UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES

MAR 14 1994

Ms. Michele Williams
Advocates for Children's Education
8004 S.W. 198 Terrace
Miami, Florida 33189

Dear Ms. Williams:

Thank you for the opportunity to respond to your concerns regarding children with attention deficit disorder and children with attention deficit hyperactive disorder (referred to in this letter as children with ADD). These concerns were set forth in your letter dated June 14, 1993, to Robert R. Davila, former Assistant Secretary, Office of Special Education and Rehabilitative Services; your letter dated June 14, 1993, to John T. MacDonald, former Assistant Secretary, Office of Elementary and Secondary Education; your letter dated May 6, 1993, to Judy A. Schrag, former Director, Office of Special Education Programs; and your letter dated June 14, 1993, to Jean Peelen, Director, Elementary and Secondary Education Policy Division, Office for Civil Rights. In your letters, you seek further clarification of Department of Education (Department) policies with respect to children with ADD.

Based on your inquiry, it is apparent that you are familiar with the Department Memorandum dated September 16, 1991, entitled "Clarification of Policy to Address the Needs of Children with Attention Deficit Disorders within General and/or Special Education" (Clarification Memorandum). Your questions concern the requirements of two Federal laws: Part B of the Individuals with Disabilities Education Act (Part B) and Section 504 of the Rehabilitation Act of 1973 (Section 504). The Office of Special Education and Rehabilitative Services (OSERS), of which the Office of Special Education Programs (OSEP) is a component, is responsible for administering Part B and for interpreting the requirements of Part B and its implementing regulations at 34 CFR Part 300. The Office for Civil Rights (OCR) is responsible for enforcing Section 504 and for interpreting the Section 504 implementing regulation at 34 CFR Part 104. Copies of the Department's regulations implementing Part B and Section 504 are enclosed for your information. Your questions and the Department's responses are set forth below.

1. When (i) ADD is identified through P.L. 94-142, Part B evaluation criteria; (ii) is a chronic or acute health problem limiting alertness (attention); and (iii) adversely affects educational performance, is ADD recognized under Part B?

One of the areas that the Department addressed in the Clarification Memorandum was the eligibility of children with ADD under the "other health impairment" (OHI) disability category. As the Department has previously advised, a child with ADD could be eligible as a child with a disability under the OHI disability category solely by reason of ADD if the ADD is a chronic or acute health problem; the child experiences limited alertness by reason of the ADD; the ADD adversely affects the child's educational performance and, as a result, the child needs special education and related services.

2. When conditions (i), (ii), and (iii) are met as above, is a student only covered by Part B or covered by both Part B and Section 504?

Section 504 employs a functional definition of disability. As set forth at 34 CFR §104.3(j), to be covered by Section 504 in these circumstances, a child must have a physical or mental impairment that substantially limits one or more major life activities. Whether a child's ADD is an impairment that constitutes a substantial limitation must be determined on an individual basis. While it is possible that a child with ADD might be covered by Section 504, but might not be eligible for services under Part B, the reverse -- that the child is eligible for services under Part B, but is not covered by Section 504 -- is difficult to imagine.

3. Is ADD a distinct disability from SLD, dyslexia, etc., deserving of remedies and interventions specifically tailored to alleviate its interferences with the learning process?

A determination of whether a child with ADD is eligible for services under Part B must be made through the evaluation procedures at 34 CFR §§300.530-300.534. A child with ADD may be served under one of several disability categories such as SLD or serious emotional disturbance (SED) or OHI, if the child meets the eligibility criteria for the specific disability category. See 34 CFR §300.7. Please note that dyslexia itself does not constitute a discrete disability category under Part B, but rather is a subcategory of the disability category "specific learning disability," defined at 34 CFR §300.7(b)(10).

Because of its functional focus, Section 504 does not contemplate distinct disabilities. Under Section 504, a school district is required to provide FAPE to each qualified individual with a disability, regardless of the nature or severity of the disability. 34 CFR §104.33(a).

4. Is it mandatory that schools conduct a medical assessment and evaluation (or re-evaluation) when ADD is suspected?

Our response assumes that this question is addressing medical assessment and medical evaluation, rather than medical assessment and general evaluation.

