General

Section 504 prohibits discrimination against qualified students with a disability. 29 U.S.C. § 794(a). Section 504 states, “[n]o otherwise qualified individual with a disability ... shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” 29 U.S.C. § 794(a).

Section 504 requires that school districts provide qualified students with a “free appropriate public education… regardless of the nature or severity of the person’s [disability].” 34 C.F.R. § 104.33(a). Under Section 504, an appropriate education means “the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and (ii) are based upon adherence to [504’s] procedures.” 34 C.F.R. § 104.33(b).

Eligibility

Under Section 504, an individual with a disability includes any person who “(i) has a

physical or mental impairment which substantially limits one or more major life activities, (ii)

has a record of such an impairment, or (iii) is regarded as having an impairment.” 34 C.F.R. §

104.3(j)(1). However, only students who have a substantial limitation of a major life activity are entitled to a FAPE. 29 U.S.C. § 705(20)(B)(i); 42 U.S.C. § 12102(2). Section 504 and the Americans with Disabilities Act share the same non-exhaustive list of major life activities, which include seeing, hearing, eating, walking, standing, sitting, speaking, learning, reading, concentrating, thinking, writing, and communicating, among others. *See* 28 C.F.R. § 35.108(c)(1)(ii).

Evaluations

Section 504 requires that districts conduct evaluations of any student before making an initial placement or before any subsequent significant change in placement. 34 C.F.R. § 104.35(a). When evaluating a student, Section 504 requires that:

(1) Tests and other evaluation materials have been validated for the specific purpose for which they are used and are administered by trained personnel in conformance with the instructions provided by their producer;

(2) Tests and other evaluation materials include those tailored to assess specific areas of educational need and not merely those which are designed to provide a single general intelligence quotient; and

(3) Tests are selected and administered so as best to ensure that, when a test is administered to a student with impaired sensory, manual, or speaking skills, the test results accurately reflect the student's aptitude or achievement level or whatever other factor the test purports to measure, rather than reflecting the student's impaired sensory, manual, or speaking skills (except where those skills are the factors that the test purports to measure).

34 C.F.R. § 104.35(b).

Reevaluations

Districts must conduct “periodic” reevaluations of students who are eligible under Section 504. 34 C.F.R. § 104.35(d). Compliance with the IDEA’s reevaluation procedures is one way of complying with this requirement. *Id.*

504 Meeting/Placement Process

When making decisions about services and supports for a student, Section 504 requires that districts “draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior.” 34 C.F.R. § 104.35(c)(1). Additionally, districts must ensure that information from these sources is “documented and carefully considered.” *Id.* at 104.35(c)(2). Placement decisions must also be made “by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options.” *Id.* at 104.35(c)(3).

Burden of Proof

The student’s parents bear the burden of proof, both in production and persuasion, on any claim under Section 504 of the Rehabilitation Act. See e.g., Mrs. C. v. Wheaton, 916 F.2d 69, 74 (2d Cir. 1990); S.W. by J.W. v. Warren, 528 F. Supp. 2d 282, 290 (S.D.N.Y. 2007).

OATH Jurisdiction

Section 504 requires that recipients of federal funds that operate public educational programs or activities must “establish and implement . . . a system of procedural safeguards that includes...an impartial hearing with opportunity for participation by the [student’s] parents or guardian and representation by counsel, and a review procedure.” 34 C.F.R. § 104.36. Impartial Hearing Officers have authority to hear claims under Section 504 of the Rehabilitation Act if delegated the authority by the Local Education Agency (LEA). The New York City Department of Education delegated to OATH the authority to adjudicate due process complaints under Section 504. NYC Exec. Order No. 20 (June 24, 2022), [www1.nyc.gov/assets/oath/downloads/pdf/EO-20-final-rehab-Act-504-delegation-Signed.pdf](file:///\\csc.nycnet\oath\oath_special_education_hearings_division\Template%20Orders\www1.nyc.gov\assets\oath\downloads\pdf\EO-20-final-rehab-Act-504-delegation-Signed.pdf). I am an IHO employed by OATH.