

## **IX. THE ANATOMY OF AN EFFECTIVE 504 PLAN: OVERCOMING LEGAL AMBIGUITIES**

### ***Acknowledgement***

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### ***Disclaimer***

*This portion of the Legal Compliance Guide is meant to be practical and broad in scope. It does not emphasize the nuances of the law, and should not be interpreted as providing legal advice.*

### **A. How to Address Disabilities**

As explained in the previous sections of this Legal Compliance Guide, the creation of a 504 plan is one method of addressing a student's disabilities, and the creation of an IEP is another. Also referenced in the earlier sections of this Legal Compliance Guide is the fact that a well-crafted IEP can satisfy the requirements of Section 504, though a 504 plan may not necessarily satisfy the requirements of the IDEA. Moreover, it is important to note that the protections of Section 504 and the IDEA—as well as the ADA and other education laws—may apply regardless of whether a student is provided with a 504 plan or IEP.

Although disabilities can be addressed through other means, such as IEPs, this section of the Legal Compliance Guide is concerned exclusively with Section 504. As such, each subsection is written through the lens of Section 504. Namely, Part B will discuss some essential accommodations and modifications that should be considered when creating a student's 504 plan, Part C will explain the notion of the Least Restrictive Environment within the context of Section 504, and Part D will provide advice—including thought-provoking scenarios and analyses provided by the Office for Civil Rights ("OCR," a component of the U.S. Department of Education that enforces Section 504)—relating to how school administrators and staff should think about and treat Section 504.

Before discussing some of the essential accommodations and modifications that should be considered when creating a student's 504 plan, it is important to note Section 504's requirement that recipient school districts employing fifteen or more persons must designate at least one person, often referred to as a Section 504 Coordinator, to coordinate its efforts to comply with Section 504. 34 C.F.R. § 104.7(a). OCR explains that the duty of a school district's Section 504 Coordinator often extends beyond coordinating and monitoring compliance with Section 504:

In addition to coordinating and monitoring compliance with Section 504 within a school district Section 504 Coordinators will often distribute Section 504-related forms, documents, and information to parents; provide staff with information about Section 504 policies, practices, and procedures to help ensure that they fulfill their responsibilities in a timely and appropriate manner; respond to parent complaints; and complete other Section 504-related tasks within schools as necessary.

U.S. Department of Education, Office for Civil Rights, *Parent and Educator Resource Guide to Section 504 in Public Elementary and Secondary Schools* 37 (December 2016) [hereinafter *Resource Guide to Section 504*].

## **B. Essential Accommodations and Modifications**

From the perspective of students in public schools (and their parents), Section 504 means two important things: a child with a disability cannot be discriminated against by the school or school district, and “[a] child with a disability can get reasonable **accommodations and services** so that he/she can participate in and benefit from all federally-funded school programs and activities to the same extent as children without disabilities.” Advocates for Children of New York, *AFC's Guide to Section 504* at 5 (February 2016) (emphasis in original). It is important to highlight the fact that Section 504 does not just entitle a student with disabilities to reasonable accommodations and modifications related to academics, but it also entitles a student with disabilities to reasonable accommodations and modifications so that the student can participate in and

benefit from nonacademic services, such as athletics and extracurricular activities. Section 504's implementing regulations explain: "A recipient to which this subpart applies shall provide non-academic and extracurricular services and activities in such manner as is necessary to afford handicapped students an equal opportunity for participation in such services and activities." 34 C.F.R. § 104.37(a)(1). The regulations include the following non-exhaustive list of nonacademic and extracurricular services and activities that may be provided under Section 504:

[C]ounseling services, physical recreational athletics, transportation, health services, recreational activities, special interest groups or clubs sponsored by the recipients, referrals to agencies which provide assistance to handicapped persons, and employment of students, including both employment by the recipient and assistance in making available outside employment.

