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ADHD: The IDEA? Section 504? Nothing?

- “The IDEA is not a panacea for all of life’s ills.” *Maricus W. v. Lanett City Bd. of Educ.*, 141 F. Supp. 2d 1064 (M.D. Ala. 2001).

ADHD – Center for Disease Control

Children ages 4-17:

- Approximately 11% of children 4-17 years of age (6.4 million) have ever been diagnosed with ADHD, according to parent report from 2011-12.
- The percent of children with an ADHD diagnosis continued to increase, from 7.8% in 2003 to 9.5% in 2007 and to 11.0% in 2011-12. (Missouri decreased from 8.6% to 8.4%).
- The percent of children with an ADHD diagnosis varied by state, from a low of 5.6% in Nevada to a high of 18.7% in Kentucky.

ADHD – Center for Disease Control

- The percentage of children 4-17 years of age taking medication for ADHD, as reported by parents, increased by 28% between 2007 and 2011.
- Percentage of children taking medication for ADHD was:
 - 4.8% in 2007
 - 6.1% in 2011
 - Missouri decreased from 6.7% to 6.4%

ADHD (DSM-5)

Attention-Deficit/Hyperactivity Disorder:

A. A persistent pattern of inattention and/or hyperactivity-impulsivity that interferes with functioning or development, as characterized by (1) and/or (2):

- 1. **Inattention:** Six (or more) of the following symptoms have persisted for at least 6 months to a degree that is inconsistent with developmental level and that negatively impacts directly on social and academic/occupational activities:
 - Note: The symptoms are not solely a manifestation of oppositional behavior, defiance, hostility, or failure to understand tasks or instructions. For older adolescents and adults (age 17 and older), at least five symptoms are required.
 - a. Often fails to give close attention to details or makes careless mistakes in schoolwork, at work, or during other activities (e.g., overlooks or misses details, work is inaccurate).
 - b. Often has difficulty sustaining attention in tasks or play activities (e.g., has difficulty remaining focused during lectures, conversations, or lengthy reading).
 - c. Often does not seem to listen when spoken to directly (e.g., mind seems elsewhere, even in the absence of any obvious distraction). Cont.

ADHD (DSM-5)

- d. Often does not follow through on instructions and fails to finish schoolwork, chores, or duties in the workplace (e.g., starts tasks but quickly loses focus and is easily sidetracked).
- e. Often has difficulty organizing tasks and activities (e.g., difficulty managing sequential tasks; difficulty keeping materials and belongings in order; messy, disorganized work; has poor time management; fails to meet deadlines).
- f. Often avoids, dislikes, or is reluctant to engage in tasks that require sustained mental effort (e.g., schoolwork or homework; for older adolescents and adults, preparing reports, completing forms, reviewing lengthy papers).
- g. Often loses things necessary for tasks or activities (e.g., school materials, pencils, books, tools, wallets, keys, paperwork, eyeglasses, mobile telephones).
- h. Is often easily distracted by extraneous stimuli (for older adolescents and adults, may include unrelated thoughts).
- i. Is often forgetful in daily activities (e.g., doing chores, running errands; for older adolescents and adults, returning calls, paying bills, keeping appointments).

ADHD (DSM-5)

- **2. Hyperactivity and impulsivity:** Six (or more) of the following symptoms have persisted for at least 6 months to a degree that is inconsistent with developmental level and that negatively impacts directly on social and academic/occupational activities:
- **Note:** The symptoms are not solely a manifestation of oppositional behavior, defiance, hostility, or a failure to understand tasks or instructions. For older adolescents and adults (age 17 and older), at least five symptoms are required.
- a. Often fidgets with or taps hands or feet or squirms in seat.
- b. Often leaves seat in situations when remaining seated is expected (e.g., leaves his or her place in the classroom, in the office or other workplace, or in other situations that require remaining in place).
- c. Often runs about or climbs in situations where it is inappropriate. (Note: In adolescents or adults, may be limited to feeling restless.)
- d. Often unable to play or engage in leisure activities quietly. Cont.

ADHD (DSM-5)

- e. Is often “on the go,” acting as if “driven by a motor” (e.g., is unable to be or uncomfortable being still for extended time, as in restaurants, meetings; may be experienced by others as being restless or difficult to keep up with).
- f. Often talks excessively.
- g. Often blurts out an answer before a question has been completed (e.g., completes people’s sentences; cannot wait for turn in conversation).
- h. Often has difficulty waiting his or her turn (e.g., while waiting in line).
- i. Often interrupts or intrudes on others (e.g., butts into conversations, games, or activities; may start using other people’s things without asking or receiving permission; for adolescents and adults, may intrude into or take over what others are doing).

