



# Supporting Students with Disabilities and Avoiding the Discriminatory Use of Student Discipline under Section 504 of the Rehabilitation Act of 1973

**U.S. Department of Education  
Office for Civil Rights**

**July 2022**



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**Supporting Students with Disabilities and Avoiding the Discriminatory Use of Student Discipline Under Section 504 of the Rehabilitation Act of 1973**

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**UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE FOR CIVIL RIGHTS**

THE ASSISTANT SECRETARY

July 19, 2022

Dear Colleague:

I write to share information for schools, school districts, State officials, parents and guardians, and students about how Section 504 of the Rehabilitation Act of 1973 (Section 504), a Federal civil rights law that prohibits discrimination based on disability, applies to the use of student discipline.<sup>1</sup>

This guidance<sup>2</sup> describes schools' responsibilities under Section 504 to ensure nondiscrimination against students based on disability when imposing student discipline.<sup>3</sup> Specifically, the guidance explains how compliance with Section 504's requirement to provide a free appropriate public education (FAPE) to students with disabilities can assist schools in effectively supporting and responding to behavior that is based on a student's disability and that could lead to student discipline. By using Section 504's procedures to identify and meet the behavioral, social, emotional, and academic needs of students with disabilities as required for FAPE, schools can help prevent or reduce behaviors that might otherwise result in discipline. As the guidance explains, when schools do choose to administer discipline for students with disabilities, they must do so in a nondiscriminatory manner.

Schools need not choose between keeping their school community—including students and school staff—safe or complying with the law. Schools are required not to discriminate against students with disabilities on the basis of disability, a responsibility that extends to the conduct of everyone with whom the school has a contractual or other arrangement, such as school district

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<sup>1</sup> 29 U.S.C. § 794; 34 C.F.R. pt. 104. The Office for Civil Rights (OCR) enforces Section 504 for all programs and activities that receive Federal financial assistance from the U.S. Department of Education (Department), including those of public elementary and secondary schools, local educational agencies, State educational agencies, preschools, and private schools that receive such assistance.

<sup>2</sup> The Department has determined that this Dear Colleague Letter is significant guidance under the Office of Management and Budget's Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (Jan. 25, 2007), <https://www.federalregister.gov/documents/2007/01/25/E7-1066/final-bulletin-for-agency-good-guidance-practices>. If you are interested in commenting on this guidance, please email us your comment at [OCR@ed.gov](mailto:OCR@ed.gov) or write to us at the following address: Office for Civil Rights, U.S. Department of Education, 400 Maryland Avenue, S.W., Washington, D.C. 20202. For further information about the Department's guidance processes, please visit <https://www2.ed.gov/policy/gen/guid/significant-guidance.html>.

<sup>3</sup> This guidance is issued to provide recipients with information to assist them in meeting their obligations, and to provide members of the public with information about their rights, under the civil rights laws and implementing regulations that the Department enforces. The Department's legal authority is based on those laws. Except for the underlying statutory or regulatory requirements referenced in this Dear Colleague Letter, this significant guidance is nonbinding and does not create or impose new legal requirements. Instead, it provides information and examples to inform recipients about how the Department evaluates whether covered entities are complying with their legal obligations.

SUPPORTING STUDENTS WITH DISABILITIES AND AVOIDING THE DISCRIMINATORY USE OF STUDENT DISCIPLINE UNDER  
SECTION 504 OF THE REHABILITATION ACT OF 1973

police officers or school resource officers. Nothing in Section 504, however, prohibits a school from responding to emergency circumstances or from taking appropriate, nondiscriminatory steps to maintain safety while supporting students learning how to be accountable for the impact of their actions on others. As the guidance explains, when a student’s behavior is based on disability, including when the behavior significantly impairs other students’ education or threatens the safety of the student or others, the student’s Section 504 team is responsible for considering the impacts of the behavior on others when determining the appropriate placement for the student. This consideration could result in a change to the educational setting for the student with a disability or in a change to the student’s services or supports to more effectively address the behavior and ensure safety. Furthermore, Section 504 FAPE requirements do not interfere with a school’s ability to address extraordinary situations in which a student’s behavior, including disability-based behavior, is an immediate threat to their own or others’ safety, such as by contacting crisis intervention specialists or law enforcement. Complying with Section 504’s general nondiscrimination and FAPE requirements helps to ensure an educational environment that is nondiscriminatory, supportive, positive, inclusive, productive, and safe for all.

OCR appreciates schools’ many efforts to support and respond to students’ behavioral needs in order to prevent the use of student discipline, and, when discipline is used, to implement disciplinary policies, practices, and procedures fairly and consistent with all Federal civil rights laws.<sup>4</sup> Nonetheless, OCR’s continued enforcement experience reflects that many students with disabilities face discipline because they are not receiving the support, services, interventions, strategies, and modifications to school or district policies that they need to manage their disability-based behavior. Additionally, many students with disabilities are subjected to discrimination based on their disability when being disciplined, such as when students with disabilities are unnecessarily disciplined more severely than students without disabilities for the same or similar behavior.

OCR is committed to ensuring equal access to education for all students and to promoting educational excellence at the nation’s schools through the vigorous enforcement of students’ civil rights. An important part of our mission is to ensure that students are not denied equal educational opportunity or subjected to discrimination based on their disabilities, including through the improper use of discipline.

I look forward to working with you to achieve this shared goal.

Sincerely,

/s/

Catherine E. Lhamon  
Assistant Secretary for Civil Rights

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<sup>4</sup> In addition to Section 504, OCR enforces other Federal laws that prohibit discrimination based on disability, race, color, national origin, sex, and age. For OCR guidance on topics under these laws, please visit <http://www.ed.gov/ocr>.

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## I. INTRODUCTION: SETTING THE FOUNDATION

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This guidance focuses on schools' obligations to meet the needs of students with [disability-based behavior](#) as required by Section 504 and on other steps schools must take to avoid discrimination on the basis of disability when disciplining students.<sup>1</sup> The hypothetical examples in this guidance are intended to be illustrative of selected principles, and not an exhaustive discussion of principles that may affect the outcome of any OCR case. The examples in this guidance do not determine the outcome of any particular set of facts, as OCR assesses the facts of each case individually and applies the law to those facts.

- ❖ Section I explains the scope of Section 504's coverage and the relationship between Section 504 and Part B of the [Individuals with Disabilities Education Act](#) (IDEA).
- ❖ Section II explains the responsibility of public elementary and secondary schools<sup>2</sup> to provide a [free appropriate public education](#) (FAPE),<sup>3</sup> and how doing so may help prevent or reduce the need for discipline of students with disabilities who have behavioral needs.
- ❖ Section III explains schools' responsibility to provide reasonable modifications<sup>4</sup> to their policies, practices, or procedures necessary to avoid disability discrimination.
- ❖ Section IV discusses schools' responsibility to avoid discrimination in the context of discipline, including discrimination based on stereotypes, generalizations, or assumptions about an individual's disability.<sup>5</sup>
- ❖ Section V explains that students with disabilities may experience discrimination on multiple bases or intersectional discrimination.

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<sup>1</sup> 29 U.S.C. § 794; 34 C.F.R. pt. 104. While the focus of this guidance is on schools' duties under Federal law, some practices mentioned in this guidance—such as corporal punishment, seclusion, and some forms of restraint—may be prohibited under State laws, and this guidance should not be viewed as authorizing their use in violation of law.

<sup>2</sup> This guidance uses the terms *school* and *school district* as shorthand for ease of reading, but the requirements discussed in this guidance apply to the programs and activities of all public elementary and secondary schools, school districts, and State educational agencies that receive Federal financial assistance from the Department of Education (Department). 34 C.F.R. §§ 104.1, 104.2, 104.4, 104.32-104.36. Preschools may not exclude qualified persons with disabilities and must consider the needs of qualified persons with disabilities when determining the aid, benefits, or services provided. 34 C.F.R. § 104.38. Private elementary and secondary schools that receive Federal financial assistance are subject to the requirements of 34 C.F.R. § 104.39. Some statutes administered by the Department require State and public school district recipients to provide what are known as "equitable services" to students placed by their parents in private school. *See, e.g.*, 34 C.F.R. §§ 300.132, 300.137, 300.138. Such recipients may not assist private schools that discriminate based on disability against beneficiaries of the recipient's programs. 34 C.F.R. § 104.4(b)(1)(v); *see* 34 C.F.R. pt. 104, App. A, ¶ 1. However, the Department does not consider the provision of equitable services to students and their families to be Federal financial assistance to the private school that would otherwise make the private school a recipient subject to Section 504. *Id.*

<sup>3</sup> *See* 34 C.F.R. § 104.33(a), (b)(1).

<sup>4</sup> 34 C.F.R. § 104.4. OCR notes that the Department of Justice (DOJ) interprets requirements under Section 504 consistently with those under Title II of the Americans with Disabilities Act (Title II). *See* 28 C.F.R. § 35.130(b)(7) (Title II regulation requiring reasonable modifications where necessary to avoid disability discrimination).

<sup>5</sup> 34 C.F.R. §§ 104.4; 104.33(a), (b); 104.34(a)-(c); 104.35(a)-(c). *See Guckenberger v. Bos. Univ.*, 974 F. Supp. 106, 134 (D. Mass. 1997) (" . . . Section 504 specifically prohibit[s] discrimination . . . based on thoughtlessness, apathy and stereotypes about disabled persons.").

- ❖ The Appendix includes a [Glossary](#) of common terms and acronyms used in this guidance.<sup>6</sup>

As discussed throughout the guidance, nothing in Section 504 prohibits schools from responding to emergency circumstances or from taking appropriate, nondiscriminatory steps to maintain school safety while supporting students learning how to be accountable for the impact of their actions on others.

### **A. The Scope of Section 504's Coverage**

Section 504 applies to elementary and secondary public schools (including public charter schools and State-operated schools), public school districts, State educational agencies (SEAs), and private schools and juvenile justice residential facilities<sup>7</sup> that receive Federal financial assistance<sup>8</sup> from the Department, referred to in this guidance as [recipients](#), whether they receive the Federal financial assistance directly from the Department or indirectly through another recipient.<sup>9</sup> Section 504 prohibits recipients from discriminating against a “qualified [person with a disability](#)”<sup>10</sup> on the basis of disability in the recipients’ Federally assisted [programs or activities](#).<sup>11</sup> For instance, a recipient SEA must ensure that public schools and districts in the State do not discriminate based on disability.<sup>12</sup> Thus, recipients may not discriminate against a [qualified student with a disability](#) in their programs and activities, including in connection with policies, procedures, and practices related to student discipline.<sup>13</sup> Additionally, a school’s inappropriate use of [mechanical](#), [physical](#), or other restraints (referred to collectively in this guidance as

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<sup>6</sup> As noted in the Glossary, except where terms are directly from a statute or regulation that OCR enforces, or OCR’s Civil Rights Data Collection (CRDC) definitions, the terms and acronyms in the Glossary are offered to assist the reader only for purposes of clarity in this guidance, are not intended to apply more broadly, and are not binding in any way. The CRDC collects data on leading civil rights indicators related to access and barriers to educational opportunity from preschool through 12th grade.

<sup>7</sup> For more information about the civil rights responsibilities of juvenile justice facilities, please refer to U.S. Dep’t of Just. & U.S. Dep’t of Educ., *Dear Colleague Letter: Civil Rights in Juvenile Justice Residential Facilities* (Dec. 8, 2014), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-residential-facilities-201412.pdf>.

<sup>8</sup> Another Federal law, Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12131-12134, and DOJ’s implementing regulations for Title II, 28 C.F.R. pt. 35, prohibit disability discrimination by State and local governments, regardless of whether they receive Federal funds. OCR shares with DOJ responsibility for enforcing Title II with regard to public educational institutions. 28 C.F.R. § 35.190(b)(2); 28 C.F.R. §§ 35.172–35.174. This guidance focuses on Section 504’s requirements; for more information about Title II, see DOJ’s [ADA.gov](http://ADA.gov) website.

<sup>9</sup> 34 C.F.R. §§ 104.2, 104.3(f), (h). Recipients include entities to which Federal financial assistance from the Department is extended directly or through another recipient. 34 C.F.R. § 104.3(f). Other entities, such as postsecondary education institutions and organizations that provide before- or after-school programming, that receive Federal financial assistance from the Department are subject to Section 504, including its general nondiscrimination requirements; this document does not focus on the Section 504 responsibilities of those other recipients.

<sup>10</sup> 29 U.S.C. § 794(a); 34 C.F.R. pt. 104.

<sup>11</sup> 34 C.F.R. § 104.3(k)(1)-(4). OCR also enforces the following laws that apply to the programs and activities of recipients of Federal financial assistance: Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq., 34 C.F.R. pt. 100 (Title VI); Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 et seq., 34 C.F.R. pt. 106 (Title IX); and the Age Discrimination Act, 42 U.S.C. § 6101 et seq., 34 C.F.R. pt. 110.

<sup>12</sup> See 34 C.F.R. § 104.4(a), (b)(1)(i)-(v), (vii), (b)(4); 34 C.F.R. pt. 104, App. A, ¶ 1; see also 34 C.F.R. § 104.5; OCR, *Assurance of Compliance—Civil Rights Certificate*, <https://www2.ed.gov/about/offices/list/ocr/letters/boy-scouts-assurance-form.pdf>.

<sup>13</sup> 34 C.F.R. §§ 104.3(l)(2), 104.4.

