

VIII. 504 PLAN ELIGIBILITY: WHAT ARE THE DETERMINING FACTORS?

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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. Section 504 of the Rehabilitation Act: What it Does and Doesn't Cover

Section 504 covers any student “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.” 34 C.F.R. § 104.3(j)(1). The implementing regulations of Section 504 go on to explain that “a physical or mental impairment” means:

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

34 C.F.R. § 104.3(j)(2)(i).

A “major life activity” is also defined in the regulations: “functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.” 34 C.F.R. § 104.3(j)(2)(ii). This definition was subsequently expanded—through the American with Disabilities Act Amendments Act of 2008 (“ADA AA”)—to include, without limitation, the following functions: eating, sleeping, standing,

sitting, reaching, lifting, bending, reading, concentrating, thinking, writing, communicating, interacting with others, and the operation of a major bodily function (numerous examples of which are provided in the ADA AA's implementing regulations). 28 C.F.R. § 35.108(c)(1).

Noticeably absent from Section 504 and its implementing regulations is a definition of "substantially limits." The meaning of "substantially limits" is important to understand, and will be explained in relative detail in Part B below.

B. Disability Definition Ambiguities and Impairment Determinations: What Can and Cannot be Considered?

Whether a student has an impairment (either physical or mental) that "substantially limits" a major life activity must be determined on a case-by-case basis. *See, e.g.,* U.S. Department of Education, Office for Civil Rights, *Protecting Students With Disabilities: Frequently Asked Questions About Section 504 and the Education of Children with Disabilities*, <https://www2.ed.gov/about/offices/list/ocr/504faq.html> (last visited, Aug. 26, 2018) [hereinafter *Protecting Students With Disabilities*]. Examples of disabilities that *may* qualify students for protection under Section 504 include, but are not limited to: asthma, ADD/ADHD, cancer, depression, diabetes, dyslexia, HIV/AIDS, mobility issues or physical disabilities, and severe allergies. Advocates for Children of New York, *AFC's Guide to Section 504* (February 2016) 4. Students may be eligible for Section 504 protection based on their disability, *even if their disability does not affect their learning or ability to function in school*. A student with a major life impairment in breathing, for example, could be eligible for a 504 Plan even if she is earning mostly A's.

Section 504 also accounts for certain impairments that are episodic or in remission. The determining factor of whether such an impairment would qualify an individual for Section 504 protection is if the disability, when active, would substantially limit a major life activity. 42 U.S.C. § 12102(4)(D). Some examples of impairments that could fall under this category include lupus, epilepsy, bipolar disorder, and post-traumatic stress disorder. Similarly, Section 504 protects individuals with certain "temporary

impairments.” Whether an individual with a “temporary impairment” qualifies for Section 504 protections, however, once again must be determined on a case-by-case basis, and must “tak[e] into consideration both the duration (or expected duration) of the impairment and the extent to which it actually limits a major life activity of the affected individual.” *Protecting Students With Disabilities*.

Adding to the confusion of whether an impairment “substantially limits” a “major life activity,” is the notion of mitigating measures—i.e., measures that can theoretically be taken so that an impairment does not “substantially limit” a “major life activity.” Fortunately, the ADA AA clarifies that “[t]he determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures.” 28 C.F.R. § 35.108 (d)(1)(viii). There are, however, two exceptions—ordinary eyeglasses and contact lenses. The ADA AA’s implementing regulations explain: “[T]he ameliorative effects of ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment substantially limits a major life activity,” where “ordinary eyeglasses or contact lenses” are defined as “lenses that are intended to fully correct visual acuity or to eliminate refractive error.” *Id.* The ADA AA provides a non-exhaustive list of mitigating measures:

- (i) Medication, medical supplies, equipment, appliances, low-vision devices (defined as devices that magnify, enhance, or otherwise augment a visual image, but not including ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aid(s) and cochlear implant(s) or other implantable hearing devices, mobility devices, and oxygen therapy equipment and supplies;
- (ii) Reasonable modifications or auxiliary aids or services as defined in this regulation;
- (iii) Learned behavioral or adaptive neurological modifications; or
- (iv) Psychotherapy, behavioral therapy, or physical therapy.

28 C.F.R. § 35.108 (d)(4).

C. Documenting the Evaluation Process

The evaluation and placement procedures in Section 504 are less structured than those described in the IDEA—Section 504’s evaluation and placement procedures provide significantly more discretion to recipient school districts. Nonetheless, Section 504 does require recipient school districts to establish standards and procedures for the evaluation and placement of qualifying individuals who need—or are suspected to need—special education or related services. These standards and procedures are meant to ensure that:

- (1) Tests and other evaluation materials have been validated for the specific purpose for which they are used and are administered by trained personnel in conformance with the instructions provided by their producer;
- (2) Tests and other evaluation materials include those tailored to assess specific areas of educational need and not merely those which are designed to provide a single general intelligence quotient; and
- (3) Tests are selected and administered so as best to ensure that, when a test is administered to a student with impaired sensory, manual, or speaking skills, the test results accurately reflect the student's aptitude or achievement level or whatever other factor the test purports to measure, rather than reflecting the student's impaired sensory, manual, or speaking skills (except where those skills are the factors that the test purports to measure).

