

WHAT TO DO WHEN THE SCHOOL SAYS "NO"

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CASA Training
February 18, 2021

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IDEA & SECTION 504/ADA

Students With Disabilities

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SOURCES OF AUTHORITY

- Federal statutes/laws (IDEA, Rehab Act §504, ADA, etc.)
- Federal regulations (C.F.R.)
- Judicial decisions (Federal/State/DP Hearing)
- State regulations
- Guidance documents from federal and state departments of education (Office of Special Education Programs (OSEP), Office of Civil Rights (OCR), VA Dept of Educ (VDOE))

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COMMON AREAS OF DISAGREEMENT

- **Child Find:** failure to identify/locate/evaluate all children with disabilities residing in the district
- **Eligibility:** failure to identify a child as eligible
- **IEE:** failure to agree or file DP on the parent
- **FAPE:** failure to meet the child's unique needs, or confer an educational benefit (greater than "some" or "more than *de minimus*") See Andrew F.
- **LRE:** least restrictive environment to the maximum extent appropriate
- **IEP:** failure to develop an appropriately ambitious IEP, failure to implement it with fidelity, or procedural violations
- **Parent Participation:** must be meaningful
- **Discipline:** no manifestation of disability

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STAY PUT

- "Stay Put": during litigation (beginning from filing of the due process hearing request), the child stays in the *current educational placement*
- Current educational placement:
 - Where all services on IEP can be provided
 - If all services on IEP can't be replicated, it's a change in placement
- In VA, no change in placement without parental consent
- No "stay put" for disciplinary/MDR appeals: stay in alternative setting until hearing officer decision issues or time expires, unless parents/school agree otherwise

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TUITION REIMBURSEMENT – 2 OPTIONS

- At **IEP meeting**, before removing child:
 - You must state your concerns, and
 - You must state your intent to enroll your child in a private program at public expense
- **10 business days** before removing child, write a letter to the school stating:
 - Your specific concerns, in detail, about the inadequacy of the school's IEP and/or placement
 - Your basis for rejecting the IEP
 - Why your child will be damaged if placed in the school's proposed program
 - A statement of your intent to enroll your child in a private program at public expense

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IDEA DISPUTE RESOLUTION: 4 OPTIONS

- Informal resolution
- State complaint to VDOE
- Mediation
- Due process hearing (appeal to state or federal court)

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STATE COMPLAINT TO THE VIRGINIA DEPARTMENT OF EDUCATION ("VDOE")

- Can Be Made By ANYONE (an organization or individual)
- Formal Complaint (written, signed, statement of violation)
- 1-year statute of limitations
- DP goes first (complaint issue(s) set-aside until decided). 34 CFR §300.152(c)
- Schools Submit Response
- Investigation by VDOE
- 60 days to VDOE decision
- Can appeal within VDOE complaint system

https://www.doe.virginia.gov/special_ed/evolving_disputes/complaints/index.shtml

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34 C.F.R. § 300.151-153

STATE COMPLAINT TO THE VIRGINIA DEPARTMENT OF EDUCATION ("VDOE")

- VDOE Complaint Form
- https://www.doe.virginia.gov/special_ed/resolving_disputes/complaints/forms/state-special-education-complaint-form.pdf
- Not limited to space on the form. You can draft your own response and attach it to the complaint form.

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34 C.F.R. § 300.151-153

STATE COMPLAINT TO THE VIRGINIA DEPARTMENT OF EDUCATION ("VDOE")

- Historic problems with the complaint process in VA:
 - Complaint specialists making up own facts/claims then finding against parent on these made-up facts/claims
 - Unclear guidance on when a complaint is "received" by VDOE for 1 yr. SOL (e.g., if emailed, then considered received when email opened by VDOE staff person---could be two weeks later!)
 - Failure to address systemic complaints---but changing (Poe: USDOE)
 - Failure to order compensatory services when violations found
 - Seem to address procedural violations, not substantive violations of FAPE

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https://www.doe.virginia.gov/special_ed/resolving_disputes/mediation/index.shtml

MEDIATION (34 C.F.R. §300.506)

- Formal request—by school after both parents and school agree to mediate
- Can address matters of identification, evaluation, placement, FAPE, or any other matters arising under 34 CFR part 300 not subject to DP (OSEP Memo 13-08.A-6)
- Voluntary for all parties—can walk away
- With qualified, impartial mediators appointed by VDOE—no cost to parent
- Can't delay due process hearing
- Confidential
- Legally binding and enforceable agreement