“restraints”) or use of [seclusion](#) in response to student behaviors could deny the student FAPE or constitute disability discrimination, as explained in prior OCR guidance.<sup>14</sup>

Recipients must ensure that their employees and all who participate in providing the recipients’ educational program or activity under a contractual, licensing, or other arrangement do so in a nondiscriminatory manner.<sup>15</sup> Section 504 prohibits a recipient from indirectly engaging in conduct through a contractual, licensing, or other arrangement that would be discrimination if the recipient engaged in the conduct directly.<sup>16</sup> The responsibility not to discriminate includes a duty for recipients to ensure their own policies, practices, and procedures do not directly cause, or indirectly result in, disability discrimination by other entities that participate in the recipient’s educational program or activity through a contractual, licensing, or other arrangement.<sup>17</sup>

A school’s responsibility not to discriminate against students with disabilities applies to the conduct of everyone with whom the school has a contractual or other arrangement, such as lunch or recess monitors, cafeteria staff, bus drivers, security staff, private security companies or other contractors, school district police officers, or school resource officers (SROs). Schools cannot divest themselves of their nondiscrimination duty by relying on such personnel when the personnel operate under a contract or other arrangement, such as a memorandum of understanding.<sup>18</sup> Recipients have a responsibility not to discriminate in, among others, the following activities related to student discipline: questioning a student with a disability and investigating allegations of a violation of school rules; issuing tickets, citations, and fines for violations of school rules, such as truancy; using surveillance technologies; conducting searches of students with disabilities and their property; making referrals of students with disabilities to law enforcement, including referrals that result in school-related arrests; and initiating or carrying out threat or risk assessments of students with disabilities.<sup>19</sup>

## **B. Section 504 and the IDEA**

Schools have certain overlapping responsibilities under Section 504 and Part B of the IDEA, which is a Federal law that makes special education and related services available to children who are eligible for FAPE as defined by the IDEA.<sup>20</sup> The IDEA and its implementing regulations establish

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<sup>14</sup> See OCR, *Dear Colleague Letter: Restraint and Seclusion of Students with Disabilities* (Dec. 28, 2016), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201612-504-restraint-seclusion-ps.pdf>.

<sup>15</sup> 34 C.F.R. § 104.4(a), (b)(1) (prohibiting discrimination on the basis of disability, whether “directly or through contractual, licensing, or other arrangements”), (b)(4).

<sup>16</sup> See *id.*

<sup>17</sup> See *id.*

<sup>18</sup> See *id.*

<sup>19</sup> To learn more about recipients’ obligations under Section 504 more generally, please refer to OCR’s *Parent and Educator Resource Guide to Section 504 in Public Elementary and Secondary Schools*, <https://www2.ed.gov/about/offices/list/ocr/docs/504-resource-guide-201612.pdf> (Section 504 Resource Guide).

<sup>20</sup> Part B of the IDEA, which applies to students in preschools, elementary schools, and secondary schools between the ages of 3 and 21, requires schools to provide FAPE, as defined by that law, to IDEA-eligible students. 34 C.F.R. §§ 300.17, 300.101, 300.102. In some instances, the IDEA uses the same terminology as Section 504, but defines the terms differently. See, e.g., 34 C.F.R. §§ 300.15 (IDEA definition of evaluation), 300.17 (IDEA definition of FAPE).

specific requirements related to the discipline of IDEA-eligible children.<sup>21</sup> Students with disabilities who are eligible under the IDEA also have rights under Section 504, and OCR enforces the Section 504 rights, including the Section 504 FAPE rights, of IDEA-eligible students enrolled in elementary or secondary school. Thus, OCR can investigate allegations that a school district violated the Section 504 rights of students who have an [individualized education program](#) (IEP) under the IDEA. For such students, where noted in this guidance, schools may satisfy their Section 504 FAPE obligations by complying with the IDEA's requirements.<sup>22</sup>

Some students have a disability for purposes of Section 504 FAPE, but their disability-based needs do not also make them eligible for FAPE under the IDEA. These students are commonly referred to as "[Section 504-only](#)" students. This guidance addresses the rights and responsibilities concerning FAPE under Section 504 that apply to Section 504-only students,<sup>23</sup> as well as the general nondiscrimination responsibilities under Section 504 that apply to all students with disabilities, including IDEA-eligible students. Throughout this guidance, "FAPE" refers to FAPE under Section 504 unless otherwise stated. The Department's Office of Special Education and Rehabilitative Services (OSERS) has provided, simultaneous with the issuance of this guidance document, information and resources about student discipline for IDEA-eligible students and schools' responsibilities to IDEA-eligible children. For information explaining the IDEA requirements applicable to discipline, including the complaint procedures available under the IDEA, please consult OSERS's *Questions and Answers: Addressing the Needs of Children with Disabilities and IDEA's Discipline Provisions*.<sup>24</sup>

## II. PROVIDING FAPE TO STUDENTS WITH DISABILITY-BASED BEHAVIOR

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Section 504 requires a recipient that operates a public elementary or secondary education program to provide FAPE to each qualified student with a disability, regardless of the nature or severity of the disability.<sup>25</sup> To provide FAPE under Section 504, schools must offer regular or special education, and [related aids and services](#), that: (1) are designed to meet the student's

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Nothing stated in this guidance is intended to alter existing requirements applicable to IDEA-eligible students or create conflicting requirements with the IDEA.

<sup>21</sup> See 34 C.F.R. §§ 300.530-536.

<sup>22</sup> Under Section 504, implementing an IEP developed in accordance with the IDEA is one way to meet Section 504's FAPE requirement. 34 C.F.R. § 104.33(b)(1)(i), (b)(2).

<sup>23</sup> Some Section 504-only students ultimately may be found to be IDEA-eligible as a result of subsequent evaluations. For example, a school may initially evaluate a student and determine that the student needs related services under Section 504 but does not need specialized instruction making them eligible under the IDEA. If the school has subsequent reason to suspect that the same student does need such special education and related services under the IDEA, the school must evaluate the student again, which could result in the student being found eligible under the IDEA. Although the examples in this guidance describe the rights of students under Section 504, a school under the circumstances of these examples could be required by the IDEA to evaluate or reevaluate the student for eligibility based on their current behavioral needs. For example, due to the COVID-19 pandemic and resulting school closures, some Section 504-only students may have new, reemerging, or worsening disability-based behaviors, such as social anxiety-related behaviors, that interfere with their learning or that of others.

<sup>24</sup> OSERS, *Questions and Answers: Addressing the Needs of Children with Disabilities and IDEA's Discipline Provisions* (July 19, 2022), <https://sites.ed.gov/idea/files/qa-addressing-the-needs-of-children-with-disabilities-and-idea-discipline-provisions.pdf> (Questions and Answers).

<sup>25</sup> 34 C.F.R. § 104.33(a).

individual educational needs as adequately as the needs of students without disabilities are met, and (2) satisfy Section 504 FAPE requirements for evaluation and placement, educational setting, and procedural safeguards.<sup>26</sup>

A group of knowledgeable persons, which can include the student’s parents or guardians, develops an individualized plan addressing the services the team has identified as necessary to provide the student FAPE.<sup>27</sup> This group of knowledgeable persons is often called the student’s [Section 504 team](#). Though a written plan is not explicitly required by Section 504’s regulations, schools often capture the plan for providing a student FAPE in writing, in an individualized document commonly called a [Section 504 plan](#), in order to ensure consistent understanding and effective implementation of the student’s services. Schools must take steps to ensure that any staff responsible for providing a student with the services necessary to receive FAPE understand the student’s needs and have the training and skills required to implement the services.<sup>28</sup> A school’s failure to provide the requisite services is likely to result in a denial of FAPE.<sup>29</sup>

Section 504 plans generally describe the specific services the student needs, who will provide the services, how they will be provided, and the setting in which the student will receive the services. The Section 504 team uses a variety of information obtained through evaluations to identify the services and supports that a student needs, including those needed to address any disability-based behavior.<sup>30</sup> For students with disability-based behavior that interferes with their own or others’ ability to learn, their Section 504 plan may identify individualized [behavioral supports](#) for responding to the behavior and supporting the student’s behavioral needs, explain how the school will implement the supports, and describe how the team can assess whether the supports are effective.<sup>31</sup> Providing the needed services and supports can help the student appropriately engage in learning, build and maintain social relationships, and avoid behaviors that otherwise would lead the school to consider disciplinary measures.

The following subsections focus on students with disability-based behaviors, though all qualified students with disabilities are entitled to FAPE.<sup>32</sup> The discussion explains the general FAPE requirements in the context of students with behavioral needs and then the FAPE requirements specific to discipline.

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<sup>26</sup> 34 C.F.R. §§ 104.33(b)(1), 104.34 (educational setting), 104.35 (evaluation and placement), 104.36 (procedural safeguards).

<sup>27</sup> 34 C.F.R. §§ 104.33(b)(1), 104.35(a)-(c).

<sup>28</sup> *Id.*

<sup>29</sup> See 34 C.F.R. § 104.33(b)(1).

<sup>30</sup> 34 C.F.R. § 104.35(a)-(c).

<sup>31</sup> See *infra* pp. 10-11 (discussing behavioral supports); pp. 15-21 (discussing evaluation and placement determinations to address circumstances where a student’s disability-based behavior significantly impairs the education of others or poses a safety threat). For additional information, please refer to OSERS’s *Supporting Child and Student Social, Emotional, Behavioral, and Mental Health Needs*, <https://www2.ed.gov/documents/students/supporting-child-student-social-emotional-behavioral-mental-health.pdf>.

<sup>32</sup> To learn more about FAPE generally, please refer to 34 C.F.R. § 104.33 and OCR’s Section 504 Resource Guide, *supra* note 19.

## **A. General Overview of FAPE in the Context of Students with Behavioral Needs**

The discussion below explains the following requirements related to FAPE under Section 504: (1) when schools must identify and evaluate students with behavioral needs to determine if they are a student with a disability; (2) the requirements for evaluations and [placement](#) determinations; (3) how schools identify needed behavioral supports; (4) the schools' responsibility to meet the needs of students with disabilities in an educational setting with students without disabilities, to the maximum extent appropriate for the individualized needs of the student with a disability; and (5) the relevant procedural safeguards for FAPE.

### **1. Identifying and Evaluating Students with Behavioral Needs**

A school must conduct an initial evaluation, at no cost to the student's parents or guardians, when it has reason to believe a student needs special education or related aids and services because of a disability.<sup>33</sup> For example, 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.<sup>34</sup> Section 504 requires that schools have effective procedures in place for referring a student for an evaluation.<sup>35</sup> While not a separate requirement, to ensure effective implementation of its evaluation procedures, a school may need to provide training to school personnel on when a student's behaviors, or other factors, indicate the need for an evaluation under Section 504.<sup>36</sup>

A parent or guardian may, at any time, request an evaluation at public expense.<sup>37</sup> Section 504 does not limit the number of evaluations a student may reasonably request or receive.<sup>38</sup> The student's parent or guardian is entitled to notice of the school's decision and may challenge a denial of their request under Section 504's procedural safeguards.<sup>39</sup> While parents or guardians may request an evaluation, and schools must respond to any such requests, the responsibility to timely identify students who may need an evaluation remains with the school.<sup>40</sup>

Following a student's initial evaluation and identification as a student with a disability, Section 504 requires reevaluations on a periodic basis, in addition to a subsequent evaluation before any significant change in placement.<sup>41</sup> As discussed in Section II, expulsions and certain out-of-school

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<sup>33</sup> 34 C.F.R. § 104.35(a).

<sup>34</sup> See 34 C.F.R. § 104.35; see also Section 504 Resource Guide, *supra* note 19 at 12.

<sup>35</sup> 34 C.F.R. § 104.35(a)-(c).

<sup>36</sup> See *id.* To learn more about over-identification of students who do not actually have a disability, under-identification of students who do have a disability and need services, and mis-identification of students as having a different type of disability than the disability they have, please see OCR's *Dear Colleague Letter: Preventing Racial Discrimination in Special Education* (Dec. 12, 2016), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201612-racedisc-special-education.pdf> (Racial Discrimination in Special Education DCL).

<sup>37</sup> 34 C.F.R. §§ 104.35(a), 104.33(a)-(b)(1), (c).

<sup>38</sup> 34 C.F.R. §§ 104.35(a), 104.33(b)(1), 104.36.

<sup>39</sup> 34 C.F.R. § 104.36; see *infra* p. 13.

<sup>40</sup> 34 C.F.R. §§ 104.32; 104.33(a), (b); 104.35.

<sup>41</sup> 34 C.F.R. §§ 104.35(a) (evaluation before any subsequent significant change in placement), 104.35(d) (procedures for periodic reevaluation of students who have been provided special education and related services). Reevaluation procedures consistent with the IDEA are one way of meeting Section 504's requirements. *Id.*

suspensions are examples of disciplinary removals that would be considered significant changes in placement.<sup>42</sup>

There are many potential ways in which a student's behavior may indicate the student has a disability and requires FAPE. For example, depending on the facts and circumstances, the school's duty to evaluate could be triggered by any of the following:

- ❖ Information or records shared during enrollment;<sup>43</sup>
- ❖ Student behaviors that may harm the student or another person;
- ❖ The observations and data collected by school personnel;
- ❖ Information voluntarily provided by the student's parents or guardians;
- ❖ The school's own disciplinary or other actions indicating that school personnel have concerns about the student's behavior, such as frequent office referrals, demerits, notes to parents or guardians, or use of restraints or seclusion; and
- ❖ Information that a previous response by school personnel to the student's behavior resulted in repeated or extended removals from educational instruction or services, or that a previous response (*e.g.*, a teacher's use of restraints or seclusion)<sup>44</sup> that traumatized a student resulted in academic or behavioral difficulties.

A student's disability-based behavioral needs are likely to change over time during the course of their education. A change could occur, for instance, because a student's mental health worsens or the environmental conditions at the student's home or school deteriorate, resulting in an adverse emotional or mental effect on the student.<sup>45</sup> Schools should therefore be aware that additional evaluations may be required if, after the initial evaluation, the school has reason to believe that the student's needs are no longer being met within their current placement. For example, a school may find it necessary to conduct an additional evaluation based on the student developing new or more significant behaviors that impede learning following the loss of a close relative. Similarly, a student may need an additional evaluation if the student's behaviors have improved significantly such that the placement no longer reflects the student's current needs.

In identifying and evaluating students under Section 504, schools must also comply with their responsibilities under other Federal civil rights laws. For example, districts must comply with Title VI of the Civil Rights Act of 1964 (Title VI), which prohibits discrimination based on race, color, or national origin in connection with, but not limited to, any of the following:<sup>46</sup>

- ❖ over-identification of students of color as having disabilities based on age-appropriate

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<sup>42</sup> See *infra* pp. 14-21.

<sup>43</sup> Schools and districts may not use this information, or the enrollment or admissions process generally, to screen out or otherwise discriminate against students with disabilities who are eligible to attend the school. See 34 C.F.R. § 104.4(b)(1)(ii), (b)(1)(iv), (b)(4).

<sup>44</sup> See OCR, *Dear Colleague Letter: Restraint and Seclusion of Students with Disabilities* 16-17, *supra* note 14.

