Foundation Concepts of §504: A Piece-by-Piece Comparison and Contrast of §504 and IDEA

Presented by
Jose L. Martín, Attorney
Richards Lindsay & Martín, L.L.P.
Austin, Texas
jose@rlmedlaw.com

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Purposes of Each Law

- **§504**—prevents discrimination in programs or agencies receiving federal funds (e.g., public schools)

  29 U.S.C. §794(a) (1973).

- **IDEA**—provides funding for participating States to develop and maintain special education programs.

  20 U.S.C. §1400, et seq. (1975).

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Basic Processes

- **§504 and IDEA in a Nutshell:**

  Child-find (where are they?)
  Evaluation (what does the data say?)
  Eligibility Determination (are they in?)
  Section 504 Plan or IEP (if needed)
  Periodic Reevaluation (at least every 3 yrs)
  Procedural Safeguards (parent rights)
  Non-discrimination obligations

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More §504 Process

1. Referral (eval offered to parent)
2. Parent Consent
3. Data collection (teacher, parent input)
4. Notice of §504 Meeting/Evaluation
5. §504 Meeting/Evaluation
6. Decisions: eligibility, need for §504 Plan
7. If need for plan, develop §504 Plan
8. Distribute to instructional staff
9. Monitor implementation
10. Hold periodic reviews/reevaluations

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Child-Find Requirement

- **§504**—Requires schools to identify all students suspected of having disabilities and need for services who reside within their boundaries

  34 C.F.R. §104.32(a)—A coordinated set of activities (training, notices, referral process, outreach efforts).

- **IDEA**—Same, triggered by suspicion of disability and need for sp ed services

  34 C.F.R. §300.111

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Eligibility Formulations

- **§504**—(1) Physical or mental impairment that (2) substantially limits a major life activity. 34 C.F.R. §104.3(j)(1).

  No list of qualifying disabilities

  2008 ADAAA relaxed the "substantial limitation" portion of definition

- **IDEA**—Student (1) meets eligibility criteria under one of 13 categories, and (2) needs special education services ("specially designed instruction"—34 CFR 300.39(a))

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"Old-School" §504 Major Life Activities

- **Pre-2008 ADAAA Listing (not exhaustive)—34 CFR 104.3(j)(2)(ii):**

  Caring for one's self
  Performing manual tasks
  Walking
  Seeing
  Hearing
  Speaking
  Breathing
  Learning
  Working

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"New-School" §504 Major Life Activities

- **2008 ADAAA added:**

  Eating
  Sleeping
  Lifting
  Standing
  Bending
  Reading
  Concentrating
  Thinking,
  Communicating
  All major body functions/systems

  42 U.S.C. §12101, Sec. 4(a)

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Committee-Based Decision-Making

- **§504**—Committee of persons that includes persons knowledgeable about child, options, data

  34 C.F.R. §104.35(c)

  Will be composed differently depending on student and disability

- **IDEA**—IEP team (ARD committee in TX) with specifically required staff and parent as additional required member

  34 C.F.R. §300.320

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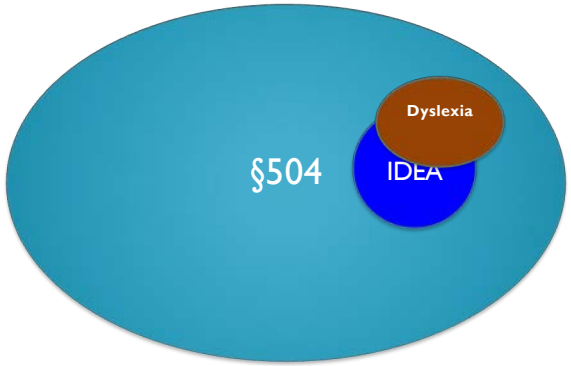
Visual Interplay of 504, Sp Ed, and Dyslexia



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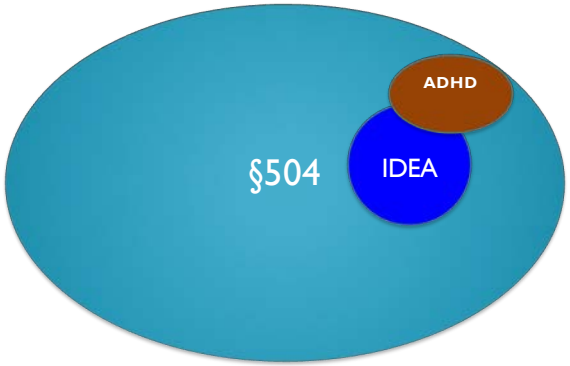
Visual Interplay of 504, Sp Ed, and ADHD



