Parent and Educator Resource Guide to Section 504 in Public Elementary and Secondary Schools

U.S. Department of Education
Office for Civil Rights
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U.S. Department of Education
Office for Civil Rights
Catherine E. Lhamon
Assistant Secretary
December 2016

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Parent and Educator Resource Guide to Section 504 in Public Elementary and Secondary Schools

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UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

Dear Superintendents and Other School Administrators:

Thank you for the essential work you do to ensure that students with disabilities in the United States have an equal educational opportunity. As school leaders, you are invaluable resources for people in your district regarding the rights of students with disabilities under Section 504 of the Rehabilitation Act of 1973 (Section 504). The U.S. Department of Education's Office for Civil Rights (OCR) supports your efforts to help your schools comply with Section 504, including the Department's implementing regulations, and looks forward to working with you to provide students with an educational environment free from disability-based discrimination.

The attached resource guide reminds all educational institutions receiving Federal financial assistance from the Department that they must vigilantly work to ensure compliance with Section 504 and other Federal laws that protect students with disabilities. We intend this resource guide to also help parents of students with disabilities understand the obligations imposed under Section 504. In particular, the resource guide summarizes key requirements of Section 504, and aims to increase understanding of these requirements for both parents and members of the school community alike. If you need technical assistance, please contact the OCR regional office serving your State or Territory by visiting wdcrobcolp01.ed.gov/CFAPPS/OCR/contactus.cfm or call OCR's Customer Service Team at 1-800-421-3481; TDD 1-800-877-8339.

Thank you for your commitment to assisting your schools in complying with Section 504 and to ensuring that all your schools' students have safe and healthy environments in which to learn and thrive. We in OCR look forward to continuing to work with you to help prevent and address disability discrimination in our nation's schools.

Sincerely,

/s/

Catherine E. Lhamon
Assistant Secretary for Civil Rights

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Introduction

Every year, public school teachers, leaders, parents, students, and other interested parties contact the U.S. Department of Education's Office for Civil Rights (OCR) asking questions about the educational and civil rights of students with disabilities who are enrolled in public elementary and secondary schools.

> In this resource guide, the term *parent* includes guardians and others with the authority to act on behalf of and in the interest of a student.

During these exchanges, OCR often hears (1) uncertainty about the Federal civil rights obligations of public schools and individual school employees in a wide range of situations involving students with disabilities; (2) a lack of awareness of required processes and procedures for securing services and access to programs and opportunities for students who have or may have disabilities; or (3) confusion about student rights under the applicable Federal disability laws. As a result, some school officials may violate the Federal civil rights laws that are designed to protect students with disabilities. Similarly, some parents do not know what services and protections their children with disabilities may be entitled to receive or how to appropriately initiate or follow the process and procedures for securing disability services for their children from the school.

To facilitate efforts to eliminate discrimination against students with disabilities, OCR offers this resource guide to provide answers to questions that OCR has received and increase understanding among parents and members of the school community of the Federal civil rights laws that protect students with disabilities in public schools, and in particular, Section 504 of the Rehabilitation Act of 1973 (Section 504).[1]

Imbedded in the discussion of key provisions of Federal law, the resource guide repeatedly asks parents, teachers, and others to think about how they might respond in different scenarios. For example:

> What should parents do when their child appears to need extra help in school, and they believe their child may have a disability?
>
> What kinds of assistance are available?
>
> Who should parents speak with about their concerns and questions?
>
> What are teachers, administrators, and other school employees required to do for a student who has or may have a disability?

[1] 29 U.S.C. § 794; 34 C.F.R. pt. 104.

Section 504 is a Federal law that prohibits disability discrimination by recipients of Federal financial assistance.[2] All public schools and school districts, as well as all public charter schools and magnet schools, that receive Federal financial assistance from the Department must comply with Section 504.

Section 504 provides a broad spectrum of protections against discrimination on the basis of disability. For example, all qualified elementary and secondary public school students who meet the definition of an individual with a disability under Section 504 are entitled to receive regular or special education and related aids and services that are designed to meet their individual educational needs as adequately as the needs of students without disabilities are met.[3] Section 504 also requires, among other things, that a student with a disability receive an equal opportunity to participate in athletics and extracurricular activities, and to be free from bullying and harassment based on disability.

Specifically, this resource guide:

- Highlights key requirements of Section 504 in the area of public elementary and secondary education, including available services and complaint procedures;
- Explains how Section 504 applies in various hypothetical situations within public elementary and secondary schools;[4] and
- Discusses two other Federal laws that address the rights of students with disabilities: (1) Title II of the Americans with Disabilities Act of 1990 (Title II);[5] and (2) Part B of the Individuals with Disabilities Education Act (IDEA).[6]

You can go to page 40 for information about key differences among Section 504, Title II, and the IDEA.

[2] *Id*. All references to schools, public schools, and districts in this resource guide mean recipient public schools and school districts. Also, the terms schools, school districts, and districts are used interchangeably.

[3] 34 C.F.R. § 104.33.

[4] Although Section 504 covers a larger age range than the typical age of students in kindergarten through 12th grade, this resource guide focuses on the timeframe from kindergarten through high school graduation.

[5] 42 U.S.C. §§ 12131-12134; 28 C.F.R. pt. 35.

[6] 20 U.S.C. §§ 1400-1419; 34 C.F.R. pt. 300. Part B of the IDEA addresses the obligations of States and school districts to provide special education and related services to eligible children with disabilities. The Office of Special Education Programs (OSEP) in the Department's Office of Special Education and Rehabilitative Services (OSERS) administers the IDEA. For information about the IDEA, please see osep.grads360.org and www.ed.gov/osers/osep/index.html.

The Meaning of Disability Under Section 504

Below is a discussion of what it means to be a student or individual with a disability, and of related terms that help to comprehensively define *disability* as it is used in Section 504 and its implementing regulations.

Disability. Under Section 504, an individual with a disability (also referred to as a *student with a disability* in the elementary and secondary education context) is defined as a person who: (1) has a physical or mental impairment that substantially limits a major life activity; (2) has a record of such an impairment; or (3) is regarded as having such an impairment.[7]

The determination of whether a student has a physical or mental impairment that substantially limits a major life activity (and therefore has a disability) must be made on a case by case basis.[8] In addition, when determining if someone meets the definition of a disability, the definition must be understood to provide broad coverage of individuals.[9]

Physical or mental impairments. Section 504 defines a physical or mental impairment as 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.[10]

The Section 504 definition of physical and mental impairment also includes any mental or psychological disorder.[11] The definition does not include all specific diseases and conditions that may be physical or mental impairments because of the difficulty of ensuring the completeness of such a list.

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[7] 29 U.S.C. § 705(9)(B), (20)(B).

[8] 34 C.F.R. § 104.35.

[9] 42 U.S.C. § 12102(4)(A). The Americans with Disabilities Act Amendments Act of 2008 (Amendments Act) amended both the Americans with Disabilities Act (ADA) and the Rehabilitation Act definition of disability for Section 504 to broaden the meaning of disability and the protections under these Federal laws. *See* 42 U.S.C. § 12101 notes; 154 Cong. Rec. S8342, 8346 (daily ed. Sept. 11, 2008) (statement of the Managers to Accompany S. 3406, The Americans with Disabilities Act Amendments Act of 2008). *See also* OCR, *Dear Colleague Letter: Americans with Disabilities Act* (Jan. 19, 2012), www.ed.gov/ocr/letters/colleague-201109.html and accompanying *Questions and Answers on the ADA Amendments Act of 2008 for Students with Disabilities Attending Public Elementary and Secondary Schools* (Jan. 19, 2012), www.ed.gov/ocr/docs/dcl-504faq-201109.pdf.

[10] 34 C.F.R. §104.3(j)(2)(i).

[11] *Id.*; *see also* OCR, *Protecting Students with Disabilities: Frequently Asked Questions About Section 504 and the Education of Children with Disabilities* (FAQ 12) (last modified Oct. 16, 2015), www.ed.gov/ocr/504faq.html.

Major life activities.

> To summarize, major life activities include certain acts a person does (such as hearing, speaking, lifting) and a person's bodily functions (such as lung disease that affects a person's respiratory system, or a traumatic brain injury that affects the function of the brain).

The list of major life activities under Section 504 includes, but is not limited to, the activities listed below.[12]

- caring for oneself
- performing manual tasks
- seeing
- hearing
- eating
- sleeping
- walking
- standing
- lifting
- bending
- speaking
- breathing
- learning
- reading
- concentrating
- thinking
- communicating
- working

Major bodily functions are also major life activities under the law, and these major bodily functions include functions of the bowel, bladder, and brain; normal cell growth; and the immune, endocrine (for example, thyroid, pituitary, and pancreas), respiratory, reproductive, circulatory, digestive, and neurological systems.[13]

These lists, however, do not provide every possible major life activity or bodily function; therefore, if an activity or bodily function is not listed in the Amendments Act, it might still be considered a major life activity under Section 504.[14]

> For example, if a school provides a form with a list of major life activities to consider during an evaluation process, a student may still have a physical or mental impairment that substantially limits a major life activity even if the activity is not listed on the school's form.

[12] 29 U.S.C. § 705(9)(b), (20)(B); 42 U.S.C. § 12102(2)(A).

[13] 42 U.S.C. § 12102(2)(B).

[14] 42 U.S.C. § 12102(2).

> School staff should note, in particular, that a student may have a disability and be eligible for Section 504 services even if his or her disability does not limit the major life activity of learning.
>
> Therefore, rather than considering only how an impairment affects a student's ability to learn, school staff must also consider how the impairment affects *any* major life activity of the student and, if necessary, assess what is needed to ensure that students have an equal opportunity to participate in the school's programs.[15]

For example: (1) a student with a visual impairment who cannot read regular print with glasses is substantially limited in the major life activity of seeing; (2) a student with an orthopedic impairment who cannot walk is substantially limited in the major life activity of walking; and (3) a student with diabetes who requires insulin injections is substantially limited in the operation of a major bodily function, the endocrine system. These students would have to be evaluated, as described in the Section 504 regulations, to determine whether they need special education and/or related services.[16]

> School staff should note that a student may have a disability and be eligible for Section 504 services, including modifications, even if the student earns good grades.
>
> This is because the student's impairment may substantially limit a major life activity regardless of whether the student performs well academically, and the student may need special education or related aids and services because of this disability.[17]

For example, a student who has dyslexia and is substantially limited in reading finds it challenging to read the required class material in a timely manner. Alternatively, a student who has been diagnosed with depression may be substantially limited in her ability to concentrate while completing school assignments. In both of these cases, the student spends far more time preparing for class than other students and earns good grades because of the student's intelligence and extreme efforts. The student would still be substantially limited in the major life activity of reading despite earning good grades and may require a multi-sensory approach to learning, and additional time to complete in-class tests or quizzes, even if that student earns mostly A's.