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https://www.doe.virginia.gov/special_ed/resolving_disputes/due_process/index.shtml

DUE PROCESS HEARING

- A due process hearing is an evidentiary hearing on the record before an impartial hearing officer
- May be requested by parent or school; burden of proof falls on party bringing the complaint
- 2-year statute of limitations (unless misrepresentation; sometimes lack of rights in native language)
- Issues not raised in the complaint can't be raised at the hearing

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DUE PROCESS HEARING

- Due process is available to resolve disputes relating to:
 - Identification (child find, eligibility, change in eligibility, termination of any service)
 - Evaluation
 - Educational placement and services 34 C.F.R. § 300.507(a)
 - FAPE
- Hearing officers have authority to:
 - Issue subpoenas (enforcement through Circuit Court)
 - Exclude certain evidence & testimony
 - Enter disposition on every issue

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DUE PROCESS HEARING

- HO appointed in 5 days
- Response from school required within 10 days
- Resolution meeting: 15 calendar days after notice of filing DP request/complaint. 34 CFR §300.510(a)
 - Schools' attorneys present at resolution meeting only if parents' attorneys present
 - If resolved at Resolution Session:
 - Written, signed settlement
 - Either side can void it within 3 business days
 - Confidentiality—not mandatory but parties can enter into an agreement to make the resolution session confidential

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DUE PROCESS HEARING

- Expedited process for hearings on disciplinary matters. 34 C.F.R. § 300.532(a); 8 VAC 20-81-160(E)
- Hearing occurs within 20 school days of filing
- HO determination within 10 school days after the hearing
- Unless agree to waive it or use mediation, resolution meeting must occur within 7 calendar days of receipt of complaint.

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DUE PROCESS HEARING

- Hearing Officer Decision:
 - In writing
 - Findings of fact & conclusions
 - Nonexpedited hearing—45 days after Resolution Period
 - Expedited hearing (disciplinary)—20 days
- Transcript/recording
- Appeal: 90 days to federal court or 180 days to state court

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REMEDIES

- IDEA
 - Prospective Relief
 - Finding of eligibility
 - Change in IEP
 - Change in placement or preventing a change in placement
 - Reversal of manifestation determination decision
 - Retrospective Relief
 - Compensatory education
 - Tuition reimbursement
 - Attorney fees + costs (34 CFR §300.517(a)(1)(i))
 - NO expert witness fees
 - NO punitive damages
- Section 504/ADA
 - Retrospective Relief
 - Compensatory education
 - Tuition reimbursement
 - Monetary/compensatory damages
 - Intentional discrimination
 - e.g., bad faith/gross misjudgment
 - Attorney fees + costs
 - Expert witness fees
 - NO punitive damages

NOTE: In both, school can recover litigation costs from parents when the underlying action is frivolous, unreasonable, or without foundation

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VDOE Guidance Documents

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OTHER OPTIONS

- Ombudsman for Special Education – an informal source of information and referral, aids in answering individuals' questions and assists in the resolution of concerns and issues
 - https://www.doe.virginia.gov/special_ed/resolving_disputes/ombudsman/index.shtml
- Facilitated IEPs – use of a facilitator to assist with communication in developing an IEP
 - https://www.doe.virginia.gov/special_ed/resolving_disputes/facilitated-iep/index.shtml
 - School and parent request on form at least 2 weeks prior to the IEP meeting

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Rehabilitation Act of 1973, Section 504

- Broad civil rights (non-discrimination) law that applies to schools and colleges receiving public funding and provides protection for people with disabilities
- Accommodations, modifications, services, and improved building accessibility to provide equal access to education
- Unlike IDEA, it includes an anti-retaliation provision (34 C.F.R. § 100.7(e), 104.61)
- It provides legal remedies if a school district discriminates, excludes, or retaliates against a parent, child or school district employee exercising their rights

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Rehabilitation Act of 1973, Section 504

- Eligibility under Section 504 requires a “physical or mental impairment” that “substantially limits one or more major life activity.” 34 C.F.R. § 104.3
- If don’t need special education services, you can still be eligible under Section 504 (e.g., diabetic child with insulin issues; child with a nut or bee allergy)
- A “Section 504 Plan” does not have to be written and does not require parental consent – but schools would be silly not to put it in writing

