

The Intersection of Student Disability and Discipline Issues

**A comparison of Section 504 of the Rehabilitation Act, Title II of the ADA,
and other laws affecting the Rights of Disabled Students**

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SUMMARY OF THE STATUTE

Section 504:

A civil rights law that prohibits discrimination on the basis of disability in any educational program or activity of a recipient of federal financial assistance.

The ADA:

A civil rights law that prohibits discrimination solely on the basis of disability in employment, public services , and public accommodations.

PURPOSE OF THE STATUTE

Section 504:

To facilitate qualified disabled student's continued enrollment in or return to school.

The ADA:

To facilitate the employment of individuals with disabilities and ensure their access to public buildings and facilities.

WHO ADMINISTERS THE STATUTE?

Section 504:

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

The ADA:

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

U.S. Department of
Justice has the lead role
in coordinating the ADA
among various other
federal agencies.

WHAT ENTITIES ARE COVERED?

Section 504:

Entities receiving federal financial assistance.

Title II ADA:

Public entities including state and local governments.

“QUALIFIED” INDIVIDUALS

Section 504:

A person who meets the education and other requirements for admission and participation in an educational program or activity.

The ADA:

A person who meets the skill, experience, education and other job-related requirements of a position held or desired and who, with or without reasonable modification, can perform the essential functions of such a position. Job descriptions must be carefully developed to list as requirements only functions that are truly essential to the job.

WHO IS PROTECTED?

Any otherwise qualified individual who:

- (1) has a physical or mental impairment that substantially limits one or more major life activities;
- (2) has a record of having such an impairment;
or
- (3) is regarded as having such an impairment.

WHAT ARE MAJOR LIFE ACTIVITIES

Walking, seeing, hearing, communicating, speaking, breathing, standing, lifting, bending, reading, learning, concentrating, thinking, working, caring for oneself, and performing manual tasks.

WHAT IS PROHIBITED?

Section 504:

Denying a qualified individual with a disability an opportunity to participate in a benefit from an educational program or activity or providing them an unequal opportunity.

The ADA:

Denying a qualified individual access to a public facility or program

IS THERE FUNDING TO IMPLEMENT SERVICES?

Section 504:

No

The ADA:

Not directly from ADA, but there are limited tax credits for removing barriers and to encourage employment and training of individuals with disabilities.

Under 504 who determines whether there is a disability?

- Unlike elementary and secondary institutions, postsecondary institutions are not required “find” and identify students who are disabled.
- Post-secondary institutions are not permitted to ask about disability status before admission except where they are attempting to take remedial action to correct past effects of discrimination.
- After admission inquiries can be made on a “confidential basis” about disabilities that may require accommodation.

REASONABLE MODIFICATIONS UNDER SECTION 504

Reasonable modifications and academic adjustments to policies, practices or procedures if requested:

(1) Must be made where necessary to ensure equal access to the benefits and services of the post-secondary educational program and activities.

(2) Need not be made where the institution can demonstrate the modification will present an “undue burden”.

REASONABLE MODIFICATIONS UNDER SECTION 504

(3) Students are not required to ask for or to accept accommodations, adjustments or auxiliary aids or services.

(4) No accommodation or adjustment will be provided to a student without his consent.

Refusal of the Modification

- If a student refuses to accept the adjustment or modification he will be deemed to be treated as a person without a disability and subject to all the same rules and requirements as the non-disabled student.
- If after refusing the modification, the student, for example, does not complete academic work or violates a code of conduct, the post-secondary institution can treat the student in the same way it would treat a student without a disability who does not complete academic work or violates a code of conduct.

STUDENTS WITH MENTAL HEALTH ISSUES:

- Not every student who experiences problems related to mental health is a person with a disability protected by section 504. Their “issues” must substantially limit their abilities as previously described.
- Section 504 does not “require” postsecondary institutions to take action against a student with a disability who is engaging in threatening behavior. That “duty” comes from other laws.