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[15] 34 C.F.R. § 104.35.

[16] *Id*.

[17] 42 U.S.C. § 12102; 154 Cong. Rec. S8342, 8346 (daily ed. Sept. 11, 2008) (statement of the Managers to Accompany S. 3406, The Americans with Disabilities Act Amendments Act of 2008). *See also* OCR, *Questions and Answers on the ADA Amendments Act of 2008 for Students with Disabilities Attending Public Elementary and Secondary Schools* (FAQ 7 & 9) (Jan. 19, 2012), www.ed.gov/ocr/docs/dcl-504faq-201109.pdf.

Mitigating measures. When determining if a person has a disability, a school cannot consider the ameliorative effects of mitigating measures when determining how the impairment impacts the major life activities under consideration.[18]

For example, a student with low vision (unable to read typical size print with ordinary eyeglasses or contacts) who is able to read using a computer program that enlarges the font size of documents is still a person with a disability, even though the computer program permits the student to diminish the impact of his or her low vision and read lessons and other materials for school.

> The Amendments Act provides a non-comprehensive list of mitigating measures: medications; prosthetic devices (for example, an artificial arm); assistive devices (for example, computer modifications that increase accessibility, wheelchairs, scooters, walkers, canes, and crutches); learned behavior; and adaptive neurological modifications that an individual may use to eliminate or reduce the effects of an impairment.

Note that the use of ordinary eyeglasses or contacts is the one exception to the mitigating measure rule.[19] In other words, if a person's vision is corrected with ordinary eyeglasses or contacts,[20] the school may consider how the eyeglasses or contacts help the student see when making a determination about whether the student has a disability based on seeing.

You can go to page 20 for more discussion about mitigating measures.

Substantial limitation. The determination of substantial limitation must be made on a case-by-case basis with respect to each individual student.[21] Section 504 requires that, for elementary and secondary school students, a group of knowledgeable persons draw upon information from a variety of sources in making this determination.[22]

> The group of knowledgeable persons is often called a *Section 504 Team*.

[18] 42 U.S.C. § 12102(4)(E)(i).

[19] 42 U.S.C. § 12102(4)(E)(ii).

[20] 42 U.S.C. § 12102(4)(E)(iii)(I).

[21] 34 C.F.R. § 104.35.

[22] 34 C.F.R. § 104.35(c).

The Amendments Act also requires, however, that in making that determination under Section 504, the beneficial effects of mitigating measures (other than ordinary eyeglasses and contact lenses) must not be considered.[23] For example, school districts must determine if a student with asthma has a disability without considering how an inhaler affects the student's major life activities such as breathing and talking.

Episodic impairments. If an impairment only occurs periodically (that is, it is episodic) or is in remission, it is a disability if, when in an active phase, it would substantially limit a major life activity.[24] For example, a student with epilepsy is a student with a disability if, during a seizure, the student is substantially limited in a major life activity such as thinking, breathing, or neurological function. Or, a student with bipolar disorder is a person with a disability if, during manic or depressive episodes, the student is substantially limited in a major life activity such as concentrating or brain function.

Record of a disability. To meet the Section 504 definition of an individual with a disability, a student could also *have a record of* a disability.[25] Having *a record of a disability* means that a person either has a history of a disability or has been misclassified as having a mental or physical impairment that substantially limits one or more major life activities.[26] For example, a person who had heart disease, cancer, or a mental illness, may have a record of a disability, but no longer have the impairment.[27] An example of a misclassification is a school district that incorrectly identified a student as having a learning disability, when further testing revealed the student's issues where caused by the need for ordinary eyeglasses and the student does not have a learning disability.

A student who has a record of a disability may or may not need special education or related aids and services. Section 504 does not obligate a school district to provide aids or services that a student does not need. But, even if a student with a disability does not need services, the student is protected from disability-based discrimination under Section 504's general non-discrimination requirements.[28]

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[23] 42 U.S.C. § 12102(4)(E).

[24] 42 U.S.C. § 12102(4)(D).

[25] 34 C.F.R. § 104.3(j)(2)(iii).

[26] *Id*.

[27] Department of Justice: *ADA, Title II Technical Assistance Manual,* II-2.5000, www.ada.gov/taman2.html#II-2.5000; 34 C.F.R. pt. 104, App. A.

[28] 34 C.F.R. §§ 104.4(b), 104.21-23, 104.37, 104.61 (incorporating 34 C.F.R. § 100.7(e)); *see also* OCR, *Questions and Answers on the ADA Amendments Act of 2008 for Students with Disabilities Attending Public Elementary and Secondary Schools* (FAQ 10 & 11) (Jan. 19, 2012), www.ed.gov/ocr/docs/dcl-504faq-201109.pdf.

Regarded as having a disability. A student could also meet the definition of an individual with a disability by being *regarded as* a person with a disability.[29] This could mean, for example, that the student does not have any impairment, but is treated by others as having a disability.

For example, a person who does not have a physical or mental impairment that substantially limits a major life activity but who is not allowed on the soccer team because of the false belief that the student has the human immunodeficiency virus (HIV) would be regarded as having a disability.[30] Note, as stated previously, although the student with HIV in this instance is not entitled to receive aids and services, the student is nevertheless protected from disability-based discrimination under Section 504's general non-discrimination requirements.

An individual does not fall within the definition as someone regarded as having a disability if the physical or mental impairment is transitory (that is, having an actual or expected duration of six months or less) and minor.[31] For example, if a person has a broken leg but is expected to fully recover within six weeks, and the injury is considered minor, that person is *not* regarded as a person with a disability even if others treat the person as if he or she has a disability.[32]

> Note, while Section 504 does not require a school to take specific action if a student has a physical or mental impairment that is transitory and minor, Section 504 also does not prohibit schools from going beyond what the law requires to assist a student.
>
> The school district could, for example, allow the student to take a bus to school, when the student with the broken leg typically walks to school, or provide a pass to allow the student to use the faculty elevator–which is typically off-limits for students–while the student uses crutches.

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[29] 34 C.F.R. § 104.3(j)(2)(iv).

[30] Department of Justice: *ADA, Title II Technical Assistance Manual*, II-2.6000, www.ada.gov/taman2.html#II-2.6000; 34 C.F.R. pt. 104, App. A.

[31] Amendments Act § 4(e) (codified as amended at 42 U.S.C. § 12102). A transitory and minor impairment is a minor impairment with an actual or expected duration of 6 months or less. 42 U.S.C. § 12102(3)(B). An episodic impairment, on the other hand, is a disability if it would substantially limit a major life activity when active. *Id*. § 12102(4)(D). Neither the ADA statute nor regulation indicates a time limitation for an episodic impairment, whereas a transitory impairment is 6 months or less.

[32] Impairments that are episodic in nature or in remission are different from temporary impairments. Temporary impairments could be a disability or could not be a disability, depending upon the extent of the limitation and the length of time. Impairments that are episodic in nature are in remission or are ongoing, while temporary impairments exist for a limited time span. A temporary impairment caused by an injury (for example, a broken leg) may be a covered disability under the ADA Amendments Act if it is sufficiently severe to substantially limit a major life activity. *See Summers v. Altarum Institute Corp*., 740 F.3d 325 (4th Cir. 2014); *see also* OCR, *Protecting Students with Disabilities: Frequently Asked Questions About Section 504 and the Education of Children with Disabilities* (FAQ 34) (last modified Oct. 16, 2015), www.ed.gov/ocr/504faq.html.

Qualified individual with a disability. Finally, in addition to satisfying the definition of an individual with a disability, a student with a disability must also be qualified for the protections of Section 504 in order to be covered under the law. For students with disabilities at the elementary and secondary level, being qualified under Section 504 is based primarily on whether the person is a certain age.

Specifically, a student with a disability is a qualified individual with a disability if the student is of an age at which: (1) students without disabilities are provided elementary and secondary educational services; or (2) it is mandatory under State law to provide elementary and secondary educational services to students with disabilities.[33]

A student with a disability is also a qualified individual with a disability if he or she is a student to whom a State is required to provide a free appropriate public education (FAPE) under the IDEA, another Federal education law that addresses the rights of students with disabilities.

You can go to page 40 for a discussion of the IDEA.

[33] 34 C.F.R. § 104.3(*l*)(2). *See also* footnote 4 (noting that this resource guide addresses students from kindergarten through 12th grade).

An Overview of a Free Appropriate Public Education

Section 504 and the IDEA contain requirements for FAPE for students with disabilities, but there are some differences. Under the IDEA, FAPE is a statutory term.[34] It requires a school district to develop an individualized education program (IEP) for each eligible student with a disability that sets out, among other information, the student's program of special education and related services. In this section, however, we discuss the FAPE requirements under Section 504 only.

You can go to page 40 for a discussion of the differences between Section 504 FAPE and IDEA FAPE.

All elementary and secondary school students who are qualified individuals with disabilities, as defined by Section 504, and who need special education and/or related aids and services are entitled to FAPE. Under Section 504, FAPE is the provision of regular or special education and related aids and services that are designed to meet the individual educational needs of students with disabilities as adequately as the needs of non-disabled students are met and are based on adherence to procedures governing educational setting, evaluation and placement, and procedural safeguards.[35] Implementation of an IEP developed in accordance with the IDEA is one means of meeting the Section 504 FAPE standard.[36]

Though not explicitly required by the Department's Section 504 regulations, school districts often document the elements of an individual student's FAPE under Section 504 in a document, typically referred to as a *Section 504 Plan.*

In general, a *Section 504 Plan* describes the regular or special education and related aids and services a student needs and the appropriate setting in which to receive those services.

A written Section 504 Plan is often a useful way to document that the school district engaged in a process to identify and address the needs of a student with a disability and to communicate, to school personnel, the information needed for successful implementation. OCR encourages schools to document a student's Section 504 services in a written plan to help avoid misunderstandings or confusion about what Section 504 services the school offered the student. Note, however, that IDEA-eligible students with disabilities who have an IEP are not required to also have a Section 504 plan even though they are protected under Section 504. For these students, the IEP developed and implemented in accordance with the IDEA is sufficient.

[34] 20 U.S.C. § 1401(9) and 34 C.F.R. § 300.17.

[35] 34 C.F.R. § 104.33.

