

The Rights of Kids with ADHD

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Some Real World Lessons...

- Go with accommodations in mind for your own child. – Sources – Neuropsych, social worker, teacher
- Don't let them push you around – issue with Social worker – re extra time on home work.
- Trust school, but don't trust them- come in with an agenda.

Who is covered?

IDEA

- Requires presence of one of 13 specified disability categories
- Disability must adversely impact educational performance
- Student must need special education
- Does NOT prohibit discrimination based on disability.

504

- Requires diagnosed physical or mental impairment
- Impairment must substantially limit any major life activity
- Student must need special education, related services OR accommodations
- Does protect against discrimination based on disability

What do those criteria mean?

IDEA – Must meet at least one of 13 categories of disability

- Other Health Impaired includes children with ADD or ADHD whose disability results in limited strength, vitality or alertness, including limited alertness to educational tasks due to heightened alertness to environmental stimuli.

504

- Has no categories of eligibility.
- Any physical or mental impairment diagnosed by someone clinically trained to make that diagnosis is accepted as a disability.

Criterion # 2

IDEA

- Adverse affect on educational performance is NOT limited to academics and can be based on other difficulties at school, i.e., social or behavioral problems
- Does not exclude kids because they are gifted
- Can't rely solely on grades or test scores to assess adverse impact.

504

- Substantial limitation on major life activity, can include thinking, concentrating, reading, writing, math, social activity.
- There does not have to be a limitation on academic performance, low grades or low test scores.

Criterion # 3

IDEA requires that the child needs special education

- There must be some instructional component from a special education teacher in order for a kid to qualify for spec ed., but does not have to be full or substantial time in special ed class room. Could be co-taught classes, pull out for resource room, push-in to regular class or check-in/check-out for beginning and end of day

504 requires that the child needs special education, related services and/or accommodations

- Although a child can get special education under a 504 plan (contrary to rumor), it is not required.
- Sufficient if they need related services, e.g., social work or nursing service or accommodations like extra time on tests, preferential seating, quiet room.

Bottom Line...

- It is much easier to qualify for a 504 plan than it is for an IEP.

The July 26, 2016 OCR Dear Colleague Letter Expanded Scope of Protection for Kids with ADHD under Section 504

- Does Not Have the Force of Law, but **SHOULD BE GIVEN DEFERENCE BY SCHOOLS AND THE COURTS**
- MDC and CHADD were heavily involved in the process of developing this letter and provided research on ways kids with AD/HD were not being properly served under Section 504
- <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201607-504-adhd.pdf>

What's so important about the Letter?

- 13 KEY ADDITIONS AND CLARIFICATIONS OF RIGHTS UNDER 504
- AFFIRMING, CLARIFYING AND EXPANDING THE RIGHTS OF KIDS WITH ADHD

1. Right to Evaluation and Identification

- Districts must appropriately and timely evaluate and identify students suspected of having AD/HD.

2. Requires appropriate accommodations AND services at no cost to the family.

- Districts must document and provide appropriate placement and services, regardless of cost. Section 504 requires more than just accommodations if needed for the students needs to be addressed.

3. Expands scope of mitigating measures

- Mitigating measures, such as medication, **extra tutoring or unusual effort** are not a basis for exclusion from eligibility if the student's disability substantially limits one or more major life activity without those measures.

4. Ineligibility under IDEA Does Not Equal Ineligibility Under 504

- A determination that a student is ineligible under IDEA doesn't mean that they may not be eligible under Section 504. The scope of eligibility under 504 is much wider.

5. A clinical diagnosis of AD/HD creates a presumption of eligibility

- Diagnosis of ADHD means student has an impairment for purposes of 504 and creates presumption of substantial limitation of major life activity.
- **THIS IS HUGE!**

6. High Academic Performance/giftedness does not exclude eligibility

- Students that are high performing academically, but are impacted by their AD/HD in other ways and/or have behavioral or social problems without specific academic difficulty, may still be eligible for 504 protection. Referral should occur for behavior even if not related to academics.

7. EF difficulties and non-academic behavior/social problems covered

- Students with AD/HD may also be eligible due to disruptive behavior, social skills issues, or problematic behavior such as not turning in homework or talking out of turn even if their grades are adequate

8. Kids with Inattentive Type or Ability to Hyperfocus Shouldn't be Ignored or Excluded

- Schools have an obligation to evaluate inattentive type students and take into account extra parent effort and avoid discounting impact due to ability to hyper-focus for preferred tasks

9. RTI can't block eligibility

- Use of RTI programs should not interfere with access to 504 protections. Schools should neither rigidly adhere to the steps of Response to Intervention programs as a predicate for evaluation nor categorically require the collection of intervention data as a part of an evaluation.

