

Legal Protections for Students with Disabilities in After-School Programs

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I. Legal Framework:

- A. Individuals with Disabilities Act (IDEA)** is a federal law that requires school districts to provide special education services to qualified students. Unless the afterschool program is an IEP service, after-school programs are NOT required to provide special education services. Thus, a student's IEP does not apply to an after-school program, even if it is run by the school district or housed in the school district.
- B. Section 504 of the Rehabilitation Act of 1973 (Section 504)** is a federal law that prohibits any program that receives federal funding (such as public school districts) from excluding individuals with disabilities from participating in or benefitting from any district program or activity. The federal Office of Civil Rights (OCR) has investigation and enforcement authority.
- C. Title II of the Americans with Disabilities Act (ADA) (Title II)** is a federal law that prohibits state and local governments (such as public school districts) from discriminating against persons with disabilities. OCR has investigation and enforcement authority.
- D. Title III of the ADA (Title III)** is a federal law that prohibits discrimination on the basis of disability in the activities of places of public accommodations (private or non-profit organizations that are generally open to the public, including after school programs and day care centers not covered by other sections). The federal Department of Justice (DOJ) has investigation and enforcement authority.

II. What Constitutes Disability Discrimination?

A. **Section 504:**

Discrimination can be found in exclusion, inferior treatment, or differential treatment that is not a justified response to the needs or capabilities of an individual with a disability. Discrimination is not limited to actions that result from ill will. Discrimination is usually defined in terms of programs taking prohibited actions or failing to meet affirmative obligations, including:

- Denying a qualified individual with a disability the opportunity to participate in or benefit from an aid, benefit, or service. This obligation, sometimes referred to as the "comparable opportunities" requirement, applies to all aspects of a district's operations, including nonacademic and extracurricular activities.
- Affording a qualified individual with a disability an opportunity to participate in or benefit from an aid, benefit, or service that is not equal to that afforded others.
- Providing a qualified individual with a disability with an aid, benefit, or service that is not as effective as that provided to others.
- Aiding or perpetuating discrimination against a qualified individual with a disability by providing significant assistance to an agency, organization, or person that discriminates on the basis of disability in providing any aid, benefit, or services to beneficiaries of the recipient's program.
- Denying a qualified individual with a disability the opportunity to participate as a member of planning or advisory boards.

- Otherwise limiting a qualified individual with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving an aid, benefit, or service.
- Directly, or through contractual or other arrangements, utilizing criteria or methods of administration that: a) have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability; b) have the purpose of defeating or substantially impairing accomplishment of the objectives of the recipient's program with respect to individuals with disabilities; or c) perpetuate the discrimination of another recipient if both recipients are subject to common administrative control or are agencies of the same state.

B. Title II:

Extends protections to state/local government. Additionally, discrimination under Title II of the ADA is philosophically the same as discrimination for purposes of Section 504, in that the law is not limited to prohibition of actions demonstrating animus, defining discrimination as including:

1. Use of criteria that unnecessarily "screen out" or "tend to screen out" individuals with disabilities from the use and enjoyment of goods and services.
2. Failure to make nonfundamental, reasonable modifications of "policies, practices, or procedures" when such modification is necessary to accommodate disabled persons.
3. Failure to take necessary steps "to ensure that no individual with a disability is excluded, denied services, segregated, or otherwise treated differently than other individuals."

C. Title III:

A public accommodation must reasonably modify its policies, practices, or procedures to avoid discrimination. If the public accommodation can demonstrate, however, that a modification would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations it provides, it is not required to make the modification. Protections under Section 504/Title II are generally more stringent than those under Title III.

III. What laws apply to after-school programs?

- Section 504/Title II applies to all aspects of a public school district, including non-academic, extracurricular and after school activities
- Section 504/Title II applies to any third-party separate entity/program that receives **significant aid** from a school district
- Title III applies to any third-party separate entities that do not receive significant aid from a school district

Gloucester Township Public Schools (OCR #02-17-1002, Mar. 2017): OCR found "significant aid" existed between the school district and a private childcare program operated in seven elementary schools a NJ district. Parent sought 1:1 aide for student during after-school care program, when student had 1:1 aide in IEP. OCR found school district responsible to ensure the private childcare program provided student reasonable accommodations under Section 504. OCR found significant aid between the school district and the day care program existed due to the district's contractual arrangement (lease to use space in exchange for market rent and day care program only available to children enrolled in school district) and the significant assistance school provided to the program (day care overseen by school district employees, day care employees employed and paid through school district, registration forms and fees made out to school district, funds deposited in school district accounts, school district provided admin services to program). Childcare program required to provide aide and school district required to ensure

compliance with 504/Title II, or they would have to terminate aid to (i.e. relationship with) discriminatory childcare program.

IV. If significant aid exists, what responsibilities do school district and the third-party after-school programs responsibilities for students with disabilities in the after-school program under Section 504/Title II?

After-school program must conduct an individualized inquiry with a group of knowledgeable people to determine whether reasonable modifications/accommodations or necessary aids and services would provide a student with a disability with an equal opportunity to participate in an after-school program activities and services. School district must ensure compliance with 504/Title II. District should put non-discrimination clauses in contracts with after-school providers to ensure third-party is agreeing to comply with 504/Title II. School district must ensure after-school program is following 504/Title II because it will also be held responsible for any violations. School district must terminate significant aid (i.e. relationship) with any program that does not abide by 504/Title II.