ADHD (DSM-5)

“ADHD and intermittent explosive disorder share high levels of impulsive behavior. However, individuals with intermittent explosive disorder show serious aggression toward others, which is not characteristic of ADHD.”

IDEA

The IDEA definition of “child with a disability” encompasses children having a disability as defined by the IDEA and “who, by reason thereof, needs special education and related services.” 34 C.F.R. § 300.8(a)(1).

IDEA

If a child has an IDEA disability, “but only needs a related service and not special education, the child is not a child with a disability under this part.” 34 C.F.R. § 300.8(a)(2)(i).

IDEA

For the IDEA, unlike for Section 504, the ameliorative effects of mitigating measures are taken into account when determining eligibility.

IDEA

“Other Health Impairment’ means having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment that is due to chronic or acute health problems, such as asthma, attention deficit disorder or attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, sickle cell anemia, and Tourette Syndrome, and adversely affects a child’s educational performance.” State Plan at 22.

IDEA

“Criteria for Initial Determination of Eligibility

A child displays a Health Impairment when:

- A. a health impairment has been diagnosed by a licensed physician, licensed psychologist, licensed professional counselor, licensed clinical social worker, or school psychologist, and
- B. the health impairment adversely affects the child's educational performance.” State Plan at 23.

IDEA

A medical diagnosis alone is an insufficient basis for determining that a student meets IDEA criteria.

IDEA

Missouri Compliance Standards and Indicators:

1300.10.c. **Documentation** indicates that the health impairment results in limited strength, vitality or alertness, including a heightened alertness to environmental stimuli.

NOTE (1): Limited strength refers to physical strength and energy and includes lack of endurance for fine and/or gross motor activities (e.g. poor trunk control, slouching, tires easily, muscular power). It also refers to a student's emotional stamina, and how the student responds to stress/pain

NOTE (2): Limited vitality refers to the capacity for endurance including duration, intensity and frequency over time. It takes into consideration the level of sustained energy/effort displayed by the student.

NOTE (3): Limited alertness refers to mental processing and the ability to think clearly. It includes the ability to manage/maintain attention and awareness including the ability to sustain focus. It also includes heightened alertness including being overly observant, watchful or "on guard."

IDEA

- “adversely affects the child’s educational performance”
- What is “educational” performance?
Depends on who you ask.
- How much adverse affect and for how long? Depends on who you ask.

IDEA

- “The questions of whether such a child ‘needs special education’ ... and how to articulate that interpretation in the first instance-have generated a cacophony of different answers.”

IDEA

- “Needs special education”
- *Special education* means specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability, including—
 - (i) Instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and
 - (ii) Instruction in physical education.

IDEA

- *Specially designed instruction* means adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or delivery of instruction—
 - (i) To address the unique needs of the child that result from the child’s disability; and
 - (ii) To ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children.

IDEA

“There is nothing in either the IDEA or in the state or federal implementing regulations to indicate that a student would qualify as a ‘student with a disability’ when the school voluntarily modifies the regular school program by providing differentiated instruction which allows the child to perform within his ability at an average achievement level.” Cont.

IDEA

“The Hearings Officer found that Sidney received ‘differentiated instruction’ in the classroom such as additional time highlighting and taking tests, being moved closer to the teacher during tests, and having the teacher read the test directions to him, but that ‘differentiated instruction such as this is available to all children in [Sidney's] classroom and is not an accommodation or different method of teacher, as special education or Section 504 modifications or accommodations would be.’” Cont.

IDEA

"Differentiated instruction is a strategy used by the Third Grade Teacher to help students focus, perform and clue in better on the important parts of the lesson. Differentiated instruction is used because each student learns in a different way."

IDEA

“Petitioner's inattention issues appeared manageable with teacher reminders to attend, and classroom accommodations provided STUDENT sufficient support to allow her to continue to make progress. According to the District, Petitioner did not present any evidence that she required special education services to progress in the general education curriculum.” Cont.