<sup>45</sup> To learn about the impacts of the COVID-19 pandemic on students' well-being and mental health, please see OCR's report, *Education in a Pandemic: The Disparate Impacts of COVID-19 on America's Students* (June 9, 2021), <https://www2.ed.gov/about/offices/list/ocr/docs/20210608-impacts-of-covid19.pdf>.

<sup>46</sup> See 34 C.F.R. § 100.3(a), (b) (providing a non-exhaustive list of discriminatory actions prohibited under Title VI). See also *Racial Discrimination in Special Education DCL*, *supra* note 36 at 2; U.S. Dep't of Educ. & U.S. Dep't of Just., *Dear Colleague Letter: English Learner Students and Limited English Proficient Parents* 8, 24-29 (Jan. 7, 2015), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-el-201501.pdf> (English Learner DCL).

- behaviors that are unrelated to disability;
- ❖ under-identification of students of color who do have disabilities;
- ❖ unlawful delays in evaluating students of color or English learners for a disability;
- ❖ failure to use valid and reliable assessments, including behavioral assessments, for students who are English learners that appropriately measure the student's achievement or aptitude for the skill being measured, rather than measuring the student's ability to speak English; and
- ❖ failure to consider the language needs of English learners who have a disability.

In addition, schools must provide information in a language the parent or guardian understands regarding Section 504's FAPE requirements, including information about the development of a Section 504 plan, to parents or guardians who have limited English proficiency.<sup>47</sup> This responsibility includes providing parents or guardians with limited English proficiency a meaningful opportunity to receive timely communications about their child's education in a language the parent or guardian understands and to participate in their child's Section 504 meetings through the use of qualified interpreters with knowledge of any specialized terms or concepts. Similarly, Section 504 requires schools to communicate effectively with parents or guardians who have a disability, including by providing the auxiliary aids and services parents or guardians need in order to participate in their child's Section 504 meetings.<sup>48</sup>

## **2. Requirements Applicable to Evaluations and Placement Determinations**

Under Section 504, evaluations must be conducted by trained personnel and interpreted by a group of knowledgeable persons, and based on relevant information from a variety of sources.<sup>49</sup> Evaluations need to be conducted in a timely manner in order for a school to meet its FAPE requirements, and OCR uses a reasonableness standard in determining whether an evaluation was conducted in a timely manner.<sup>50</sup>

First, when a school district has reason to believe a student needs special education or related services because of a disability, it cannot unreasonably delay the evaluation and may not ignore evidence indicating the student may be a student with a disability. If the district wishes to simultaneously take other steps to support a student, like conducting an additional study or implementing school-wide supports, it may do so, but it still must complete the evaluation in a timely manner. OCR would likely find it unreasonable for a district to delay a student's evaluation

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<sup>47</sup> 34 C.F.R. §§ 100.3, 300.322(e); 20 U.S.C. §§ 1414(b)(3)(A), 1703(f). See English Learner DCL, *supra* note 46 at 10, 25 & n.63, 27, 30 & n.85, 37-40. Title VI requires that all students have equitable access regardless of race, color, or national origin to a timely referral for an evaluation if a district has reason to believe the student has a disability for which special education or related services are needed. 34 C.F.R. §§ 100.3(a), (b)(1)-(2); 104.35. See Racial Discrimination in Special Education DCL, *supra* note 36 at 3. Schools must also treat students equitably in the evaluation process, the quality of special education services and supports provided, and determinations regarding educational setting. 34 C.F.R. § 100.3; 20 U.S.C. § 1414(d)(3)(B)(ii), 1415(b)(4); 34 C.F.R. § 300.324(a)(2)(ii). See Racial Discrimination in Special Education DCL, *supra* note 36 at 3; English Learner DCL, *supra* note 46 at 24-29. Any training on evaluations under Section 504 may also need to include guidance on how to avoid discrimination based on race, color, national origin, or other protected classes in the identification and evaluation process.

<sup>48</sup> See 34 C.F.R. § 104.4(a), (b).

<sup>49</sup> See 34 C.F.R. § 104.35(a)-(c).

<sup>50</sup> See 34 C.F.R. §§ 104.33(a), (b); 104.35. See also Section 504 Resource Guide, *supra* note 19 at 12.

because it does not have sufficient personnel trained to perform the needed assessments and fails to secure private evaluators to meet the need. In addition, 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).

Second, evaluations under Section 504 must be administered by trained individuals and interpreted by a group of persons (referred to in this guidance as the Section 504 team) who are knowledgeable about the student, the meaning of the evaluation data, and the placement options.<sup>51</sup> The school must ensure the Section 504 team has relevant information to draw upon from a variety of sources.<sup>52</sup> The types of individuals who should be involved in administering and interpreting an evaluation for a particular student will depend on the facts and circumstances, but where a student's behavior is a factor in an evaluation, such individuals might include, among others: psychologists, behavior specialists, teachers, social workers, and/or counselors. An appropriate placement will provide the student with a disability the regular or special education and related aids and services necessary to meet the student's individual educational needs.<sup>53</sup>

Third, the Section 504 regulations identify a non-exhaustive list of sources of information for the Section 504 team to obtain, document, and carefully consider in connection with evaluations and placement decisions, as appropriate based on the facts and circumstances.<sup>54</sup> These sources of information include: aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior.<sup>55</sup> In addition, information from parents or guardians can be especially valuable, and observations of the student by psychologists or other professionals while the student is in class or during other activities can be useful. As a general principle, school districts must select assessments and other evaluation materials that are tailored to assess specific areas of educational need, administered by trained personnel consistent with the instructions for that assessment or evaluation, and valid for the purpose for which they are used to best ensure the results accurately reflect the factor that the assessment or evaluation is intended to measure.<sup>56</sup>

Although not specifically discussed in Section 504's regulations, schools may be familiar with a [functional behavioral assessment](#) (FBA) from the context of the IDEA. An FBA focuses on identifying the function or purpose behind a child's behavior, and typically examines a wide range of factors specific to the child, including social, affective, and environmental factors.<sup>57</sup> The goal

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<sup>51</sup> 34 C.F.R. § 104.35(b)-(c).

<sup>52</sup> *Id.*

<sup>53</sup> 34 C.F.R. §§ 104.33(b)(1), 104.35.

<sup>54</sup> 34 C.F.R. § 104.35(b), (c)(1), (c)(2). Though not specifically required for evaluations conducted under Section 504, districts also may find it helpful to look to the IDEA's regulations for the types of information that are reasonable, relevant, and useful in conducting evaluations under Section 504. *See* 34 C.F.R. § 300.304(b)(1), (b)(3) (requiring districts to use, at a minimum, "a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child . . ." and "technically sound instruments" for the assessments).

<sup>55</sup> 34 C.F.R. § 104.35(c).

<sup>56</sup> 34 C.F.R. § 104.35(b)(1)-(3).

<sup>57</sup> The IDEA requires schools to conduct an FBA under certain circumstances in the context of disciplinary removals. *See* 34 C.F.R. § 300.530; Questions and Answers, *supra* note 24 at 28-29, 52.

of an assessment, whether behavioral or otherwise, is to identify student needs and provide the Section 504 team with the information needed to determine effective services and supports for the student. If there is reason to believe the student's behavior may be based on the student's disability, one purpose of the evaluation is an individualized assessment of the behavior,<sup>58</sup> and the Section 504 team may determine that an FBA is appropriate for that student. 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.<sup>59</sup>

### 3. Identifying Necessary Behavioral Supports, Including Behavioral Intervention Plans

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.<sup>60</sup> 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.<sup>61</sup>

To support a student's needs, Section 504 teams can consider using information obtained through a behavioral assessment to proactively develop and implement a [behavioral intervention plan](#) (BIP) and incorporate the BIP into the student's Section 504 plan. A BIP identifies behavioral supports to reduce or eliminate, and often replace, those behaviors that interfere with the student's or other students' ability to learn, and it is tailored to the student with a disability's specific behavioral needs. A BIP that is meaningfully informed by a behavioral assessment can help eliminate or reduce disability-based behavior that would lead to violations of a student code of conduct. Through a behavioral assessment, the Section 504 team can learn about the nature of the behavior, the function the behavior serves for the student, factors indicating when the behavior might occur, and the consequences of the behavior.<sup>62</sup> If a Section 504 team chooses to use a behavioral assessment to develop a BIP, and that assessment identifies specific behavioral supports needed to ensure FAPE, the Section 504 team would need to develop the BIP with such supports, and the school would need to implement it, as part of the student's Section 504 plan

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<sup>58</sup> See 34 C.F.R. §§ 104.33(b)(1), 104.35(a)-(c).

<sup>59</sup> See 34 C.F.R. § 104.33(b)(1).

<sup>60</sup> 34 C.F.R. § 104.35. In the case of IDEA-eligible students whose disability-based behavior interferes with the student's learning, or other students' learning, the IEP team is required to consider, and include in the IEP where necessary to provide FAPE, the use of positive behavioral interventions and supports and other strategies to address the disability-based behavior. 20 U.S.C. § 1414(d)(3)(B)(i). 34 C.F.R. §§ 300.324(a)(2)(i), (b)(2); § 300.320(a)(4). See OSERS, *Dear Colleague Letter on the Inclusion of Behavioral Supports in Individualized Education Programs* 1 (Aug. 1, 2016), <https://sites.ed.gov/idea/files/dcl-on-pbis-in-ieps-08-01-2016.pdf>.

<sup>61</sup> This support is distinct from seclusion, which can deny FAPE and result in discrimination. See *supra* note 14.

<sup>62</sup> See OSERS, *Positive, Proactive Approaches to Supporting Children with Disabilities: A Guide for Stakeholders 7-9* (July 19, 2022), <https://sites.ed.gov/idea/files/guide-positive-proactive-approaches-to-supporting-children-with-disabilities.pdf>.

for providing FAPE.

To be useful in addressing the behavior, a BIP should include information about: acceptable replacement behaviors,<sup>63</sup> 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. In identifying acceptable replacement behaviors that are achievable for the student, schools may not rely on stereotypes, generalizations, or assumptions about a student's disability, race, color, national origin, or sex, such as assuming that girls are more capable of sitting still than boys.<sup>64</sup>

If a student continues to have disability-based behavioral challenges that impede learning, despite the student's Section 504 plan being properly implemented, *i.e.*, with fidelity, the student's placement may not be adequately addressing the student's disability-based behavioral needs. Depending on the individual circumstances, the school may reconvene the Section 504 team to determine if additional or different services are necessary.<sup>65</sup> If an adjustment in services does not adequately address the behavior—including because the disability results in new behaviors or the existing behaviors escalate in severity—an additional evaluation may be necessary to identify the student's current needs and to develop additional or different supports to meet those needs.<sup>66</sup> An additional evaluation would also be necessary if the school has reason to believe the student may have an additional disability affecting their behavior.<sup>67</sup>

Because the Section 504 FAPE obligation is ongoing, districts may need to reconvene Section 504 teams to: monitor the implementation of the Section 504 plan and effectiveness of a student's placement; determine if additional evaluations are needed; and determine if any adjustment in the placement, including in behavioral supports or the student's [educational environment](#) (discussed below) is needed.<sup>68</sup>

#### **4. Supporting Students with Disability-Based Behavior in Appropriate Educational Settings**

Section 504 requires that a school district educate a student with a disability in an academic setting alongside students without disabilities to the maximum extent appropriate for the needs of the student with a disability.<sup>69</sup> The same is true for the provision of nonacademic services and participation in extracurricular activities.<sup>70</sup> Thus, a school district must place a student with a

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<sup>63</sup> Depending on the facts and circumstances, a student's Section 504 team could determine, for example, that teaching the student to remain seated and face the teacher is an acceptable behavior to replace the behavior of running around the classroom, and that the replacement behavior meets the student's individualized needs.

<sup>64</sup> See 34 C.F.R. §§ 104.33(b), 104.34(a), 104.35(a)-(c), 104.4; § 100.3(a), (b)(1), (b)(5); § 106.31(a), (b).

<sup>65</sup> Please note, however, that "a full reevaluation is not required every time an adjustment in placement is made." 34 C.F.R. pt. 104, App. A, ¶ 25.

<sup>66</sup> 34 C.F.R. § 104.35. As noted earlier, *see supra* note 23, some Section 504-only students ultimately may be found to be IDEA-eligible as a result of subsequent evaluations.

<sup>67</sup> *See id.*

<sup>68</sup> *See id.* *See infra* pp. 14-21 (discussing the subsequent evaluation required, and applicable procedural safeguards, if a proposed adjustment would significantly change the student's placement).

<sup>69</sup> 34 C.F.R. § 104.34(a).

<sup>70</sup> 34 C.F.R. §§ 104.34(b) (meals and recess), 104.37(a)(2) (counseling services, physical recreational athletics, transportation, health services, recreational activities, special interest groups or clubs sponsored by the recipient,

disability in the regular educational environment—meaning the setting where students without disabilities participate in academic, nonacademic, and extracurricular services and activities—unless the Section 504 team reaches an individualized determination that the student’s needs cannot be met satisfactorily in that environment even with [supplementary aids and services](#).<sup>71</sup> Supplementary aids and services could include, among other examples, preferential seating, counseling services, or the implementation of a BIP. In most cases, if the Section 504 plan has been implemented as designed but still does not adequately address the disability-based behavior, the Section 504 team will be able to identify additional or different services to enable a student with a disability who is in the regular education environment to remain in that setting.

Any decisions about a student’s educational environment must always be individualized. For example, a school district would violate Section 504 if it had a one-size-fits-all policy that required students with a particular disability to attend a separate class, program, or school regardless of educational needs. Similarly, it would violate Section 504 to respond to a student’s disability-based behavior by shortening the length of the student’s school day, thus reducing the minutes or hours the student is in the educational environment, without reconvening the Section 504 team to determine if additional or different services are needed, or if an additional evaluation is necessary. Any decision by the Section 504 team to reduce the amount of time a student is in school or to place the student in a separate setting must be based on an individualized determination about the student’s needs, using information from a variety of sources that is documented and carefully considered, and must be informed by an evaluation whenever the proposed changes would constitute a significant change in placement.<sup>72</sup>

Schools must identify and provide individualized behavioral supports that a student with a disability needs no matter the educational setting, including when the Section 504 team determines that a more restrictive educational environment is necessary.<sup>73</sup> In determining the student’s individualized placement, and reconvening the Section 504 team as needed, schools must place them along with students without disabilities to the maximum extent appropriate to meet the needs of the student with a disability.<sup>74</sup> The determination of which educational setting among an array of settings is appropriate must be tailored to the student’s individual needs. The Section 504 team also must ensure that the school has in place the individualized services the student needs to support a return to a less restrictive setting.<sup>75</sup> Note that some Section 504-only students may need an evaluation under the IDEA if their school has reason to believe the student requires special education.<sup>76</sup>

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referral to agencies that provide assistance to persons with disabilities, and employment of students, including employment by the school district and assistance in making available outside employment).