[36] 34 C.F.R. § 104.33(b)(2).

Under Section 504, FAPE must be provided free of charge to students with disabilities.[37] Schools may impose fees on a student with a disability only if the fees are equally imposed on students without disabilities.[38] For example, fees to cover the cost of a field trip that apply to all students are fees a school can charge to a student with a disability.

Key features of FAPE under Section 504 include:

- Evaluation and placement procedures that guard against misclassification or inappropriate placement of students;[39]
- Periodic reevaluation of students who have been provided special education or related services and prior to a significant change in placement;[40]
- 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;[41]
- 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;[42]
- 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.[43]

[37] 34 C.F.R. § 104.33(c).

[38] *Id.*

[39] 34 C.F.R. § 104.35.

[40] 34 C.F.R. § 104.35(d).

[41] 34 C.F.R. § 104.33(b)(1)(i).

[42] 34 C.F.R. § 104.34(a).

[43] 34 C.F.R. § 104.36.

Student Evaluations and Placement Under Section 504

Under Section 504, school districts must conduct an evaluation in a timely manner of any student who needs or is believed to need special education or related services because of a disability.[44] When a school is aware of a student's disability, or has reason to suspect a student has a disability, and the student needs or is believed to need special education or related services, it would be a violation of Section 504 if the school delays or denies the evaluation.[45]

In some circumstances, the IDEA evaluation process may provide the school district with the necessary information, required by Section 504, to determine whether a student has a disability, and whether that student needs related aids and services or supplementary aids and services in the regular education environment because of that disability. However, if a State or school district uses a separate process for evaluating the needs of students under Section 504, it must follow the requirements for evaluation specified in the Section 504 regulations.[46]

> A school district must evaluate a student if it has reason to believe the student has a disability and the student needs special education or related services as a result of that disability, even if the student only exhibits behavioral (and not academic) challenges.[47]

For example, those students who have a high-number of discipline referrals for inappropriate verbal outbursts in class, as compared to their peers, could be students with disabilities in need of services. Some students, due to an unaddressed disability, may engage in behaviors that do not conform to school codes of conduct because the students are not receiving needed special education or related aids and services, including needed services to address behavior. These and other indications that a student's behavior is out of the expected range of behaviors for students of similar age may trigger a school district's obligation to evaluate under Section 504 to determine whether the student has a disability and needs special education or related services as a result of that disability.

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[44] 34 C.F.R. § 104.35(a). English Learner (EL) students who may have a disability, like all other students who may have a disability and may require special education or related aids and services under Section 504, because of that disability, must be located, identified and evaluated in a timely manner. 34 C.F.R. §§ 104.32 and 104.35(a)-(b). To avoid inappropriately identifying EL students as students with disabilities because of their limited English proficiency, an EL student must be evaluated in an appropriate language based on the student's needs and language skills. For additional information, see OCR and DOJ, *Dear Colleague Letter: English Learner Students and Limited English Proficient Parents* (Jan. 7, 2015), www.ed.gov/ocr/letters/colleague-el-201501.pdf.

[45] 34 C.F.R. § 104.35.

[46] *Id*.

[47] 34 C.F.R. § 104.33.

A school district must, at no cost to parents, evaluate students who are suspected of having a disability, or more than one disability, in all related or all specific areas of educational need.[48] For example, a student who is easily distracted and unfocused may be manifesting attention-deficit/hyperactivity disorder (ADHD), depression, or a specific learning disability.[49] There is a range of physical or mental impairments that could cause a student to have a disability under Section 504 and to need special education or related services because of that disability, but this determination cannot be made without first evaluating the student.

If a school district determines, based on the facts and circumstances of the individual case, that a medical assessment is necessary to conduct a Section 504 individual evaluation in order to determine whether a child has a disability under Section 504 and needs special education or related services because of a disability,[50] the school district must ensure that the student receives this assessment at no cost to the student's parents.[51] When determining if the student has a disability and needs special education or related aids and services, school districts are also required to have procedures to ensure that evaluation information is documented and carefully considered.[52]

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[48] *Id;* 34 C.F.R. § 104.35

[49] Research estimates that approximately one-quarter to one-third of all children with ADHD also have a learning disability, and that they have coexisting psychiatric disorders at a much higher rate than students without ADHD. *See* U.S. Department of Education, *Teaching Children with Attention Deficit Hyperactivity Disorder: Instructional Strategies and Practices* (2004), www.ed.gov/teachers/needs/speced/adhd/adhd-resource-pt2.doc.

[50] A specific diagnosis is not actually necessary if the school determines a student is substantially limited in a major life activity and that limitation is caused by a mental or physical impairment. 34 C.F.R. §§ 104.3(j), 104.35*; see also* OCR, *Dear Colleague Letter and Resource Guide on Students with ADHD*, 23 n.70 (July 26, 2016), www.ed.gov/ocr/letters/colleague-201607-504-adhd.pdf.

[51] 34 C.F.R. §§ 104.33, 104.35, and 34 C.F.R. pt. 104, App. A (discussing Subpart D, ¶ 23) ("Recipients must also pay for psychological services and those medical services necessary for diagnostic and evaluative purposes."); *See also* OCR, *Dear Colleague Letter and Resource Guide on Students with ADHD,* 23 n.71 (July 26, 2016), www.ed.gov/ocr/letters/colleague-201607-504-adhd.pdf; U.S. Department of Education, Office of Special Education and Rehabilitative Services, Office of Special Education Programs, *Identifying and Treating Attention Deficit Hyperactivity Disorder: A Resource for School and Home* (last modified Feb. 13, 2009), www.ed.gov/rschstat/research/pubs/adhd/adhd-identifying.html. If a school district does not have the appropriate personnel on staff to conduct a medical assessment for diagnostic and evaluative purposes, the district must make arrangements for the medical assessment at no cost to the parent.

[52] 34 C.F.R. § 104.35(c)(2).

In OCR's investigative experience, school districts sometimes rely on a student's average, or better-than-average, classroom grades or grade point average (GPA) and, as a result, make inappropriate decisions. For example, a school district might wrongly assume that a student with an above-average GPA does not have a disability and therefore fail to conduct a Section 504 evaluation of that student, even if the school suspects that the student has ADHD or the school is aware that the student has been diagnosed with ADHD outside of school.

However, a student with a disability may achieve a high level of academic success but may nevertheless be substantially limited in a major life activity due to the student's impairment because of the additional time or effort the student must spend to read, write, or learn compared to others.[53]

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.

[53] 28 C.F.R. § 35.108(d)(3)(iii). *See also* 29 C.F.R. pt. 1630, App. (Equal Employment Opportunity Commission Interpretive Guidance on Title I of the Americans with Disabilities Act) (discussing Section 1630.2(j)(4)) (Mar. 25, 2011), www.gpo.gov/fdsys/pkg/CFR-2013-title29-vol4/pdf/CFR-2013-title29-vol4-part1630-app-id986.pdf.

Scenario 2 – Suspected Disability & Involvement of Knowledgeable People

Robert's seventh grade teachers report that he often falls asleep, without warning, during class and misses instruction. His parents insist that he gets a good night sleep but note that their pediatrician told them Robert might have narcolepsy, a chronic brain disorder that involves poor control of sleep and wake patterns. What should the teachers do?

Staff should seek an evaluation to determine whether Robert has a physical or mental impairment that is interfering with his ability to stay awake. The group who meets to review this evaluation and make a decision about services must consist of knowledgeable people (for example, school nurses, teachers, counselors, psychologists, school administrators, social workers, doctors, etc.) who, in interpreting evaluation data and determining the needed services, carefully review and analyze information collected from a variety of sources (for example, the pediatrician's report; aptitude and psychological test results; the student's grade reports; teacher observations; the student's social and cultural background; the student's family).

If the evaluation, which must be conducted at no cost to the parents or student, shows that the student has a disability, then the knowledgeable group (that is, people who are knowledgeable about the student, the meaning of the evaluation data and about the placement options), must together determine placement, including the special education or related aids and services the student needs under Section 504.

Scenario 3 – Disabilities in Remission

Doctors diagnosed Omar with cancer at the beginning of the summer break, between fourth grade and fifth grade. When initially diagnosed, Omar was weak and tired all the time, and, at times, unable to even get out of bed or dress or feed himself. He received chemotherapy in July and August and returned to school, without any symptoms of his disease, at the beginning of the school year. At that time his parents informed the school of Omar's cancer diagnosis. It is now November and doctors have informed Omar's parents that his disease appears to be in remission. Omar's mom notes that he runs and plays like all the other children and his grades are great. How would a group of knowledgeable persons determine if Omar has a disability?

A student who has an impairment that is episodic (for example, epilepsy or post-traumatic stress disorder) or in remission is considered to be a person with a disability if, when active (that is, when symptoms are evident or reoccur), the impairment substantially limits a major life activity. When active, Omar's illness left him weak and unable to get out of bed. In other words, when active, cancer substantially limits his ability to care for himself which, under Federal law, is a major life activity. Moreover, the cancer substantially limits the major bodily function of normal cell growth, which is also a major life activity under Federal law. For this reason, the group of knowledgeable persons would determine that Omar is a student with a disability.

However, he may or may not require special education or related aids and services that are designed to meet his individual educational needs as adequately as the needs of non-disabled students are met. Even if Omar does not need special education or related aids and services, he would still be protected under Section 504, for example, from bullying and harassment based on his disability.

School districts must have standards and procedures to evaluate students who may have a disability and need special education or related services.[54] The evaluation of a student, however, must be individualized. Although Section 504 does not require a specific process, the standards and procedures must meet certain requirements. Specifically, the evaluation standards and procedures must ensure that:

- Evaluations consist of more than IQ tests;[55]
- Evaluations measure specific areas of educational need. These could include speech processing, inability to concentrate, and behavioral concerns;[56]
- Tests are selected and administered to the student in a manner that best ensures that the test results accurately reflect the student's aptitude or achievement or other factor being measured, rather than reflect the student's disability, except where those are the factors being measured;[57]
- Tests and other evaluation materials are validated for the specific purpose for which they are used;[58] and
- Tests are appropriately administered by trained personnel.[59]

[54] 34 C.F.R. § 104.35(b).

[55] 34 C.F.R. § 104.35(b)(2).

[56] *Id.*

[57] 34 C.F.R. § 104.35(b)(3).

[58] 34 C.F.R. § 104.35(b)(1).