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Common §504 Conditions

- Dyslexia (if not eligible SLD under IDEA)
- Diabetes (virtually always)
- Chronic health conditions
- Severe food or other allergies
- ADD, ADHD
- Psychological conditions (if not IDEA)
- HIV+ status, AIDS
- Fetal Alcohol Syndrome
- Other…

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Eligibility Formulations

- **Disability/Eligibility Spectrum**

  Depending on severity of disability, individual need for services, students with the same disability may be eligible under different laws

  E.g., students with ADHD could qualify under §504 or IDEA depending where they lie in the severity/need spectrum

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Eligibility Formulations

- **Disability/Eligibility Spectrum**

  ADHD Scenario 1—needs only organizational aids, behavioral interventions, extra time, preferential seating, some counseling

  Eligibility? **§504**, since no need for IDEA special education services

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Eligibility Formulations

- **Disability/Eligibility Spectrum**

  ADHD Scenario 2—Significantly below grade level, needs organizational aids, FBA/BSP (significant behavior issues), accommodations, and inclusion sped instructional assistance in two core academic areas

  Eligibility? **IDEA**, as there is a need for IDEA special education services

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Eligibility Formulations

- **Disability/Eligibility Spectrum**

  ADHD Scenario 3—Serious behaviors, co-morbid ODD, need for structured low staff-to-student ratio sp ed instructional setting

  Eligibility? **IDEA**, there is a need for IDEA special education services in a specialized sped setting

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FAPE Formulations

- **§504**—Meeting the needs of eligible students as adequately as those of nondisabled students (34 CFR 104.33(b))
  - An equal educational opportunity standard
  - No guarantee of result or maximization
- **IDEA**—IEP that enables appropriate progress in light of child's circumstances (*Endrew*—2017)(clarification of *Rowley* 1982 FAPE "educational benefit" standard)

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Evaluations

- **IDEA**—Testing-based process with detailed requirements and timelines
  - Written evaluation reports, administration of various test instruments (see 34 CFR 300.301, 304-305)
  - Stricter evaluation requirements, more structured process, more test data—due to funding, potential for segregated placement

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Evaluations

- **§504** evaluations focus on review and consideration of various sources of relevant data (34 CFR 104.35(c))

  A substantially different and more general evaluation model—may or may not include testing

  Data sources mentioned—"aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, adaptive behavior"

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Programs

- **§504**—Focus on accommodations, some services, modifications to policies

  §504 "special education" services (34 CFR 104.33(b))

  Services not limited to low-cost or free services (see *2016 OCR ADHD Resource Guide*, at 27)

  School policies that would harm or discriminate against a student with disabilities may have to be modified (e.g., food in classroom, attendance policies)

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Programs

- **IDEA**—"True" IDEA-funded specially designed instruction, lots of related services, continuum of placements, modified curriculum, accommodations, aids, alternate state assessments.

  See, e.g., 34 C.F.R. §§300.34, 300.39, 300.115, 300.320.

  Key distinguishing features: instruction by IDEA-funded specially certified teachers, potential for modified curriculum, potential for state assessment based on alternate content standards.

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Procedural Safeguards

- **IDEA**—Lots of extensive procedural safeguards: parent membership in IEP teams, independent evaluations, SEA complaints, "big" due process hearings (state-funded), mediation, prior written notice of reasons for decisions, among others…

  See 34 C.F.R. Part 300, Subpart E.

- **§504**—Basic general rights: notice, review of records, local complaint, District-provided due process hearing, review procedure, OCR complaint

  34 C.F.R. §104.36

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Procedural Safeguards

- **§504 Required Notices (with two additional notices, one required by Texas law and another by OCR guidance)**
  - Basic Child-Find Notice/Posting
  - Notice of §504 Evaluation
  - Notice of Parent Rights/Procedural Safeguards
  - Notice of §504 Meeting
  - Notice of Evaluation Results
  - Notice of §504 students with learning difficulties (see TEC §28.0081)
  - Notice of Denial of Referral

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Procedural Safeguards

Notices in Old CESD Paper forms (2019)

Basic Child-Find Notice/Posting (old CESD Form 3)

Notice of §504 Evaluation (Form 5)

Notice of Parent Rights/Procedural Safeguards (6)

Notice of §504 Meeting (9)

Notice of Evaluation Results (11)

Notice of §504 students with learning difficulties (see TEC §28.0081)(21)

Notice of Denial of Referral (19)

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Timelines

- **IDEA**

  Specific timelines from consent to initial evaluation report—60 calendar days or States can set another timeline.