Health and Safety Emergency:

- Under Section 504, post secondary institutions may always take immediate action to deal with an emergency if there is a significant risk to the health or safety of others. OCR has interpreted this to include threat to self in certain cases it has considered.
- They may also take action under Title II of ADA against a student with a disability who poses a “direct threat” to the health or safety of others.

DIRECT THREAT

Direct threat is defined in 56 Fed Reg 35694, 35701 as “a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices or procedures or by the provision of auxiliary aids or services.

DIRECT THREAT

- If a student poses a direct threat to others, schools may take action whether or not the student has a disability.
- If the student is posing the direct threat he is no longer deemed an “individual with a qualified disability” for the purposes of 504 protections and can be subject to disciplinary measures including dismissal.
- The student does not have to accept the modification but, if the student with the disability refuses accept proposed modifications (i.e. counseling, leaves of absence, etc.) then he will be treated like a person without a disability.
- See 42 USC 12201(d) and 28 CFR 35.130(e).

DIRECT THREAT

- The Department of Education's use of "direct threat" is broader than the Department of Justice's.
- The Department of Education interprets "direct threat" to include threat to self or others.
- The Department of Justice's interpretation of Title II regulations which does not recognize direct threat to self outside of the employment context.
- However, both agree with the Supreme Court that any analysis or determination of "direct threat" must be based on an individualized assessment and utilize factors articulated in Supreme Court case law in determining whether institutions properly applied the standard to a particular student and that the standard must be applied uniformly to disabled as well as non-disabled students.

HOW TO DETERMINE WHETHER A STUDENT POSES A DIRECT THREAT

- Conduct an individualized assessment of the student's ability to safely participate in programs. The assessment may not be based on generalizations or stereotypes.
- Determine the nature, duration, severity of the risk and the probability of potential injury.
- Determine whether reasonable modifications of policies, practices or procedures will mitigate the risk of harm.

**STUDENTS POSING DIRECT THREATS MAY BE OFFERED
MODIFICATIONS IT BELIEVES
WILL MITIGATE THE RISKS, INCLUDING**

- Requirements for counseling
- Requirements for psychological evaluation
- Submission of documentation of fitness from a medical professional
- Required leaves of absence
- Medication

DISCIPLINE OF DISABLED STUDENTS UNDER SECTION 504

Generally, a post-secondary institution may take action against students (including those with disabilities) who:

(1) violate school policies or student codes of conduct;

(2) pose a direct threat to others; or

(3) who are at serious risk of self-injury ... so long as the institution uniformly applies the school policy to students with and without disabilities.

DISCIPLINE

Permitted disciplinary action may include:

- Suspension
- Expulsion
- Mandatory leaves of absence
- Class or dormitory reassignment
- Protection orders

OTHER KEY STATUTES: THE FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT (FERPA):

- Enforced by the Department of Education's Family Compliance Office.
- Protects the privacy of students "educational records". These rights belong to the parent until the child reaches age 18 or attends a post-secondary institution.
- A school must have written permission of the parent or eligible student to release any information from the student's education record.

FERPA: NEW REGULATIONS INCLUDE PROVISIONS ON HEALTH AND SAFETY

The regulations, issued in December:

Clarify that educational agencies and institutions

May disclose information from education records to appropriate parties, including parents, whose knowledge of the information is necessary to protect the health or safety of a student or another individual if there is a significant and articulable threat to the health or safety of a student or another individual, considering the totality of the circumstances. (Section 99.36)

DEFINITION OF EDUCATION RECORD

Records that are:

- (1) directly related to a student, and
- (2) maintained by an educational agency or institution or by a party acting for the agency or institution. At the elementary and secondary level, a student's health records, including immunization records maintained by an educational agency or institution is subject to FERPA. Records that schools maintain on special education students are education records.

