

VII. HOW THE 504 PLAN PROCESS WORKS: CRITICAL LEGAL ESSENTIALS

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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.

The purpose of this section of the Legal Compliance Guide is to provide readers with an understanding of what Section 504 of the Rehabilitation Act of 1973 (“Section 504”) mandates. Given that this guide is being created for educators, administrators, parents, and attorneys interested in special education law, this section will delve into the meaning of a Free Appropriate Public Education (“FAPE”) under Section 504. Additionally, this section will examine the similarities and differences between Section 504 and two other federal laws that are relevant to education: the Individuals with Disabilities Education Act of 2004 (“IDEA”), and the Americans with Disabilities Act (“ADA”).

A. Section 504 – Purpose and Protection

According to Section 504’s implementing regulations, Section 504 “is designed to eliminate discrimination on the basis of handicap in any program or activity receiving Federal financial assistance.” 34 C.F.R. § 104.1. The most relevant portion of Section 504—from the perspective of stakeholders in the education sector—reads as follows:

No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, 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 or under any program or activity conducted by any Executive agency or by the United States Postal Service.

29 U.S.C. § 794(a).

B. FAPE Under Section 504

Please Note: Much of the following discussion of FAPE comes from the Parent and Educator Resource Guide to Section 504 in Public Elementary and Secondary Schools, published by the U.S. Department of Education, Office for Civil Rights in December 2016. This document is a very helpful resource in the public domain, available on the Office for Civil Rights' website at <http://www2.ed.gov/about/offices/list/ocr/index.html>.

All elementary and secondary students who qualify as having a disability under Section 504, and who require special education and/or related aids and services, are entitled to FAPE. U.S. Department of Education, Office for Civil Rights, *Parent and Educator Resource Guide to Section 504 in Public Elementary and Secondary Schools* 10 (December 2016) [hereinafter *Resource Guide to Section 504*]. “**In general, a Section 504 Plan describes the regular or special education and related services a student needs and the appropriate setting in which to receive those services.**” *Id.* Under Section 504, FAPE requires the educational program to provide access for students regardless of the severity of a student's disability, and without cost to the student or student's parent or guardian—except for those fees that are also imposed on non-disabled students, parents, or guardians. 34 C.F.R. § 104.33. If an individual requires a residential placement due to the individual's disability, for instance, the placement, including non-medical care and room and board must be provided at no cost, regardless of whether the program is public or private. *Id.* The aforementioned *Resource Guide to Section 504* lists the key features of FAPE under Section 504:

- Evaluation and placement procedures that guard against misclassification or inappropriate placement of students;

- Periodic reevaluation of students who have been provided special education or related services and prior to a significant change in placement;
- Provision of regular or special education and related aids and services that are designed so that the individual educational needs of students with disabilities are met as adequately as the needs of non-disabled students are met;
- Education of students with disabilities with non-disabled students—to the maximum extent that this arrangement is appropriate for the needs of students with disabilities;
- A system of procedural safeguards (that is designed to inform parents of a school district's actions or decisions and to provide parents with a process for challenging those actions or decisions) that include notice; an opportunity for parents to review their child's records; an impartial due process hearing (with an opportunity for participation by the student's parents or guardians and representation by counsel); and a review procedure.

Resource Guide to Section 504 at 11 (internal citations omitted).

C. Similarities and Differences Between Relevant Federal Laws:

Section 504, the ADA, and the IDEA

To get a good sense of how the 504 Plan process works, it is important to consider the similarities and differences of the three most prominent federal laws relevant to education: Section 504, the ADA, and the IDEA.

Section 504 and the ADA

Section 504 and the ADA are both civil rights laws prohibiting discrimination based on disability. Section 504 prohibits discrimination on the basis of disability in programs and activities (both public and private) that receive federal financial assistance. The ADA, on the other hand, prohibits discrimination solely on the basis of disability in

employment, public services, and accommodations. Disability Rights Education & Defense Fund, *A Comparison of ADA, IDEA, and Section 504*, <https://dredf.org/legal-advocacy/laws/a-comparison-of-ada-idea-and-section-504/> (last visited Aug. 26, 2018) [hereinafter *A Comparison of ADA, IDEA, and Section 504*].