[59] *Id.*

Scenario 4 – Appropriate Testing

Juan is a student in the third grade. His teacher tests reading comprehension with written in-class quizzes. Juan has trouble finishing the quizzes on time, and his answers are short and incomplete. Because of the poor responses on the quizzes, Juan's teacher believes he may have a disability related to his ability to understand what he reads (reading comprehension skills). The school conducts an evaluation that requires Juan to read a passage and to write responses to a series of questions about the passage. Was this testing appropriate to evaluate Juan's suspected disability?

This test would not be appropriate for determining whether Juan has a disability related to reading comprehension if he has a disability related to writing. Specifically, if Juan struggles with writing, such as trouble staying in the margins, organizing words left to right and getting words on paper, Juan may have a disability related to his ability to write manually and may not score well on the test because he cannot finish answering questions in the time given, not because he does not understand the reading passage. In this example, Juan may have excellent reading comprehension skills, but his inability to write well quickly may result in a low test score.

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.

If a parent believes his or her child has a disability, the parent may ask, for example, a principal, counselor, social worker, or teacher to arrange for an evaluation of the student. Through the Section 504-compliant evaluation process, a knowledgeable group of people will determine if the student has a disability and, if so, what services the student needs.[60]

Although a parent does not have an absolute right to a Section 504 evaluation upon request, a school must evaluate a student if the school has reason to believe the student is in need of special education or related services because of a disability.[61]

> 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.

If the school does not agree to evaluate the student, the school must inform the parent of his or her right to challenge the school's decision. If a parent disagrees with any decisions regarding the identification, evaluation, or educational placement of his or her child, the parent may seek an impartial hearing (often called a *due process hearing*) that provides the parent with an opportunity to participate and permits representation by an attorney and a review procedure.[62]

You can go to page 35 for a discussion of procedural safeguards, including due process.

A parent may have a specialist or other educational professional, who is independent of the school, test his or her child.[63] School districts are required to consider information from a variety of sources in interpreting evaluation data and in making placement decisions, and the independent evaluation is another source that makes up the universe of information about the student.[64]

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[60] The school's evaluation process may be the same under Section 504 and the IDEA. An evaluation could reveal that the student is eligible for services under the IDEA and Section 504, Section 504 only, or that the student is not a student with a disability under Section 504, or is a student with a disability under Section 504 who does not need special education or related aids and services.

[61] 34 C.F.R. § 104.35(a). If a school wants to evaluate a student for the first time (initial or preplacement evaluation) and the parent refuses, the school cannot proceed with the evaluation. Instead, the school may, but is not required to, seek a decision from a hearing officer to permit the evaluation. *See* OCR, *Protecting Students with Disabilities: Frequently Asked Questions About Section 504 and the Education of Children with Disabilities* (FAQ 27) (last modified Oct. 16, 2015), www.ed.gov/ocr/504faq.html.

[62] 34 C.F.R. § 104.36.

[63] Note that Section 504 does not specifically address whether a school district must reimburse a parent if the parent has the student evaluated by professionals who are not affiliated with the school district.

[64] 34 C.F.R. § 104.35(c)(1).

In determining a student's needs, sources to consider include aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior.[65]

Other information that the school district must also consider is a medical diagnosis or the results of a medical assessment obtained by the school district. If a district believes a medical assessment is necessary and the parent volunteers to pay for a private assessment, the district must make it clear that the parent has a choice and can choose to accept a school-furnished assessment at no cost to the parent.[66]

OCR interprets Section 504 to require informed parental consent for the initial evaluation. If a parent refuses consent for an initial evaluation and a recipient school district suspects a student has a disability, OCR interprets Section 504 to allow school districts to use due process hearing procedures to seek to override the parents' denial of consent.[67] OCR also urges schools to allow for parental participation when considering any change in the student's Section 504 provision of FAPE, including location of services.[68]

> Section 504 is silent on the form of parental consent required. OCR has accepted written consent as compliance.[69] Making a request in writing can help avoid misunderstandings between parents and school districts, and could help to prove or disprove a related allegation in the event a parent decides to file a formal civil rights complaint against a school district in the future.

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[65] *Id.*

[66] 34 C.F.R. §§ 104.33, 104.35 and 34 C.F.R. pt. 104, App. A (discussing Subpart D, ¶ 23) ("Recipients must also pay for psychological services and those medical services necessary for diagnostic and evaluative purposes."). *See also* OCR, *Dear Colleague Letter and Resource Guide on Students with ADHD* (July 26, 2016), www.ed.gov/ocr/letters/colleague-201607-504-adhd.pdf; and U.S. Department of Education, Office of Special Education and Rehabilitative Services, Office of Special Education Programs, *Identifying and Treating Attention Deficit Hyperactivity Disorder: A Resource for School and Home*, at 9 (last modified Feb. 13, 2009), www2.ed.gov/rschstat/research/pubs/adhd/adhd-identifying.html. If a school district does not have the appropriate personnel on staff to conduct a medical assessment for diagnostic and evaluative purposes, the district must make arrangements for the medical assessment at no cost to the parent.

[67] *See* OCR, *Protecting Students with Disabilities: Frequently Asked Questions About Section 504 and the Education of Children with Disabilities* (FAQ 27) (last modified Oct. 16, 2015), www.ed.gov/ocr/504faq.html.

[68] 34 C.F.R. § 104.35(a) and 34 C.F.R. pt. 104, App. A (discussion of Subpart D) (enable parents or guardians to influence decisions regarding the evaluation and placement of their children); *see also* OCR, *Protecting Students with Disabilities: Frequently Asked Questions About Section 504 and the Education of Children with Disabilities* (FAQ 41) (last modified Oct. 16, 2015), www.ed.gov/ocr/504faq.html.

[69] IDEA, as well as many state laws, also require written consent prior to initiating an evaluation. *See* OCR, *Protecting Students with Disabilities: Frequently Asked Questions About Section 504 and the Education of Children with Disabilities* (FAQ 42) (last modified Oct. 16, 2015), www.ed.gov/ocr/504faq.html.

Often school districts must address health issues of students during school hours or during extracurricular activities conducted after school hours. For example, students with food allergies may need an injection of epinephrine in an emergency, or students with diabetes may need help with carbohydrate counting and administering insulin injections. These measures (for example, self-management techniques or medication) are often referred to as mitigating measures. The effect of the epinephrine, insulin, or other mitigating measures, cannot be considered when the school district assesses whether a student has a disability.[70]

You can go to page 6 for more discussion about mitigating measures.

In other words, when a school district conducts an evaluation for disability, it is important to consider that mitigating measures can treat the impairment, thereby obscuring the substantial limitations of the impairment. Therefore, it is useful to have evidence showing that an impairment would be substantially limiting in the absence of the ameliorative (beneficial) effects of mitigating measures. For example, such evidence could include information about the limitations a person experienced prior to taking medication, or evidence concerning the expected course of a particular disorder absent mitigating measures (such as a student with a peanut allergy could stop breathing after contact with peanuts.) This is why it is also beneficial to involve parents in the evaluation process, to access such information that parents may have.

A student is not required to stop taking needed medication or using another mitigating measure in order to receive an evaluation.

Therefore, when determining whether a student with a health concern has a disability, the school district must evaluate whether the health concern (for example, a tree nut allergy or diabetes) would be substantially limiting without considering the beneficial effects (amelioration) of medication or other measures.[71] For many children with a peanut allergy, for example, the allergy, when active, is likely to substantially limit the major life activities of breathing and respiratory function, and therefore, the child would have a disability. If, because of an allergy or other health concern the student has a disability and may reasonably be believed to need special education or related aids or services, the student has a right to an evaluation under Section 504.[72]

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[70] 42 U.S.C. § 12102(4)(E)(i).

[71] *Id.*

[72] 34 C.F.R. §104.35(a); For more information about health plans and Section 504, see OCR, *Questions and Answers on the ADA Amendments Act of 2008 for Students with Disabilities Attending Public Elementary and Secondary Schools* (FAQ 12 & 13) (Jan. 19, 2012), www.ed.gov/ocr/docs/dcl-504faq-201109.pdf.

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.[73] The type of tests and other information obtained will vary for each individual student depending on the suspected impairment.

[73] 34 C.F.R. § 104.35(c).

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.

Section 504 requires school districts to conduct periodic reevaluations of students with disabilities.[74] Section 504 also requires school districts to conduct reevaluations prior to significant changes in placement.[75]

- OCR considers an exclusion from the educational program (for example, an out-of-school suspension) of more than 10 consecutive school days to be a significant change in placement.[76]
- OCR also considers a series of short-term exclusions (each 10 school days or fewer) from the educational program to be a significant change in placement, if the short-term exclusions total more than 10 school days *and* create a pattern of removal.[77]

[74] 34 C.F.R. § 104.35(d). A reevaluation procedure consistent with the IDEA is one means of meeting this Section 504 requirement.

[75] 34 C.F.R. § 104.35(a).

[76] *Id.* That an exclusion from an educational program for more than 10 consecutive school days is a significant change in placement is in accord with a U.S. Supreme Court decision interpreting the law that preceded the IDEA and a U.S. Supreme Court decision under the 14th Amendment to the U.S. Constitution. The Supreme Court ruled that a suspension of more than 10 days constitutes a change of placement under the law that preceded the IDEA. *Honig v. Doe*, 484 U.S. 305, 325 n.8, 328-29 n.11 (1988). Also see the IDEA regulations, which provide that disciplinary removals from a child's current placement for more than 10 consecutive school days, or a series of removals that cumulate to more than 10 school days and constitute a pattern of removal, are considered a change of placement and trigger a variety of safeguards under the IDEA. 34 C.F.R. §§ 300.536(a), 300.530 *see also* OCR, *Protecting Students with Disabilities: Frequently Asked Questions About Section 504 and the Education of Children with Disabilities* (FAQ 30) (last modified Oct. 16, 2015), www.ed.gov/ocr/504faq.html.

[77] 34 C.F.R. § 104.35(a); *see* OCR, *Protecting Students with Disabilities: Frequently Asked Questions About Section 504 and the Education of Children with Disabilities* (FAQ 30) (last modified Oct. 16, 2015), www.ed.gov/ocr/504faq.html. Under Section 504, OCR's determination of whether a series of exclusions creates a pattern of removal is made on a case-by-case basis, and may include consideration of several factors including the length of each removal, the proximity of the removals to each other, and the total amount of time the child is excluded from school. *See also* 34 C.F.R. § 300.536 (IDEA regulations).

