nondiscrimination and make sure an updated and accurate version is published on your District's website homepage, in your central office, and in all handbooks. The regulations implementing Title II, Title VI, Title IX, Section

¹ <https://www2.ed.gov/about/offices/list/ocr/docs/504-resource-guide-201612.pdf>

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504, the Age Discrimination Act, and the Boy Scouts Act require schools to issue notices of non-discrimination. *See* 34 C.F.R. Sections 100.6(d), 106.9, 104.8, 110.25, 108.9, and 28 C.F.R. Section 35. OCR publishes a sample notice of non-discrimination which meets the requirements of these laws on its website.² If you chose to utilize this notice of non-discrimination, make sure it is cohesive with your Board of Education policies and regulations regarding nondiscrimination and contains updated contact information.

Also, annually districts should review their Section 504 policies and procedures manual. Has this procedurals manual been updated since the ADA Amendments Act went into effect in 2009? Are we comfortable with the timelines identified in the procedures? Is all the staff identified in the manual still with the District?

Finally, train your staff regarding Section 504 requirements and direct staff regarding how to make Section 504 referrals and where and how complaints of disability discrimination should be reported. Additionally, is your Section 504 compliance coordinator also the person designated in your district to investigate claims of disability discrimination? If so, does your compliance coordinator understand their obligation to investigate and document complaints of disability discrimination? Does your compliance coordinator need training in this area?

By analyzing these questions and examining and updating your Section 504 policies and procedures now, you can hopefully minimize liability or prevent disability discrimination claims in the future.

² <https://www2.ed.gov/about/offices/list/ocr/docs/nondisc.html>