- ***Elmore County (AL) Sch. Dist., 70 IDELR 162 (OCR 2017)***: An afterschool program's claim that it was "not equipped to handle children with extreme behavior issues" did not excuse its decision to unenroll a student with developmental delays from the program. OCR indicated program should have considered if reasonable accommodations (e.g. 1:1 aide) would provide the student with equal access. Note: This was district after school program, but if it had been an after school program run by 3rd party that received significant aid from district, district would need to ensure the 3rd party complied with Section 504/Title II.
- ***Winooski (VT) Sch. Dist., 46 IDELR 172 (OCR 2006)***: Finding that although the student required a one-to-one aide for other aspects of the educational program, the IEP did not require that the aide be provided for extracurricular activities (ski team and student council). However, district violated 504 because it did not conduct individual inquiry of student's extracurricular needs for equal access (i.e. school never considered her extracurricular accommodation needs at IEP meetings or separate 504 meeting). Note: These were district programs, but if the ski team was run by 3rd party organization that received significant aid from district, district would need to ensure that provider complied with 504/Title II.
- ***Mattituck-Cutchogue (NY) Union Free School District, 113 LRP 27884 (OCR 04/17/13)***: a Principal believed that a field trip to Washington, D.C., was too much for a middle schooler with anxiety to handle. However, OCR found that the principal wasn't entitled to make that decision on his own. Noting that the district never convened a 504 team before excluding the student from the trip, OCR found that the district failed to comply with Section 504. Note: This was a district program, but if this trip was being conducted by 3rd party, if there was significant aid from district to the 3rd party, district would need to ensure compliance with 504/Title II.

V. What are the parameters of reasonable modifications/accommodations or necessary aids and services in after-school programs?

- **No reasonable accommodation**: When a student cannot participate in an activity even with reasonable accommodations, the program may appropriately deny the child participation in the activity. In all events, the district has the burden of demonstrating that the student should not participate. For example, a program, on an individual basis, may prohibit a student from participation, if his participation presents an unreasonable health risk to himself or others.

However, a student's exclusion from a program will be appropriate only if there are no accommodations that could ensure the student's safety or equal participation.

- **North Hunterdon/Voorhees Reg'l (NJ) High Sch. Dist., 25 IDELR 165(OCR 1996):** OCR found no violation where student with cerebral palsy and seizure disorder was permitted on vocational field trips after being cleared by nurse, but would be prohibited from attending if not cleared (usually due to seizure activity that day). OCR found school made individual determination and participation on days with seizure activity presented unreasonable health risk to himself and others that no reasonable accommodation could account for.
- **Donegal (PA) Sch. Dist., 66 IDELR 231 (OCR 2015):** A district improperly banned a student with a nut allergy from attending class field trips unless his parent was available to supervise him. Instead, it should have included the child in all field trips by providing him with nut-free food options and assigning him an aide who could administer an epinephrine pen during medical emergencies.
- **Fundamental alternation to program:** A program need not provide a modification if it can show that doing so would constitute a fundamental alteration to its program (most often applies to sports/selective activities). A modification is likely a fundamental alteration if it changes such an essential aspect of the activity or game that it would be unacceptable even if it affected all participants equally (such as adding an extra base in baseball).
- **Lack of funds:** A lack of funds to cover cost of reasonable accommodations is generally not an acceptable reason to deny the participation of a student with a disability.
- **Require parent participation:** A program cannot require the parent of a student with a disability to accompany the student in the program when a similar obligation is not imposed upon the parents of nondisabled students. Parents can, however, volunteer.
- **Require parents to pay more:** A program cannot require a parents of a student with disability to pay more than required of nondisabled peers, even if cost of student with disability is greater (e.g. to cover cost of 1:1 aide).
- **Competitive/selective programs:** May require a level of skill or ability of a student in order for that student to participate in a selective or competitive program or activity (e.g. sports team), as long as the selection or competition criteria are not discriminatory.
- **Alternative program creation when no reasonable accommodation available:** Program not required to create alternative activities for students with disabilities who cannot participate in program with accommodations (e.g. no obligation to create wheelchair basketball league).

VI. What are the potential consequences for after-school program and school if after-school program that receives significant aid from district engages in disability discrimination?

- **OCR:** Parent can file a complaint with OCR against both after school program and district. Both APS and after school program will have to file written responses. OCR will open an investigation and request many records and conduct interviews with program staff (and family). If OCR finds disability discrimination, it may order:
 - Order district to ensure after-school program accommodates student in after-school program or District to stop providing aid to after-school program (i.e. end relationship)
 - OCR can monitor and follow-up with district for compliance with after school programs
 - OCR findings are also public and available on their website
 - OCR has the authority to withhold all federal funds district if school program do not comply with 504/Title II (last resort)

- **Lawsuit:** Parents can file a lawsuit alleging disability discrimination against both after-school program and district. Ultimately, Judge could order monetary and/or compensatory damages if it finds district/after-school programs actions constituted disability discrimination and substantially departed from the acceptable professional practice. Although the student's identity will be protected, both district and after-school program would be named in the lawsuit and it would be available to the public.