Part B does not necessarily require a school district to conduct a medical evaluation for the purpose of determining whether a child has ADD. If a public agency believes that a medical evaluation by a licensed physician is needed as part of the evaluation to determine whether a child suspected of having ADD meets the eligibility criteria of the OHI category, or any other disability category under Part B, the school district must ensure that this evaluation is conducted at no cost to the parents.

If the school district believes that there are other effective methods for determining whether a child suspected of having ADD meets the eligibility requirements of the OHI category, or any other disability category under Part B, then it would be permissible to use qualified personnel other than a licensed physician to conduct the evaluation as long as all of the protections in evaluation procedures, set forth in the requirements at 34 CFR §§300.530-300.534, are met. However, it would not be inconsistent with Part B for a State to impose a requirement that a school district ensure that a medical evaluation by a licensed physician is conducted as a part of an evaluation. This medical evaluation, however, would have to be at no cost to the child or his/her parents.

Like Part B, Section 504 does not necessarily require a school district to conduct a medical assessment. If a school district determines, based on the facts and circumstances in an individual case, that a medical assessment is necessary to make an appropriate evaluation consistent with 34 CFR §104.35(a) and (b), then the district must ensure that the child receives this assessment at no cost to the parents. If alternative assessment methods meet the evaluation criteria, then these methods may be used in lieu of a medical assessment.

5. Do children with ADD require separate "ADD classes" or are they to be served along a range of placements from mainstream to self-contained, depending upon the students' individual needs?

Part B contains least restrictive environment (LRE) requirements that are equally applicable to children with ADD who have been determined eligible for services under Part B. Under these LRE requirements, each public agency must ensure that all children with disabilities are educated with nondisabled children to the maximum extent appropriate, and that special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 34 CFR §300.550(b)(1)-(2). This provision states Part B's strong preference for educating children with disabilities in regular classes with appropriate support services. Further, this LRE requirement prohibits a school district from placing a child with a disability outside of a regular classroom if educating the child in the regular classroom, with supplementary aids and support services, can be achieved satisfactorily. The child's individualized education program (IEP), which sets forth the individualized and appropriate program of special education and related services provided to the child, constitutes the basis for the child's placement decision. Further, Part B requires that each child with a disability be educated in the school or facility as close as possible to the child's home, that is, the school that he or she would attend if not disabled, unless the child's IEP requires another arrangement. 34 CFR §300.552.

Recognizing that the regular classroom may not be the appropriate placement for all children, Part B also requires public agencies to ensure the availability of a continuum of alternative placements, or a range of placement options, to meet the needs of children with disabilities for special education and related services. 34 CFR §300.551(a). The options on this continuum include "instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions." 34 CFR §300.551(b)(1). Further, these options must be made available to the extent necessary to implement each child's IEP. 34 CFR §300.552(b).

Section 504's LRE requirement is virtually identical to that of Part B. 34 CFR §104.34(a) and (b). School districts must provide whatever placements are necessary to provide FAPE in the least restrictive environment.

6. May a child be given detentions, suspensions or expulsions for behaviors that are a direct outgrowth or symptom of his handicap?

Generally, student discipline is a State and local matter. However, when children who are eligible for services under Part B are involved, the requirements of Part B as they pertain to discipline of children with disabilities apply. Part B has been

found by the United States Supreme Court in its decision in Honig v. Doe, 108 S. Ct. 592 (1988), to prohibit State or local school authorities from unilaterally excluding children with disabilities from the classroom for dangerous or disruptive conduct arising from their disability. Under Part B, exclusion of a student with a disability from school for longer than 10 school days constitutes a change in placement, and the parents must be given written prior notice of the proposed placement change, including an explanation of applicable procedural safeguards and due process rights should they wish to challenge the proposed placement decision. 34 CFR §§300.504-300.505. School officials may, however, use their normal discipline procedures, such as temporary suspension for up to 10 school days. In addition, the use of study carrels, timeouts, detentions, or other restrictions in privileges would be permissible, to the extent that they would not be inconsistent with the child's IEP. This determination must be made, on a case-by-case basis, in light of the particular facts and circumstances.