<sup>71</sup> 34 C.F.R. § 104.34. See *infra* pp. 15-16, 18-21 (discussing when adjustments to a student’s educational setting may be needed to address an immediate safety threat).

<sup>72</sup> 34 C.F.R. §§ 104.34(a); 104.35(a), (c)(2).

<sup>73</sup> 34 C.F.R. §§ 104.33(a), (b)(1); 104.35(c).

<sup>74</sup> 34 C.F.R. §§ 104.33(b)(1); 104.34(a), (b); 104.35(c). If placement in the more restrictive educational environment constituted a significant change in placement and there is reason to believe the student needs to return to the less restrictive setting, an evaluation is required under Section 504. 34 C.F.R. § 104.35(a).

<sup>75</sup> See 34 C.F.R. §§ 104.33(b)(1); 104.34(a), (b); 104.35(c).

<sup>76</sup> See *supra* note 23.

## **5. Procedural Safeguards Available Under Section 504 to Parents or Guardians Who Believe Their Child with Disability-Based Behavior Has Been Denied FAPE**

Schools are required under Section 504 to develop and implement a system of procedural safeguards to enable parents or guardians to challenge the school's actions regarding the provision of FAPE, including with respect to identification, evaluation, and placement.<sup>77</sup> The safeguards include:

- ❖ notice of the proposed action, including a proposed disciplinary removal that constitutes a significant change in placement;<sup>78</sup>
- ❖ an opportunity for the parent or guardian to review the student's educational records;
- ❖ an impartial due process hearing, with an opportunity for the parent or guardian to participate and to be represented by an attorney; and
- ❖ a review procedure to appeal the outcome of the hearing.<sup>79</sup>

Compliance with the IDEA's procedural safeguards is one means of meeting this requirement.<sup>80</sup>

Parents or guardians can use these procedures to challenge, among other actions:

- ❖ a denial of the parent's or guardian's request to evaluate the student;
- ❖ the scope of an evaluation, such as where the evaluation failed to include an assessment of the student's disability-based behavior;
- ❖ the findings of an evaluation, including findings related to a determination that behavior for which certain discipline is proposed is not disability-based; and
- ❖ a denial of a request to adjust the student's current services and supports as needed to address a disability-based behavior.

In addition, with certain exceptions, the Family Educational Rights and Privacy Act (FERPA) gives parents or guardians the right to review, seek amendment of, and provide consent for the disclosure of personally identifiable information from their child's education records, including education records created and maintained by a school's law enforcement unit exclusively for non-law enforcement purposes, such as a disciplinary action or proceeding.<sup>81</sup>

### **B. FAPE Requirements Applicable to Student Discipline**

In addition to the general requirements for Section 504 FAPE discussed above, the use of student

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<sup>77</sup> 34 C.F.R. § 104.36.

<sup>78</sup> See *infra* pp. 14-21 (discussing [significant changes in placement due to discipline](#)); 34 C.F.R. §§ 104.35(a), 104.36. In addition to Section 504's requirements, the Supreme Court has explained that the Due Process Clause of the U.S. Constitution requires, "in connection with a suspension of 10 days or less, that the student be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story." *Goss. v. Lopez*, 419 U.S. 565, 581 (1975).

<sup>79</sup> 34 C.F.R. § 104.36.

<sup>80</sup> *Id.*

<sup>81</sup> 20 U.S.C. § 1232g; 34 C.F.R. pt. 99. FERPA addresses privacy rights regarding education records, including the right of parents or guardians to inspect and review their child's education records. See 34 C.F.R. §§ 99.3 (defining "education records"), 99.8 (explaining what provisions apply to records of a law enforcement unit). For more information on FERPA and law enforcement, please refer to the Department's guidance on *School Resource Officers, School Law Enforcement Units, and the Family Educational Rights and Privacy Act (FERPA)*, [https://studentprivacy.ed.gov/sites/default/files/resource\\_document/file/SRO\\_FAQs\\_2-5-19\\_0.pdf](https://studentprivacy.ed.gov/sites/default/files/resource_document/file/SRO_FAQs_2-5-19_0.pdf).

discipline can implicate FAPE in other ways.<sup>82</sup> This section discusses: (1) when proposed discipline of a student with a disability requires an additional evaluation and the steps schools must take after this evaluation; (2) the application of the FAPE requirements to students with disabilities who are subject to threat or risk assessments; (3) the application of the FAPE requirements to informal disciplinary removals; and (4) Section 504's limited exception concerning the discipline of students with disabilities who currently engage in illegal substance use.

### 1. Evaluations Prior to a Disciplinary Removal that Significantly Changes the Placement of a Student with a Disability

Section 504 requires school districts to evaluate students with disabilities prior to any significant change in a student's placement.<sup>83</sup> In the context of a significant change of placement due to a proposed disciplinary removal, the purpose of the evaluation (referred to in this guidance as a manifestation determination)<sup>84</sup> is to decide whether the behavior for which discipline is proposed is based on the student's disability, and, if so, whether changes in the student's placement are required to ensure the student receives FAPE. Under Section 504, OCR's longstanding interpretation of a significant change in placement in the context of discipline has been an exclusion of more than 10 consecutive school days or a similar pattern of removal.<sup>85</sup> Examples include an expulsion or an out-of-school suspension or other disciplinary removal of more than 10 consecutive school days.

OCR considers a series of short-term nonconsecutive removals to also constitute a significant change in placement if combined they total more than 10 school days during the school year and

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<sup>82</sup> For IDEA-eligible students, the IDEA and its regulations provide specific requirements for disciplinary removals. These requirements differ in some respects from Section 504's requirements. See 34 C.F.R. §§ 300.530-537. To learn more, please refer to OSERS's *Questions and Answers: Addressing the Needs of Children with Disabilities and IDEA's Discipline Procedures*, *supra* note 24.

<sup>83</sup> 34 C.F.R. § 104.35(a) ("A recipient that operates a public elementary or secondary education program or activity shall conduct an evaluation in accordance with the requirements of paragraph (b) of this section of any person who, because of handicap, needs or is believed to need special education or related services before taking any action with respect to the initial placement of the person in regular or special education and any subsequent significant change in placement.").

<sup>84</sup> The IDEA's regulations use the term "manifestation determination" in connection with determining whether the conduct for which certain discipline is proposed is a manifestation of a student's disability. See 34 C.F.R. § 300.530(e). Section 504's regulations do not use the term "manifestation determination" but require an "evaluation" prior to a significant change in placement. See 34 C.F.R. §104.35(a). For purposes of this document, this type of evaluation is referred to as a "manifestation determination." Although a manifestation determination under IDEA and Section 504 have the same purpose, different regulatory requirements apply. See *Questions and Answers*, *supra* note 24.

<sup>85</sup> 34 C.F.R. § 104.35(a); Section 504 Resource Guide, *supra* note 19 at 22 & n.76. The Section 504 Resource Guide cites *Honig v. Doe*, 484 U.S. 305, 325 n.8 (1988). In *Honig*, the Supreme Court found that OSERS adopted OCR's interpretation from 1980 regarding an exclusion of more than 10 school days and applied it to the Education of the Handicapped Act (EHA), which preceded the IDEA; the Court deferred to the Department's interpretation of EHA. *Id.* In doing so, the Court found that the Department "correctly decided that a suspension in excess of 10 days does constitute a prohibited 'change in placement'" for the purposes of the EHA. *Id.* The Court also reaffirmed that a suspension of more than 10 school days triggers the due process protections of the Fourteenth Amendment to the U.S. Constitution. *Id.* (citing *Goss v. Lopez*, 419 U.S. 565, 576 (1975)). A "10-day suspension from school is not *de minimis* . . . and may not be imposed in complete disregard of the Due Process Clause." *Goss*, 419 U.S. at 576. Please see the limited exception, *infra* page 24, for proposed discipline for current use of illegal drugs or alcohol.

create a pattern of removal.<sup>86</sup> OCR determines whether a series of removals creates a pattern of removal on a case-by-case basis, considering evidence related to, among other factors: the length of each removal, the proximity of the removals to each other, the total amount of time the student is removed from school, and the nature of the behavior underlying each incident and giving rise to the series of removals.<sup>87</sup> Schools must ensure that they do not violate the rights of a student with a disability by creating a pattern of removals that constitutes a significant change in placement absent a manifestation determination.<sup>88</sup>

A school must provide notice to the parent or guardian of a student with a disability before taking action regarding the student's evaluations or placement, including if it proposes discipline that would constitute a significant change in placement.<sup>89</sup> Because schools are prohibited from implementing a disciplinary removal of a student with a disability that constitutes a significant change in placement without first conducting the manifestation determination described on the following page, in some instances schools may need to expedite the manifestation determination to avoid violating Section 504 FAPE requirements. If a school removes a student with a disability for more than 10 school days without completing the evaluation required before a significant change in placement, the school would need to correct the failure to comply with Section 504.<sup>90</sup>

During the interim period when the required manifestation determination is being completed and before the school knows if the behavior is based on the student's disability, the school can take other steps if needed to address the potential ongoing impact of the behavior, including any impact on the safety of the student or others. Consider, for example, a school that determined through its normal factfinding process that a student with a disability harassed a classmate, and thus proposed to expel the student with a disability. The school would be required to evaluate to determine if the student's behavior was based on a disability because the expulsion would be a significant change in placement.<sup>91</sup> While the evaluation is being completed, in addition to offering

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<sup>86</sup> See 34 C.F.R. § 104.35(a). In the context of discipline, OCR's interpretation of Section 504's regulation regarding a significant change in placement aligns with the IDEA's requirements regarding a change in placement for a series of disciplinary removals that are 10 consecutive school days or less but total more than 10 school days in a school year. See 34 C.F.R. § 300.536(a)(2).

<sup>87</sup> The factors OCR considers in making the factual determination in its enforcement matters align closely with the IDEA's requirements pertaining to a pattern of removals that constitute a change in placement. See 34 C.F.R. § 300.536(a)(2)(ii), (a)(2)(iii) (IDEA regulations concerning change of placement because of disciplinary removals).

<sup>88</sup> See *supra* note 85.

<sup>89</sup> See 34 C.F.R. §§ 104.33(b)(1)(ii) (FAPE requires compliance with regulations on educational setting, evaluation and placement, and procedural safeguards), 104.35(a) (requirements for an evaluation prior to a significant change in placement), 104.36 (requirements for procedural safeguards, including notice, for evaluations and placement decisions); 34 C.F.R. pt. 104, App. A. ¶ 25 (due process procedures must be afforded to parents or guardians before the recipient takes any action regarding evaluation, or placement of a student with a disability).

<sup>90</sup> See 34 C.F.R. § 104.35(a). If OCR investigates and finds a violation because a recipient did not conduct an evaluation prior to a significant change in placement, OCR would negotiate a remedy to overcome the effects of the discrimination. 34 C.F.R. § 104.6(a). Consistent with its obligation to operate in compliance with Section 504, 34 C.F.R. § 104.5(a), a recipient that corrects its violation on its own is also responsible for correcting any discrimination resulting from its violation, which could include providing compensatory services. For information on compensatory services under Section 504, please refer to OCR's guidance, *Providing Students with Disabilities Free Appropriate Public Education During the COVID-19 Pandemic and Addressing the Need for Compensatory Services Under Section 504* (Feb. 17, 2022), <https://www2.ed.gov/about/offices/list/ocr/docs/fape-in-covid-19.pdf>.

<sup>91</sup> See 34 C.F.R. § 104.35(a).

services or supports to the classmate who was harassed, the school could move the student with a disability to a different classroom within their current educational placement, if one is available, from that of the classmate who was harassed.<sup>92</sup> Moving the student with a disability to a different classroom would not be a significant change in placement if the student could receive the same educational instruction, services, supports, interventions, and modifications to policies in the new classroom, alongside students without disabilities to the same extent.

Section 504 FAPE requirements do not interfere with a school's ability to address those extraordinary situations in which a student's behavior, including disability-based behavior, is an immediate threat to their own or others' safety. For example, nothing in Section 504's FAPE requirements prohibits schools from contacting mental health crisis intervention specialists or law enforcement under such extraordinary circumstances, even if the result is that those professionals remove the student from school. Additionally, OCR recognizes that, in emergency circumstances, based on exigency and safety, a school may seek to impose an immediate short-term disciplinary removal of a student with a disability because the student's behavior presents a serious and immediate threat to the safety of the student or of others that cannot be mitigated by other means. Any OCR investigation would review the specific facts to determine whether the school's conduct was reasonably necessary to ensure safety, including under circumstances where an immediate removal would result in a pattern of removals.

Where a school provides educational instruction and services to students without disabilities during the pendency of disciplinary proceedings or during the period of a disciplinary removal, it also must provide educational instruction and services to similarly situated students with disabilities during the pendency of their evaluation.<sup>93</sup> The evaluation, *i.e.*, the manifestation determination, required before the eleventh school day of a disciplinary removal consists of the two-step process described below.

**STEP ONE:** At the first step, the Section 504 team determines whether the behavior in question was caused by or has a direct and substantial relationship to the student's disability.<sup>94</sup>

The school must provide the Section 504 team with relevant information from a variety of sources sufficient to enable the team to determine if the student's behavior is based on the student's disability; the school must ensure such information is documented and carefully considered.<sup>95</sup> This information could include, for example:

- ❖ any previous evaluations of the student with respect to disability-based behavior;

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<sup>92</sup> As explained on page 19, the school may be required by Section 504 or other Federal civil rights laws to provide remedies to a student who was harassed to restore or preserve the student's equal access to their education if the harassment created a hostile environment on the basis of race, sex, disability, or other protected classes.

