

**SECTION
504**

**THE 1973
REHABILITATION ACT**

**Referral, Evaluation and
Placement**

**Avoiding OCR Investigations
and Due Process Hearings**

2008-2009

James F. McKethan, Ed. D.

Equal Opportunity . . .

**SECTION
504**

Lau v Nichols

*Nothing is more unequal than
the equal treatment of
unequal people . . .*

Author Unknown

Section 504 States . . .

**SECTION
504**

29 USC § 794

No otherwise qualified individual with a disability . . . Shall, solely by reason of his or her handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.

This is the Law!!!!

Discrimination

**SECTION
504**

34 CFR §104.4

Discrimination is the exclusion from participation in, the denial of benefits of, any program or activity receiving or benefiting from federal financial assistance. Students may not be denied participation in or be denied benefit from services that are afforded nondisabled students.

Equal Education Opportunities

SECTION
504

34 CFR §104.33(b)(1)(i)

An appropriate education is a program designed to meet the individual educational needs of individuals with disabilities as adequately as the needs of nondisabled students are met.

Free Appropriate Public Education!!!!

The School District's Obligations

SECTION
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34 CFR §104.33(b)(1)



Appropriate

- Regular education, or
- Special education and related aids and services

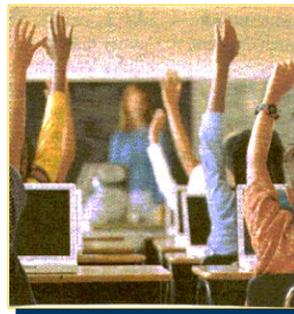
How far do school officials need to go to comply with this requirement?

Special Education - Section 504

SECTION
504

[23 IDELR 504 (OCR: Letter to McKethan, August, 1994)]

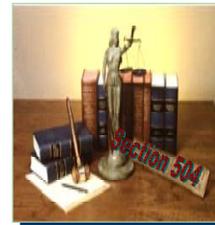
“Special education” under the civil rights statutes and regulations is a decision for the local education agency to make in conformance with whatever other local, state, and Federal laws, i.e., the IDEA, etc., apply.



Relationships To Other Laws

SECTION
504

- Title VI of the Civil Rights Act of 1964
- Title IX of the 1972 Educational Amendments
- Section 504 of the 1973 Rehabilitation Act
- The Education for All Handicapped Children's Act (PL 94-142)
- Americans with Disabilities Act of 1990
- 42 U.S.C. Chapter 21 Section 1983
- 20 U.S.C. Chapter 70 – Elementary and Secondary Education Act
- ADA Amendments Act of 2008



ADA Amendments Act of 2008

SECTION 504

Effective January 1, 2009

- Reverses effect of Supreme Court decisions
- Envisions a broad umbrella of coverage
- Lowers bar for showing that an impairment substantially limits
- Prohibits consideration of mitigating measures
- Requires assessment in active state for impairments in remission or episodic
- Expands list of major life activities
- Clarifies third prong, "regarded as," definition of person with a disability
- Makes clear that reasonable accommodations are not required for persons regarded as disabled
- Makes clear that minor and transitory impairments are not protected disabilities



IDEA and Section 504 Comparison

SECTION 504

IDEA

SECTION 504

- | | |
|---|---|
| <ul style="list-style-type: none"> • Funding statute • Discrete categories of disabilities • Some Section 504 children are not covered under IDEA • Develop IEP's reasonably calculated to convey educational benefit | <ul style="list-style-type: none"> • Non-funding statute • Broadly defines disabled children • All IDEA children are covered by Section 504 • Equal opportunity statute: meet the needs of disabled students as adequately as the needs of non-disabled are met |
|---|---|



