

Client Alert

October 3, 2016

Education Law

Whether it is reviewing your discrimination and Title IX policies, handling an OCR complaint, providing training for teachers and staff, or providing legal advice as issues arise during the school day, Osborn Maledon's Education Law team is here to help. For more information, please contact:

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Section 504 and Students With Attention Disorders: OCR Speaks

Earlier this year, the U.S. Department of Education's Office for Civil Rights released guidance on schools' obligations under Section 504 of the Rehabilitation Act to students with attention disorders. Under Section 504, a school must provide special education and related services to eligible students with disabilities that impact a major life activity.

OCR identified the following common offenses by schools:

- Failure to identify students for evaluation,
- Failure to conduct timely and adequate evaluations of those students who are identified,
- Failure to provide the services and aids a disabled student is determined to need, and
- Failure to have Section 504 grievance and due process procedures in place and to notify parents of their rights.

In the recent guidance, OCR offered advice about each of these areas.

Identifying Students to be Evaluated for ADD or ADHD

Under Section 504, a school must identify and evaluate any student who "needs or is believed to need" special services due to disability. It is important for teachers and administrators to understand that anyone can have ADD/ADHD, even students who are academically successful or who are quiet and cooperative. Thus, teachers and staff should receive training about the signs of ADD/ADHD.

Providing Timely and Adequate Evaluations

Once a student has been identified as possibly having an attention disorder, the student must be evaluated right away—the school cannot delay evaluation while it attempts to find interventions to "fix" the problem. Of course, parents may also request an evaluation if they suspect that a student's academic or behavioral difficulty is the result of a disability.

For the evaluation, the school must assemble a group of people, including persons who know the child and those who understand ADD/ADHD and the placement options, to answer two questions:

1. Does the student have a disability under Section 504?
2. If so, what aids and services does the student need and in what setting?

To answer these questions, the evaluation team may consider various sources of information, including teacher recommendations and input about the student's behavior and academic progress, information from the student and his/her parents or guardians, information from psychologists or physicians, and aptitude tests.

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A student has a disability if *any* major life activity—for example, learning, thinking, reading, concentrating, or brain functions—is substantially limited by his or her impairment, and students with a diagnosis of ADD or ADHD are presumed to have a disability. Schools can make their own evaluation without a medical evaluation, but if the Section 504 evaluation team decides a medical evaluation is necessary, the school must pay for it.

Providing Aids and Services to Disabled Students

A disabled student may or may not require aids and services. If the evaluation team determines that the student needs particular aids or services, the school must provide them. The evaluation team must consider what the individual student needs; it is not appropriate for a school to have a set “package” of aids and services provided to every student with ADD/ADHD. The evaluation team cannot consider costs and administrative burdens when determining what aids and services the student needs.

The school must distribute the Section 504 plan to the student's teachers and other appropriate staff. Moreover, the plan must be clear and detailed enough to ensure that teachers, staff, and parents understand what the plan requires. Most failure-to-implement complaints involve teachers or staff who are unaware that the plan exists or confusion over vaguely worded plans.

The evaluation team must reassess the student's needs periodically to determine whether changes to the plan are necessary.

Section 504 Procedural Protections for Students and Parents

Under Section 504, schools must have two separate procedures in place—a grievance procedure and a due process procedure—and must notify parents about them.

- Grievance Procedure: Schools must have a procedure that provides for prompt, fair resolutions to parent complaints.
- Due Process Procedure: Schools must establish a way for parents to appeal decisions regarding identification, evaluation, or educational placement of students with disabilities, including ADD/ADHD. The due process procedure must promptly afford parents a hearing before an impartial person (often a hearing officer) who is knowledgeable about Section 504 and is not an employee of the school. Parents cannot be required to pursue a complaint through the grievance procedure before seeking a due process hearing.

Although the due process procedures may be published on school websites, in student handbooks and otherwise generally disseminated, parents must be *directly* notified of the due process procedures if the school denies a parent's request for a Section 504 evaluation of their child or determines that the child is disabled or that he/she needs services.

This client alert provides only a brief summary of the issues raised by the lengthy and detailed OCR guidance and the procedures required by Section 504. To read more, OCR's guidance can be found here:

<http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201607-504-adhd.pdf>.

If your school needs assistance establishing a grievance procedure and/or due process procedures, or if you have any questions about Section 504 compliance, please contact us.