<sup>93</sup> 34 C.F.R. § 104.33(b)(1)(i); 104.4(a), (b)(1)(i)-(iv), (vii).

<sup>94</sup> See 34 C.F.R. § 104.35(a); *supra* note 85. See *S-1 v. Turlington*, 635 F.2d 342, 346-48 (5th Cir. 1981) (explaining that an expulsion for a student with a disability is a change of placement that must be accompanied by a determination of whether the student's conduct "bears a relationship" to or "results from" the disability); see also *Doe v. Maher*, 793 F.2d 1470, 1480 n.8 (9th Cir. 1986), *aff'd sub nom. Honig v. Doe*, 484 U.S. 305 (1988) (treating the phrase "conduct that has a direct and substantial relationship" to the disability as synonymous with "conduct that arises from" the disability, "conduct that is caused by" the disability, "[disability]-related misconduct," and "conduct that is a manifestation of" the disability.).

<sup>95</sup> See 34 C.F.R. § 104.35(a)-(c).

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- ❖ the student’s Section 504 plan (including any behavioral supports the student needs), any updates to the plan, and information about whether the current Section 504 plan is being implemented with fidelity;
- ❖ psychological or medical evaluation data related to the behavior at issue;
- ❖ relevant information provided by the student’s parents or guardians;
- ❖ academic records;
- ❖ relevant discipline records, including information on whether previous disciplinary actions led to changes in behavior, and incident reports, including any involving SROs or other law enforcement officials, consistent with applicable Federal or State privacy protections; and
- ❖ relevant teacher notes, observations, and data collected about the behavior.

To be useful in determining whether the behavior is based on the student’s disability, these materials should be relevant to the behavior at issue and recent enough to provide the Section 504 team an accurate understanding of the student’s current behavior.

In reviewing information about the implementation of the student’s Section 504 plan as part of this evaluation, the team may find that the school failed to provide behavioral supports and services required by the plan to address the behavior underlying the proposed discipline. In this instance, the behavior would be based on disability because the school failed to meet the student’s behavioral needs as required by the Section 504 plan. Depending on the facts, such a failure to implement the Section 504 plan could deny the student FAPE,<sup>96</sup> and the Section 504 team would need to consider whether, due to the denial of FAPE, the student is entitled to compensatory services. Under these circumstances, any disciplinary removal could compound the school’s failure to address the student’s disability-based needs by extending the denial of FAPE during the period of removal.<sup>97</sup>

For this evaluation, it is not sufficient for a school to simply use the same procedures it uses for suspensions or expulsions of students without disabilities if those procedures do not meet Section 504’s requirements.<sup>98</sup> For example, Section 504 requires a school’s evaluation process to be completed by a group of persons knowledgeable about the student and the meaning of the evaluation data.<sup>99</sup> If a single person, such as a principal who is in charge of the school’s general disciplinary process for all students, alone determined whether a student’s behavior was based on the student’s disability, such a unilateral decision would not comply with Section 504.

**STEP TWO:** The school’s next step depends on whether the behavior for which the school proposed discipline is determined to be based on disability.

*a. When the Student’s Behavior is Based on Disability*

This subsection explains a school’s responsibilities when a student’s behavior is determined to

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<sup>96</sup> 34 C.F.R. §§ 104.35(a)-(c), 104.33(b)(1). Failure to implement a student’s Section 504 plan can cause a denial of FAPE and violate Section 504. 34 C.F.R. § 104.33(a)-(b).

<sup>97</sup> See 34 C.F.R. § 104.33(b)(1)(i). See also 34 C.F.R. § 300.530(e)(1)(ii), (2), (3) (requiring remedies under the IDEA if the conduct leading to a removal was the result of a failure to implement the student’s IEP).

<sup>98</sup> See 34 C.F.R. §§ 104.33(b)(1), 104.35(a)-(c), 104.36.

<sup>99</sup> 34 C.F.R. § 104.35(a), (c); see Section 504 Resource Guide, *supra* note 19 at 15.

be based on disability, including options that a school has when a student's disability-based behavior is disruptive to other students' learning or to school safety.

If, after a full review of the information obtained, the Section 504 team determines that the behavior that violated a school rule is disability-based, the school is prohibited from carrying out any discipline that would exclude the student on the basis of disability.<sup>100</sup> Under this circumstance, the discipline would deny the student equal educational opportunity by excluding the student based on disability, in violation of Section 504.<sup>101</sup>

A finding that the student engaged in disability-based behavior in violation of a school rule could be one reason to believe that the student's placement may be inappropriate and that the student may need additional or different services, such as behavioral supports, or may need a change in educational setting to ensure FAPE. Accordingly, the Section 504 team must continue the evaluation to determine if the student's current placement is appropriate.<sup>102</sup> The Section 504 team may determine that an additional assessment, which may include a behavioral assessment, is necessary,<sup>103</sup> in which case the Section 504 team should consider using the information obtained to develop and implement a BIP.

***Consider this hypothetical example***

*A student's initial evaluation found that the student has post-traumatic stress disorder and that the student's disability-based behaviors include irritability with unprovoked outbursts and mood swings. School staff referred the student for evaluation due to behaviors that violated school rules, including physical fighting, verbal altercations, and disorderly conduct. As part of the evaluation, the student's Section 504 team obtained an FBA and developed a Section 504 plan requiring the creation of a BIP within a specified timeframe to address the disability-based behaviors. The school completed and implemented the BIP as specified, yet the student continued to engage in similar conduct violating school rules; after one incident in particular, the school proposed an expulsion. Because an expulsion would constitute a significant change in placement, the school conducted a subsequent evaluation, and the team determined the behavior was based on disability. As a result, the school did not expel the student for the behavior. In considering whether the student's current placement was appropriate, the team realized that the student's FBA relied on outdated information about the student's needs and determined that a new FBA was necessary. Based on the findings of an updated FBA, the team adjusted the student's placement by adding weekly individual counseling sessions to the group counseling sessions included as a behavioral support in the student's BIP.*

<sup>100</sup> See 34 C.F.R. §§ 104.4(a); 104.33(a), (b)(1)(i); 104.35(a), (c).

<sup>101</sup> See 34 C.F.R. §§ 104.4(a), (b)(1), (b)(2); 104.33(a), (b)(1)(i).

<sup>102</sup> See 34 C.F.R. §§ 104.33(a), 104.35(c). The school could also have a responsibility to evaluate the student to determine if they are eligible for services under the IDEA. See *supra* note 23; see also Questions and Answers, *supra* note 24.

<sup>103</sup> See 34 C.F.R. § 104.35(a)-(c). For IDEA-eligible students, if the behavior is determined to be a manifestation of a student's disability under the procedures set forth in the IDEA, the IEP team must conduct an FBA, subject to limited exceptions. 34 C.F.R. § 300.530(f)(1)(i)-(ii). For more information about the IDEA's requirements, see Questions and Answers, *supra* note 24.

In determining the appropriate placement for the student with a disability, the impact of the student's disability-based behavior on other students is a relevant factor.<sup>104</sup> Where a student's disability-based behavior significantly impairs the education of others or otherwise threatens the safety of the student or others, the Section 504 team's placement determination could result in a change to the student's services, supports, or educational setting to more effectively address the behavior and attempt to prevent it from recurring. OCR recognizes that, in addition to schools' duties concerning the provision of FAPE, schools may have responsibilities under Section 504 or other Federal civil rights laws (such as Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972) to provide remedies to restore or preserve other students' equal access to the school's education programs and activities because, for example, a student's disability-based behavior has created a hostile environment on the basis of race, sex, disability, or other protected classes. Where the FAPE requirements of Section 504 require a school to address a student's disability-based behavior by adjusting the student's placement rather than implementing discipline, the student's Section 504 team is responsible for considering the impacts of the behavior on other students when determining the placement for the student with a disability.

The Section 504 team must consider whether additional or different services and supports would enable the student to remain in their current educational setting.<sup>105</sup> 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. In addition to adjusting the student with a disability's services and supports as needed, an appropriate remedy to a hostile environment must be tailored to the circumstances and the requirements of the applicable Federal civil rights laws; for example, a school may be required to offer supportive measures to the student subjected to harassment and provide any individualized services or supports the student needs to access their education.<sup>106</sup>

The student's Section 504 team may determine that the individual student's needs cannot be

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<sup>104</sup> 34 C.F.R. pt. 104, App. A, ¶ 24 ("Although under § 104.34, the needs of the [student with a disability] are determinative as to proper placement, . . . where a [student with a disability] is so disruptive in a regular classroom that the education of other students is significantly impaired, the needs of the [student with a disability] cannot be met in that environment. Therefore, regular placement would not be appropriate to his or her needs and would not be required by § 104.34.")

<sup>105</sup> See 34 C.F.R. § 104.34(a).

<sup>106</sup> See generally 34 C.F.R. §§ 104.4, 104.6, 104.33(a), (b) (Section 504 requirements); see also Section 504 Resource Guide at 32-33, *supra* note 19 (discussing schools' responsibilities under Section 504 to respond to harassment of students with disabilities, which could include providing counseling for the students); §§ 106.3, 106.30(a), 106.31(a), (b), 106.44, 106.45(b)(1)(i) (Title IX requirements); see also OCR, *Questions and Answers on the Title IX Regulations on Sexual Harassment (July 2021)*, at 18 (July 20, 2021, updated June 28, 2022), <https://www2.ed.gov/about/offices/list/ocr/docs/202107-qa-titleix.pdf> (providing examples of supportive measures); §§ 100.3(a), (b), 100.8 (Title VI requirements); see also OCR, *Racial Incidents and Harassment Against Students* (Mar. 10, 1994), <https://www2.ed.gov/about/offices/list/ocr/docs/race394.html> (providing examples of possible appropriate responses to harassment under Title VI, including counseling for victims of racial harassment). To learn more about recipients' responsibility to address harassment under these laws, please visit [www.ed.gov/ocr](http://www.ed.gov/ocr) for additional guidance.

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.<sup>107</sup> For a student whose disability-based behavior cannot be addressed in less restrictive settings even with supplementary aids and services, placement in a more restrictive setting could be appropriate until the student's needs can be met in a less restrictive setting. Regardless of a student's educational setting, the student with a disability is entitled to FAPE, including behavioral supports for disability-based behavior.<sup>108</sup> Furthermore, if the team determines that the disability-based behavior cannot be addressed in the regular educational setting even with supplementary aids and services, and the student therefore needs a more restrictive setting, the student must continue to be educated with students without disabilities to the maximum extent appropriate to the needs of the student with a disability.<sup>109</sup>

For instance, the Section 504 team may determine that, based on the student's needs, the appropriate placement for a particular student with a disability who has autism is in a separate classroom with staff trained specifically to support students with autism, located in the same school, with individualized behavioral supports and services to enable the student to learn safely and productively in that classroom. The Section 504 team can reconvene as needed to regularly monitor whether the student's behavioral needs have changed such that the student's placement and educational environment should be modified again. Of course, if the team found that, even with properly implemented behavioral supports and supplementary aids and services, the student's disability-based behavior significantly impaired the education of other students in the separate classroom, this would not be an appropriate placement.<sup>110</sup>

Because any Section 504 FAPE determination must be individualized, schools may not rely on stereotypes, generalizations, or assumptions about individuals with disabilities generally or a student's specific disability in deciding whether a student's needs can be met in a particular educational environment.<sup>111</sup> For example, Section 504 precludes school staff from making placement decisions based on an assumption that all students who have a conduct disorder

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<sup>107</sup> See 34 C.F.R. § 104.34(a). The Section 504 team may also determine that an evaluation to determine the student's eligibility under the IDEA is needed. See *supra* note 23; see also Questions and Answers, *supra* note 24.

<sup>108</sup> 34 C.F.R. §§ 104.33(b)(1)(i), 104.35(c).

<sup>109</sup> 34 C.F.R. §§ 104.35(c), 104.34(a). See *supra* pp. 11-12. Schools must provide appropriate placements for students who cannot be educated in the regular education setting. See 34 C.F.R. pt. 104, App. A, ¶ 23 (explaining that, under 34 C.F.R. § 104.33(b), "[a]n appropriate education could consist of education in regular classes, education in regular classes with the use of supplementary services, or special education and related services. Special education may include specially designed instruction in classrooms, at home, or in private or public institutions . . ."); 34 C.F.R. § 104.33(c)(3) (discussing residential placements). Under the IDEA, special education includes instruction conducted in the home, in hospitals and institutions, and in other settings, 34 C.F.R. § 300.39(a)(1), and the IDEA requires that school districts have available a continuum of alternative placements to meet the individual educational needs of different children with disabilities who need special education. 34 C.F.R. § 300.115(a), (b)(1).

<sup>110</sup> 34 C.F.R. § pt. 104, App. A, ¶ 24. As stated previously, the Section 504 team may also determine that an evaluation to determine the student's eligibility under the IDEA is needed. See *supra* note 23; see also Questions and Answers, *supra* note 24.

<sup>111</sup> See 34 C.F.R. §§ 104.33(b), 104.34(a), 104.35(a)-(c). See *Guckenberger*, 974 F.Supp. at 134. See also note 64 and accompanying text (explaining that schools may not rely on stereotypes, generalizations, or assumptions about a student's race, color, national origin, or sex in making placement decisions).

cannot be educated in the general education setting.

b. *When the Student's Behavior is Not Based on Disability*

If the Section 504 team finds that the student's behavior was not based on a disability, Section 504 permits the school to discipline the student as it proposed as long as it does so in the same manner that it disciplines similarly situated students without disabilities, as explained in Section IV.A.<sup>112</sup> Under these circumstances, the discipline would not violate Section 504 because the student is not being excluded on the basis of any disability-based behavior and is being treated in the same manner as a student without a disability for substantially the same behavior.<sup>113</sup>

In addition, if a school does not provide educational services to students without disabilities who are suspended or expelled, neither Section 504's FAPE requirements nor the nondiscrimination responsibilities discussed in Section IV require the school to continue providing educational services to the student with a disability who is disciplined in the same way for behavior that is not based on their disability.<sup>114</sup> Of course, a school may choose to provide all students with continued educational services. For students with disabilities under Section 504 who are also IDEA-eligible, the IDEA requires the school to provide continued educational services in the context of certain disciplinary removals.<sup>115</sup>

When a student with a disability returns to school from a disciplinary removal, the evaluation and placement requirements explained above continue to apply. If a student's return to school involves a significant change in placement, Section 504 requires the school to which the student is returning to conduct an evaluation and determine the student's appropriate placement, including the individualized behavioral supports needed to address the student's disability-based behavior.<sup>116</sup> As outlined above, the evaluation could include an FBA, as appropriate, used to develop a BIP. Even where the student's return would not involve a significant change in placement, convening the Section 504 team to determine if there should be any adjustment in the student's behavioral supports and other services would best allow the school to support the student's needs upon returning to school and may help prevent future behavioral incidents.