A suspension or disciplinary removal of a student with a disability for more than 10 school days, which constitutes a change in placement, may not be imposed without a determination by a group of persons, as described in the Part B regulations at 34 CFR §§300.344 and 300.533(a)(3), that the student's misconduct is not a manifestation of the student's disability. If a removal of a student with a disability from school for a period of up to 10 school days is being contemplated, no prior determination by the group of persons described at 34 CFR §§300.533(a)(3) and 300.344 as to whether the student's misconduct is related to the student's disability is required. If the group determines that the misconduct is not a manifestation of the student's disability, the school district may impose normal disciplinary measures subject to the parents' right to request a due process hearing on whether the manifestation determination was correct, which would stay any long-term suspension or expulsion until the review proceedings are completed.

If the group determines that the student's misconduct is a manifestation of the student's disability, the student may not be suspended for more than 10 school days. If the misconduct is related to the disability, it is appropriate to review the student's placement. Nonpunitive changes in placement may be appropriate and should be implemented subject to applicable procedural safeguards. If the parents request a due process hearing under 34 CFR §300.506 to challenge an LEA's proposal to change the student's placement, that action may not be unilaterally taken over the parent's objections until all administrative and judicial review proceedings have been completed. Under Part B, even during a disciplinary removal that exceeds 10 school days, schools may not cease educational services to students with disabilities. This is so, regardless

of whether the student's misconduct is determined to be a manifestation of the student's disability.

Under Section 504, long-term suspensions of more than 10 days and, in some cases, cumulative short-term suspensions exceeding 10 days constitute a significant change of placement. It should be noted that in-school discipline that removes the child from the educational program will be viewed, for this purpose, as a suspension. Prior to a significant change in placement, 34 CFR §104.35(a) requires reevaluation, following the procedural safeguards in 34 CFR §104.36. The first step in this reevaluation is to determine whether the misconduct leading to the disciplinary action was caused by the child's disability. A group of persons, which must include individuals personally familiar with the child and knowledgeable about special education and which may be the same group that made the initial placement decision, must be convened for this purpose. If the group determines that the misconduct does not arise from the disability, the child may be disciplined in the same manner as similarly situated children without disabilities are disciplined. On the other hand, if the group determines that the misconduct is caused by the disability, the group must continue the reevaluation, following the requirements of 34 CFR §§104.35 and 104.36, to determine if the child's current placement is appropriate. This procedure is explained in detail in two Memorandums to OCR Senior Staff, dated October 28, 1988, and November 13, 1989. Copies of these documents are enclosed.

Occasional detentions and similar forms of discipline do not require re-evaluation or determination of the cause of the misconduct under Section 504. Generally detentions, for example, would not constitute a significant change in placement, particularly if they occur before or after instructional hours. If, however, a pattern of disciplinary actions for behaviors caused by or symptomatic of the child's disability develops, there might be sufficient cause to believe that a Section 504 violation is occurring.

7. If the services a child with ADD requires are offered only within a program for children who are severely emotionally disturbed, must the child be "shoehorned" into that category and labeled SED in order to get those services, even though exposure to worse and more bizarre behaviors and exposure to clinically mentally ill children is detrimental to children with ADD because they "copycat" everything they see, and they are distracted by the outbursts of others. Or should the school district create comparable programs designed to improve the behaviors of the children with ADD in an atmosphere less distracting to them?

Initially, we want to correct your assumption that Part B requires that a particular child accept a particular label in order to be eligible for and receive required special education and related services. The entitlement under Part B is the entitlement of each eligible child with a disability to FAPE and not to a particular label, such as specific learning disability, serious emotional disturbance, other health impairment, or any other eligible disability category under Part B. Rather, the child's IEP, which must reflect the child's educational needs, forms the basis for the placement decision, and not the category of the child's disability.

Under Part B, each child's placement must be determined at least annually on the basis of the child's IEP. 34 CFR §300.552(a)(2) and Note. Each child's IEP must contain, among other elements, a statement of the specific special education and related services to be provided to the child and the extent that the child will be able to participate in regular educational programs. 34 CFR §300.346(a)(3). The overriding rule is that each child's placement must be determined on an individual basis.