  34 C.F.R. §300.301(c)(1).

  Also, timelines for prior written notice period

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Timelines

- **§504**

  No timelines are set in the regulations for initial evaluations, but OCR evaluates timeliness of evaluations "by reference" to the timelines for IDEA FIEs set forth by the state.

  Meaning, districts should complete §504 evaluation meetings at least within IDEA timeline, after the parent consents, or earlier if the situation does not require that amount of time for evaluation data collection.

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Major Changes to §504 Eligibility in 2008 ADA Amendments Act

1. Expands listing of major life activities

Adding all body functions/systems as individual major life activities makes it easy for students with chronic health conditions to qualify

Most students on health plans may need to be made §504-eligible, according to OCR, so that they have access to §504 process and safeguards (*OCR 2012 Dear Colleague Letter*, at question 13)

42 U.S.C. §12101, at Sec. 4(a).

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2. Impairments that are episodic or in remission qualify students if they would substantially limit a major life activity when in active/full-blown state

Episodic (ups and downs); remission (gone but may come back)

Watch for variable ADHD, seasonal asthma

(Students in remission likely only qualify technically (i.e., eligibility but no §504 plan))

42 U.S.C. §12101, at Sec. 4(a)

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3. Effects of mitigating measures must not be considered in determining eligibility (except for eyeglasses)

This includes any aid that alleviates impact of impairment(meds, compensatory strategies, accommodations, tech, prostheses, RtI services, etc…)

How does a committee evaluate such a student (e.g., a student on ADHD medication, who is doing well)?...

Only ***technical*** eligibility if no need for accommodations (no 504 services plan)

42 U.S.C. §12101, at Sec. 4(a)

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3. Effects of mitigating measures must not be considered in determining eligibility (except for eyeglasses)

Thus, for ADHD child on meds, eligibility question for 504 committee is:

Would ADHD substantially limit student's concentration, thinking, or brain function if he were not on meds?

See *2015 OCR Dear Colleague Letter and Q & A*, 67 IDELR 189, at question 21.

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3. Effects of mitigating measures must not be considered in determining eligibility (except for eyeglasses)

Key Point—Mitigating measures must not be taken into account at the eligibility stage, but they are relevant in determining need for *services*

A student's voluntary use of mitigating measures may decrease the need for §504 services in the school setting.

Why not eyeglasses? Unexplained in the law, but likely due to fact majority of people need them.

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4. Substantial limitation standard is relaxed

No longer a "significant restriction "standard." *OCR 2012 Dear Colleague Letter and Q&A*, at question 4; ADAAA, at Sec. 2.

Congress does not want too much time spent analyzing this eligibility requirement (ADAAA, at Sec. 2).

Rejects the "demanding standard" line of Supreme Court cases (*See* ADAAA, Sec. 2)

Probable modern definition—Impairment makes major life activity more difficult or burdensome than for average population of same age.

42 U.S.C. §12101, at Sec.

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5. Philosophy of "maximum eligibility"

Definition of disability shall be interpreted in favor of "broad coverage under this Act, to the maximum extent permitted by the terms of the Act." 42 U.S.C. §12101 at §4(a)(4)(A).

"Students who, in the past, may not have been determined to have a disability under Section 504 and [ADA] may now in fact be found to have a disability under those laws." *OCR 2012 Dear Colleague Letter and Q&A*, at question 4.