IDEA

“The evidence establishes that STUDENT may have had times when she was tired and exhibited limited vitality during the first hour of class and instances when she was inattentive; however, STUDENT's ADHD or medical challenges did not adversely affect her educational performance to such a degree that she required special education.” Cont.

IDEA

“Various modifications and accommodations to STUDENT's educational program allowed her to improve her class performance and stay focused, complete her work, and ultimately meet grade level standards in academic subjects.”

IDEA

“The hearing officer had sufficient reason to conclude that the accommodations that the school district offered Anna via her Section 504 plan, particularly the provisions for daily teacher checks for homework assignments, one-step directions, and use of a graphic organizer, would assist with Anna's difficulties and allow her to excel in the regular classroom.”

IDEA

Make sure an eligibility team answers all of the necessary questions:

- Does the student meet the criteria for an IDEA disability (presumably OHI)?
- If so, does the disability adversely affect educational performance?
- If so, does the student need special education because of the disability?

Section 504

- Section 504
 - Physical or mental impairment?
 - Substantial limitation of a major life activity?

Section 504

“An impairment in and of itself is not a disability” and “A medical diagnosis of an illness does not automatically mean a student can receive services under Section 504.” OCR Revised Q and A.

Section 504

“Not every student with ADHD needs the same set of services, or any services at all.” July 2016 Dear Colleague Letter.

Section 504

- The relevant major life activity isn't just learning in the school setting.
- 23 IDELR 504, *Letter to McKethan*, Office for Civil Rights – Students may have a disability that in no way affects their ability to learn, yet they may need extra help of some kind from the system to access learning. For instance, a child may have very severe asthma (affecting the major life activity of breathing) that requires regular medication and regular use of an inhaler while in school. Without regular administration of the medication and inhaler, the child cannot remain in school.

Section 504

“Over the past five fiscal years (2011-2015), the Department’s Office for Civil Rights (OCR) has received more than 16,000 complaints alleging discrimination on the basis of disability in elementary and secondary education programs. Approximately 2,000, or one in nine, of these complaints involved allegations of discrimination against a student with ADHD.” July 2016 Dear Colleague Letter.

Section 504

“Because the Americans with Disabilities Act Amendments Act (Amendments Act) clarified the broad scope and definition of the term ‘disability,’ more students with ADHD are now clearly entitled to the protections under Section 504.” July 2016 Dear Colleague Letter.

Section 504

“OCR will presume, unless there is evidence to the contrary, that a student with a diagnosis of ADHD is substantially limited in one or more major life activities.” July 2016 Dear Colleague Letter.

Section 504

“School districts must be sure not to act on the basis of stereotypes or generalizations about the nature of ADHD in general, or its incidence in particular groups.” July 2016 Dear Colleague Letter.

Section 504

“The determination of whether an individual has a disability should not demand extensive analysis.” ADA AAA.

Section 504

- Compare individual's performance of major life activity to the way that most people in the general population can perform the same major life activity.
- For school purposes, compare the student to the average student.

Section 504

“Grades alone are an insufficient basis upon which to determine whether a student has a disability. Moreover, they may not be the determinative factor in deciding whether a student with a disability needs special education or related aids or services. Grades are just one consideration and do not provide information on how much effort or how many outside resources are required for the student to achieve those grades.” *Questions and Answers on the ADA Amendments Act of 2008*, (OCR).

Section 504

“The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures.”

Section 504

Mitigating measures: for example, medication, medical supplies, hearing aides, assistive technology, reasonable accommodations, learned behavioral or adaptive neurological modifications.

Section 504

- “Mitigating measures remain relevant in evaluating the need of a student with a disability for special education and related services.” *Questions and Answers on the ADA Amendments Act of 2008*, (OCR).
- In other words, mitigating measures may be taken into account when determining any services or accommodations a student who has been found eligible under Section 504 needs.

Section 504

Logan (OH) Local School District (OCR 2013): “[O]nce the Student started to receive interventions through the IAT process, the District’s continuing decision that no disability was suspected was based on the Student’s progress and behavior while receiving interventions; therefore, the District improperly considered the ameliorative effects of the mitigating measures.”

Section 504

“The school district cannot consider the ameliorative effects of any mitigating measures, such as improved grades resulting from peer-tutoring in math, in determining whether the student has a disability but could consider them in determining the individual educational needs.” July 2016 Dear Colleague Letter.

Section 504

Section 504 FAPE: “the provision of regular or special education and related aids and services”

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