34 C.F.R. § 104.37(a)(2).

OCR explains that modifications need only be reasonable, and that "school districts may require a level of skill or ability of a student in order for that student to participate in a selective or competitive program or activity, so long as the selection or competition criteria are not discriminatory." *Resource Guide to Section 504* at 27. Thus, a student that qualifies as disabled under Section 504 is not guaranteed the ability to participate in any selective or competitive program or activity offered by the student's school district. *Id.* Moreover, although Section 504 generally requires school districts to make reasonable modifications to its policies and practices whenever doing so is necessary to ensure equal opportunity, there are circumstances in which they are not required to do so. Namely, if "the school district can demonstrate that the requested modification would constitute a fundamental alteration of the nature of the extracurricular athletic activity," then the district need not make what might otherwise be considered a reasonable modification necessary to ensure equal opportunity. *Id.*

Advocates for Children of New York ("AFC") provides a helpful, though non-exhaustive, list of accommodations and services—both academic and non-academic—

that can be available under Section 504. AFC's list is grouped by particular needs often protected under Section 504. AFC provides the following examples of 504 accommodations and services for:

- **Students with medical needs:**
  - Getting medicine during the school day
  - Receiving periodic blood tests for blood sugar levels
  - Using a nebulizer
  - Removing particular allergens such as food, chalk, bleach, or pesticides
  - Learning in a chemical-free environment (for chemical sensitive students)
- **Students with learning disabilities:**
  - Use of a tape recorder or calculator
  - Testing accommodations, such as: having test directions and/or questions read aloud; more time to complete tests; or taking tests in quiet locations
  - Adjustments to high school diploma requirements
- **Students with physical disabilities:**
  - Use of the school elevator or wheelchair lift
  - Modified participation in gym or adaptive physical education
  - Assistance of a health para-professional in school and/or on the bus
  - Use of a computer or other needed technology
- **Students with emotional or other behavioral disabilities:**
  - Modified classroom schedule
  - Behavior intervention plan
  - Assistance of a para-professional
  - Access to a guidance counselor or social worker

*AFC's Guide to Section 504* at 6.

### **C. Placement in Least Restrictive Environment**

Section 504's implementing regulations mandate that recipient school districts "educate, or shall provide for the education of, each qualified handicapped person in its

jurisdiction with persons who are not handicapped to the maximum extent appropriate to the needs of the handicapped person.” 34 C.F.R. § 104.34(a). Thus, Section 504 requires that students with disabilities be educated in the least restrictive environment necessary to meet their needs. In fact, a recipient school district “shall place a handicapped person in the regular educational environment operated by the recipient *unless it is demonstrated by the recipient* that the education of the person in the regular environment with the use of supplementary aids and services cannot be achieved satisfactorily.” *Id.* (emphasis added). Moreover, in the event that a recipient school district places a student in a setting other than a regular educational environment, the district must take into account the alternate setting’s proximity to the student’s home. *Id.*

Section 504’s least restrictive environment mandate applies not only to the academic setting, but also to nonacademic settings and extracurricular services (e.g., meals, recess, physical education). Section 504’s implementing regulations explain: “[A] recipient shall ensure that handicapped persons participate with nonhandicapped persons in such activities and services to the maximum extent appropriate to the needs of the handicapped person in question.” 34 C.F.R. § 104.34(b).

#### **D. Red Flags**

Knowing the information provided in this Legal Compliance Guide will help ensure compliance with Section 504. Indeed, many red flags have been discussed throughout this guide. Section VII, for example, explains some important similarities and differences between Section 504 and other prominent education-related laws. These similarities and difference should be kept in mind. For instance, OCR cautions: “If a school district finds a student ineligible for services under the IDEA, the school district is not relieved of its obligations under Section 504 or Title II [of the ADA]; it is still required to consider if the student has a disability under Section 504 of Title II [of the ADA].” *Resource Guide to Section 504* at 42. Section VIII of this Legal Compliance Guide also provides helpful information to consider when faced with tricky eligibility and impairment decisions.