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Modern §504 Eligibility Formulation

1. **Does student have physical or mental impairment?**
1. **If so, does impairment substantially limit a major life activity (with relaxed standard and expanded list of activities)?**

If answers to both are "yes," then student is §504-eligible

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Modern §504 Eligibility Formulation

3. **Does student need accommodations, services, or modifications to policies in order to receive a FAPE?**

   A "needs-based" analysis—If "yes," then student is §504-eligible **and** entitled to a §504 Services Plan that confers FAPE (meets the need of the §504 student as adequately as the needs of nondisabled peers)

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"Technical" Eligibility

- OCR envisions situations where a student has an impairment that substantially limits a major life activity, but student needs no §504 plan for FAPE (see *2016 OCR ADHD Resource Guide*, at p. 13; *2012 OCR Dear Colleague Letter*, at question 11)

  These students are eligible §504 students in the sense that they are legally protected from disability-based discrimination (e.g., disability harassment, discriminatory exclusion or denial of benefits in education programs, discriminatory exclusion from extracurriculars/nonacademic services, and possibly, MDR discipline protection)

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"Technical" Eligibility

- Thus, accommodations and services are provided only on the basis of **actual need**

  "Neither the Amendments Act nor Section 504 obligates a school district to provide aids or services that the student does not need." *2012 OCR Dear Colleague Letter*, at question 11.

  But, a student with a disability that has no need for services "remains protected by the general nondiscrimination protections of Section 504."

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Impact on Academics Not Needed

- While some impairments may limit the major life activity of "learning," impairments can limit other life activities and support eligibility

  "Nothing in the ADA or Section 504 limits coverage or protection to those whose impairments concern learning." *2012 OCR Dear Colleague Letter and Q & A*, at question 7.

  No "educational need" requirement for §504 eligibility; only limitation on *any* major life activity

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Cases of Virtually Automatic Eligibility

- OCR has indicated that some conditions will virtually always result in §504 eligibility:

  "A school district should not need or require extensive documentation or analysis to determine that a child with **diabetes, epilepsy, bipolar disorder, or autism** has a disability under Section 504 and Title II." *2012 DCL*, Question 4, 112 LRP 3621 (OCR 2012)

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Pregnancy?

- EEOC's commentary to the ADA regulations states:

  "Although **pregnancy itself is not an impairment**, and therefore is not a disability, a pregnancy-related impairment that substantially limits a major life activity is a disability under the first prong of the definition." 76 FED. REG. 16,980, (March 25, 2011).

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RtI Issues

- For both §504 and IDEA, USDOE takes position that while RtI can be beneficial, it should not be implemented in a way that delays or denies child-find and evaluations to students with suspected disabilities

  See *Memorandum to State Directors of Special Education* (OSEP—January 21, 2011); *OCR Resource Guide on ADHD*, at p. 15-17.

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RtI Issues

- The concern is particularly acute when students *known* to have disabilities are required to participate in RtI programs prior to referral

  See, e.g., *Indian River County (FL) Sch. Dist.*, 11 LRP 70055 (OCR 2011); *Bristol-Warren (RI) Regional Sch. Dist.*, 56 IDELR 303 (OCR 2010); *Harrison (CO) Sch. Dist. Two*, 57 IDELR 295 (OCR 2011); *Forest Hills (OH) Local Sch. Dist.* 111 LRP 70117 (OCR 2011)("diabetes RtI")

  RtI is most safely applied with students with (1) no known disability that (2) exhibit academic difficulties

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- **Per OCR, when do districts tend to get into child-find problems with RtI?**
  1. Rigidly insisting on implementing RtI in all cases (and all tiers) prior to referral
  2. Categorically requiring that data from RtI must be collected and incorporated as a necessary element of an evaluation
  3. Overly lengthy implementation of multi-tiered system of interventions without either success or action.

See *OCR Resource Guide on ADHD*, at p. 16-17.

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- **How much data is needed to find an impairment?**

The committee must determine whether it has sufficient information, from a variety of sources, to determine (from an educational perspective) whether the student has an impairment.

"It is unacceptable to rely on presumptions and stereotypes regarding persons with disabilities." *2015 OCR Dear Colleague Letter and Q & A*, 67 IDELR 189, at question 19.

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Tricky Areas of Intersection

- **Students that are evaluated for sp ed, but do not qualify, or that are dismissed from sp ed**

  Potential candidates for §504 referral, as they may have disabilities and needs, even if not IDEA-eligible.

  Misconception—these students are automatically IDEA-eligible, as sort of a "consolation prize" to parents. See, e.g., *Letter to Veir,* 20 IDELR 864 at Question 4 (OCR 1993).

  These students should be *considered* for §504 referral.