IDEA and Section 504 Comparison

SECTION 504

IDEA

SECTION 504

- | | |
|--|--|
| <ul style="list-style-type: none"> • Consent for Evaluation • Evaluations • LRE • IEP Team • Special Education • Culture, Economic & Environment • Discipline – Manifestation • Procedural Due Process | <ul style="list-style-type: none"> • Consent for Evaluation • Evaluations • LRE • Placement Team • Special Education • Culture, Economic & Environment • Discipline-Manifestation • Procedural Due Process |
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504 Hazards & Catch 22's

SECTION 504

- **Murky procedures**
- **Over-identification**
 - ▶ Conversations about 504 plans before eligibility
 - ▶ Increased pressure due to accountability
 - ▶ Demands from parents
 - ▶ The discipline dilemma
 - ▶ Insurance companies
 - ▶ Creating a rights entitlement
- **Failure to identify children**
 - ▶ The discipline dilemma
 - ▶ Deprivation of services/rights
- **Providing 504 plans in lieu IEP'S**
- **Not following procedures**
- **Refusing to implement EEOP's**

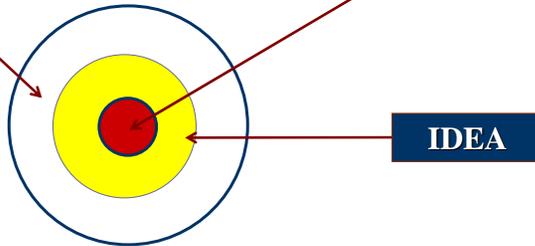


Students At Risk for Failure

SECTION 504

Non Disabled Students

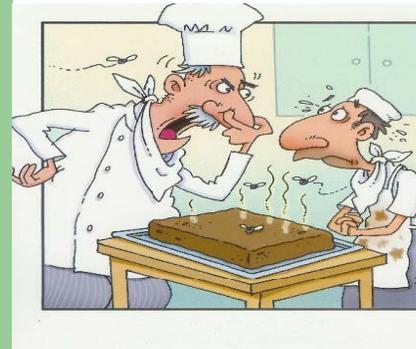
Section 504 Students



Who are the “pure” Section 504 students?

Understand Section 504 Requirements and Your Local Procedures

SECTION 504



No, you idiot...
I said they wanted a
sheet cake!!!!!!

Administration & Enforcement

SECTION 504



- ✓ Section 504 of the Rehabilitation Act of 1973 is administrated by the United States Department of Education Office for Civil Rights.
- ✓ State departments of education have no enforcement authority for issues arising under Section 504. Many do not provide technical assistance in 504 matters.

General Notice

SECTION 504

34 CFR §104.8

- School districts shall provide notices of discrimination in admission or access to, treatment or employment in, its programs and activities and shall
- Identify the official responsible for ensuring compliance with Section 504

Grievance Procedures

SECTION 504

34 CFR §104.7

School districts shall:

- Designate at least one person to coordinate its compliance
- Adopt grievance procedures that incorporate appropriate due process standards and that provide for the prompt and equitable resolution of complaints alleging discrimination

Procedural Safeguards

SECTION 504

34 CFR §104.36

A hearing has been requested, now what?



Procedural Safeguards

SECTION 504

34 CFR §104.36

- § Notice regarding identification evaluation or educational placement
- § Opportunity to examine relevant records
- § Impartial hearing
 - opportunity for participation by parents
 - representation by legal counsel
 - a review procedure
- § Compliance with IDEA procedures is one means of meeting the 504 requirement

Minimize Conflict with Parents

SECTION 504

- Act on parental request for evaluations
- Develop a parent-friendly brochure outlining the step-by-step referral process
- Distribute brochure to parents and local medical and mental health office
- Have a Section 504 forum for parents, community service providers
- Be knowledgeable of the student's impairment
- Implement 504 accommodations

Child Find

SECTION
504

34 CFR §104.32

A recipient that operates a public elementary or secondary education program shall annually:

- Undertake to identify and locate every qualified handicapped person residing in the recipient's jurisdiction who is not receiving a public education; and
- Take appropriate steps to notify handicapped persons and their parents or guardians of the recipient's duty under this subpart.