- OCR also considers a school's transferring a student from one type of program to another (for example, from a general education class with pull-out special education services to a self-contained special education class) or terminating or significantly reducing a related service to be a significant change in placement.[78]

In addition, when addressing discipline for students with disabilities, it is important that schools comply with applicable legal requirements governing the discipline of a child for misconduct caused by, or related to, the child's disability.[79]

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.[80] 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.[81]

[78] 34 C.F.R. § 104.35(a); *see also* OCR, *Protecting Students with Disabilities: Frequently Asked Questions About Section 504 and the Education of Children with Disabilities* (FAQ 30) (last modified Oct. 16, 2015), www.ed.gov/ocr/504faq.html.

[79] *See* 34 C.F.R. § 104.35. *See generally* 34 C.F.R. §§ 104.4, 104.32-36; OCR, *Dear Colleague Letter: Charter Schools* (May 14, 2014), www.ed.gov/ocr/letters/colleague-201405-charter.pdf. See also 34 C.F.R. § 300.530(e)-(f) (IDEA regulations).

[80] 34 C.F.R. § 104.35(a). As noted previously, *see supra*, note 77, OCR also considers a series of short-term exclusions (each 10 school days or fewer) from the educational program to be a significant change in placement, if the short-term exclusions total more than 10 school days and create a pattern of removal.

[81] 34 C.F.R. § 104.35(a).

Additional Considerations for Placement and Services Under Section 504

Students who are identified as having a disability and needing special education and/or related aids and services are entitled to special education and a broad range of supplemental and related aids and services, as needed, such as tutors, note-takers, or one-on-one aides; assistive technology, psychological and counseling services; or speech or occupational therapy.[82]

> To the extent that services and aids, or changes to policies and procedures (for example, allowing testing accommodations such as extended time for exams) for a student with a disability can be implemented by a student's regular education teacher, the regular education teacher is responsible for implementing them.[83]
>
> For example, a regular education teacher may need to provide a student with a disability an outline of the teacher's lecture, permit the student to sit in the front of the classroom, or allow the student to turn in homework late.
>
> However, the school district is ultimately responsible for ensuring there are sufficient qualified personnel available to provide the supplemental and related aids and services.[84]

Students with disabilities must be educated with students who do not have disabilities to the maximum extent appropriate to the needs of the student with a disability.[85] In addition, school districts must place students with disabilities in the regular education environment unless the school district demonstrates that educating the student with a disability in the regular education environment with the use of supplementary aids and services cannot be achieved satisfactorily.[86] In implementing the decision of a group of knowledgeable persons to place a student in a setting other than the regular educational environment, the school must take into account the proximity of the alternate setting to the student's home.[87]

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[82] 34 C.F.R. § 104.33.

[83] 34 C.F.R. § 104.34(a).

[84] 34 C.F.R. § 104.33.

[85] 34 C.F.R. § 104.34(a).

[86] *Id.*

[87] *Id.*

To meet the requirements of FAPE, school districts, implementing the placement decision made by a group of knowledgeable persons, may place a student with a disability in, or refer such student to, a program not operated by the school district.[88] Nevertheless, the school district remains responsible for ensuring that the education offered is an appropriate education, as defined in the Section 504 regulation.[89] In addition, the school district cannot require the parent to pay the financial obligations (for example, tuition, the cost of room and board and non-medical care in a program that is away from home) associated with the placement.[90] Transportation must also be provided at no greater cost than would be incurred if the student were placed in the home district.[91] (Of course, if transportation is a related service for a particular student with a disability, the school district cannot charge the student for that transportation.[92])

If, to provide FAPE, a school district places a student with a disability in a private school, then the school district is required to pay for the private school. However, if a school district makes FAPE available and the student's parents choose to place the child in a private school, the school district is not required to pay for the student's education in the private school.[93] Disagreements between parents or guardians and the school district regarding whether the school district has made FAPE available, or regarding the question of financial responsibility for services in the private school, are subject to Section 504's due process procedures.[94]

> School districts must make decisions regarding the needs and placement of a student with a disability on an individual basis, rather than on presumptions or stereotypes regarding persons with disabilities or classes of such persons, or based on concerns about the costs of providing the related aids or services.[95]

For example, it would be a violation of Section 504 for a school district to have a policy that every student with autism, regardless of the severity of the disability, must attend a separate school designed primarily for students with autism.[96] However, a school district can implement the decision of a group of knowledgeable persons to place a student with a disability in a separate class or school if the student with a disability's needs are such that he or she cannot be satisfactorily educated within the regular educational environment even with supplementary aids and services.[97]

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[88] 34 C.F.R. § 104.33(b)(3).

[89] *Id.*

[90] *Id.*

[91] 34 C.F.R. § 104.33(c)(1)-(3).

[92] 34 C.F.R. § 104.33(c).

[93] 34 C.F.R. § 104.33(c)(4).

[94] *Id.*

[95] 34 C.F.R. §§ 104.33(b), 104.35.

[96] 34 C.F.R. §§ 104.4, 104.34(a).

[97] 34 C.F.R. § 104.34(a).

When a student with a disability transfers to a new school district, the receiving district has a responsibility to ensure it meets the student's disability-based needs.[98] In determining how to meet those needs, the receiving district must draw upon information from a variety of sources, which would include past evaluations and past Section 504 plans and IEPs.[99]

If the student has a current Section 504 plan from the former school and, after reviewing the plan, the receiving school believes the plan provides FAPE, there is nothing in Section 504 that prohibits the new school from adopting the plan for the student. In addition, if upon review of the plan from the former school, the receiving school determines additional evaluation is necessary or that the plan needs to be revised, there is nothing in Section 504 that prohibits the new school from implementing the current plan while it conducts the evaluation and develops a new plan. [100]

[98] 34 C.F.R. §§ 104.33-104.36.

[99] 34 C.F.R. § 104.35(c). *See also* OCR, *Protecting Students with Disabilities: Frequently Asked Questions About Section 504 and the Education of Children with Disabilities* (FAQ 38) (last modified Oct. 16, 2015), www.ed.gov/ocr/504faq.html.

[100] *Id*.

Athletics and Extracurricular Activities

School districts must provide non-academic services and activities in a manner that provides students with disabilities an equal opportunity for participation.[101] This requirement includes activities such as extracurricular athletics and special interest groups or clubs sponsored by the school district.[102]

School districts must afford qualified students with disabilities an equal opportunity for participation in extracurricular athletics in an integrated manner to the maximum extent appropriate to the needs of the student.[103] This requirement means that a school district must make reasonable modifications to its policies, practices, or procedures whenever such modifications are necessary to ensure equal opportunity, unless the school district can demonstrate that the requested modification would constitute a fundamental alteration of the nature of the extracurricular athletic activity.[104]

The fact that a student has a disability does not mean that the student must be allowed to participate in any selective or competitive program offered by a school district. Rather, 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.[105]

> In considering whether a reasonable modification is legally required, the school district must first engage in an individualized inquiry to determine whether the modification is necessary. [106] As a result of this inquiry, a school district may find, for example, that a hard-of-hearing sprinter needs a visual cue at the start of each race because he or she cannot hear the starter's pistol, or that staff must administer a glucose test and insulin, as necessary, to a student with diabetes in order to facilitate his or her participation in an afterschool club activity.

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[101] 34 C.F.R. § 104.37.

[102] *Id.*

[103] 34 C.F.R. §§ 104.37(a), (c), 104.34(b), 104.4(b)(1)(ii).

[104] *See Alexander v. Choate*, 469 U.S. 287, 300-01 (1985) (Section 504 may require reasonable modifications to a program or benefit to assure meaningful access to qualified persons with disabilities); *Se. Cmty. Coll. v. Davis*, 442 U.S. 397 (1979) (Section 504 does not prohibit a college from excluding a person with a serious hearing impairment as not qualified where accommodating the impairment would require a fundamental alteration in the college's program); *PGA Tour, Inc. v. Martin*, 532 U.S. 661 (2001) (under Title III of the ADA, waiver of a particular rule for an athlete with a disability deemed by the Supreme Court to be a reasonable accommodation because an individualized analysis revealed that the waiver did not result in a fundamental alteration of the athletic activity); *see also* OCR, *Dear Colleague Letter: Students with Disabilities in Extracurricular Athletics* (Jan. 25, 2013), www.ed.gov/ocr/letters/colleague-201301-504.html.

[105] 34 C.F.R. §§ 104.37(a), (c), 104.34(b), 104.4(b)(1)(ii); *see also* OCR, *Dear Colleague Letter: Students with Disabilities in Extracurricular Athletics* (Jan. 25, 2013), www.ed.gov/ocr/letters/colleague-201301-504.html.

[106] 34 C.F.R. § 104.37; *see also* OCR, *Dear Colleague Letter: Students with Disabilities in Extracurricular Athletics* (Jan. 25, 2013), www.ed.gov/ocr/letters/colleague-201301-504.html.

On the other hand, a modification might constitute a fundamental alteration if it alters such an essential aspect of the activity or game that it would be unacceptable even if it affected all competitors equally (for example, removing a base from a baseball diamond). Alternatively, a change that has only a peripheral impact on the activity or game itself might nevertheless give a particular player with a disability an unfair advantage over others and, for that reason, fundamentally alter the character of the competition (for example, allowing a student with a disability to start a race a few seconds before his non-disabled peers). Such changes would not be required under Section 504.

Physical Accessibility

School districts are required to ensure that students and others with disabilities, including parents, are not denied access to the school's programs or activities because of inaccessible facilities, including academic buildings, walkways, restrooms, athletic facilities, and parking spaces.[107] The requirements public schools must meet to ensure programs and activities are accessible depends on the date a building (or facility) was built (constructed) or altered (changes made to a building that affect its use for accessibility purposes).[108]

Under Section 504, for facilities constructed prior to June 4, 1977, program access is required.[109] In general terms, program access means that, although the facility or parts of the facility may not be physically accessible, the public school must still make its programs and activities available to students with disabilities. For example, if stairs lead to the upper floors of a school and the school does not have an elevator, ramp, or chair lift, and a student with a disability is unable to traverse the stairs, the student will be unable to reach the upper floors. A resolution to this problem could be moving classes that the student needs (or wants) to take from the upper floors to the accessible ground floor during the time period the student with a disability takes the class.

Under Section 504, facilities (such as buildings) that were built or altered on or after June 4, 1977, are referred to as new construction.[110] Specific construction and design standards apply to these facilities. The construction and design standards provide information, for example, about the required width of bathroom stalls, how steep a ramp may be, and the required height of countertops and tables. The construction and design standards have evolved over time, and the date of construction or alteration determines which accessibility requirements apply.[111] For

[107] 34 C.F.R. §§ 104.22-104.23; 28 C.F.R. §§ 35.150-35.151.