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- **Students that are evaluated for sp ed, but do not qualify, or that are dismissed from sp ed**

  Factors? IEP team recommendations, remaining diagnoses, performance, IEP accommodations, evaluation results, parent input.

  If in doubt, schools may want to offer parents a §504 evaluation.

  Schools should document child-find consideration, even if result is decision not to conduct §504 referral.

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- **Students that are evaluated for sp ed, but do not qualify, or that are dismissed from sp ed**

  At times, a student evaluated under IDEA for a suspected SLD may not qualify for sp ed, but may have test scores suggesting possible dyslexia (e.g, moderate weaknesses in word reading, phonemic awareness, phonological processing).

  In these situations, §504 evaluation should be offered to parent, student likely to qualify under §504 (since dyslexia limits reading, and reading is a modern major life activity)

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- **Students that are evaluated for sp ed, but do not qualify, or that are dismissed from sp ed**

  ***Challenging situation*—Students found to have low-average IQ and globally weak academic functioning**

  "Flat line" achievement score profile (low in all academic areas, global academic deficits)

  Thus, not SLD (requires profile suggesting a pattern of strengths and weaknesses).

  Is there a mental impairment?

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- **Students that are evaluated for sp ed, but do not qualify, or that are dismissed from sp ed**

  ***Challenging situation*—Students found to have low IQ and global deficits**

  If FSIQ is in average range (even low average), there is no cognitive impairment.

  If IQ is below average ranges, "borderline intellectual functioning" or "below average intellectually functioning" could be the mental impairment.

  Note—See, e.g., *Baltimore (MD) City Pub. Schs.*, 108 IDELR 11741 (OCR 2007)(borderline intellectual functioning is a mental impairment).

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- **Students that are evaluated for sp ed, but do not qualify, or that are dismissed from sp ed**

  ***Challenging situation*—Students found to have low IQ and global deficits**

  No disability. But don't these students need services? Aren't they substantially limited?

  For §504 eligibility, first, there must be a physical or mental impairment, **before** looking at substantial limitation

  §504 not intended to address the needs of nondisabled students with academic deficits, but these students pose a quandary for schools

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- **Students that are evaluated for sp ed, but do not qualify, or that are dismissed from sp ed**

  ***Challenging situation*—Students found to have low IQ and global deficits**

  All schools have a population of nondisabled students with academic deficits/difficulties (likely due to non-disability reasons)

  IDEA and §504 are not for them—needs must be addressed through regular ed programs

  Deficit does not necessarily equal disability

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Discipline

- **504**—Limits on excessive short-term disciplinary removals, manifestation determination review (MDR) requirement for disciplinary changes in placement (long-term removals)

  Short-term removals—≤10 consecutive school days

  Long-term removals—>10 consecutive school days

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Discipline

- **504**

  10 'free' short-term removal days *safely* available per school year

  Accumulations beyond a total of 10 may be seen as ***"patterns of exclusion"*** amounting to a collective disciplinary change in placement (depending on amount of total removals, proximity to one another, length of each)

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Discipline

- **504**

  MDR requirement prevents discriminatory disciplinary exclusions

  Constitute a §504 *reevaluation* (various sources of data needed to conduct MDR)

  Sources of doctrines are guidance documents issued by OCR—See *OCR Staff Memorandum*, 16 IDELR 491 (OCR 1989); *OCR Memorandum*, 307 IDELR 7 (OCR 1989).

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Discipline

- **IDEA**—Same limits on short-term removals (34 CFR 300.530(b), 300.536) and long-term removals (34 CFR 300.530(e), (c))

  1997 IDEA discipline provisions originated from §504 USDOE guidance

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Discipline

- **§504**—Different treatment for students engaging in drug or alcohol offenses:

  If students commit a drugs/alcohol offense, and are determined to be a current user of drug/alcohol, then they lose (1) right to MDR, and (2) right to §504 DP hearing.

  See 29 U.S.C. §706(20)(C)(iv).