**2. Application of FAPE Requirements to Students with Disabilities Who May Be Subject to Threat or Risk Assessments**

Some schools require students to undergo a "threat assessment" or "risk assessment" in connection with student discipline. These assessments are used to identify students who may pose a threat of physical violence to others at school or at school-sponsored events or to assess the level of risk that a student who previously engaged in serious misbehavior may pose to others in such settings. Under Section 504, schools must avoid any disability discrimination in their use of threat or risk assessments, such as unnecessarily treating students with disabilities differently

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<sup>112</sup> See 34 C.F.R. §§ 104.33(b)(1)(i); 104.4(a), (b)(1)(i)-(iv), (vii).

<sup>113</sup> 34 C.F.R. § 104.4(a), (b)(1). See *infra* pp. 27-30 (discussing when treating a student with a disability differently is discriminatory).

<sup>114</sup> See 34 C.F.R. §§ 104.33(b)(1)(i); 104.4(a), (b)(1)(i)-(iv), (vii).

<sup>115</sup> See 34 C.F.R. § 300.530(b)(2), (c), (d), (g) (requiring schools to provide educational services for IDEA-eligible students under certain circumstances); Questions and Answers, *supra* note 24.

<sup>116</sup> 34 C.F.R. § 104.35(a)-(c).

from other students,<sup>117</sup> and must safeguard a student with a disability's FAPE rights throughout any threat or risk assessment process.<sup>118</sup> Schools can do so by ensuring that school personnel who are involved in screening for and conducting threat or risk assessments for a student with a disability are aware that the student has a disability and are sufficiently knowledgeable about the school's FAPE responsibilities so that they can coordinate with the student's Section 504 team. A school district whose threat or risk assessment team does not coordinate with the Section 504 team of a student with a disability could risk violating the student's FAPE rights.<sup>119</sup>

Coordination with the Section 504 team prior to completing the threat or risk assessment determination could result in additional or different behavioral supports to mitigate or eliminate the threat or risk. For example, the Section 504 team can provide valuable information about: the nature of the student's disability-based behaviors and common triggers; whether the student has been receiving behavioral supports, and, if so, the effectiveness of those supports; and specific supports and services that may be able to mitigate or eliminate the risk of harm without requiring exclusion from school. Even if a student is removed from school following a threat or risk assessment, the school must ensure that the student continues to receive the services required for FAPE and that the student is afforded any applicable procedural rights, including, as needed, by notifying and consulting the student's Section 504 team.<sup>120</sup>

### **3. Application of FAPE Requirements to Informal Disciplinary Removals**

In OCR's enforcement experience, some schools informally issue or propose a disciplinary removal in response to a student's disability-based behavior. Informal exclusions occur for part or all of the school day, and they can sometimes last for an indefinite period of time. These exclusions are considered informal because the school removes the student from class or school without invoking the school's disciplinary procedures.<sup>121</sup>

Informal exclusions are subject to the same Section 504 requirements as formal disciplinary removals, including the FAPE requirements discussed above and the nondiscrimination responsibilities discussed in Section IV. As with more formal uses of student discipline, when a

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<sup>117</sup> See *infra* pp. 27-30 (discussing when treating a student with a disability differently is discriminatory).

<sup>118</sup> See 34 C.F.R. §§ 104.4(b)(1), 104.33-104.36. See also *supra* p. 16 (discussing ways schools can comply with Section 504's FAPE requirements under emergency circumstances in which a student with a disability's behavior is an immediate threat to their own or others' safety).

<sup>119</sup> Through its enforcement experience, OCR is aware that some law enforcement agencies may instruct school district officials to keep the identity of a student, who is out of school and being investigated, confidential during its investigation. This instruction may include a specific limitation of staff, e.g., superintendent and school principal, who may be informed of the student's identity. In this instance, school records would identify if the student is a student with a disability, and school officials must consult such records to determine if the student is protected by Section 504. See 34 C.F.R. § 104.33(a). If so, the district is responsible for ensuring that its compliance with a confidentiality instruction does not result in the district violating the student's rights under Section 504 or other Federal laws. For example, the district can communicate its obligations under Federal law to the law enforcement agency and work with the agency to permit additional school staff to be informed of the student's identity and out-of-school status on a need-to-know basis to ensure the student's rights under Section 504 are not violated.

<sup>120</sup> See 34 C.F.R. §§ 104.33, 104.35. See *supra* pp. 14-21 (discussing FAPE requirements for student discipline).

<sup>121</sup> An informal disciplinary exclusion due to a student's disability-based behavior is distinct from a determination, made consistent with the FAPE requirements discussed in Section II, that a child needs to attend classes for only part of the school day due to a disability, such as for health-related reasons.

student is subjected to informal removals that constitute a significant change in placement, the school must comply with the requirements pertaining to evaluation, placement, setting, and procedural safeguards discussed above.<sup>122</sup> Additionally, a school's lack of appropriate record-keeping regarding informal exclusions may cause the school to violate Section 504's FAPE requirements and procedural safeguards, including the documentation requirement for evaluation and placement decisions and the parent's or guardian's right to review their child's education records.<sup>123</sup> Accurate records of the basis for excluding the student and the time during which a particular student was excluded are needed for a school to determine whether and when a proposed exclusion would constitute a significant change in placement, and thus determine when Section 504's notice requirement is triggered, whether the behavior that led to the informal exclusion(s) is a manifestation of the disability, and whether the student's behavioral needs warrant an additional evaluation.<sup>124</sup>

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. In determining whether the school complied with Section 504, OCR would

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<sup>122</sup> See 34 C.F.R. §§ 104.33(a),(b); 104.35(a)-(c); 104.36. The use of informal exclusions of students with disabilities, like other forms of discipline, can also result in discriminatory different treatment. See *infra* pp. 27-30.

<sup>123</sup> 34 C.F.R. §§ 104.35(a), (c)(2); 104.36. See 34 C.F.R. § 100.6(b) ("Each recipient shall keep such records . . . as the responsible Department official or his designee may determine to be necessary to enable him to ascertain whether the recipient has complied or is complying with this part"), incorporated by reference at 34 C.F.R. § 104.61. See *supra* p. 13 (explaining Section 504's procedural safeguards); p. 9 (explaining documentation requirements for the information considered in connection with evaluations and placement determinations).

<sup>124</sup> *Id.*

consider, among other relevant factors: whether the school sufficiently documented the exclusion to allow the student’s Section 504 team to make informed decisions about FAPE (e.g., by documenting the behavior that led to the exclusion, length of the exclusion, and whether the school provided the services necessary for the student to receive FAPE, which could include implementation of a BIP); the nature and duration of the exclusion, including whether it constituted a significant change in placement; whether the school complied with the applicable requirements regarding evaluation, placement, setting, and procedural safeguards; and whether the school denied the student a “free” public education under Section 504 by substituting the parents’ or guardians’ support for their children for the school’s own responsibility to provide FAPE.<sup>125</sup>

Also, through OCR’s enforcement work, OCR has encountered descriptions of a removal as an “excused absence,” among other terms, that is in fact an informal exclusion. The educational impact on the student, rather than the specific words used to describe the removal, is what matters when determining the school’s compliance with Section 504’s FAPE requirements.

#### **4. Limited Exception Regarding FAPE and Discipline for Current Illegal Substance Use**

There is one limited exception in which the above Section 504 FAPE requirements do not apply. Under Section 504, where a school proposes disciplining a student with a disability because of current use of illegal drugs or the use of alcohol, the FAPE requirements discussed above, including those regarding an evaluation before a significant change in placement, do not apply.<sup>126</sup> Schools may discipline a student with a disability who is currently engaging in the illegal use of drugs or the use of alcohol to the same extent that the school disciplines students without disabilities for this conduct.<sup>127</sup> In addition, the due process procedures discussed above do not apply to disciplinary actions related to current illegal drug or alcohol use.<sup>128</sup> This limited exception does not apply to a student who: (1) has successfully completed a supervised drug rehabilitation program or has otherwise been rehabilitated successfully and is no longer engaging in the illegal use of drugs; (2) is participating in a supervised rehabilitation program and is no longer engaging in such use; or (3) is erroneously regarded as engaging in such use.<sup>129</sup>

### **III. REASONABLE MODIFICATIONS TO DISCIPLINARY POLICIES FOR STUDENTS WITH DISABILITIES**

While schools lawfully may impose discipline on students with disabilities, they must still avoid discrimination. Under Section 504, schools must make reasonable modifications to their criteria, policies, practices, or procedures when necessary to avoid discrimination on the basis of

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<sup>125</sup> See 34 C.F.R. 104.33(a), (c).

<sup>126</sup> 29 U.S.C. §§ 794(a), 705(20)(C)(iv). “Illegal use of drugs” refers to the use of drugs for which possession or distribution is unlawful under the Controlled Substances Act. 21 U.S.C. § 801 et seq.; 29 U.S.C. § 705(10).

<sup>127</sup> 29 U.S.C. § 705(20)(C)(iv).

<sup>128</sup> *Id.* See *supra* p. 13.

<sup>129</sup> 29 U.S.C. § 705(20)(C)(ii)(I)-(ii)(III). Where this limited exception does not apply and a recipient disciplines a student with a disability inconsistent with Section 504’s requirements, the recipient is responsible for correcting any discrimination resulting from its violation, such as providing compensatory services and correcting the student’s educational records. See 34 C.F.R. § 104.6(a); *supra* note 90.

disability.<sup>130</sup> The modifications may be needed to avoid disability discrimination against an individual student with a disability or a group of students with disabilities. Of course, schools may determine that the modifications made to avoid disability discrimination would also benefit other students, and thus choose to modify a policy on a school-wide basis. Reasonable modifications can also include not applying a policy to students for behaviors that are manifestations of their disability or disabilities. This section provides examples of modifications that might be reasonable in the context of student discipline.

Reasonable modifications can include adapting a policy to support a student's behavioral needs. For instance, a school might have a policy of assigning students to sit on the school bus, during field trips sponsored by an afterschool program, in alphabetical order and requiring all students to remain in their assigned seats while the bus is moving, both to ensure safety and to track student attendance effectively. Students who do not remain in their assigned seats may be prohibited from riding the bus on future trips or face other disciplinary consequences. Under the policy, a student with a disability who has difficulty remaining seated on the bus would be assigned to a seat in the back of the bus based on their last name. In order to support the student in remaining safely seated and avoid rule violations that could result in exclusion from the bus or other consequences, the school could modify its policy of seating students in alphabetical order by assigning the student to sit in the front or by a bus aide who would be responsible for reminding the student to remain seated.

***Consider this hypothetical example***

*A middle school teacher who supervises the afterschool yearbook club may have a rule that students who interrupt others while they are speaking at the club's weekly meetings must miss the following week's meeting if they continue the behavior after three warnings. A student in the club has attention-deficit/hyperactivity disorder (ADHD), and, as their evaluation explains, their ADHD causes them to talk excessively and frequently interrupt conversations. Even if the rule is intended only to make sure all students can focus during the meetings, it could have the effect of discriminating against the student with ADHD and others if the behavior is associated with their disability. (See pages 31-32 to learn about discriminatory effects under Section 504.) The student's parent files a complaint with OCR<sup>131</sup> alleging disability discrimination after the school refused to consider modifying the rule.*

*In analyzing these facts, if OCR found that the school had failed to consider whether it could make any reasonable modifications to the rule, OCR would likely require the school to consult with the student and their parent, as appropriate, to determine whether the*

<sup>130</sup> 34 C.F.R. § 104.4 (Section 504 regulation prohibiting disability discrimination). Recipient preschools are subject to the requirements of § 104.4 and to the obligation of making reasonable modifications. 34 C.F.R. § 104.4(a), (b). OCR notes that the Department of Justice interprets reasonable modification requirements under Section 504 consistently with those under Title II of the ADA. See 28 C.F.R. § 35.130(b)(7) (Title II regulation requiring reasonable modifications where necessary to avoid disability discrimination).

<sup>131</sup> For information on how OCR investigates and resolves complaints, please refer to OCR's Case Processing Manual (CPM), available at <https://www2.ed.gov/about/offices/list/ocr/docs/ocrspm.pdf>. The hypothetical examples in this guidance involving OCR complaints presume the complaint is resolved consistent with the CPM.

*school could provide reasonable modifications. For instance, upon such consultation, the school might determine that it would be reasonable for it to: provide individually tailored supports that may reduce the likelihood of the student interrupting meetings, such as incentives that recognize or reward the student for the positive behavior of raising their hand before speaking; instruct the teacher to give the student a private visual signal to ensure the student is aware if they are talking over others; and excuse the student from having to miss the next weekly meeting.*

Schools may also need to make reasonable modifications to their policies, practices, or procedures to avoid disability discrimination in interactions between students with disabilities and SROs or other school-based law enforcement personnel who operate under a contractual or other arrangement with the school.<sup>132</sup> Examples of modifications that may be reasonable, depending on the circumstances, include: using de-escalation strategies; removing distractions and providing time and space to calm the situation when the child poses no significant safety threat; avoiding or minimizing touching a child whose disability makes them sensitive to touch; and waiting for a parent to arrive. It may also be a reasonable modification to have a person other than the school-based law enforcement officer communicate with the child and support them in de-escalating, such as a staff member whom the student trusts. When a school has reason to believe a student's behaviors are related to a mental health crisis, it may be reasonable to involve personnel specially trained in crisis intervention.<sup>133</sup>

In addition, providing effective training to staff and others who participate in the education program under a contractual, licensing, or other arrangement, including SROs and other school-based law enforcement personnel, on the school's nondiscrimination responsibilities under Section 504 is likely to ensure that these personnel are prepared to make any needed reasonable modifications in their interactions with students with disabilities.<sup>134</sup> Such training could include, among other topics: instruction on explicit and implicit bias and cultural and linguistic competence; developmentally- and age-appropriate responses to student behaviors, including disability-based behaviors; positive behavioral interventions and supports; parent and student privacy rights; and working collaboratively with school administrators to improve school climate.