34 C.F.R. § 104.35(b). It should be noted that Section 504 also requires a “preplacement evaluation”—in accordance with the aforementioned requirements—“of any person who, because of handicap, needs or is believed to need special education or related services before taking any action with respect to the initial placement of the person in regular or special education and any subsequent significant change in placement.” 34 C.F.R. § 104.35(a). The Office for Civil Rights (“OCR,” a component of the U.S. Department of Education that enforces Section 504) cautions: “School districts violate Section 504 when

they deny or delay conducting an evaluation of a student when it would have been reasonable for a staff member to have suspected that a student has a disability and needs special education or related services because of that disability.” U.S. Department of Education, Office for Civil Rights, *Parent and Educator Resource Guide to Section 504 in Public Elementary and Secondary Schools* 18 (December 2016) [hereinafter *Resource Guide to Section 504*]. Additionally, Section 504 requires recipient school districts to establish procedures—again, in accordance with the aforementioned requirements—“for periodic reevaluation of students who have been provided special education and related services.” 34 C.F.R. § 104.35(d).

Although not explicit in Section 504 or its implementing regulations, OCR “has interpreted Section 504 to require districts to obtain parental permission for initial evaluations.” *Protecting Students With Disabilities*. Like the IDEA, however, Section 504 allows districts to use due process hearing procedures to seek to override a parents’ denial of consent for an initial evaluation. *Id.* It is also important to note, “Section 504 requires districts to provide notice to parents explaining any evaluation and placement decisions affecting their children and explaining the parents’ right to review educational records and appeal any decision regarding evaluation and placement through an impartial hearing.” *Id.*

Section 504’s implementing regulations also provide guidance with respect to how school districts ought to interpret evaluation data, and how to use the evaluation data to determine an appropriate placement. The regulations mandate that recipient school districts satisfy each of the following four points when interpreting evaluation data and making placement decisions:

- (1) [D]raw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior, (2) establish procedures to ensure that information obtained from all such sources is documented and carefully considered, (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 the placement options, and (4) ensure that the placement decision is made in conformity with [35 C.F.R. § 104.34].

34 C.F.R. § 104.35(c).

Following a determination of eligibility, schools are encouraged by OCR to document a student's Section 504 services in a written plan. *Resource Guide to Section 504* at 10. A separate 504 plan for IDEA-eligible students, however, is not required. Even though these students are protected under Section 504, "the IEP developed and implemented in accordance with the IDEA is sufficient." *Id.*

D. IEP, 504 Plan, or Both – Unraveling Difficult Eligibility Situations

A Section 504 plan is often used in cases in which a child does not qualify for special education (i.e., does not have one of the 13 defined disabilities included in special education law), or does not require special education services to learn, but is entitled to Section 504 services or accommodations. *AFC's Guide to Section 504* at 7. For instance, a student with mobility challenges that require the use of a wheelchair may not need an IEP, but likely would need—and be entitled under Section 504—to a ramp or some other accommodation in order to have access to the school building. *Id.* Similarly, consider a student, Pearl, that is capable of reading at grade level, but reads much slower than her peers. In the event that the Committee on Special Education does not classify Pearl with a "learning disability"—or one of the other 13 disabilities included in special education law—Section 504 may entitle her to testing accommodations, such as extra time on tests. *Id.*

If a student does have one of the 13 disabilities included in special education law, however, an IEP should be considered. While a 504 plan is concerned with anti-discrimination and accessibility, an IEP is concerned with ensuring that a student with a disability is provided with a uniquely tailored educational program and related services that will allow the student to make meaningful progress in light of the student's circumstances. Let's reconsider the example of Pearl from the previous paragraph, but

assume that Pearl does not read at grade level and in fact has been identified and classified as a student with a learning disability. In addition to testing accommodations, such as extended time on tests, Pearl may require a more individualized program. She may, for instance, require an IEP that mandates that she is pulled out of class five times per week for special education teacher support services (“SETSS”). Pearl’s IEP may, therefore, include a general education program with five periods of SETSS per week, *plus* testing accommodations, such as extended times on tests. As a result, there would be no need to provide Pearl with a 504 plan in addition to the IEP—“Because special education-classified students typically receive services and accommodations through the special education system, they do not need to apply separately for the same services via Section 504.” *Id.* Section 504’s implementing regulations make this last point quite clear: “Implementation of an Individualized Education Program...is one means of meeting the [Section 504 FAPE] standard.” 34 C.F.R. § 104.33(b)(2).

Since an IEP is able to include accommodations that could otherwise be included in a 504 plan, it is not *necessary* to provide a student with both. Nonetheless, the law does not prohibit the provision of both an IEP and a 504 plan to a particular student. Practically, however, the creation of both an IEP and a 504 plan is likely to create unnecessary work and confusion. Nonetheless, in certain circumstances, such as when a student has a temporary impairment (as described in Part B above), a school may reasonably prefer to provide a 504 plan to a special education student rather than alter the student’s IEP for the mere provision of a temporary accommodation.