When to Consider a Referral

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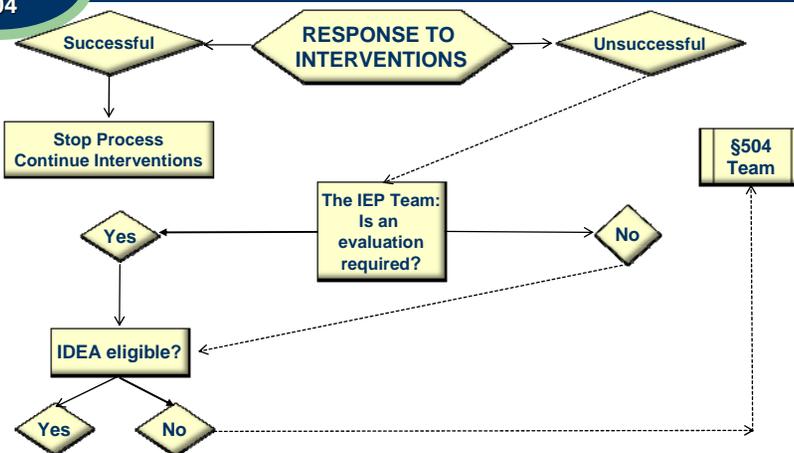
Consider a referral when:

- A parent makes a request for an evaluation or for a 504 plan
- Suspension or expulsion is being considered
- Academic performance is lower than expected
- A student is evaluated and is not IDEA eligible
- Student exhibits an on-going medical problem
- Students enroll with a 504 plan from another district
- An impairment of any kind is suspected
- A student is chronically absent due to medical/health issues
- A student receives medication on school grounds

The events listed are occasions when the existence of a disability should be considered and do not imply that the student is 504 eligible:

A Referral Process

SECTION
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Not IDEA Eligible?

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504

Section 504 eligibility is not a consolation prize for students who do not qualify for special education

Perry Zirkel, Lehigh University

The 504 Eligibility Standard

SECTION
504

...eligibility under 504 is a strict standard. When a school improperly identifies a student . . . It not only mislabels the student but it opens the door to a host of procedural obligations and potential legal liabilities

Jim Wash, "Compliance Keys,"
Section 504 Compliance Advisor, April 2007

Handicapped Persons

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504

34 CFR §104.3(j)

"Handicapped person." (1) "Handicapped persons" 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.

OCR: Staff Memo, 1992, 19 IDELR 894
ADA Amendment Act of 2008

Mental and Physical Impairments

SECTION
504

34 CFR §104.3 (j)(2)(i)

any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine; or

any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

Mental and Physical Impairments

SECTION
504

34 CFR §104.3 (j)(2)(i)

What About the following?

- Non Verbal Learning Disorder
- Central Auditory Processing Disorder
- Pregnancy
- Scotopic Sensitivity Syndrome
- Obesity
- Slow Learners
- DSMIV-R conditions
- Alcoholism
- Drug Addiction

Substantial Limitation

SECTION 504

29 CFR 1630.2(J)(2)

Significantly maybe replace with:

- To a large extent
- Considerably
- Greatly
- Noticeably

Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner or duration under which the average person in the general population can perform the same major life activity.

Major Life Activities

SECTION 504

34 CFR §104.3(j)(2)(ii) amended by the ADAAA of 2008

"Major life activities" means functions *such as* caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

The ADAAA added: reading, concentrating, thinking sleeping, eating lifting , bending and communicating and the operation of a major bodily function such as the immune system, normal cell growth, digestive, bowel, bladder functions

What about testing taking and controlling behavior?

Cultural, Environmental and Economic Factors

SECTION 504

34 CFR §104 Appendix A Analysis of Final Regulation

"The first of the three parts of the definition (of a disabled person) specifies that only physical and mental disabilities are included. Thus, environmental, cultural, and economic disadvantage are not themselves covered."