Training may also be invaluable to school personnel who are responsible for making threat or risk assessments. Appropriate training could help such individuals distinguish incidents that are best resolved by involving a crisis intervention professional and providing other reasonable modifications to help the student de-escalate from incidents that otherwise could pose a serious and immediate safety threat requiring removal from school. Training for individuals involved in

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<sup>132</sup> See 34 C.F.R. § 104.4; see 28 C.F.R. § 35.130(b)(7); see also *supra* pp. 2-3.

<sup>133</sup> See OSERS, *Supporting Child and Student Social, Emotional, Behavioral, and Mental Health Needs*, *supra* note 31.

<sup>134</sup> See U.S. Dep't of Just., Civil Rights Div., Investigation of the Baltimore City Police Department 81 (Aug. 10, 2016), <https://www.justice.gov/crt/file/883296/download> (finding that training the recipient's police officers "on how to interact with individuals with mental health disabilities is a reasonable modification to policies, practices, and procedures to afford people with mental health disabilities the equal opportunity for a police intervention that is free from unreasonable force.").

making threat and risk assessments could also focus on strategies and procedures to coordinate more effectively with a student's Section 504 team.<sup>135</sup>

#### **IV. SECTION 504'S GENERAL PROHIBITION OF DISABILITY DISCRIMINATION IN STUDENT DISCIPLINE—DIFFERENT TREATMENT AND DISCRIMINATORY EFFECTS**

Section 504 protects students with disabilities from disability discrimination in all aspects of student discipline, from the ways that teachers manage classroom behaviors to the use of [exclusionary discipline](#). Disability discrimination means excluding, denying benefits to, or otherwise discriminating against a student based on their disability,<sup>136</sup> including by denying them equal educational opportunity in the most integrated setting appropriate to their needs.<sup>137</sup>

This section discusses two ways in which a school's use of discipline could discriminate against students with disabilities under Section 504, namely, when: (1) the school subjects a student to **unnecessary different treatment** based on disability, or (2) the school's criteria, policies, practices, or procedures have **unjustified discriminatory effects** on students based on disability.

##### **A. Unnecessary Different Treatment**

The focus of this section is on schools' responsibilities when disciplining a student with a disability for behavior that is not based on disability, and, specifically, when different treatment for a student with a disability is unnecessary.

Section 504 prohibits schools from unnecessarily treating a student differently on the basis of disability.<sup>138</sup> Consider, for example, a school that generally provides all students who receive an out-of-school suspension with a packet of instructional materials to review while they are suspended so that students do not fall behind during the period of suspension. While the school may wish to avoid inconveniencing the teachers of a student with a disability who learns in a separate special education classroom during that student's suspension because the teachers would be required to print out a considerable amount of additional material for the student beyond that provided to students without disabilities, the school may not avoid providing the materials to the student with a disability solely for administrative convenience. Students with disabilities may be provided different or separate aid, benefits, or services only when doing so is necessary for the aid, benefits, or services to be as effective as those provided to students without disabilities.<sup>139</sup> Therefore, a school violates Section 504 if it unnecessarily treats a student differently based on their disability when administering discipline.

As explained in Section II, it may be necessary for a school in some situations to treat a student with a disability differently when implementing discipline because the behavior giving rise to the violation of a school rule is based on their disability.<sup>140</sup> In these cases, imposing the discipline in

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<sup>135</sup> See *supra* p. 22.

<sup>136</sup> Disability discrimination also includes discrimination against a person because the person has a record of having a disability or is regarded as having a disability. See 29 U.S.C. § 705(20)(B); 34 C.F.R. § 104.3(j).

<sup>137</sup> 34 C.F.R. § 104.4(b)(1)(i)-(v), (vii); 28 C.F.R. § 35.130(b)(1)(i)-(v), (vii), (b)(8). Preschools that receive Federal financial assistance are subject to Section 504's prohibition against discrimination. 34 C.F.R. § 104.4(a).

<sup>138</sup> 34 C.F.R. § 104.4(b)(1)(iv).

<sup>139</sup> *Id.*

<sup>140</sup> See *supra* pp. 14-21.

the same way it applies to other students would deny the student FAPE.<sup>141</sup> As Section III explains, it may be necessary for a school in some situations to treat a student with a disability differently because reasonable modifications, for example to a disciplinary policy, are needed to avoid discrimination.

When a student with a disability and a student without a disability exhibit the same or comparable behavior in violation of school policy, the school generally may discipline the students in the same manner. A school may not discipline a student with a disability more severely than students without disabilities for similar behavior unnecessarily, that is unless it has a legitimate, nondiscriminatory reason for doing so and the reason is not a pretext for discrimination.<sup>142</sup> 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.

First, OCR determines whether there is evidence that a school has treated the student differently on the basis of disability. Direct evidence may include remarks, testimony, or admissions by school officials revealing discrimination based on disability.<sup>143</sup> For example, OCR may find direct evidence of different treatment based on disability when school personnel make statements revealing that a decision in response to student behaviors was based on stereotypes, generalizations, or assumptions about the student based on their disability or about individuals with disabilities generally.<sup>144</sup> OCR also investigates whether there is sufficient indirect, circumstantial evidence indicating the student was treated differently based on disability.<sup>145</sup> One such type of evidence occurs when a school disciplines the student with a disability more severely than a similarly situated student or group of students without a disability who engaged in comparable behavior, such as by using [corporal punishment](#) on the student with a disability but not disciplining the student without a disability at all.<sup>146</sup>

Statistical evidence can also be circumstantial evidence of different treatment, such as if students with disabilities are underrepresented in the student population but overrepresented among students disciplined for particular conduct. OCR would not find that a recipient had treated a

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<sup>141</sup> Section 504 protects individuals who have a disability from discrimination based on their disability. Please note that, because FAPE is necessary to ensure students with disabilities receive equal educational opportunity, providing additional or different services to a student with a disability required for FAPE that students without disabilities do not also receive would not constitute prohibited discrimination on the basis of disability.

<sup>142</sup> See 34 C.F.R. § 104.4(b)(1)(i)-(v), (vii).

<sup>143</sup> Direct evidence is evidence that "if believed, proves the fact of [discriminatory animus] without inference or presumption." *Portis v. First Nat'l. Bank of New Albany, Miss.*, 34 F.3d 325, 328-329 (5th Cir. 1994) (internal citations omitted).

<sup>144</sup> See *id.* at 329; but see *Standard v. A.B.E.L. Servs., Inc.*, 161 F.3d 1318, 1329-30 (11th Cir. 1998), *abrogated on other grounds* (remarks by non-decisionmakers or remarks unrelated to the decision at issue are not direct evidence of discrimination).

<sup>145</sup> See generally *McDonnell Douglas v. Green*, 411 U.S. 792 (1973) (method for analyzing discrimination based on circumstantial evidence).

<sup>146</sup> See *Loyd v. Phillips Bros., Inc.*, 25 F.3d 518, 522 (7th Cir. 1994) (describing types of indirect evidence).

student differently solely on the basis of statistical evidence, but such statistical evidence, along with other types of evidence, may be used to support a finding of different treatment.<sup>147</sup>

Next, if OCR finds evidence of different treatment, OCR investigates whether the school has stated a legitimate, nondiscriminatory reason for treating the student with a disability differently than other students. For example, although two students may have engaged in the same behavior, it might be the first such violation for the student without a disability and the second such violation for the student with a disability under a code of conduct that escalates disciplinary consequences for repeat offenses. Because the code of conduct allows for more severe discipline for students with prior violations, and, for the purposes of this example, the behavior is not based on disability, OCR would likely find that the school has identified a legitimate, nondiscriminatory reason for disciplining the student with a disability more severely.

If a school did not have a legitimate, nondiscriminatory reason for different treatment of a student with a disability, OCR would find that the school violated Section 504.<sup>148</sup> If a school does state a legitimate, nondiscriminatory reason for different treatment of a student with a disability, OCR will investigate whether that reason was in fact the reason the school treated the student with a disability differently, or instead a pretext, or excuse, for disability discrimination. If OCR found that the school's stated reason was pretext for disability discrimination, OCR would conclude that the school violated Section 504.

***Consider this hypothetical example***

*A middle school teacher saw two students—a student who has a mental health disability and a student without a disability—arguing and pushing each other in the back of the teacher's classroom. The teacher referred the student with a disability to the principal for discipline under the school's code of conduct prohibiting physical fighting, which allows a range of consequences from verbal warning to expulsion. The teacher gave the student without a disability a verbal warning but did not refer the student without a disability to the principal's office for further discipline. Neither student has any disciplinary history prior to this incident and, based on these facts, OCR would likely find the two students similarly situated absent information being offered to the contrary. As a result, the teacher's decision to refer the student with a disability for discipline but not refer the similarly situated student without a disability would likely demonstrate initial evidence of different treatment based on disability.*

*During an OCR investigation, additional information is provided showing that the teacher's reason for referring only the student with a disability for discipline was that the student with a disability started the fight. OCR would likely consider this explanation a nondiscriminatory justification for treating the two students differently but would continue the investigation to determine if the reason given was the actual reason for the different treatment.*

<sup>147</sup> *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339-40 (1977) (holding that, "like any other kind of evidence, [statistical evidence] may be rebutted," but "(s)tatistical analyses have served and will continue to serve an important role' in cases in which the existence of [intentional] discrimination is a disputed issue.").

<sup>148</sup> See 34 C.F.R. § 104.4(b)(1)(i)-(v), (vii).

*If OCR found evidence that the stated justification was indeed the reason for the different treatment, OCR would likely find insufficient evidence that the school discriminated against the student with a disability by disciplining the student more severely. On the other hand, OCR would likely find sufficient evidence that the stated reason was not the actual reason for the different treatment if the student without a disability told OCR they had admitted to the teacher right away that they were the one who started the fight. OCR may also learn that the teacher previously told a classroom aide that the teacher refers for discipline all students with mental health disabilities who become involved in a physical fight because the teacher assumes that people with mental health disabilities pose a greater risk of violence to others.<sup>149</sup> OCR would likely find this evidence together sufficient evidence that the stated reason for the different treatment was pretext for disability discrimination. If OCR found discrimination, it could require the school to address the discrimination through individual and systemic remedies as appropriate, such as deleting all references to any discipline imposed by the principal for this incident from the student with a disability's educational records, mandating training for staff who make disciplinary decisions, and changing the school's disciplinary procedures to prevent this type of discrimination from recurring.*

Notably, in this example, there are no facts indicating the school had a duty under Section 504 to treat the student with a disability differently to avoid discriminating against the student on the basis of disability. For example, if the school had proposed giving both students an out-of-school suspension of more than 10 school days, the Section 504 requirements for disciplinary removals that would constitute a significant change in placement discussed above<sup>150</sup> would have been triggered for the student with a disability, and, if the student's behavior was based on their disability, Section 504 would have prohibited the school from imposing the suspension on the student on the basis of their disability. Under the facts in this example, however, the student's behavior was not based on their disability. Therefore, under Section 504, the school needed to treat both students the same but failed to do so.

**B. Discriminatory Effects of a School's Disciplinary Criterion, Policy, Practice, or Procedure**

Disciplinary policies and procedures that result in unjustified discriminatory effects based on a disability, even if unintentionally, violate Section 504.<sup>151</sup> Under Section 504's regulations, schools may not use criteria, policies, practices, or procedures that have the effect of: (1) discriminating on the basis of disability, such as by excluding students with disabilities from participating in

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<sup>149</sup> See U.S. Dep't of Health and Human Servs., *Mental Health Myths and Facts*, MENTALHEALTH.GOV (Feb. 28, 2022), <https://www.mentalhealth.gov/basics/mental-health-myths-facts> ("Fact: The vast majority of people with mental health problems are no more likely to be violent than anyone else. Most people with mental illness are not violent and only 3%-5% of violent acts can be attributed to individuals living with a serious mental illness.").

<sup>150</sup> See *supra* pp. 14-21.

<sup>151</sup> 34 C.F.R. § 104.4(b)(4). See *Alexander v. Choate*, 469 U.S. 287, 295, 299 (1985).

school or denying them the benefits of the school's programs and activities, or (2) defeating or substantially impairing the school's objectives with respect to students with disabilities.<sup>152</sup>

Even when a school criterion, policy, practice, or procedure (referred to collectively below as the school's "policy") is neutral on its face, it may still have the discriminatory effect of denying a student with a disability meaningful access to the school's aid, benefits, or services, or of excluding the student based on disability. A school may impose legitimate safety requirements necessary for the safe operation of the school's services, programs, or activities, but the school must ensure that its safety requirements are based on actual risks, not mere speculation, stereotypes, or generalizations about individuals with disabilities.<sup>153</sup> The school must provide FAPE to eligible students under Section 504 regardless of the nature or severity of the student's disability.<sup>154</sup>

In considering whether a facially neutral discipline policy has the discriminatory effect of denying students meaningful access to the school's aid, benefits, or services, or of excluding them based on disability, OCR would compare the policy's effects on students with and without disabilities.<sup>155</sup> In some cases, evidence of how the policy impacts one or more specific individuals will be enough to show that the policy's disparate impact is based on disability. For example, OCR may receive a complaint on behalf of several students subject to the same school, district, or Statewide policy, and could find evidence of discriminatory effects based on those students' experiences. The policy's discriminatory effect on the basis of disability may also be obvious, such as the effect of a policy that automatically imposes an afterschool detention for any use of profanity on a student whose Tourette's Syndrome sometimes causes the student to curse involuntarily.<sup>156</sup> In other instances, statistical evidence might suggest that students with disabilities are disproportionately disciplined for certain conduct, leading OCR to investigate whether the school's disciplinary practices are resulting in a discriminatory effect on students with disabilities. While statistical evidence alone does not prove discrimination, it can raise a question regarding whether school districts are imposing discipline in discriminatory ways, warranting further investigation.