Further, placement decisions may not be based on factors such as the category of disability, the configuration of the delivery system, the availability of educational or related services, the availability of space, or administrative convenience. In addition to the LRE provisions summarized above, the requirements of 34 CFR §300.533 are applicable to placement decisions for eligible children with disabilities under Part B. In making placement decisions, public agencies must 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 CFR §300.533(a)(1). Each child's placement must be made by a group of persons, including persons knowledgeable about the child, the meaning of evaluation data, and placement options. 34 CFR §300.533(a)(3).

Section 504 also guarantees FAPE in the least restrictive environment appropriate to the needs of children with disabilities, and the continuing focus on the individual educational needs of each child would preclude "shoehorning" children into inappropriate placements. 34 CFR §§104.33(a) and 104.34. The most significant difference between the FAPE requirements of Section 504 and those of Part B is that Part B requires FAPE, consisting of special education and related services, implemented on the basis of an IEP document, whereas Section 504 requires FAPE, consisting of regular or special education and related aids and services, as implemented by any appropriate means, including, but not limited to, an IEP. 34 CFR §104.33(b)(1) and (2).

8. Are teachers allowed to refuse to implement ADD interventions in regular classrooms because it is "extra work" or "not in a Union contract?"

9. Can a teacher refuse to teach a child who has ADD/ADHD?

Because these questions are related, we are issuing a combined response. Neither Part B or Section 504 confers specific responsibilities on teachers. Rather, specific rights and protections are afforded to children with disabilities and their parents, if the children are eligible under Part B or covered by Section 504. However, the provisions of a collective bargaining agreement cannot authorize a school district's failure to provide the rights and protections guaranteed under Part B to all eligible children with disabilities and their parents and guaranteed under Section 504 to all qualified individuals with disabilities and their parents.

Part B also requires States to have procedures for ensuring an adequate supply of qualified personnel, as the term "qualified" is defined at 34 CFR §300.15. 34 CFR §§300.381 and 300.121. Determinations as to which personnel will provide services to a child eligible for services under Part B are left to State and local educational authorities.

10. Are teachers' unions allowed to make contracts which contain rules that are in opposition to civil rights laws such as Section 504?

11. Can a teachers' union be brought up before OCR for violation of students' civil rights by promulgation of rules and regulations that deny children's civil rights?

Because these questions are related, we are issuing a combined response. Implementation of any collective bargaining agreement or of any rules and regulations that have the effect of limiting the participation of children with disabilities in the regular educational environment or of imposing other burdens on children with disabilities or of making the aids, benefits, and services provided by the school district less effective than those provided to other students would constitute a violation of Section 504 and its implementing regulation. In enforcing Section 504, however, OCR has no jurisdiction over entities that do not receive Federal funding through the Department. As long as a teachers' union does not receive such funding, OCR could not dictate the terms of any collective bargaining agreement it proposes or find the union in violation of Section 504 and its implementing regulation if the terms of the proposed contract prove to be discriminatory. OCR could, however, find a school district in violation if it ratified such a collective bargaining agreement and then attempted to use it as a justification for not meeting the LRE requirement or for restricting children with

disabilities in obtaining aids, benefits, or services or for providing these children with aids, benefits, and services that are not as effective as those provided to nondisabled children.

12. a) If a class action suit is brought against a state for which a settlement requires a great deal of money be available to provide the mandated services, will OCR accordingly determine what amount will be sufficient to meet the needs and order the state's appropriations committee to make the necessary provisions? b) Would school districts be held in violation if they gave no services requiring expenditures until such monies became available, whether or not partial or full funding might be already accessible in their own budgets?

In seeking to remedy violations of Section 504, OCR does not determine what amount of money is necessary to eliminate the violations. If a complaint is made against a school district, OCR investigates to determine if violations are occurring. If OCR identifies civil rights violations, it then attempts to obtain corrective action from the district, including a corrective action plan that sets forth what actions the school district needs to take and over what period of time. If money is required to remedy a violation affecting a class of complainants, for example, OCR does not become involved in the process of appropriating the necessary funds. When the school district submits a corrective action plan to OCR, the school district becomes responsible for obtaining the funds necessary to comply with that corrective action plan within the agreed time frames. If the school district does not submit an acceptable plan to OCR, or if it does not fulfill the terms of the corrective action plan that it has submitted to OCR, it may become subject to enforcement proceedings, which could result in the termination of or failure to renew Federal financial assistance.