Before delving into some sample scenarios that school districts might face—and how they should and should not handle such scenarios—it is worth emphasizing one particular red flag: ambiguity. When developing 504 plans for students, it is extremely important that the plans are written with as much clarity and specificity as possible. 504 plan drafters ought to avoid including open-ended accommodations or providing teachers with discretion when it comes to implementation. A well-drafted 504 plan should not be able to be interpreted in more than one way—phrases like “as needed” should, therefore, be avoided as much as possible. Relatedly, school districts should make sure that a child’s teachers understand all of the accommodations set forth in the child’s 504 plan.

Perhaps the best way to consider red flags is by considering relevant scenarios that school districts often face. As such, this section of the Legal Compliance Guide will conclude with some select scenarios—and corresponding analyses—provided by OCR (which, again, is tasked with enforcing Section 504). The following scenarios and analyses—along with others—can be found in OCR’s *Resource Guide to Section 504*, available at <http://www2.ed.gov/about/offices/list/ocr/index.html>.

### ***Scenario 1 – Suspected Disability & Evaluation***

*Rosita is a fourth grade student at her local public elementary school. Her teacher notices that Rosita has trouble concentrating during class lessons and that it takes Rosita significantly longer than most students to complete in-class assignments. While the teacher acknowledges that it is very difficult for Rosita to stay seated and on-task, she does not think Rosita needs special education services because she is earning B’s and C’s. What should the teacher do?*

In this situation, Rosita’s teacher needs to inform the proper individuals in the school system that Rosita needs to be evaluated. It is only through an evaluation process that a school district can properly determine if a student

has a disability and needs Section 504 services. Note that grades alone, whether good or bad, do not necessarily indicate whether a student has or does not have a disability. Even if Rosita does not require special education, she could still receive other Section 504 services if she meets the Section 504 definition of disability and is in need of related aids or services or supplemental services. For example, Rosita may have ADHD and may, because of her ADHD, need extra time to complete assignments and assistance from a classroom aide to stay on task during class. However, even if Rosita does not require either special education or related aids and services, as long as she is a student with a disability under Section 504, she is still protected under that law from other forms of discrimination (for example, bullying and harassment - see the discussion on page 32). The teacher's referral of Rosita for evaluation is central to complying with Section 504 here.

*Resource Guide to Section 504 at 14.*

### ***Scenario 5 – Timeframes for Evaluation***

*Mr. Williams is very concerned. In September, two weeks after the new school year began, his 16 year-old son told him that he was having a hard time hearing his teacher and, as a result, he is unable to take detailed notes during class lectures. The school promised to evaluate the student, and Mr. Williams consented to the evaluation before the end of September. However, it is now December and, to date, his son has not been evaluated. Should the school have completed the evaluation before December?*

Most likely, yes. Section 504 does not provide a specific amount of time for school districts to complete an evaluation. However, under the IDEA (another Federal law that protects students with disabilities and of which

schools should be aware), an initial evaluation must be conducted within 60 days of receiving parental consent for the evaluation or if the State has established a different timeframe for conducting the evaluation, within that timeframe. OCR generally looks to the IDEA timeline, or if applicable, to State requirements or local district policy to assess the reasonableness of the time it takes the school to evaluate the student once parental consent has been obtained.

*Resource Guide to Section 504 at 17.*

### ***Scenario 6 – Disagreement Over Need to Evaluate***

*Maya is a good student who has an A in reading, an A in math, and a B in each of her other classes. She maintains these grades even though she has been absent several times since the beginning of the school year for a gastrointestinal disorder. In addition, she often has to leave school early because of vomiting. Maya's mom took Maya to the doctor and, the following week, Maya's mom presented Maya's teacher with a medical report indicating that Maya suffers from gastroesophageal reflux disease (GERD). Maya's mom then asked the teacher if the school would evaluate Maya to see if she is eligible for Section 504 services. The teacher told Maya's mom not to worry, noting that an evaluation "is not necessary at this time because Maya continues to do well in all her classes." The teacher then promised to let Maya's mother know immediately if Maya's grades begin to decline. Should the teacher have responded in this manner?*

No. Not every illness will automatically result in Section 504 protection for the affected student. On the other hand, even if a student earns good grades, he or she may still have a disability. For example, even if Maya's



disease did not interfere with her ability to attend school, she might still be determined to be a student with a disability under Section 504 because the disease substantially limits a major life activity (that is, her ability to digest food). In such a situation, Maya may not need special education or related aids and services; however, she would still be protected (for example, from bullying and harassment based on disability) under Section 504.