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ADA AMENDMENTS ACT OF 2008 ELIGIBILITY EXPANDED

- Whether an individual is disabled should not demand extensive analysis
- Ameliorating effects of mitigating measures (other than eyeglasses or contacts) may not be considered (e.g., ADHD medication, medical equipment and devices, prosthetic limbs, low vision devices, hearing aids, mobility devices, oxygen therapy equipment, use of assistive technology, reasonable accommodations, auxiliary aids or services, and learned behavioral or adaptive neurological modifications. 42 U.S.C. § 12102(4)(E))
- Scope of “major life activities” expanded and nonexhaustive
- 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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SUBSTANTIALLY LIMITS

- › In passing the ADA, Congress rejected the assumption that an individual with a specific learning disability who performs well academically cannot be substantially limited in activities such as learning, reading, writing, thinking, or speaking. H.R. Rep. No. 110-730, pt. 1, at 15 (2008)
- › Grades do not provide information on how much effort or how many outside resources are required for the student to achieve those grades
- › Students should not be penalized because of adaptive strategies or accommodations that lessen the deleterious impacts of their disability

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SUBSTANTIALLY LIMITS

- › OCR has addressed, more than once, the issue of grades in determining whether a child is disabled under 504
- › Using the example of a child with dyslexia who spends more time preparing for class than other students and earns good grades because of the student's intelligence and extreme efforts, OCR says still substantially limited in the major life activity of reading. *Parent and Educator Resource Guide to Section 504 in Public Elementary and Secondary Schools* (2016)
- › In a local complaint resolution, OCR said “. . . grades alone are a single source evaluation and do not necessarily accurately distinguish subsets of skills in a subject area or reflect how a student achieved the grades.” Virginia Beach (VA) City Public Schools, 54 IDELR 202, 3 (OCR 2009)

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MAJOR LIFE ACTIVITIES

• Caring for oneself	• Bending
• Performing manual tasks	• Speaking
• Seeing	• Breathing
• Hearing	• Learning
• Eating	• Reading
• Sleeping	• Concentrating
• Walking	• Thinking
• Standing	• Communicating
• Lifting	• Working

42 U.S.C. § 12102(2)(A)
34 C.F.R. § 104.3 (j)(2)(ii)

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MAJOR BODILY FUNCTIONS

• Functions of the immune system	• Circulatory system
• Normal cell growth	• Endocrine
• Digestive	• Reproductive functions
• Bowel	
• Bladder	
• Neurological	
• Brain	
• Respiratory	

42 U.S.C. § 12102(2)(A)
34 C.F.R. § 104.3 (j)(2)(ii)

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SECTION 504 SERVICES/ACCOMMODATIONS

- ❑ Section 504 requires that students with disabilities be given comparable aids, benefits, and services to those provided to nondisabled students in LRE
- ❑ Includes music, physical education, lunch, services of the guidance office, or vocational training programs offered through the high school
- ❑ Unlike with IDEA where the Supreme Ct. rejected this comparative/equal standard. *Bd. of Educ. Of the Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176, 198 (1982), *Andrew F. ex rel. Joseph F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S.Ct. 988, 1001 (2017)

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SECTION 504 FAPE

- Requires public schools to provide FAPE to each qualified handicapped person
- Free: includes cost of transportation and residential placements
- Appropriate Education: regular or special education and related aids/services designed to meet the individual educational needs of disabled as adequately as the needs of nondisabled, AND compliance with §504 procedural requirements
- Section 504: providing educational services that are equivalent to those offered nondisabled students; comparative obligation; equal access to education received by nondisabled peers; prohibition against discrimination

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SECTION 504 FAPE

- In addition to equal academic opportunities, students with a disability must receive:
 - Equal opportunity to participate in athletics
 - Equal opportunity to participate in extracurricular activities
 - Freedom from bullying and harassment based on disability.



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SECTION 504 DISCRIMINATION

34 C.F.R. § 104.4(b)

- Section 504 prohibits schools from:
 - Denying a student with disabilities the opportunity to participate in or benefit from any aid, benefit, or service-- the comparable opportunities requirement that includes nonacademic and extracurricular activities;
 - Giving a student with disabilities an aid, benefit, or service that is not equal to that afforded others;
 - Providing a student with disabilities with an aid, benefit, or service that is not as effective as that provided to others; or
 - Otherwise limiting a student with disabilities in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving an aid, benefit, or service.

