

Section 504: Major New Developments for Regular and Special Education Students

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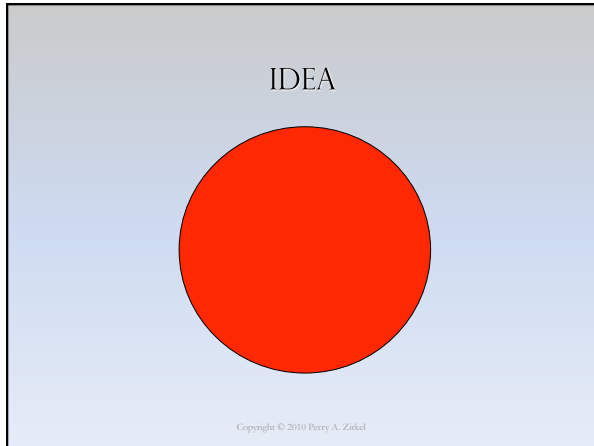
Perry A. Zirkel
University Professor of Education and Law
Lehigh University

	IDEA	Section 504	ADA
Type of Legislation:	funding act	civil rights act	SAME as § 504
Original Passage:	1975	1973	1990
Coverage:	students pre-K - 12	students K - postsec. + employees + facilities	SAME as § 504
FAPE:	special ed + related services	special or regular ed + related services	SAME as § 504
Administering Agency:	OSEP + SEAs	OCR (+ EEOC)	SAME as § 504
Eligibility Definition:	2 essential elements: 1) listed class'n 2) need for spec. ed	3 essential elements: 1) impairment 2) major life activity 3) substantial	SAME as § 504

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PRONG 1	PRONG 2	PRONG 3
Presence of:	Record of:	Regarded as:
•Physical or Mental Impairment	•Physical or Mental Impairment	•Physical or Mental Impairment
•Major Life Activity	•Major Life Activity	•Major Life Activity
•Substantial Limitation	•Substantial Limitation	•Substantial Limitation

OCR Senior Staff Memorandum (1992): Prong 1 is the only basis for FAPE (i.e., addition); prongs 2 & 3 are for preventing subtraction; see also OCR FAQ (2009) (<http://www.ed.gov/about/offices/list/ocr/504faq.html>).
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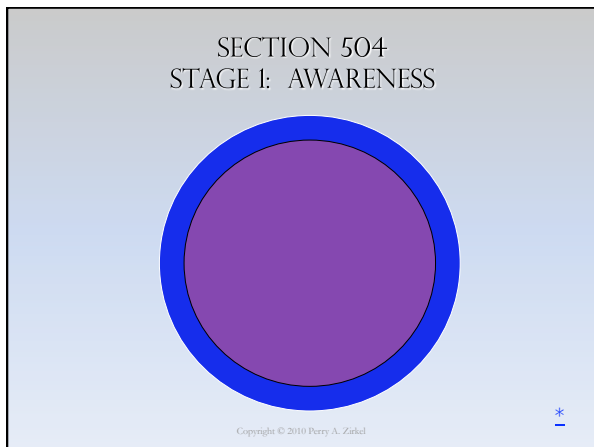
The three phases of Section 504's application to students in K-12 schools:

Stage 1: Awareness ← OCR *

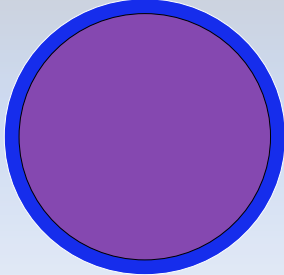
Stage 2: Constriction ← Courts - e.g., *Sutton* * (1999) and *Toyota* (2002)

Stage 3: Expansion ← Congress – i.e., the ADA Amendments (ADAA) *

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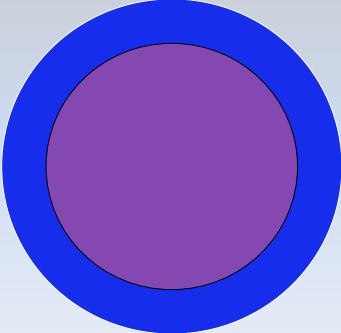
SECTION 504
STAGE 2: CONSTRUCTION



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SECTION 504
STAGE 3: EXPANSION



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**The impact of the ADAA,
effective 1/1/09:**

Impairment:

- silent, thus, same open-ended and ever increasing options

Major Life Activity:

- expanded and elevated list – e.g., reading, concentrating, thinking, eating, sleeping + major bodily functions

Substantial Limitation:

- without, not with, the use of mitigating measures
- expansive list of mitigating measures – e.g., cochlear implants, assistive technology, learned behavioral or adaptive neurological modifications, and reasonable accommodations
- impairments that are episodic or in remission when active

Overall Determination:

- expansive rather than stingy and need not entail “extensive analysis”

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Transitional Issue

Does the ADA apply retroactively, i.e., to complained of acts that occurred before 1/1/09?*

* Compare, e.g., *Becerril v. Pima County Assessor's Office*, 587 F.3d 1167 (9th Cir. 2009); *Lytes v. DC Water & Sewer Auth.*, 572 F.3d 936 (D.C. Cir. 2009); *Milholland v. Sumner County Bd. of Educ.*, 569 F.3d 562 (6th Cir. 2009); *EEOC v. Agro Distrib. LLC*, 555 F.3d 562 (5th Cir. 2009); *Fikes v. Wal-Mart*, 322 F. App'x 882 (11th Cir. 2009); *Moran v. Premier Educ. Group, LP*, 599 F. Supp. 2d 263 (D. Conn. 2009) (no), *with Jenkins v. Nat'l Med. Examining Bd.*, 38 NDLR ¶ 156 (6th Cir. 2009) (yes).