Section 504’s protections apply to “handicapped persons,” which Section 504’s implementing regulations defines as “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.” 34 C.F.R. § 104.3(j)(1). Similarly, ADA protections apply to any individual with a “disability,” which means, in the context of the ADA, an individual with “(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment.” 42 U.S.C. § 12102. It is important to note that the Americans with Disabilities Act Amendments Act of 2008, which took effect on January 1, 2009, amended the meaning of “disability” in the ADA and Section 504 alike—the two laws now share provisions including a conforming amendment. Notwithstanding the overlap in the type of persons Section 504 and the ADA are intended to protect, the two laws apply under different circumstances. Namely, while Section 504 is designed to prohibit discrimination on the basis of disability in programs (public and private) that receive federal assistance, the ADA is designed to protect individuals seeking employment or goods and services.

Another difference between Section 504 and the ADA is the way in which each law treats the notion of a FAPE. As stated in Part B above, all elementary and secondary students who qualify as having a disability under Section 504, and who require special education and/or related aids and services, are entitled to FAPE. *Resource Guide to Section 504* at 10. The ADA, on the other hand, does not directly provide FAPE. The ADA’s protections, however, do extend to nonsectarian private schools, and the ADA can provide additional protection in combination with actions brought under Section 504. *A Comparison of ADA, IDEA, and Section 504*.

Section 504 and IDEA

Section 504 and the IDEA both entitle students with disabilities access to appropriate public education services and placements. Both laws also contain a child find/identification duty—schools are required to identify and evaluate students that are eligible for services or accommodations. Under the IDEA there are specific guidelines regarding how students are evaluated and aided. For IDEA eligibility, students must fall under one of 13 categories of defined disabilities. In Section 504, however, there is a much broader definition of eligibility, and determination is made on a case-by-case basis, rather than categorically. Further, the outcome of IDEA eligibility, the Individualized Education Plan (“IEP”), requires instruction specifically tailored to the student’s needs. Section 504 does not require specifically tailored instruction, though it does require necessary accommodations for access.

Although both Section 504 and the IDEA require periodic re-evaluations for qualified students, the IDEA requires a mandatory three-year re-evaluation, whereas there is no set timeline for Section 504 re-evaluations. 34 C.F.R. § 104.3(d). Streams of funding for the two laws differ as well. While the IDEA is a grant statute that provides federal funding for special education programs, Section 504—like the ADA—is an antidiscrimination law that does not provide federal funding. As a result, Section 504 requires schools to use state or local funds to pay for services. 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).

Dispute resolutions under Section 504 are similarly more broadly defined than under the IDEA. Whereas the IDEA has specific requirements with respect to complaints, resolution sessions, timelines, etc., Section 504 merely requires “a system of procedural safeguards that includes notice, an opportunity for the parents or guardian of the person to examine relevant records, an impartial hearing with opportunity for participation by the person's parents or guardian and representation by counsel, and a review procedure.” 34 C.F.R. § 104.36.

Although Section 504 and the IDEA both deal with FAPE, the FAPE requirements under each law are substantially different. Section 504's definition of an "appropriate education" requires "the provision of regular or special education and related aids and services that...are designed to meet individual educational needs of a handicapped persons as adequately as the needs of nonhandicapped persons are met." 34 C.F.R. § 104.33. FAPE under the IDEA, however, includes instruction that is unique and specially designed for access to "full educational opportunity." This different treatment of FAPE highlights the difference in the intent of Section 504 as compared to the intent of the IDEA. Namely, while Section 504 is designed to remove barriers to participation in school life, the IDEA is designed to remove barriers to academics and curriculum.