13. Can administrative personnel who continue to refuse to implement policies mandating evaluations, strategies, interventions, classrooms, and teacher training according to P.L. 94-142, Section 504, and the Clarification of Policy mentioned above (in spite of their full knowledge of these) be held personally liable for violations of civil rights?

If administrative personnel refuse to implement policies necessary for compliance with Section 504, their employer, usually an LEA or an SEA, is liable for any resulting civil rights violation as long as the employer is under the jurisdiction of OCR. Neither Part B nor Section 504 contains language holding individuals personally responsible for the civil rights violations perpetrated in the course of their employment.

I hope that the above information clarifies the Department's policies on children with ADD. If we can be of further assistance, please let us know.

Sincerely,

Thomas Hehir/pv

Thomas Hehir
Director
Office of Special Education
Programs

Jeanette Lim

Jeanette J. Lim
Director
Policy Enforcement and
Program Service
Office for Civil Rights

Enclosures

cc: Mrs. Bettye Weir
Florida Department of Education

Mr. Archie B. Meyer, Sr.
Regional Civil Rights Director, Region IV

MEMORANDUM

UNITED STATES DEPARTMENT OF EDUCATION
WASHINGTON, D.C. 20202

NOV 13 1989

TO : OCR Senior Staff

FROM : William L. Smith
Acting Assistant Secretary
for Civil Rights

SUBJECT: Suspension of Handicapped Students -- Deciding Whether Misbehavior Is Caused By A Child's Handicapping Condition

This memorandum supplements guidance entitled, "Long-term Suspension or Expulsion of Handicapped Students," issued on October 28, 1988. As stated in that memorandum, before implementing a suspension that constitutes a significant change in a handicapped child's placement, a recipient must conduct a reevaluation. As a first step in this reevaluation, the recipient must determine, using appropriate evaluation procedures that conform with the Section 504 regulation, whether the misconduct in question was caused by the child's handicapping condition.[1]

Questions have been raised regarding who should make the threshold determination whether misconduct is caused by the handicapping condition, and what criteria should be applied in making this determination. Since the Section 504 regulation does not speak directly to this issue, case law has been examined for guidance.

Case law

The first appellate decision rendered on the requirements of Section 504 and the Education of the Handicapped Act (EHA) regarding the expulsion of handicapped students held that, "before a handicapped student can be expelled, a trained and knowledgeable group of persons must determine whether the student's misconduct bears a relationship to his handicapping condition." S-1 v. Turlington, 635 F.2d 342, 350 (5th Cir.) cert. denied, 454 U.S. 1030 (1981)(Turlington).[2] In a case challenging expulsions that had occurred early in the 1977-78 school year, the court said that "[t]he only way in which the expulsions could have continued [after the EHA became effective] is if a qualified group of individuals determined that no relationship existed between the plaintiffs' handicap and their misconduct." Id. (emphasis added). The court upheld the district court's ruling that no

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[1] Following the lead of the Ninth Circuit in Doe v. Maher, 793 F.2d 1470, 1480 n. 8 (1986), aff'd sub nom. Honig v. Doe, 108 S. Ct. 592 (1988), we regard as synonymous the terms "conduct that arises from the handicap," "conduct that is caused by the handicap," "conduct that is a manifestation of the handicap," "conduct that has a direct and substantial relationship to the child's handicap," and "handicap-related misconduct." A handicapped child's conduct would be covered by this definition if the handicap significantly impairs the child's behavioral controls, but would not be covered if it bears only an attenuated relationship to the child's handicap.

[2] The decision applies also in the Eleventh Circuit.

handicapped student could be expelled for misbehavior related to the handicap, stressing that the burden is on state and local officials to raise the question of handicap relatedness. Id. at 349.