[108] 34 C.F.R. §§ 104.21-104.23; 28 C.F.R. §§ 35.149-35.151.

[109] 34 C.F.R. § 104.22.

[110] 34 C.F.R. § 104.23. Under Title II of the ADA, facilities that were built or altered after January 26, 1992, are referred to as new construction, and specific construction and design standards apply under Title II. 28 C.F.R. § 35.151.

[111] Examples of accessibility standards are the Uniform Federal Accessibility Standards, the 1991 ADA Standards for Accessible Design, and the 2010 ADA Standards for Accessible Design.

construction or alteration work that began on public schools on or after March 15, 2012, the 2010 ADA Standards for Accessible Design (2010 ADA Standards) apply.[112]

However, when a public school is required to meet the accessibility requirements of a specific design standard, such as the 2010 ADA Standards, compliance with the standard alone may not be sufficient to meet an individual student's needs. When this occurs, the public school has an obligation to provide access for the student.[113] For example, if the main entrance to the school has a ramp that meets all of the required accessibility standards, but a student who attends the school and uses leg braces is unable to traverse the ramp, the school would need to find another way to ensure the student has access to its program and activities. One solution could be to allow the student to use the faculty entrance that has a flat entrance and a short walkway to the entrance door.

Scenario 8 – Accessibility

Ayana recently enrolled in a school that does not have an elevator. The school was built in the early 1960s and, due to limited resources, the district has never altered the building. Ayana, who is unable to walk upstairs due to her disability, is dismayed when she discovers that the art studio is on the second floor; she had planned to take an art class the following semester. What should the school do to address this situation?

Districts are not required to make each existing facility or every part of an existing facility accessible if the facility in question was constructed before June 4, 1977; however, districts must still provide students with disabilities access to the program or activity in question. Access to programs operated by a school in older facilities that are totally or partially inaccessible may, in some instances, be provided through means other than structural change, such as relocation of programs. School districts are required to have procedures in place to ensure that parents, students, and other interested persons can obtain information about the location of services, activities, and facilities that are accessible to and usable by individuals with disabilities.[114] The school in this scenario is an existing facility because it was built before June 4, 1977, and therefore, program access is required to ensure compliance with Section 504 and the ADA. The school may, for example, move the art studio to a room on the first floor so that Ayana has an equal opportunity to participate in the art class with her peers.

[112] 28 C.F.R. § 35.151(c)(3). For entities required to comply with Section 504, OCR will permit recipients of Federal financial assistance from the U.S. Department of Education to use the 2010 ADA Standards to meet its accessibility requirements. 77 Fed. Reg. 14,972 (March 14, 2012).

[113] 34 C.F.R. § 104.21.

[114] 34 C.F.R. § 104.22(f).

Additional Protections from Discrimination

Public school students with disabilities have the right to be free from discrimination based on disability; are entitled to an equal opportunity regardless of disability; and have the right to aids, benefits, or services, equal to and as effective as those provided to students without disabilities.[115]

In some situations, providing an equal opportunity (that is, providing aids, benefits, or services that are as effective as those provided to others) requires *different* treatment for a student with a disability. For example, if all students are provided with hard copy textbooks, a student who is blind would need the textbooks in a different format (for example, Braille, large print, or an accessible electronic format) in order to have equal access to the information in the textbook. The special education and/or related aids and services provided to students under Section 504 FAPE is another example.

Students with disabilities must be provided different or separate aid, benefits, or services, however, only when it is necessary so that the aid, benefits, or services are as effective as those provided to others.[116] For aid, benefits, or services to be equally effective, public school students with disabilities must be afforded an equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement in the most integrated setting appropriate to a particular student's needs.[117]

For example, a school district's bus transportation schedule that requires a 20 minute early departure for administrative convenience (rather than, for example, possible health- or education-related reasons) for students with disabilities who need a wheelchair-accessible bus, but does not impose a similar early departure requirement on other students who take a bus, would result in discrimination in violation of Section 504.[118] In this example, the school, by unnecessarily requiring students with certain mobility disabilities to leave class 20 minutes early every day, would unlawfully limit the opportunities that the students with disabilities have, relative to their non-disabled peers, to participate in or benefit from educational services at the school.

In addition, the school's blanket practice would raise FAPE concerns because the practice applies to all students with certain mobility disabilities without considering each student with a mobility disability's individual needs.[119] Instead, the policy is based on the bus transportation schedule and administrative convenience. Unless the school makes an individual determination through the FAPE process that a student with a disability requires a shortened school day to receive FAPE, students with disabilities are entitled to an entire school day that is as long as the school day for students without disabilities.

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[115] 34 C.F.R. § 104.4(b)(1)(ii), (iii).

[116] 34 C.F.R. § 104.4(b)(1)(iv).

[117] 34 C.F.R. § 104.4(b)(2).

[118] 34 C.F.R. §§ 104.4(b)(1)(ii), 104.33, 104.35.

[119] 34 C.F.R. §§ 104.33, 104.35.

Similarly, if a school repeatedly sends a student with a disability home early, in response to her disruptive behavior in class, but does not do so for her non-disabled peers who engage in similar behavior, the different treatment would be unlawful.[120] This fact scenario would also raise FAPE concerns if the student is not able to receive the services outlined in her IEP or Section 504 plan because she is repeatedly sent home early. This determination would have to be made on a case-by-case basis depending on the particular facts and circumstances.

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.

[120] 34 C.F.R. § 104.4(a)-(b).

Bullying and Harassment

> This section includes language that is undeniably offensive and may be painful to many readers. OCR hopes the benefit of including examples to reflect the harsh reality of harassment at school helps school personnel, parents, and students understand the rights of students with disabilities who are harassed and how schools must respond, and that it outweighs the cost of offending some readers of this document.

Section 504 prohibits disability-based harassment by peers that is sufficiently serious to deny or limit a student's ability to participate in or benefit from the school's education programs and activities (in other words, creates a hostile environment).[121] When a school district knows or reasonably should know of possible disability-based harassment, it must take immediate and appropriate steps to investigate or otherwise determine what occurred.[122] If an investigation reveals that the harassment created a hostile environment, the recipient must take prompt and effective steps reasonably calculated to end the harassment, eliminate the hostile environment, prevent the harassment from recurring, and, as appropriate, remedy its effects [123]

Bullying and harassment[124] of a student by his or her peers, based on disability, may deny a student equal educational opportunities.[125] Note, however, that the label used to describe an incident (for example, bullying, hazing, teasing) does not determine how a school is obligated to respond. Rather, the nature of the conduct itself must be assessed for civil rights implications.[126]

Harassment of a student by another student (peer-on-peer) on the basis of his or her disability may take many forms, such as a student remarking out loud to other students during class that a student with dyslexia is *retarded* or *dumb* and does not belong in the class, or students repeatedly placing classroom furniture or other objects in the path of a classmate who uses a wheelchair, impeding the classmate's ability to enter the classroom. Note that harassment does not have to include intent to harm, be directed at a specific targeted student, or involve repeated incidents in order for it to be considered discriminatory.

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[121] This resource guide addresses only student-on-student bullying and harassment. Under Section 504 and Title II, students with disabilities are also protected from bullying or harassment by teachers, other school employees, and third parties. Such bullying can trigger a school's obligation to address disability-based harassment, remedy a denial of FAPE, or both. *See* 34 C.F.R. §§ 104.4, 104.33; 28 C.F.R. pt. 35. OCR recommends that States and school districts consult with legal counsel regarding their responsibilities and duties in cases of bullying or harassment that involve school personnel.

[122] 34 C.F.R. § 104.4; s*ee also* OCR, *Dear Colleague Letter: Responding to Bullying of Students with Disabilities* (Oct. 21, 2014), www.ed.gov/ocr/letters/colleague-bullying-201410.pdf.

[123] *Id*.

[124] The terms *bullying* and *harassment* are used interchangeably in this resource guide.

[125] 34 C.F.R. § 104.4; s*ee also* OCR, *Dear Colleague Letter: Responding to Bullying of Students with Disabilities* (Oct. 21, 2014), www.ed.gov/ocr/letters/colleague-bullying-201410.pdf.

[126] 34 C.F.R. § 104.4; s*ee also* OCR, *Dear Colleague Letter: Harassment and Bullying* (Oct. 26, 2010), www.ed.gov/ocr/letters/colleague-201010.pdf.

A school is responsible for promptly and effectively addressing harassment about which it knows, or reasonably should have known.[127] In some situations, harassment may be in plain sight, widespread, or well-known to students and staff, such as harassment occurring in hallways, during academic or physical education classes, during extracurricular activities, at recess, during lunch, on a school bus, or through graffiti in public areas. In these cases, the obvious signs of the harassment are sufficient to put the school on notice. In other situations, the school may become aware of a single incident of misconduct that triggers an investigation that could lead to the discovery of additional incidents that, taken together, may contribute to the creation of a hostile environment. In all cases, schools must provide notice of their policies prohibiting harassment and procedures for reporting and resolving complaints that will alert the school to incidents of harassment.[128]

> Appropriate steps to end harassment may include separating the student who was harassed and the student(s) engaged in the harassing behavior, providing counseling for the students, or taking disciplinary action against the harasser. These steps should not penalize the student who was harassed.

For example, any separation of the targeted student from an alleged harasser should be designed to minimize the burden on the targeted student's educational program (for example, not requiring the targeted student to change his or her class schedule). In addition, depending on the extent of the harassment, the school may need to provide training or other interventions not only for the perpetrators, but also for the larger school community, to ensure that all students, their families, and school staff can recognize harassment if it recurs and know how to respond.[129]

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[127] 34 C.F.R. § 104.4; *see also* OCR, *Dear Colleague Letter: Harassment and Bullying*, 2 (Oct. 26, 2010), www.ed.gov/ocr/letters/colleague-201010.pdf ("A school is responsible for addressing harassment incidents about which it knew or reasonably should have known."); *id*. at 3 ("At a minimum, the school's responsibilities include making sure that the harassed students and their families know how to report any subsequent problems, conducting follow-up inquiries to see if there have been any new incidents or any instances of retaliation, and responding promptly and appropriately to address continuing or new problems.").

[128] 34 C.F.R. §§ 104.7(b), 104.8 (school districts must adopt and publish grievance procedures providing for the prompt and equitable resolution of student disability discrimination complaints and must notify students, parents, employees, applicants and other interested parties that the district does not discriminate on the basis of disability).