If OCR finds sufficient evidence that the policy has discriminatory effects based on disability and finds that there is insufficient evidence the policy is necessary for the provision of safe operation of services, programs, or activities, OCR would likely consider the policy to be discriminatory. Evidence that an alternative policy exists that would be comparably effective in providing or

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<sup>152</sup> 34 C.F.R. § 104.4(b)(4) (prohibiting recipients of Federal financial assistance from, directly or through contractual or other arrangements, utilizing criteria or methods of administration that have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability, or that have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the recipient's program). Depending on the specific facts alleged in a complaint filed with OCR about a school criterion, policy, practice, or procedure, OCR may investigate the complaint as a violation of FAPE or a failure to make reasonable modifications.

<sup>153</sup> See 34 C.F.R. § 104.4(a), (b)(1)(i)-(v), (vii), (b)(4). OCR notes that the Department of Justice interprets requirements under Section 504 consistently with those under Title II of the Americans with Disabilities Act. See 28 C.F.R. § 35.130(h) (Title II legitimate safety regulation).

<sup>154</sup> 34 C.F.R. § 104.33(a).

<sup>155</sup> See 34 C.F.R. § 104.4(b)(4). See *Choate*, 469 U.S. at 291-92, 299-301.

<sup>156</sup> As discussed in Section II of this guidance, a recipient that knows that a student is engaging in disability-based behavior that interferes with their or other students' learning is required under Section 504 to address the behavior to meet the educational needs of the student with disability-based behavior.

safely operating the school's services, programs, or activities may indicate that the school's chosen policy is not necessary. The school would then need to reasonably modify the policy to avoid discrimination on the basis of disability.<sup>157</sup> As explained in Section III, this could include adjusting the terms of the policy for a student with a disability even if the general policy remains in place. If no such change is capable of eliminating the discriminatory effect of the policy, the school may need to revise or eliminate the policy in its entirety.

## **V. MULTIPLE BASES OF DISCRIMINATION AND INTERSECTIONAL DISCRIMINATION**

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As noted earlier, OCR is responsible for enforcing several laws that prohibit schools from discriminating based on disability; race, color, or national origin; sex; and age.<sup>158</sup> A student may experience multiple forms of discrimination at once. In addition, a student may experience discrimination due to the *combination* of protected characteristics, a form of discrimination often called intersectional discrimination. Some instances of intersectional discrimination may stem from a decisionmaker acting upon stereotypes that are specific to a subgroup of individuals, such as stereotypes specific to Black girls that may not necessarily apply to all Black students or all girls. When OCR receives a complaint alleging discrimination in the use of discipline under more than one law, OCR has the authority to investigate and, where appropriate, find a violation under any law in its jurisdiction.

## **VI. CONCLUSION**

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OCR is committed to ensuring that students are not subjected to discrimination based on their disabilities and to enforcing the FAPE rights of students with disability-based behavior and prohibitions against the discriminatory use of student discipline. In addition to providing the information shared in this guidance, OCR can provide technical assistance to schools, districts, States, and other recipients in understanding and fulfilling their responsibilities under Section 504. OCR is also available to answer questions from students, parents or guardians, community-based organizations, and other stakeholders who are interested in learning more about the rights of students with disabilities and their families under Section 504.

If you have questions about the information in this guidance or would like technical assistance, we encourage you to contact OCR at [OCR@ed.gov](mailto:OCR@ed.gov) or by calling 800-421-3481 (TDD: 800-877-8339). You can also learn more by visiting [www.ed.gov/ocr](http://www.ed.gov/ocr) and by following [OCR's blog](#) to stay up to date on OCR's latest resources.

Thank you for your commitment to improving public education by supporting the needs of students with disability-based behavior and eliminating disability discrimination in the use of student discipline.

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<sup>157</sup> See 34 C.F.R. § 104.4; see 28 C.F.R. § 35.130(b)(7).

<sup>158</sup> See *supra* note 8 and note 11.

## **APPENDIX: GLOSSARY OF KEY TERMS AND ACRONYMS USED IN THIS GUIDANCE<sup>1</sup>**

**Behavioral Intervention Plan (BIP)**—an individualized plan, often in writing, usually based on information provided through a functional behavioral assessment (FBA), that identifies behavioral supports individually tailored to a student’s needs to ensure FAPE. See 34 C.F.R. § 104.33(b)(1)(i). This may also be called a Behavior Support Plan. Although not referenced in Section 504’s regulations, this term is generally understood to mean a component of a student’s educational program designed to address behaviors that interfere with the student’s learning or that of others and behaviors that are inconsistent with school expectations. A BIP generally describes the behavior that inhibits the student from accessing learning and the positive behavioral interventions and other strategies that are to be implemented to reinforce positive behaviors and prevent behavior that interferes with the student’s learning and that of others.

**Behavioral Supports**—the supports, services, interventions, strategies, and modifications to policies used to support and respond to a student’s behavioral needs to ensure FAPE. See 34 C.F.R. § 104.33(b)(1)(i). Behavioral supports may be provided through a positive behavioral interventions and supports (PBIS) framework. To learn more about PBIS, please visit <https://www.pbis.org/>.

**Corporal Punishment**—padding, spanking, or other forms of physical punishment imposed on a child.<sup>2</sup> In a majority of States, this practice is prohibited by State law.

**Disability-Based Behavior**—behavior that is caused by or has a direct and substantial relationship to a student’s disability.

**Educational Environment** (also **educational setting**)—(1) the academic setting (meaning the class, school, or program) in which a student with a disability receives regular or special education and related aids and services, decided as part of the student’s placement; and (2) the setting in which schools provide students nonacademic and extracurricular services and activities, such as meals, recess, counseling services, physical recreational athletics, and transportation. See 34 C.F.R. § 104.34.

**Exclusionary Discipline**—the formal or informal removal, whether on a short-term or long-term basis, of a student from a class, school, or other educational program or activity for violating a school rule or code of conduct. Examples can include detentions, in-school suspensions, out-of-school suspensions, suspensions from riding the school bus, expulsions, disciplinary transfers to alternative schools, and referrals to law enforcement, including referrals that result in school-related arrests. An in-school suspension is an instance in which a child is temporarily removed from his or her regular classroom(s) for at least half a day for disciplinary purposes, but remains

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<sup>1</sup> Except where terms in this Glossary are directly from a statute or regulation that OCR enforces, or OCR’s CRDC definitions, the terms and acronyms below are offered to assist the reader only for purposes of clarity in this guidance, the terms are not intended to apply more broadly and are not binding in any way.

<sup>2</sup> This definition is used in the 2020-2021 CRDC. The CRDC collects data on leading civil rights indicators related to access and barriers to educational opportunity from preschool through 12th grade.

under the direct supervision of school personnel. Direct supervision means school personnel are physically in the same location as students under their supervision.<sup>3</sup>

**Free Appropriate Public Education (FAPE)**—the provision of regular or special education and related aids and services that are designed to meet the individual educational needs of a student with a disability as adequately as the needs of students without disabilities are met, and that complies with Section 504’s requirements pertaining to evaluation, placement, setting, and procedural safeguards. See 34 C.F.R. § 104.33(b)(1). Another Federal law, the **Individuals with Disabilities Education Act (IDEA)**, also requires FAPE. See 34 C.F.R. §§ 300.17, 300.101, 300.102 (defining FAPE under the IDEA). Although FAPE under the IDEA is distinct from FAPE under Section 504, implementation of an Individualized Education Program (IEP) developed in accordance with the IDEA is one way to meet Section 504’s FAPE standards. See 34 C.F.R. § 104.33(b)(2). This would include implementation of IDEA’s discipline provisions. To learn more about FAPE under the IDEA, please visit <http://idea.ed.gov/>. To learn more about the IDEA requirements applicable to discipline, please consult OSERS’s *Questions and Answers: Addressing the Needs of Children with Disabilities and IDEA’s Discipline Provisions* (July 19, 2022), available at <https://sites.ed.gov/idea/files/qa-addressing-the-needs-of-children-with-disabilities-and-idea-discipline-provisions.pdf>.

**Functional Behavioral Assessment (FBA)**— assessment used to understand the function and purpose of a child’s specific, interfering behavior and factors that contribute to the behavior’s occurrence and non-occurrence for the purpose of developing effective positive behavioral interventions, supports, and other strategies to mitigate or eliminate the interfering behavior.

**Individualized Education Program (IEP)**—consistent with the requirements in the IDEA regulations at 34 C.F.R. § 300.22, a written statement for a child with a disability that is developed, reviewed, and revised in accordance with the IDEA’s requirements for FAPE.

**Manifestation Determination**—under Section 504, an evaluation is required by 34 C.F.R. § 104.35(a), prior to a significant change in placement due to a disciplinary removal, to determine whether a student’s behavior was caused by, or had a direct and substantial relationship to, the student’s disability. See also 34 C.F.R. § 104.35(c) (explaining requirements for evaluations). For purposes of this document, this type of evaluation is referred to as a “manifestation determination.” Additionally, the manifestation determination includes consideration of whether the school failed to implement the student’s Section 504 plan by failing to provide the behavioral supports necessary to address the student’s disability-based behavioral needs and, as a result, denied the student FAPE. See 34 C.F.R. § 104.33(b)(1)(i). Under such circumstances, where the school’s failure to meet the student’s behavioral needs denied FAPE to the student, a disciplinary removal would add to the denial of FAPE.

**Mechanical Restraint<sup>4</sup>**—the use of any device or equipment to restrict a student’s freedom of movement. The term does not include devices implemented by trained school personnel, or

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<sup>3</sup> This definition is used in the 2020-2021 CRDC.

<sup>4</sup> This definition is used in the 2020-2021 CRDC. On December 13, 2021, the Department proposed a revised definition for mechanical restraint. For the most current information on how OCR defines this term, please visit <https://www2.ed.gov/about/offices/list/ocr/data.html>.

utilized by a student that have been prescribed by an appropriate medical or related services professional and are used for the specific and approved purposes for which such devices were designed, such as:

- Adaptive devices or mechanical supports used to achieve proper body position, balance, or alignment to allow greater freedom of mobility than would be possible without the use of such devices or mechanical supports;
- Vehicle safety restraints when used as intended during the transport of a student in a moving vehicle;
- Restraints for medical immobilization; or
- Orthopedically prescribed devices that permit a student to participate in activities without risk of harm.

**Person with a Disability**—someone who: (1) has a physical or mental impairment that substantially limits one or more major life activities; (2) has a record of such an impairment; or (3) is regarded as having such an impairment. *See* 29 U.S.C. § 705(20)(B) (Section 504 definitions); 34 C.F.R. § 104.3(j). A **qualified student with a disability** means a student who is a person with a disability and who is any of the following: (1) at an age at which students without disabilities are provided elementary and secondary educational services; (2) at an age at which State law requires schools to provide elementary and secondary educational services to students with disabilities; or (3) a child entitled to FAPE under the IDEA. *See* 34 C.F.R. § 104.3(l)(2).

**Physical Restraint**<sup>5</sup>—a personal restriction that immobilizes or reduces the ability of a student to move his or her torso, arms, legs, or head freely. The term physical restraint does not include a physical escort. Physical escort means a temporary touching or holding of the hand, wrist, arm, shoulder or back for the purpose of inducing a student who is acting out to walk to a safe location.

**Placement**—the regular and/or special education program in which a qualified student with a disability receives FAPE, meaning the educational instruction, services, supports, interventions, and modifications to policies that students receive to meet their individualized needs. To learn more about Section 504’s requirements for placement, see 34 C.F.R. §§ 104.34, 104.35.

**Program or Activity**—all of the operations of the entities described in 29 U.S.C. § 794(b) and 34 C.F.R. § 104.3(k), including all the operations of a local educational agency (LEA).

**Recipient**—any State or its political subdivision, any instrumentality of a State or its political subdivision, any public or private agency, institution, organization, or other entity, or any person to which Federal financial assistance is extended directly or through another recipient, including any successor, assignee, or transferee of a recipient, but excluding the ultimate beneficiary of the assistance. 34 C.F.R. § 104.3(f). Recipient includes an elementary and secondary public school (including public charter schools), private school, local educational agency, or State educational agency that receives Federal financial assistance from the Department of Education.

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<sup>5</sup> This definition is used in the 2020-2021 CRDC. On December 13, 2021, the Department proposed a revised definition for physical restraint. For the most current information on how OCR defines this term, please visit <https://www2.ed.gov/about/offices/list/ocr/data.html>.

**Related Aids and Services**—the developmental, corrective, and other supportive aids and services that a student needs in order to receive FAPE. See 34 C.F.R. pt. 104, App. A, ¶ 23.

**Restraint**—as used in this guidance, the term restraint(s) refers to [physical](#), [mechanical](#), or other restraint(s).

**Seclusion**<sup>6</sup>—the involuntary confinement of a student alone in a room or area from which the student is physically prevented from leaving. It does not include a timeout, which is a behavior management technique that is part of an approved program, involves the monitored separation of the student in a non-locked setting, and is implemented for the purpose of calming.

**Section 504-only Student**—a student with a disability, as defined under Section 504, who is not eligible for FAPE under the IDEA.

**Section 504 Plan**—an individualized plan, often in writing, that a school may choose to use to record the regular or special education and related aids and services that a specific student with a disability covered under Section 504 will receive, and the appropriate setting for that student to receive the services.

**Section 504 Team**—the group of persons who must be knowledgeable about the child, the meaning of evaluation data, and the placement options as required by 34 C.F.R. § 104.35(c), that determines for a qualified student with a disability the individualized services the student needs to receive FAPE and the setting to receive those services. The Section 504 Team often includes the student’s parents or guardians, among others knowledgeable about the student.

**Significant Change in Placement**—In the context of disciplinary removal(s), (1) a removal from class or school that lasts longer than 10 consecutive school days, or (2) a series of removals from class or school that together total more than 10 school days in a school year and constitute a pattern of removal. Additionally, a disciplinary transfer to an alternative school could constitute a significant change in placement depending on the facts and circumstances.

**Supplementary Aids and Services**—those aids and services that enable a student with a disability to participate in the regular education program to the maximum extent appropriate to the student’s needs.

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<sup>6</sup> This definition is used in the 2020-2021 CRDC. On December 13, 2021, the Department proposed a revised definition for seclusion. For the most current information on how OCR defines this term, please visit <https://www2.ed.gov/about/offices/list/ocr/data.html>.