The court said that a placement decision (such as expulsion) must be made by the individuals specified in the EHA and Section 504 regulations, and these same individuals should determine whether the misconduct resulted from the handicap (citing favorably a district court decision in the Seventh Circuit, Doe v. Koger, 480 F. Supp. 225 (N.D.Ind. 1979)(Koger)). The determination may not be made by the individuals responsible for the school's regular disciplinary procedures, such as "school board officials who lacked the necessary expertise to make such a determination." Id. at 347. The court cited to Section 504 and EHA regulatory provisions requiring that placement decisions be made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options.

The court provided some guidance on the basis for the determination of causation. First, "[a] determination that a handicapped student knew the difference between right and wrong is not tantamount to a determination that his misconduct was or was not a manifestation of his handicap." (emphasis added) Id. at 346. Second, a District may not make a categorical determination that misconduct, as a matter of law, is not a manifestation of handicap where the student is not classified as seriously emotionally disturbed or behaviorally handicapped. Id. at 346-47.

The next appellate opinion about handicap-related misconduct was Kaelin v. Grubbs, 682 F.2d 595 (6th Cir. 1982), although the sole issue on appeal was whether an expulsion was a change in educational placement. The court said it was, adopting the Fifth Circuit's rationale in Turlington. Similarly citing to Koger, the Sixth Circuit said the placement team must decide whether the child's handicap caused the disruptive behavior. 682 F.2d at 601, 602. Although its decision was based entirely on the EHA, the court referred to the similar procedural protections of Section 504. Id. at 597.

Finally, the Ninth Circuit, interpreting the EHA[3], stated that, before a suspension that constitutes a significant change in placement, a proper determination

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[3] The court of appeals, relying on the Supreme Court's decision in Smith v. Robinson, 468 U.S. 992 (1984), reversed the lower court's holding under Section 504. By enacting the Handicapped Children's Protection Act of 1986, 20 U.S.C.A. § 1415(f)(1988), Congress overruled Smith. Thus, EHA may no longer limit rights available under civil rights statutes. Like the Supreme Court in Honig v. Doe, the Ninth Circuit cited to the Section 504 regulation at 34 C.F.R. § 104.35, despite having said that its ruling relied only on the EHA.

The Fourth Circuit also has ruled that the EHA prohibited a school board from expelling a child whose misbehavior was related to his handicap. However, the opinion does not assist us in understanding how to determine the relationship between the misconduct and the handicap. School Board of the County of Prince William, Virginia v. Malone, 762 F.2d 1210 (4th Cir. 1985).

must be made whether misbehavior is a manifestation of a child's handicap. Doe v. Maher, 793 F.2d at 1482. "A 'proper determination' is one that is arrived at by an IEP team according to the correct procedures . . . or, if applicable, by a hearing officer or court on review.' Id. n. 9.

In overturning the district court's ruling that an IEP meeting must be convened within five days to consider an expulsion, the Ninth Circuit reasoned that EHA and Section 504 regulations contained no such requirement. Moreover, the IEP team would be "unequipped to evaluate the source of a handicapped student's misconduct until it has obtained the results of a comprehensive evaluation conducted in accordance with 34 C.F.R. § 104.35 . . .," and such a complete evaluation could rarely be conducted within five days. 793 F.2d at 1488. The court thus implied that a determination of handicap-relatedness could not be made on the basis of evaluation data that was almost three years old and existing records of a child's school progress and behavior, as permitted by the California Education Code.

On appeal, the Supreme Court affirmed the decision of the Ninth Circuit, holding that a school district receiving EHA funds may not unilaterally suspend for more than ten days a student who is violent and disruptive because of an emotional problem. The Court did not rule on who should determine handicap-relatedness. Honig v. Doe, 108 S. Ct. 592 (1988).

Since the Supreme Court's decision, no Federal court has clarified this issue. One appellate court, while holding that it lacked jurisdiction over a case in which administrative remedies had not been exhausted, noted a state agency determination on the issue, however. In an EDGAR complaint alleging that a handicapped child had been denied academic credit for courses in which he had missed more than 25 percent of the classes, the Rhode Island Department of Education had ruled that a multidisciplinary team must "determine if there was a causal relationship between the misbehavior for which he was being disciplined and his handicap, and if his educational placement was appropriate." Christopher W. v. Portsmouth School Committee, 877 F.2d 1089, 1091 (1st Cir. 1989). The Rhode Island Education Department had determined that the handicap appeared to have contributed to the child's absences, and that denial of credit, therefore, would violate Section 504.