Given these specific facts—a medically-diagnosed problem with the student’s digestive system, and the parent’s report that the student is frequently forced to miss school because of this medical problem—Section 504 would require the school to refer Maya for a Section 504 evaluation to determine whether she needs special education or related aids and services, including modifications, because of a disability. Note that if the school fails to conduct an evaluation of the student and it is later determined that a school evaluation was necessary, and that Maya needed, but did not receive, special education and/or related aids and services, the school would be in violation of Section 504 and may be required to provide compensatory services for Maya for the period during which the school failed to offer FAPE.

The Section 504 regulations require school districts to draw upon information from a variety of sources in interpreting evaluation data and making placement decisions. In other words, while a medical diagnosis alone can inform school staff about whether a student has a disease that substantially limits a major life activity, it is unlikely that a medical diagnosis alone will also provide enough information for school staff to determine what services the student needs. Other information that could also be collected and analyzed includes, for example, attendance records,

parent information, grade reports, aptitude and achievement tests, teacher recommendations, and the student's physical condition, social or cultural background, and adaptive behavior. The type of tests and other information obtained will vary for each individual student depending on the suspected impairment.

In this scenario, Maya has a disability. Because Maya's medically diagnosed impairment interferes with her ability to attend school, the school district may need to, among other things, modify how the school's attendance policy applies to Maya to ensure that Maya is given extra time to complete assignments when she is absent because of her disability and that she is not penalized for absences resulting from her disability.

Finally, even if the teacher did not make the referral because she did not believe that Maya needed special education or related services as a result of her digestive disorder, the teacher or other school personnel should have provided Maya's mother with a copy of the district's procedural safeguards, which would include information about the opportunity to have an impartial hearing to resolve the disagreement over Maya's need for an evaluation, and an opportunity to review her daughter's records.

*Resource Guide to Section 504* at 21–22 (internal citations omitted).

### ***Scenario 7 – Reevaluations and FAPE***

*Salim is a student with a disability and he has a Section 504 plan. At the start of the spring semester, he received an out-of-school suspension for 12 consecutive school days. Is the school required to reevaluate Salim?*

Yes. Although the Section 504 regulations do not set a specific timeframe within which students with disabilities must be reevaluated to make sure that they are receiving the appropriate services, Section 504 requires schools to conduct reevaluations periodically, and before a significant change in placement. OCR considers an exclusion from the educational program of more than 10 consecutive school days to be a significant change in placement. In this example, the school must reevaluate Salim, prior to imposing the 11th day of suspension, to determine whether his misconduct is caused by or related to his disability (manifestation determination), and if so to further evaluate to determine if his current placement is appropriate.

*Resource Guide to Section 504* at 23 (internal citations omitted).

### ***Scenario 9 – Unjustified Different Treatment***

*Ricardo has a peanut allergy. His fourth-grade class is going on a field trip to the local aquarium and Ricardo's father is told that he must chaperone Ricardo on the trip because the teachers will be very busy and cannot ensure that Ricardo will be protected from exposure to peanuts or peanut products while on the trip, especially during the lunch break. Ricardo's father cannot go on the field trip because he has to go to work. As a result the teachers tell Ricardo he cannot attend the field trip. Ricardo's father complains to the principal, noting that no other parent is required to attend the field trip. Should the school have required Ricardo's father to attend the field trip?*

No. In this case, none of the parents of students without disabilities were told that they must attend the field trip; therefore, the school may not require Ricardo's father's attendance simply because Ricardo has a

disability. Under Section 504, the school is responsible for making it possible for Ricardo to participate in this learning opportunity like his peers, without parental assistance.

*Resource Guide to Section 504* at 31.