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Remaining open questions re § 504 eligibility:

- e.g., Does the “average person/general population” frame of reference continue to apply?*
- e.g., Is “interacting with others” a major life activity?*
- e.g., Does the express 6-month measure for temporary or transitory impairments under prong 3 apply, by analogy, to prong 1?***

* 74 Federal Register 48431 (Sept. 23, 2009) (EEOC proposed regulations).

** Cf. *James A. Garfield (OH) Local Sch. Dist.*, 52 IDELR ¶ 142 (OCR 2009) (dicta).

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Resulting open questions re what is the district's obligation to this newly expanded pool of students:

- e.g., Is a “504 Plan” required per se?*
- e.g., Is the legal standard for FAPE reasonable accommodation or commensurate opportunity?*
- e.g., How do the answers to the previous questions apply to a student whose impairment is in remission or is effectively corrected by medication or another mitigating measure?

* Cf. *N. Royalton (OH) City Sch. Dist.*, 52 IDELR ¶ 203 (OCR 2009) (individual health plan served as 504 plan, with procedural safeguards, and reasonableness not the acceptable std.).

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Other resulting possible practical implications:

- increased role for the school nurse
- increased number of impartial hearings (given OCR's deferral policy for substantive issues) re both eligibility and FAPE?
- increased questions re overlap with IDEA:
 - e.g., RTI at tier 2 or 3 with diagnosis
 - e.g., new IDEA regulations re consent revocation*
- increased importance of training, communications, organizational procedures and policies (e.g., grievance procedure)

* See Letter to McKethan, 25 IDELR 295 (OCR 1996).

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Parallel developments for “double covered” students (i.e., those with IEPs):

- exhaustion
 - e.g., *Cave v. E. Meadow Union Free Sch. Dist.* (2d Cir. 2008)
- standing for parental rights
 - e.g., *D.A. v. Pleasantville Sch. Dist.* (D.N.J. 2008)
- different standard for FAPE?
 - e.g., *Mark H. v. LeMahieu* (9th Cir. 2008)
- interscholastic athletic activities
 - e.g., *Blaisden v. W. Va. Sec. Sch. Activities Comm'n* (W.V. 2002)
- school lunch
 - e.g., *C.D. v. New York City Dep't of Educ.* (S.D.N.Y. 2009)

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Parallel developments (cont.):

- disability-based peer harassment
 - e.g., *K.M. v. Hyde Park Cent. Sch. Dist.* (S.D.N.Y. 2005)
- retaliation against parents
 - e.g., *M.M.R.-Z. v. Commw. of Puerto Rico* (1st Cir. 2008)
- statute of limitations
 - e.g., *M.K. v. Sergi* (D. Conn. 2008). *But see P.P. v. W. Chester Area Sch. Dist.* (3d Cir. 2009)
- individual liability
 - e.g., *Alston v. Dist. of Columbia* (D.D.C. 2008)
- standard for money damages
 - e.g., *D.G. v. Somerset Hills Sch. Dist.* (D.N.J. 2008)

Parallel developments (cont.):

- expert witness fees
e.g., *L.T. v. Mansfield Sch. Dist.* (D.N.J. 2009); *Neena S. v. Sch. Dist. of Philadelphia* (E.D. Pa. 2009)
- jury trial
e.g., *K.I. v. Montgomery Pub. Sch.* (M.D. Ala. 2010)

Useful References

- P.A. Zirkel, *Section 504, the ADA and the Schools*.
• two-volume reference updated annually and available from www.lrp.com
- P.A. Zirkel, "A Step-By-Step Process for §504/ADA Eligibility Determinations," *West's Education Law Reporter*, 2009, v. 239, pp. 333-343.
• an article presenting a systematic process for the eligibility process, including thorough legal footnotes
- P.A. Zirkel, "What Does the Law Say?: New Section 504 Student Eligibility Standards," *Teaching Exceptional Children*, May/June 2009, pp. 68-71.
• a practical overview with sample eligibility determination form

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Useful References (cont.)

npl.ly.gov.tw/pdf/6538.pdf

- one of the several sources for the specific statutory language, which on legal databases will be available under these official, alternative citations:
122 Stat. 3554 and 42 U.S.C. § 12101 *et seq.* (2008).
<http://www.ed.gov/about/offices/list/ocr/504faq.html>
 - OCR's answers to frequently asked questions, updated in light of the ADAA
- 74 Fed. Register 48431 (Sept. 23, 2009)
- proposed regulations with planned finalization by April 2010 (compare EEOC and USDE's OCR)

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