[129] 34 C.F.R. § 104.4; *see also* OCR, *Dear Colleague Letter: Harassment and Bullying*, 3 (Oct. 26, 2010), www.ed.gov/ocr/letters/colleague-201010.pdf.

Schools also have responsibilities under Section 504's FAPE requirements when a student with a disability is harassed or bullied on *any* basis (for example, bullied based on disability, or national origin, or homelessness, or appearance). This is because the bullying or harassment can result in a denial of FAPE under Section 504 and, if that occurs, it must be remedied. FAPE may be denied to a student when, for example, the effects of the bullying include adverse changes in the student's academic performance or behavior.[130]

If the school has reason to suspect the student's needs have changed, the Section 504 team must determine the extent to which additional or different services are needed,[131] ensure that any needed changes are made promptly, and safeguard against putting the onus on the student with the disability to avoid or handle the bullying.

[130] 34 C.F.R. § 104.33; *see also* OCR, *Dear Colleague Letter: Responding to Bullying and Harassment*, 6 (Oct. 21, 2014), www.ed.gov/ocr/letters/colleague-bullying-201410.pdf.

[131] *Id*.

Disputes and Disagreements Regarding FAPE and non-FAPE Matters

Conflicts between parents and school personnel about Section 504 issues may be resolved through due process or through the school district's established grievance procedures.

> School districts are required to establish and implement a system of procedural safeguards for parents to appeal district actions regarding the identification, evaluation, or educational placement of students with disabilities who need or are believed to need special education or related services.[132] This obligation may be more commonly known as *due process*.

Examples of the types of complaints that are appropriately resolved through due process include: whether a student has a disability and is eligible for special education and or related services; whether a student with a disability requires further evaluation in order to devise an appropriate plan of services; or whether the scope of the evaluation or the current services is sufficient to meet the student's individual educational needs.

On the other hand, parents and others (for example, advocacy organizations) can attempt to resolve a range of other types of complaints, for example, complaints regarding disability-based harassment, different treatment, or a lack of accessible facilities or programs, through a district's grievance procedure.[133]

Note, a school district cannot satisfy the requirement to have due process procedures by relying on its grievance procedure, nor can a district require a parent to pursue a FAPE-related complaint through the grievance procedure before a hearing under the system of procedural safeguards will be granted. Districts must ensure that they have due process procedures that are available to parents, as required.[134]

Procedural Safeguards. Under Section 504, school districts are required to develop and implement a system of procedural safeguards to address FAPE concerns specifically, such as the identification, evaluation, and educational placement of students with disabilities.[135]

Procedural safeguards include notice; an opportunity for records review by parents or guardians; an impartial due process hearing, with an opportunity for participation by the student's parents or guardian and representation by counsel; and a review procedure.

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[132] 34 C.F.R. § 104.36.

[133] 34 C.F.R. § 104.7.

[134] *Id*.

[135] 34 C.F.R. § 104.36. One means of meeting the procedural safeguards requirements of Section 504 is compliance with IDEA procedural safeguards. If a district chooses to use an IDEA hearing procedure, the procedure must nevertheless adhere to the standards and requirements set forth in the Section 504 regulations concerning identification, evaluation, and placement.

> School districts must provide notice to parents explaining any evaluation and placement decisions affecting their children, and explain the parents' right to review relevant records and contest any decision regarding evaluation and placement through an impartial hearing.[136]

Examples of relevant records could include: evaluation reports, report cards, a Section 504 plan, discipline records, and health records. Schools can provide parents with access to relevant records by, for example, providing copies of the records or allowing parents to review the records at the school and make copies.[137]

Scenario 10 – Procedural Safeguards

Ms. Lee told staff at her son's school that she believes her son has a disability because he cannot seem to sit still and concentrate on his assignments. Although Ms. Lee has made multiple requests, the school has refused to evaluate him because the teachers do not believe the student has a disability. Ms. Lee does not receive any communication from the school about why they will not evaluate her son. Is the school's approach permissible?

No, a school cannot simply ignore a parent's request for his or her child to be evaluated, even if the school does not believe that the student has a disability. A school district is required to establish, implement, and inform parents about a system of procedural safeguards that are designed to help resolve FAPE-related disagreements regarding identification, evaluation, or educational placement of a student. As part of this system, a school must notify parents of any evaluation or placement actions and inform parents of their right to: (i) examine records or documents that the school relied on in making its decision about the student; (ii) request an impartial hearing that provides the parent with an opportunity to participate and permits representation by an attorney; and (iii) have an opportunity for review of the decision made at the hearing.

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[136] *See* OCR, *Protecting Students with Disabilities: Frequently Asked Questions About Section 504 and the Education of Children with Disabilities* (FAQ 45) (last modified Oct. 16, 2015), www.ed.gov/ocr/504faq.html.

[137] Another law called the Family Educational Rights and Privacy Act (FERPA) addresses privacy rights regarding education records, including the right of parents to inspect and review their child's education records. When a student turns 18 or enters a postsecondary institution at any age, the rights under FERPA transfer to the student. See the Department's website for more information about FERPA, www.ed.gov/policy/gen/guid/fpco/index.html.

Grievance Procedures. School districts are required to establish grievance procedures for resolving complaints related to those cases where the complainants allege that employees, other students, or third parties engaged in discriminatory behavior.[138] The grievance procedures must ensure that complaints are resolved in a prompt and equitable manner. In evaluating whether a school district's grievance procedures are prompt and equitable, OCR will examine, for example, the extent to which notice of the procedures has been provided to students, parents, and employees of the school; whether the procedures afford an opportunity for an adequate, reliable, and impartial investigation; whether reasonably prompt timeframes have been established for the various stages of the complaint process; whether notice of the outcomes of the complaint has been provided to the parties; and whether there is an assurance that any violations will be addressed, and steps will be taken to prevent a recurrence.[139]

Section 504 Coordinators. School districts with 15 or more employees must designate an employee (sometimes referred to as a Section 504 Coordinator) to coordinate the district's efforts to comply with Section 504.[140] 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.

Notice of Non-Discrimination. School districts must provide notice identifying the district's Section 504 coordinator and notifying participants, beneficiaries, applicants, and employees, that it does not discriminate on the basis of disability in admission or access to, or treatment or employment in its program or activity.[141] There are various methods a district may use to provide notice, including websites, handbooks, or postings.[142]

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[138] 34 C.F.R. § 104.7(b) (applicable to school districts that employ 15 or more employees; Section 504 does not require grievance procedures for complaints from applicants for employment or from applicants for admission to postsecondary educational institutions).

[139] *Id*. See OCR, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, at 19-21 (Jan. 2001), www.ed.gov/ocr/docs/shguide.pdf, for an explanation of *prompt and equitable* in the Title IX context.

[140] 34 C.F.R. § 104.7(a).

[141] 34 C.F.R. § 104.8(a).

[142] *Id*.

Retaliation

Section 504 prohibits retaliation.[143] For example, once a student, parent, teacher, coach, or other individual complains formally or informally to a school about a potential civil rights violation or participates in an OCR investigation or proceeding, school staff are prohibited from retaliating (including intimidating, threatening, coercing, or in any way discriminating against the individual) because of the individual's complaint or participation.[144]

> The ability of individuals to oppose discriminatory practices, and to participate in OCR investigations and other proceedings—whether by filing a complaint or by providing OCR with his or her testimony or documentary evidence—are Federally protected activities and necessary to ensure equal educational opportunity in accordance with Federal civil rights laws.[145]

Discriminatory practices are often only raised and remedied when students, parents, teachers, coaches, and others can report such practices to school administrators without the fear of retaliation. Individuals should be commended when they raise concerns about compliance with the Federal civil rights laws, not punished for doing so.

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[143] 34 C.F.R. § 104.61. This Section 504 regulatory provision incorporates the procedural provisions in the regulation implementing Title VI of the Civil Rights Act of 1964, including a regulation that prohibits school and district staff from intimidating, threatening, coercing, or discriminating against any individual for the purpose of interfering with any right or privilege secured under the Title VI statute or regulations, or because the individual has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under the Title VI regulations. 34 C.F.R. § 100.7(e).

[144] *See* 34 C.F.R. § 100.7(e) (Title VI); 34 C.F.R. § 106.71 (Title IX) (incorporating 34 C.F.R. § 100.7(e) by reference); 34 C.F.R. § 104.61 (Section 504) (incorporating 34 C.F.R. § 100.7(e) by reference); 34 C.F.R. § 108.9 (Boy Scouts Act) (incorporating 34 C.F.R. § 100.7(e) by reference). *See also* OCR, *Dear Colleague Letter: Retaliation* (Apr. 24, 2013), www.ed.gov/ocr/letters/colleague-201304.html.

[145] *Id.*

Scenario 11 – Retaliation

Ms. Chen, the mother of a student with a disability, complained privately to the principal that her daughter and other students with disabilities are not receiving an appropriate education at the school. The situation did not improve so Ms. Chen raised the issue with the principal again at a recent Parent Teacher Association meeting in front of other parents and teachers. The following week, Ms. Chen, who had been a helpful and effective classroom volunteer for many months, received a letter from the principal indicating that Ms. Chen can no longer volunteer in her daughter's classroom. Moreover, the principal offers no explanation for this change in policy in the letter. Ms. Chen asks around and learns that none of the other parent volunteers received a similar letter. May the principal do that?

Denying Ms. Chen the ability to volunteer in her daughter's classroom would be unlawful retaliation if the school did so because the parent complained to the principal that her daughter was not receiving FAPE (either initially or in front of the Parent Teacher Association). However, if the school did so for a legitimate reason (for example, because the parent was disrupting instruction or endangering students), then the school may not have violated Section 504. The ultimate determination will depend on whether evidence indicates that the school's actions were based on a legitimate reason for keeping the parent out of the classroom or if the school's explanation was a pretext (excuse) for retaliation or if retaliation was a motivating factor in addition to the legitimate reason. In this case, the school had no evidence to suggest that Ms. Chen had been, or would likely be, disruptive or dangerous. Therefore, if the school allowed other parents, who did not file a complaint, to continue to volunteer in class, these facts would suggest that forbidding Ms. Chen from volunteering based on concern about disrupting class or endangering students is pretext and that the sole reason for banning her from class was to retaliate because she raised her concerns about services for students with disabilities.

Title II and the IDEA

Two additional laws that apply to school districts' obligations to students with disabilities in the elementary and secondary public school context are Title II of the ADA (Title II) and the IDEA. This section outlines major differences among Section 504, Title II, and the IDEA; highlights similarities; and provides examples that illustrate the fact that students with disabilities may be protected under two or all three of these Federal laws simultaneously.