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Non-FAPE Activities

- **§504**—Equal opportunity to access and participate in extracurricular and non-academic activities (34 CFR 104.37)

  Including *reasonable accommodations* needed for participation (lower than regular FAPE accommodation standard)

- **IDEA**—Same (to mirror §504 rights, except accommodations must be made part of IEP)

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Non-FAPE Activities

- **Aftercare Programs**

  Subject to 34 CFR 104.37 equal opportunity to participate standard

  Disabled students cannot be excluded with admission policies that discriminate on basis of disability (see, e.g., *McAllen ISD*, 48 IDELR 142 (OCR 2006)(district violated §504 in refusing to admit two students with disabilities who were not toilet-trained into afterschool program)

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Non-FAPE Activities

- **Aftercare Programs**

  Students cannot be excluded due to need for additional supervision or behavior strategies

  See, e.g., *Ripon (CA) USD*, 46 IDELR 82 (OCR 2006)(district violated §504 in refusing behavior interventions for child with behavior issues in afterschool program); *Murrieta Valley (CA) USD*, 105 LRP 34909 (OCR 2005)(district violated §504 in failing to train staff on behavior interventions, since student was terminated from aftercare program due to behavior)

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Non-FAPE Activities

- **Aftercare Programs**

  If the program is associated with the LEA, the LEA is responsible for ensuring its compliance with 34 CFR 104.37

  Thus, whether program is run by contract with outside provider is irrelevant to LEA's §504 duty

  LEA must ensure non-discrimination in access, and provision of reasonable accommodations needed to participate

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Do Students "Regarded As" Disabled Get 504 Plans?

- Person with a disability under §504 means "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 such an impairment."

See 34 C.F.R. §104.3(j)(1)

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"Regarded As" Students

Key Distinction—"Record of" and "regarded as" students are protected against disability discrimination, but ***not*** entitled to evaluation, §504 services, or FAPE (i.e., record or perception of disability cannot lead to §504 services)

See *2012 OCR Dear Colleague Letter and Q & A*, 58 IDELR 79, at question 4; *2015 OCR Dear Colleague Letter*, 67 IDELR 189, at question 37.

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"Regarded As" Students

In public schools, "unless a student actually has an impairment that substantially limits a major life activity, the mere fact that a student has a "record of" or is "regarded as" disabled is insufficient to trigger those Section 504 protections that require the provision of a free appropriate public education (FAPE)."

2015 OCR Dear Colleague Letter, 67 IDELR 189, at question 37.

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Only students with a current impairment limiting major life activities can obtain §504 services

No need to evaluate such students

And, plans are provided to students with active impairments only if needed to have an equal opportunity to receive an education

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Why are they included in the definition of "person with a disability"?

To protect them against discrimination, exclusion, or denial of benefits based on their records or misperceptions of disability

Congress wanted to eradicate all forms of disability-based discrimination in federally funded programs

Remember, §504 is not primarily about FAPE; it's about non-discrimination (thus, FAPE is equal opportunity to receive education)

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Examples?

A student who had bone cancer in a leg, but was cured as a child, cannot be excluded from trying out for football based on having had the cancer at an early age ("record of")

A person cannot be fired from their teaching position because they are misperceived as having contagious tuberculosis ("regarded as")

Remember, §504 is not *primarily* about FAPE; it's about non-discrimination in educational program (thus, FAPE is equal opportunity to receive education)

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Can §504 Students Receive IDEA-type related services (e.g., OT, PT)?

- §504 FAPE definition includes the term "related aids and services."

  See 34 C.F.R. §104.33(b)(1)

- Need for related services is determined by §504 committee (*Fairfax Co. (VA) Pub. Schs.*, 115 LRP 3293 (OCR 2014))
- Common §504 related services include nursing services, health services, counseling, dyslexia services

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- OCR's longstanding policy is that if a §504 student needs any "supplementary" or related service in order to receive FAPE, the school must provide it

  See, e.g., Mesa (AZ) Unified Sch. Dist. No. 4, 312 IDELR 103 (OCR 1988); *Mesa (AZ) Unified Sch. Dist. No. 4*, 352 IDELR 562 (OCR 1987).

- OCR has stated that a student "is entitled to the provision of *any services* the placement team decides are appropriate to meet their individual educational needs, regardless of cost or administrative burden, *and especially where such services have been provided to IDEA-eligible students in the past.* Those services can be as varied and as comprehensive as necessary to meet a student's need." See *OCR ADHD Resource Guide*, at p. 27 (emphasis added).

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- Thus, if a §504 student needs OT services, for example, in order to receive a FAPE, the school must provide it

  And, must do so without accessing special education funding (federal or state), which is designated for use with IDEA-eligible students only.