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SECTION 504 DISPUTE RESOLUTION OPTIONS

- Informal resolution
- Federal complaint to USDOE/DOJ Office of Civil Rights
 - Mediation
- Local appeal/grievance procedures
- Due process hearing (appeal to state or federal court)
- Federal court (if exhaustion not required—see Fry)

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SECTION 504 FEDERAL COMPLAINTS

- Section 504 is enforced by the Office of Civil Rights ("OCR") within the U.S. Department of Education
- Anyone (e.g., parent, student, or advocate) can file a complaint with OCR for violations of Section 504 within 180 calendar days of the date of the alleged discrimination---opportunities for settlement
- OCR will not review the content of Section 504 Plans, IEPs, individual placements, or other educational decisions---must file for a Section 504 or IDEA due process hearing
- OCR will review identification/evaluation of students, procedural safeguards, and incidents where students with disabilities are treated differently

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**SECTION 504
FEDERAL COMPLAINTS**

- OCR Complaint Process
 - www2.ed.gov/about/offices/list/ocr/complaintprocess.html
 - Notification Letter
 - Facilitated Resolution (like mediation—not monitored)
 - Investigation
 - Resolution
 - Appeal
 - OCR Monitors Resolution Agreements
- OCR Case Processing Manual 2020
 - www2.ed.gov/about/offices/list/ocr/docs/ocrcrpm.pdf

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**SECTION 504
LOCAL APPEAL/GRIEVANCE PROCEDURES
DUE PROCESS HEARINGS**

- Varies by district
- Can adopt IDEA procedural safeguards for Section 504/ADA complaints and DP hearings, or they can develop their own (VERY shortened)


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**SECTION 504
FEDERAL COURT**

- At any time, an individual may file a Federal lawsuit
- Unlike IDEA, there is no exhaustion requirement unless the plaintiff also seeks relief for a denial of FAPE
- *Fry v. Napoleon Comm. Sch.* (2017): U.S. Sup. Ct. 2-part test to determine whether a claim is related to FAPE
 - Could the claim be brought if it occurred in a library or public theater?
 - Could an adult, as opposed to a child, press the same claim against the school?

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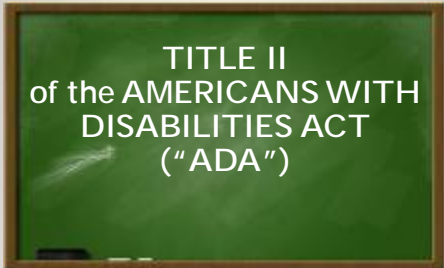
**SECTION 504
FEDERAL COURT**



- However, please note that Circuit courts have held that in order to prove intentional discrimination in the educational context, a parent must show something more than just the discrimination.
- For example, in the 4th Circuit, a parent must show either bad faith or gross misjudgment in order to prevail on a Section 504 claim

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**TITLE II
of the AMERICANS WITH
DISABILITIES ACT
("ADA")**



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TITLE II OF THE ADA

- Schools must take any action required to ensure SWD receive the same benefits and services offered to nondisabled students that does not fundamentally alter the nature of the program or impose an undue financial or administrative burden. 28 C.F.R. § 35.130(b)(7)(i) (generally); 28 C.F.R. § 35.150 (a)(2) - (a)(3) (facilities); 28 C.F.R. § 35.164 (communication).
- Special rules for equal access to school facilities and auxiliary aids and services to meet communication needs.

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ADA DISCRIMINATION

- ADA regulations prohibit a School Board from engaging in any of the following discriminatory actions:
 - Deny an opportunity to participate in or benefit from any aid, benefit, or service
 - Give an aid, benefit, or service that is not equal
 - Provide an aid, benefit, or service that is not as effective
 - Limit the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others
 - Administer/establish requirements for a licensing or certification program that discriminates against a student with disabilities

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- Fail to make reasonable modifications in policies, practices, or procedures necessary to avoid discrimination, unless it would fundamentally alter the nature of the service, program, or activity
- Impose/apply eligibility criteria that screen out disabled individuals from fully and equally enjoying any service, program, or activity, unless necessary to provide the service, program, or activity
- Fail to provide services, programs, and activities in the most integrated setting appropriate (similar to LRE)
- Impose a surcharge to cover the costs of measures required to comply with the ADA
- Impose safety requirements that are based on mere speculation, stereotypes, or generalizations rather than actual risks to safety.

28 C.F.R. § 35.130(b),(d),(f),(h)

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OCR & OSEP Guidance Documents



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