- Homeless
- Migrant
- ESL
- Poverty
- Cultural factors
- Attendance Problems
- Transiency
- Divorce
- Death of a family member and other family crises.
- Military deployments

Mitigating Measures

SECTION 504

- Many students who are on the 504 team are taking prescribed medication to mitigate the effects of the impairment.
- Students who experience a substantial limitation in any major life activity and a mitigating measure does not meet the definition of a person with a disability and would not be entitled to FAPE under Section 504

The corrective effects of mitigating measures cannot be considered in determining whether or not a person is disabled.

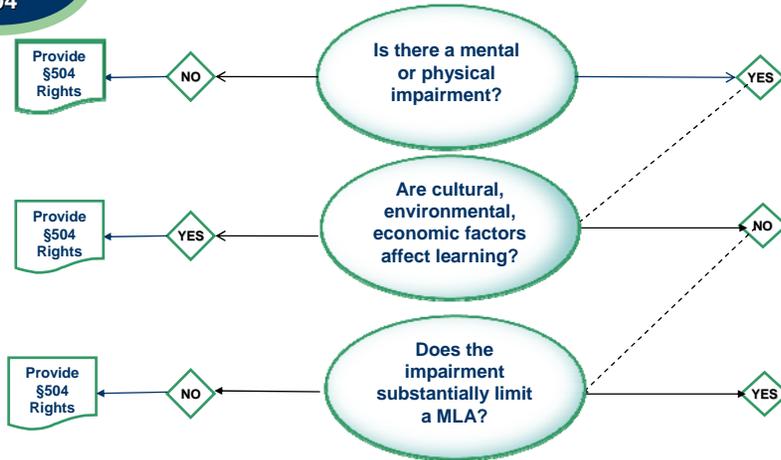
ADA Amendments Act of 2008

Eligibility Process

Assumption: SST provided interventions; the IEP team conducted an evaluation before referring for an EEO and student is not IDEA eligible

SECTION 504

Information From A Variety Of Sources - 34 CFR 104.35(c)



IEP and Section 504: Both at the Same Time?

SECTION 504

Letter to Wilson, OSEP: 12-15-04

... any accommodations deemed necessary for the student to receive a free appropriate public education under IDEA must be included on the child's individualized education program (IEP) developed in accordance with 34 CFR §§300.340-300.350. This is so, regardless of whether IDEA-eligible students are also covered by Section 504 of the Rehabilitation Act of 1973 (Section 504) and Title II of the Americans with Disabilities Act of 1990 (Title II).

The Accommodation Plan

SECTION 504

34 CFR 104.35(c)

- No requirement, per se, for a written plan
- Evaluation information
 - ✓ Mental or physical impairment.
 - ✓ Student performance information
- Eligibility decision
 - ✓ Cultural economic a & environmental factors
 - ✓ Mitigating factors
 - ✓ Substantial Limitation
- Accommodations
- Placement team
- Parental rights

Assemble The Placement Team

SECTION 504

34 CFR §104.35(c)(3)



Ensure that the placement decision is made by a group of persons:

- ✓ including persons knowledgeable about the child,
- ✓ the meaning of the evaluation data, and
- ✓ knowledgeable of placement options.

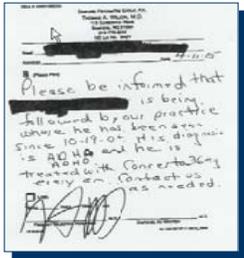
Acquire Information



SECTION
504

34 CFR 104.35(c)

In interpreting evaluation data and in making placement decisions, a recipient shall:



- draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior,
- establish procedures to ensure that information obtained from all such sources is documented and carefully considered.

