**Don’t Forget About Substitutes!**

**Examining the Obligation to Provide Substitute Teachers**

**with Key Student Information**

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We are often reminded of the duty to protect confidential student information, especially when it comes to medical and sensitive information. However, there are times when we should and, indeed, may be required to share student information in order to keep students safe. Pursuant to the Family Educational Rights and Privacy Act (“FERPA”) school districts may share student information with persons within the school district who have a “legitimate educational interest.” 34 CFR 99.31. Pursuant to the U.S. Department of Education, a school employee typically has a legitimate educational interest if he/she needs to review an educa­tion record in order to fulfill his or her professional responsibility.

A student’s teachers, aide, and the school nurse are a few obvious persons with a legitimate educational interest who need to receive information and have a copy of the student’s IEP, Section 504 plan, or health plan in order to keep the student safe and provide the student with a free and appropriate public education. However, do not overlook the need to share such information with substitute teachers. Teachers and substitute teachers should be trained about FERPA’s guidelines and what information can and should be shared while respecting student privacy as much as possible.

The Office for Civil Rights (“OCR”) has frequently examined the need to share information with substitute teachers. One such example was the matter of *St. Paul (MN) Public Sch. Dist*., 115 LRP 1476 (2014), in which OCR investigated the St. Paul Public School System after receiving a complaint that the District discriminated against a student on the basis of her disability. Specifically, the complaint alleged, among other claims, that the school failed to implement the student’s Section 504 plan in that substitute teachers were not given copies of the student’s plan and therefore were not aware of, and did not implement, behavior de-escalation strategies required by the plan.

The Complainant’s daughter [“Student”] was a fifth grade student in the District. The Student’s 504 plan primarily addressed behavioral challenges the Student faced due to her disability. The Student struggled with social and behavioral issues during “unstructured times” such as lunch and recess, working with certain teachers, and riding the bus. The plan required the Student’s teachers to praise specific behaviors, ignore inappropriate behaviors, redirect behavior before giving a consequence, use de-escalation strategies, and to discuss behaviors with the Student before implementing discipline. If a classroom teacher were to be absent and a substitute was assigned to the classroom, the plan required the teacher to insert a copy of the Student’s 504 plan in the substitute teacher’s class folder and also inform the Student’s parents of the substitute’s presence in the classroom.

The Complainant in this matter alleges that on a particular date, school staff failed to inform her that a substitute teacher had been assigned to the Student’s class as detailed by the 504 plan. Additionally, the school failed to place a copy of the Student’s 504 plan in the substitute’s folder which resulted in the substitute not providing the student with calming/de-escalating techniques. Allegedly, as a result of this failure, the Student became agitated and slapped another student who was teasing her in the classroom and, as a result, was suspended for her behavior. When interviewed by OCR, the substitute said that she knew the Student for a couple of years due to her work in the building on previous occasions. The substitute admitted to OCR that while she saw some behavior notes about Student, she didn’t remember exactly when she examined the notes. The substitute also admitted that although she may have seen the Student’s 504 plan at some point, she couldn’t recall when or what version of the plan she had seen over the years.

The Complainant also claimed that on another occasion, a different substitute also failed to follow the Student’s 504 plan in that the substitute disciplined the Student for her behavior in a manner that was not in accordance with the plan. This substitute admitted during the investigation that she was not given a copy of the Student’s Section 504 plan or given instruction regarding discipline for this Student.

After investigation, OCR determined that the Student’s 504 plan was not implemented in several respects. In pertinent part, OCR found that on the two above mentioned occasions, the District failed to implement the Student’s 504 plan by failing to give substitute teachers copies of the Student’s plan and due to the substitutes’ failure to review the plan, the Student was not provided with the prescribed de-escalation techniques as determined appropriate by her 504 team. OCR found that the failure to instruct the substitutes and provide them with a copy of the plan was particularly problematic because this Student tended to misbehave for substitutes more than with regular teachers. Based on the findings of the investigation, OCR found that there was sufficient evidence to establish that the District discriminated against the Student on the basis of her disability. The District signed a resolution agreement with OCR to resolve this matter.

Similarly, OCR conducted an investigation of the Los Angeles Unified School District and found that the District violated Section 504 regulations for failing to provide a free and appropriate public education to a student. In this case, a long-term substitute teacher had no knowledge of a student’s behavioral accommodations and thus failed to take appropriate action to address the student’s behavior needs as documented in his IEP and behavior support plan. Regarding their findings in this matter, OCR noted, “particularly in a case involving a long term substitute in a classroom containing students with behavioral problems, the District must have a consistent method of ensuring that substitutes have sufficient information to implement the students’ Section 504 Plans, IEPs, and BSPs while providing them with FAPE that includes appropriate behavior strategies.” *See* OCR Resolution Agreement Summary, Case No. 09-13-1007. The Los Angeles Unified School District entered into a Resolution Agreement with OCR to resolve this matter.

As learned from the cases detailed above, planning ahead and sharing information with substitutes in both general and special education classrooms is essential. It likely isn’t enough to verbally review a student’s BIP or briefly describe 504 plans with substitute teachers. Schools should ensure that substitutes are provided with a copy of the plan and have read it prior to teaching in the student’s classroom. Train your teachers regarding how to prepare for substitutes and discuss where key student information should be kept to keep the information protected, yet easily accessible to substitute teachers. Also consider inviting substitutes (particularly those who are frequent subs or who are scheduled for long-term positions) to back-to-school trainings or specialized trainings you may be conducting with your staff. Remind substitutes of the need to maintain the confidentiality of information they learn about students in their role as a substitute.

Further, don’t forget about planning for substitute nurses and cafeteria staff who will be held equally responsible for knowing and following student Section 504, health plans and IEPs. These are all persons who have a “legitimate educational interest” with whom key information should be shared. By preparing your teachers and substitutes with the information they need to know, you can minimize the possibility of discrimination claims and help keep students safe.