To summarize, the courts uniformly require that a determination of whether a handicapped child's misconduct arises from a handicap be made by a group of persons, including individuals personally familiar with the child and knowledgeable about special education. They also unequivocally rule out decisions based on a recipient's normal disciplinary procedures, for example, by the principal or school board. The Fifth, Sixth, Ninth, and Eleventh Circuits (and a district court in the Seventh Circuit) go further, specifying that the determination should be made by the placement team. (No other Federal trial court opinion adds to our understanding of these issues.)

These opinions offer only general guidance on how the determination should be made on whether misconduct is caused by a handicap. The Ninth Circuit would require a comprehensive evaluation in accordance with the Section 504 regulation before deciding whether the misconduct is handicap-related. In light of the professional composition of the group mandated by every court, however, we can infer that the determination must be based on the kind of information necessary to a competent professional decision. For example, the information considered would include psychological evaluation data related to behavior. Further, the relevant data would be recent enough to afford an understanding of the child's current behavior. The opinions also suggest what the causation determination is not. It is not simply a reflection of the child's special education classification (for example, that he is classified "learning disabled," not "behavior disordered"). It is not a determination of whether he knew right from wrong or that she knew her behavior was wrong. It is not sufficient that the procedure satisfies legal requirements for the suspension of nonhandicapped children.

Conclusion

Neither the Section 504 regulation nor the case law provides a simple rule of thumb. Drawing upon the Section 504 regulatory requirements for evaluation and placement at 34 C.F.R. § 104.35 and the case law discussed above, we conclude, nevertheless, that a handicapped child may not be suspended from school for more than ten days unless a recipient has determined that the misbehavior is not a manifestation of his or her handicapping condition. That determination may be made by the same group of people who make placement decisions conforming to the process required by Section 504 regulation. The group must have available to it information that competent professionals would require, such as psychological evaluation data related to behavior, and the relevant information must be recent enough to afford an understanding of the child's current behavior. At a minimum, the group must include persons knowledgeable about the child and the meaning of the evaluation data.

If you have questions about the content of this memorandum, please feel free to contact me or have a member of your staff contact Jean P. Peelen, FTS 732-1641.

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OCT 28 1988

TO : OCR Senior Staff

FROM : LeGree S. Daniels
Assistant Secretary
for Civil Rights

SUBJECT: Long-term Suspension or Expulsion of Handicapped Students

This memorandum provides guidance on the application of the Section 504 regulation at 34 C.F.R. Part 104 to the disciplinary suspension and expulsion of handicapped children from school,[1] an issue not addressed directly by the regulation. This guidance supersedes previous memoranda on this issue.

Legal Authority

The Section 504 regulation requires that a school district evaluate a handicapped child before making a significant change in his or her placement. Specifically, the regulation pertaining to evaluation and placement states:

> A recipient that operates a public elementary or secondary education program shall conduct an evaluation in accordance with the requirements 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 a regular or special education program and any subsequent significant change in placement.

34 C.F.R. § 104.35(a).

The Supreme Court's recent decision in Honig v. Doe, 108 S. Ct. 592 (1988), interpreted the Education of the Handicapped Act (EHA), rather than Section 504. Nevertheless, it lends support to OCR's regulatory provision that a recipient may not make a significant change in a handicapped child's placement without reevaluating the child and affording the due process procedures required by the Section 504 regulation at 34 C.F.R. § 104.36. The decision also supports OCR's longstanding policy of applying the regulatory provision regarding "significant change in placement" to school disciplinary suspensions and expulsions of handicapped children.

OCR Policy

1. If a proposed exclusion of a handicapped child is permanent (expulsion) or for an indefinite period, or for more than 10 consecutive school days, the exclusion constitutes a "significant change in placement" under § 104.35(a) of the Section 504 regulation.