Evaluation and Placement

SECTION
504

34 CFR §104.35 (b)

- Evaluation materials are validated for their intended use.
- Evaluations are administered in conformance with instructions provided by their producer.
- Evaluation materials are tailored to *assess specific areas* of educational need.
- Tests administration must ensure that test results accurately reflect the student's aptitude or achievement level, etc., rather than sensory deficits, e.g., impaired sensory, manual, or speaking skills . . .

ADAAA 2008 & Evaluations Planning Questions

SECTION
504

- What evaluation information will you use to assess reading, thinking, sleeping, and concentrating, etc.?
- Where will funds come from to pay for evaluations?
- How do you determine whether MLA performance is the result of a mitigating measure?
- Is it permissible to use the special education evaluation system for Section 504 evaluations?
- Is the special education evaluation system an option?

Identify the Impairment

SECTION
504

34 CFR §104.3(j)

- Physical impairment means any physiological disorder or condition, cosmetic or anatomical loss.
- Mental impairment means any mental or psychological disorder.

What information do your local 504 procedures require in order to document the disability?

Verify Substantial Limitation

SECTION 504

- Scholastic Record
- Report cards
- Work samples
- State assessment results
- Psychological evaluation
- Norm referenced educational assessments
- Curriculum-based assessment
- Structured academic & behavioral interventions
- Social and health history
- Information provided by parent

Evaluation materials must demonstrate that the student's academic and/or behavioral performance is less than that of the average, nondisabled student

Determine Eligibility

SECTION 504

- To be eligible under Section 504, a student must have an identified physical or mental impairment.
- The impairment must result in a substantial limitation in learning.
- The substantial limitations in learning must be documented with evaluation data and student records indicating the student's learning performance is less than the average non-handicapped student.
- Questions on the EEOP help to assess the degree to which the referred student's performs differently than non-handicapped students

Writing Accommodations

SECTION 504

34 CFR 104.35 (b)(1)(i)

- Neither OCR nor regulations prescribe format for accommodations, e.g. syntax, measurability, etc.
- Neither OCR nor regulations say whether accommodations are called special education or related services, etc.
- What about "reasonable" accommodations under 504?

Criterion for Appropriate Accommodations

SECTION 504

34 CFR 104.33(b)(1)

- Designed to reflect specific areas in which a substantial limitation is documented.
- Designed to meet individual educational needs of handicapped persons as adequately as the needs of nondisabled students are met.

School & Classroom Performance

Informal Evaluation Data

SECTION
504

- Does the student require more time for homework and in-school assignments?
- Are modified assignments necessary? Subject matter, types of assignments, testing, etc.?
- Are there Instructional and social behaviors that need to be addressed?
- Does the student have substantial difficulty organizing, planning and completing assignments?
- Is the student chronically absent? For what reasons?
- Is there a steady increase in disciplinary incidents?
- Does the student require specialized health management? If so, what intervention and at what frequency?

Guidelines for Accommodations

SECTION
504

34 CFR 104.33(b)(1)

- Make sure the proposed accommodation is supported by evaluation data
- Write clear accommodations, leave no room for interpretation
- Avoid open-ended accommodations
- Avoid accommodations that give teachers discretion
- Ensure teachers understand the accommodations
- Clarify terminology, e.g., preferential seating, extended time, etc.

Sample Accommodations

SECTION
504

OSERS/OCR Memo: 9-21-91

- A structured learning environment
- Repeating and simplifying instructions
- Visuals to supplement verbal instructions
- Behavioral management strategies
- Modifying test delivery
- Tape recorders and other A/V equipment
- Modified textbooks, workbooks, etc
- One-on-one tutorials
- Classroom aides
- Classroom note takers
- Case
- Modifications to non-academics
- Tailored homework assignments
- Consulting with special education
- Reducing class size

This list is not exhaustive.

Appropriate Accommodations?