At post-secondary institutions, medical and psychological treatment records of eligible students are EXCLUDED from the definition of "education records" if they are made, maintained and used only in connection with treatment of the student and disclosed only to individuals providing the treatment." These are considered "treatment records" so long as they are not disclosed for purposes other than treatment. If a school discloses these for purposes other than treatment they are no longer excluded and are then subject to all other FERPA requirements.

The Health Insurance Portability and Accountability Act of 1996 (HIPPA)

- Enforced by the U.S. Department of Health and Human Services
- It requires covered entities to protect individuals' health records and other identifiable health information by requiring appropriate safeguards to protect privacy and setting limits and conditions on the uses and disclosures that may be made without patient authorization.
- HIPPA *does not* apply to educational records covered by FERPA. It also does not apply to certain medical records of postsecondary students because FERPA provides a specific structure for the maintenance of these records. Records maintained on students at the campus health clinics are generally treatment records and thereby excluded from FERPA so long as they are not disclosed to anyone other than a person providing treatment or other appropriate professionals of the student's choice.

HIPPA Disclosure can be made:

When the covered entity has a good faith belief that the disclosure:

- (1) is necessary to prevent or lessen a serious and imminent threat to the health or safety of the patient or others; and
- (2) Is to a person(s) reasonably able to prevent or lessen the threat.

This may include, depending on the circumstances, disclosure to law enforcement, family members, the target of the threat, or others who the covered entity believes in good faith, can mitigate the threat.

The Occupational Safety and Health Act (OSHA):

- Enforced by the Department of Labor.
- Requires employers (which include schools) to provide a place of employment free from recognized hazards that are causing or likely to cause death or serious harm to employees.
- This stems from a statutory provision requiring employers to provide a place of employment “free from recognized hazards that are causing or are likely to cause death or serious physical harm”. OSHA requires employers to take steps to minimize risks if the risk of violence and serious personal injury in a workplace are significant enough to be “recognizable hazards.”
- Over the years, this has evolved to include random acts of violence.

Other issues to consider:

- Section 504 and Title II do not provide a vehicle for individuals injured by the acts of individuals with disabilities to bring legal claims to address these injuries. In cases where educational institutions have been sued for failing to prevent violence on campus, including suicide, the suits have been brought under:
 - State tort: negligence, negligent infliction of emotional distress, and wrongful death
 - State and local statutes: criminal acts of violence (assault and battery) abusing, harassing and insulting teachers (some states consider this a misdemeanor)
 - Breach of contract
 - Medical malpractice

EMERGING ISSUE: POSSIBLE 504/FERPA CONFLICT

- **Under FERPA**, schools are permitted to disclose a student's education records to officials of another school, school system, or institution of postsecondary education where the student seeks or intends to enroll.
- **Section 504** does not allow a post-secondary institution to make a "pre-admission inquiry" about a student's disability or even its' existence before the student is admitted.

EMERGING ISSUE: REQUIRING MEDICATION TO MITIGATE POTENTIAL RISK

- Neither Section 504 or Title II regulations nor case law squarely address these issues in the post-secondary context.
- In the ESEA context, under IDEA, States and local education agencies are prohibited from requiring parents to obtain prescription medication for a child as a condition of attending school or receiving FAPE. 34 CFR 300.174.
- OCR has gone both ways and has focused more on the “process” i.e. the individualized consideration rather than the “policy”.
- This is an emerging issue that will likely be the subject of legislation and/or regulatory guidance in the near future.

EMERGING ISSUE: DIRECT THREAT TO SELF UNDER THE ADA

- DOJ does not interpret Title II to cover direct threat to self. They argue that the Title I and Title III statutes refer only to “direct threat to the health or safety of others” 42 USC sec 12182(b)(3) and they want the ADA titles to be consistent.
- However, in 2002, the Court in *Chevron USA, Inc v. Echazabal* 536 U.S. 73 (2002) ruled that ADA Title I permits an EEOC regulation recognizing direct threat to self despite the fact that the Title I statute references only threat to others.
- Congress may have to ultimately resolve this issue.