10. Schools can't make the parents responsible for their evaluation process

- -District cannot make parent responsible for necessary elements or cost of evaluation
- -Can't preclude evaluation or eligibility because parents can't access private doctors/evaluators
- -Can't require parents to pay for any element of the evaluation process if required by the school to determine eligibility

11. Evaluation Process can't be discriminatory

- School districts must avoid making decisions about evaluation or eligibility based on mistaken assumptions based on gender, race or ethnicity.

12. Medical evaluation is not required, but if schools want it, they must pay for it.

- A medical assessment is not required in order to identify a student as having ADHD for purposes of 504 eligibility, but if a school district decides it is necessary, it must be provided at no cost to the parent. Further, extensive analysis is not required to determine someone has a disability because schools must consider the presence of a disability broadly

13. 504 Requires FAPE, not just accommodations

- 504 SERVICES ARE NOT AND SHOULD NOT BE LIMITED TO SERVICES THAT ARE FREE OR LOW COST TO THE DISTRICT AND CAN INCLUDE SERVICES THAT ARE ALSO PROVIDED UNDER IDEA, SUCH AS SPECIAL EDUCATION OR RELATED SERVICES, IF SUCH SERVICES ARE NECESSARY TO RECEIVE AN APPROPRIATE EDUCATION UNDER SECTION 504, meaning access to education equal to the access available to students without disabilities. .

Evolving Right to FAPE under IDEA

- Old Rule – Rowley v. Hendrick Hudson School District
- New Rule- Endrew F. v. Douglas County School District

Rowley – Some Benefit Rule

- More than nothing....less than the most...
- But how much?
- Courts disagreed:
 - Some benefit
 - Meaningful benefit
 - 6th Circuit – “Merely more than de minimis”
 - CHEVY OR A CADDILAC?
 - OR CAR WITH NO GAS?

What the heck does that mean?

- De minimis:
- Trifling, trivial, barely more than none
- Adopted by 6th Circuit based on opinion by Judge Gorsuch

The New Endrew F. Analysis

- *"...his educational program must be appropriately **ambitious in light of his circumstances...**The goals may differ, but **every child should have the chance to meet challenging objectives.**"* Further, the court stated that *"this describes a general standard, not a formula, but every child should have the chance to meet challenging objectives."*

Andrew F. – more explanation

- *"when all is said and done, a student offered an educational program providing 'merely more than de minimis' progress from year to year can hardly be said to have been offered an education at all. For children with disabilities, receiving an education that aims so low would be tantamount to 'sitting idly...awaiting the time when they were old enough to 'drop out.' ' **The IDEA demands more.**"*

The Endrew F. Holding:

- **“It (the IDEA) requires an educational program that is reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances.”** (emphasis added)

The footnotes are everything:

- *“This guidance should not be interpreted as an inflexible rule. We declined to hold in Rowley, and do not hold today, that ‘every handicapped child who is advancing from grade to grade...is automatically receiving a FAPE.’”*
- Andrew F., fn 2.

When do you need an IEP vs. a 504 ?

What are the differences?

- IDEA-

- Requires all needs be identified that adversely impact ed. performance
- Requires measurable goals and objectives for all identified needs
- Requires special education, related services and accommodations to implement all goals
- Must be reviewed and updated annually and reevaluation at least every 3 years

- 504

- Requires that all needs be identified that substantially limit major life activities.
- Does not require goals and objectives
- Requires special education, related services and/or accommodations
- Does not require annual review
- Must be reevaluated before any major changes.

Comparative Advantages of IEPs and 504 plans

- IDEA

- Very specific rules for parent participation
- Presence of goals and objectives and measurement procedure puts burden on school to implement, rather than child
- Special Ed bureaucracy in place to implement
- Funding stream from federal and state government to help subsidize
- Stronger accountability and enforcement procedures

- Section 504

- More limited rules for parent participation
- Less stigmatizing- doesn't require specific label
- Easier to get
- More flexibility re services and mode of delivery
- Can follow student into higher ed (as a reference point, not explicitly)
- OCR has enforcement authority
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