SECTION
504

- Extra set of textbooks to be kept at home.
- Student allowed to retrieve books, after the bell rings
- Familiarize teachers with accommodations
- Familiarize teachers about how disability affects behavior, emotional stability, self-esteem, and scholastic achievement.
- Notify parent immediately if an assignment is not turned.
- The parent will . . .
- The student will . . .
- Send messages home in a sealed envelope.
- Allow late assignments without penalty of lower grade.
- Do not provide consequences for violation of the school conduct code
- Guidance on using a planner on a daily basis.

Section 504 Re-Evaluation

SECTION
504

34 CFR §104.35 (C)

- The District must establish re-evaluation procedures
- The re-evaluation must be conducted on a periodic basis
- A reevaluation procedures consistent with the special education reevaluation requirement is one way of meeting Section 504 requirements.
- Conduct a reevaluation prior to any significant change of placement

Discipline - Manifestation

SECTION
504

OCR: Long-term Suspension or Expulsion, 1988

- A handicapped student may not be suspended for more than ten days w/o a manifestation hearing, e.g., determination that misconduct is not caused by the disability
- The determination is made by the Section 504 team
- The manifestation determination is a re-evaluation
- Must take into account recent evaluation data that provides an understanding of the student's current behavior

Discipline

SECTION
504

Manifestation Determination

- Is the student accommodation plan appropriate?
- Is the current placement appropriate?
- Was the student accommodation plan implemented?
- Did the disability impair the student's understanding the consequences of the behavior?
- Did the impairment limit the student's ability to control the behavior?

Discipline

SECTION
504

- The 504 team shall modify the current educational placement when the misconduct is directly caused by the disability, if appropriate, an alternative educational placement.
- The principal may initiate normal disciplinary procedures when the misconduct is not directly caused by the disability.

Discipline and Substance Abuse

SECTION
504

OCR: Staff Memo, 1991, 17 IDELR 609

- Current drug users are excluded from the definition of handicapped under Section 504 & the ADA
- Current drug and alcohol users are subject to the same disciplinary action to the extent applied to non handicapped students for similar

You Should Have Known!

SECTION
504

34 CFR Section 300.534

Special education discipline restrictions apply to regular education students if district "had knowledge" before the student's misconduct that the student was disabled:

- Parent has expressed concern in writing that student is in need of special education services.
- Parent has requested an evaluation .
- Teacher or other personnel have expressed concern about student's behavior or performance as needing special education.

Gee! How was I supposed to know?



Section 504 and ADAAA 08 Where To From Here?

SECTION
504

- Eligibility based on mitigating measures (except for eye glasses and contact lenses) - eliminated.
- Major life activities - expanded.
- Toyota criterion – eliminated.
- More comprehensive evaluations.
 - Reading, concentration, sleeping, communication – what types of evaluation information?
 - How will evaluations be financed?
 - How to determine if acceptable MLA performance the result of a mitigating measure?
- Will parents now insist on 504 plans for reading to avoid a special education label?
- Collaboration with special education colleagues.

Section 504 and ADAAA 08 Where To From Here?

SECTION
504

- More liberal eligibility criterion - more 504 students.
 - ✓ Fewer health care plans more 504 plans for medical & health related conditions?
 - ✓ 504 plans? – If so, what goes on the plan?
- What about students who will be eligible due to the effect of mitigating measures?
 - ✓ Second prong" student – protection against discrimination, but no FAPE?
 - ✓ What about discipline for "second prong" students?
 - ✓ What about discipline?
- What about procedural safeguards?
 - ✓ More OCR investigations, administrative hearings, etc.
 - ✓ Manifestation determination for students eligible in the mitigated state?
 - ✓ Inform parents of grievance procedures & OCR complaint procedures
- Planning starts now - assemble your planning team now!

Nonacademic Services

SECTION
504

CFR §104.37

School districts must provide qualified handicapped persons:

- Opportunity to participate in nonacademic and extra curricular activities
- Counseling services
- Physical education and athletics

Civil Action



SECTION
504

42 U.S.C. Chapter 21 § 1983

Every person who . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.