  Options? Contract services, split funding of a special education therapist

  Key Inquiry—Is the related service really needed for progress at school? Could OT-related accommodations suggested by the OT do the job? Is the need for services medical (to regain full function), but not educational (to participate and have opportunity for regular education)

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- Thus, if a §504 student needs OT services, for example, in order to receive a FAPE, the school must provide it

  Since students that really need IDEA-type related services will generally qualify under IDEA, the situations under which §504-only students will need those services might not be common.

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Can students with health plans qualify under §504?

- Why not deal with students with chronic health conditions my means of informal health plans?

  OCR would consider that to be a circumvention of the student's potential §504 rights to evaluation, team determination, right to FAPE, and right to procedural safeguards, even if the health plan is effective.

  See 2012 OCR Dear Colleague Letter, at Question 13

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Can students with health plans qualify under §504?

- **Think eligibility:**

  Students with chronic health impairments have "physical impairments"

  And, these students also need services—whatever services and accommodations are in the health plans

  Thus, the standard for §504 referral, and eligibility, are likely met

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Can students with health plans qualify under §504?

- To OCR, the legal protections of the §504 status are as important as the services and accommodations in §504 plans

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Can a Sp Ed Student also Have a §504 Plan?

- "If a student is eligible for services under both the IDEA and Section 504, must a school district develop both an individualized education program (IEP) under the IDEA and a Section 504 plan under Section 504?"

  "No. If a student is eligible under IDEA, he or she must have an IEP. Under the Section 504 regulations, one way to meet Section 504 requirements for a free appropriate public education is to implement an IEP." *OCR 2015 Dear Colleague Letter*, at Question 36.

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Can a Sp Ed Student also Have a §504 Plan?

- IDEA regulations state that sp ed students' IEPs must address the needs that arise from their disability and "to be involved in and make progress in the general curriculum and participate in non-academic services.

  See 34 C.F.R. §300.320(a)(4)

  Thus, IEPs under IDEA must address any services the student may need to participate in school and learn, even if the need is not directly related to eligibility category (IEP teams are responsible for protecting students' §504 nondiscrimination rights).

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Can a Sp Ed Student also Have a §504 Plan?

- Once a student qualifies under IDEA, the sp ed process must address all the child's needs that must be addressed for a student to receive a FAPE

  Examples? Speech-impaired student with diabetes (which might not qualify the student for sp ed separately), needs health services to attend and participate in school

  Who directs those services? The student's IEP team

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Can a Sp Ed Student also Have a §504 Plan?

- Answer makes sense—A two-committee structure would be cumbersome and lead to potential conflicting provisions

  Another example? Student is in sp ed for OHI (due to ADHD), but is exhibiting difficulties with reading

  Who determines if reading should be evaluated and addressed with services? The student's IEP team

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Can a §504 committee modify a school policy?

- Yes. If application of a local policy would work discrimination on the basis of disability or prevent receipt of FAPE, it must be modified.

  Even if a student does not need §504 services, a school "must still consider whether the student is entitled to a reasonable modification of policies, practices, or procedures."

  "The extent of a school district's obligation to make reasonable modifications is fact-dependent and requires a case-by-case analysis" (See *OCR Dear Colleague Letter*, at question 10, 58 IDELR 79 (OCR 2012)

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Can a §504 committee modify a school policy?

- OCR provides examples:

  Allowing a wheelchair-bound student to use a teacher elevator (regular policy prohibits student use).

  Allowing a student who had a heart condition and surgery to receive credit despite excessive absences that would normally preclude credit under local policy.

  Another example—Student with diabetes allowed frequent snacks in class, although campus prohibits eating in classrooms

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Can a §504 committee modify a school policy?

- With respect to modification of attendance policies:

  §504 committee must ensure excessive absences are legitimately related to disability.

  To do so, the committee must ensure parents submit all excuses and drs' notes required by policy.

  And, student must demonstrate mastery of curriculum (with accommodations, plan for makeup work)

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- Failure to modify a policy can mean discrimination on the basis of disability:

  If a student has submitted all necessary excuses to justify that absences are related to disability, and the student has submitted sufficient work to demonstrate mastery, denial of credit or retention would be discriminatory on the basis of disability, and a violation of §504.

  §504 committees can modify the policy on their own or work with local attendance committees to do so.

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