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[1] This memorandum addresses only the requirements under the Section 504 regulation. Requirements of the Education of the Handicapped Act may be different in some respects.

2. If a series of suspensions that are each of 10 days or fewer in duration creates a pattern of exclusions that constitutes a "significant change in placement," the requirements of 34 C.F.R. § 104.35(a) also would apply. The determination of whether a series of suspensions creates a pattern of exclusions that c itutes a significant change in placement must be made on a case-by-case basis. In no case, however, may serial short exclusions be used as a means to avoid the Supreme Court's prohibition of suspensions of more than 10 days. An example of a pattern of short exclusions that would clearly amount to a significant change in placement would be where a child is suspended several times during a school year for eight or nine days at a time. On the other hand, OCR will not consider a series of suspensions that, in the aggregate, are for 10 days or fewer to be a significant change in placement. Among the factors that should be considered in determining whether a series of suspensions has resulted in a "significant change in placement" are the length of each suspension, the proximity of the suspensions to one another, and the total amount of time the child is excluded from school.

3. In order to implement an exclusion that constitutes a "significant change in placement," a recipient must first conduct a reevaluation of the child, in accordance with 34 C.F.R. § 104.35.

4. As a first step in this reevaluation, the recipient must determine, using appropriate evaluation procedures that conform with the Section 504 regulation, whether the misconduct is caused by the child's handicapping condition.

5. If it is determined that the handicapped child's misconduct is caused by the child's handicapping condition, the evaluation team must continue the evaluation, following the requirements of § 104.35 for evaluation and placement, to determine whether the child's current educational placement is appropriate.

6. If it is determined that the misconduct is not caused by the child's handicap, the child may be excluded from school in the same manner as similarly situated nonhandicapped children are excluded. In such a situation, all educational services to the child may cease.[2]

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[2] The provision of this policy which permits total exclusion of handicapped children from educational services should not be applied in Alabama, Georgia, Florida, Texas, Louisiana, and Mississippi. In S-1 v. Turlington, 635 F.2d 342, 348 (5th Cir. Unit B 1981), the court of appeals ruled that under both Section 504 and the EHA, a handicapped child may be expelled for disruptive behavior that has been properly determined not to have been caused by the handicapping condition, but educational services may not be terminated completely during the explusion period.

7. When the placement of a handicapped child is changed for disciplinary reasons, the child and his or her parent or guardian are entitled to the procedural protections required by § 104.36 of the Section 504 regulation; that is, they are entitled to a system of procedural safeguards that includes notice, an opportunity for the examination of records, an impartial hearing (with participation of parents and opportunity for counsel), and a review procedure. Thus, if after reevaluation in accordance with 34 C.F.R. § 104.35, the parents disagree with the determination regarding relatedness of the behavior to the handicap, or with the subsequent placement proposal (in those cases where the behavior is determined to be caused by the handicap), they may request a due process hearing.

Note that these procedures need not be followed for students who are handicapped solely by virtue of being alcoholics or drug addicts with regard to offenses against school disciplinary rules as to the use and possession of drugs and alcohol. Appendix A ¶ 4 to the Section 504 regulation states:

> Of great concern to many commenters was the question of what effect the inclusion of drug addicts and alcoholics as handicapped persons would have on school disciplinary rules prohibiting the use or possession of drugs or alcohol by students. Neither such rules nor their application to drug addicts or alcoholics is prohibited by this regulation, provided that the rules are enforced evenly with respect to all students.

For example, if a student is handicapped solely by virtue of being addicted to drugs or alcohol, and the student breaks a school rule that no drugs are allowed on school property, and the penalty as to all students for breaking that rule is expulsion, the handicapped student may be expelled with no requirement for a reevaluation. This exception, however, does not apply to children who are handicapped because of drug or alcohol addiction and, in addition, have some other handicapping condition. For children in that situation, all the procedures of this policy document will apply.

Further, this policy does not prevent a school from using its normal, reasonable procedures, short of a change in placement, for dealing with children who are endangering themselves or others. Where a child presents an immediate threat to the safety of others, officials may promptly adjust the placement or suspend him or her for up to 10 school days, in accordance with rules that are applied evenhandedly to all children.

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