> OCR does not enforce the IDEA; however, OCR does enforce the Section 504 and Title II rights of IDEA-eligible students with disabilities. This means that OCR can investigate allegations that a school district violated the Section 504 and Title II rights, including Section 504 FAPE rights, of students who have an IEP under the IDEA.

Title II of the ADA prohibits State and local governments from discriminating on the basis of disability, regardless of whether or not those entities receive Federal financial assistance. OCR and the U.S. Department of Justice share in the enforcement of Title II in public elementary and secondary education systems and institutions, public institutions of higher education, vocational education (other than schools of medicine, dentistry, nursing, and other health-related schools), and public libraries.

> Violations of Section 504 that result from a school district's failure to meet the obligations identified in this resource guide also constitute violations of Title II; however, to the extent that Title II provides additional or greater protection than Section 504, covered entities must comply with Title II's requirements.[146]

The IDEA Part B is a formula grant program that provides assistance to States, and through them to local school districts, to assist in providing special education and related services to children with disabilities. Special education is defined under the IDEA as specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability and related services are defined as supportive services that are required to assist a child with a disability to benefit from special education.[147]

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[146] 28 C.F.R. § 35.103(a) and 42 U.S.C. § 12201(a). *See also* OCR, OSERS and DOJ, *Frequently Asked Questions on Effective Communication for Students with Hearing, Vision, or Speech Disabilities in Public Elementary and Secondary Schools* (Nov. 12, 2014), www.ed.gov/ocr/docs/dcl-faqs-effective-communication-201411.pdf.

[147] 34 C.F.R. §§ 300.39 and 300.34, respectively.

Unlike Section 504 and Title II, IDEA is not enforced by OCR. The Office of Special Education and Rehabilitative Services (OSERS) within the U.S. Department of Education is responsible for administering the IDEA. OSERS' responsibilities include promulgating regulations and issuing guidance documents about the IDEA as well as monitoring State educational agencies' compliance with the IDEA. OSERS also awards formula grants to States, including through the IDEA Part B program, and makes discretionary grants to eligible applicants.[148]

The IDEA differs from Section 504 and Title II in several ways.

While the IDEA focuses on special educational services for children with disabilities and the related rights afforded to eligible students and their parents, Title II and Section 504 focus on the nondiscrimination rights of students as well as other individuals with disabilities who are not students, such as family members with disabilities and members of the public with disabilities seeking information from, or access to, the services, programs, and activities of the public school. For example, under Title II and Section 504, parents with disabilities must be able to attend their children's school play or attend Parent Teacher Association meetings if other parents are able to do so.

Additionally, disabilities are defined differently under the IDEA than under Section 504 and Title II. Under the IDEA, a child with a disability means a child who has been evaluated in accordance with IDEA requirements as having a specified disability and to need special education and related services because of that disability. The IDEA and its implementing regulations include 13 disability categories: autism, deaf-blindness, deafness, emotional disturbance, hearing impairment, intellectual disability, multiple disabilities, orthopedic impairment, other health impairment, specific learning disability, speech or language impairment, traumatic brain injury, and visual impairment including blindness.[149] However, States can recognize that a child is "a child with a disability" under the IDEA if the child needs special education and related services, regardless of whether the child fits within a specific disability category.[150]

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[148] *See generally* idea.ed.gov/and https://osep.grads360.org/

[149] 20 U.S.C. § 1401(3); 34 C.F.R. § 300.8. Although a child's need for special education is a critical part of IDEA's definition of *child with a disability* and thus a child's entitlement to FAPE under IDEA, a child who has an impairment listed in the IDEA can be considered a child with a disability if the child needs a related service that consists of specially designed instruction that is considered special education rather than a related service under State standards. 34 C.F.R. § 300.8(a)(2)(ii).

[150] *See* 34 C.F.R. § 300.111(d) (IDEA does not require that children be classified by their disability so long as each child who has a disability listed in 34 C.F.R. § 300.8 and who, by reason of that disability, needs special education and related services is regarded as a child with a disability under Part B of the Act).

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; it is still required to consider if the student has a disability under Section 504 or Title II.[151]

You can go to pages 12-23 for information about the evaluation requirements under Section 504.

Section 504 and Title II require that an individual with a disability have a physical or mental impairment that substantially limits a major life activity or bodily function.

You can go to pages 3-9 for information about the definition of disability under Section 504.

There are no categories of disabilities under Section 504 and Title II; nor is there a requirement that an individual need special education and related services under Section 504 to be considered an individual with a disability. However, a child who has a disability who requires only a related service could be considered an individual with a disability for purposes of Section 504 and would be entitled to FAPE services under Section 504.

As a result, all students with disabilities who are eligible for special education and related services under IDEA are protected by Section 504 and Title II. The inverse, however, is not true. Not all students protected by Section 504 and Title II are IDEA-eligible students.

[151] In some circumstances, the IDEA evaluation process may provide the school district with the necessary information, required by Section 504, to determine whether a student has a disability, and whether that student needs related aids and services or supplementary aids and services in the regular education environment because of that disability.

Among the protections afforded students with disabilities under Title II is the right to effective communication.[152]

Among the auxiliary aids and services that help to ensure effective communication for students with disabilities are listed below. [153]

- qualified interpreters
- note takers
- exchange of written materials
- Braille materials and displays
- assistive listening systems
- accessible electronic and information technology
- open and closed captioning
- a portable device that writes and/or produces speech
- taped texts
- audio recordings
- real-time computer-aided transcription services (for example, Communication Access Real-Time translation (CART))
- screen reader software
- magnification software
- optical readers
- secondary auditory programs (SAP)
- large print materials
- word or letter boards
- writing materials
- spelling to communicate
- qualified readers
- telecommunications services

The vast majority of students who have disabilities affecting communication, such as hearing, vision, and speech disabilities, and who often rely on the types of auxiliary aids and services listed above are also IDEA-eligible.[154] School districts must therefore ensure that they comply with both the IDEA and the effective communication requirements under Title II for students with disabilities.[155]

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[152] 28 C.F.R. § 35.160.

[153] 28 C.F.R. § 35.104.

[154] *See* OCR, OSERS and DOJ, *Frequently Asked Questions on Effective Communication for Students with Hearing, Vision, or Speech Disabilities in Public Elementary and Secondary Schools* FAQ 2 (Nov. 2014), www.ed.gov/ocr/docs/dcl-faqs-effective-communication-201411.pdf. This document explains, among other things, how school districts must give primary consideration to the request of the individual with a disability in determining what type of auxiliary aid or service is needed.

[155] *See K.M. v. Tustin Unified Sch. Dist.*, 725 F.3d 1088 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 1493 (2014); *see also* OCR, OSERS and DOJ, *Frequently Asked Questions on Effective Communication for Students with Hearing, Vision, or Speech Disabilities in Public Elementary and Secondary Schools* FAQ 1& 2 (Nov. 2014), www.ed.gov/ocr/docs/dcl-faqs-effective-communication-201411.pdf.

Conclusion

When disability-based discrimination occurs within the school setting, it can be the result of an error, oversight, or misunderstanding, as opposed to an intentional desire to break the law. Regardless of cause, however, the effect on a student with a disability can be both profound and devastating. Therefore, schools must ensure that students with disabilities are properly identified in a timely manner and are consistently provided the services and other protections to which they are entitled under the law.

OCR notes that representatives from schools and districts around the country are adopting a wide range of possible approaches to help facilitate this outcome. For example, via trainings, parent meetings, and in other informal settings, school and district administrators often encourage staff and parents to:

(i) Promote early identification and evaluation of students by attending to and reporting signs and indicators of a possible disability;

(ii) Secure detailed and comprehensive information from various sources (for example, family members, doctors, school nurses, teachers, social workers) prior to making eligibility and service-related decisions on behalf of a student who may have a disability;

(iii) Communicate with appropriate teachers and non-classroom staff members (for example, coaches, gym teachers, librarians, cafeteria workers) about the aids and services to which a student with a disability may be entitled;

(iv) Consider the context within which different school staff interact with students (for example, a gymnasium versus a classroom) when making decisions about the aids and services that will be most effective in meeting a student’s needs;

(v) Monitor implementation of aids and services in order to assess effectiveness and ensure consistent provision of these aids and services by all school staff (for example, by teachers in different classrooms);

(vi) Encourage communication on a regular basis between home and school, and among relevant school staff, regarding all students, but in particular, students with disabilities;

(vii) Observe interpersonal relationships among students and interactions between staff and students in order to identify and address signs of a hostile school environment and bullying;

(viii) Document, via emails, letters, notes, or other means, important information (for example, key meetings and conversations, relevant dates, decisions, and actions taken) relating to parent and staff efforts to secure or provide aids and services to a

student with a disability; address incidents of bullying and harassment; or raise and resolve disagreements and disputes;

(ix) Attend to the issue of accessibility when considering structural changes and improvements to buildings and facilities; the purchase of new instructional technology; the placement or location of curricular and extra-curricular programs and activities both on and off campus; and the use of certain curricula or particular instructional methods, tools, and devices; and

(x) Stay informed about parent and student rights, staff responsibilities and obligations, and other policies and procedures that must be adhered to in order to comply with Section 504 and other disability rights laws.

In these and many other ways, parents and school staff are working to help reduce the likelihood that disability-based discrimination will occur in our schools and classrooms.

If you would like more information about Section 504, Title II, or the other Federal civil rights laws enforced by OCR or would like to request technical assistance, please contact the enforcement office that serves your State or jurisdiction.

Contact information for these offices is available at wdcrobcolp01.ed.gov/cfapps/OCR/contactus.cfm.

Information about discrimination based on disability is on OCR's website at www.ed.gov/policy/rights/guid/ocr/disability.html.

Or, for further information, please contact OCR's Customer Service Team toll-free at 1-800-421-3481; TDD: 877-521-2172.

For more information on the IDEA requirements, please contact OSERS at:

Office of Special Education Programs
Office of Special Education and Rehabilitative Services
U.S. Department of Education
400 Maryland Ave., S.W.
Washington, DC 20202-7100
Telephone: (202) 245-7459
http://idea.ed.gov/explore
www.ed.gov/osers/osep/index.html.

Other OCR Resources

Dear Colleague Letter: Restraint and Seclusion of Students with Disabilities (Dec. 28, 2016), www.ed.gov/about/offices/list/ocr/letters/colleague-201612-504-restraint-seclusion-ps.pdf.

Frequently Asked Questions about the Rights of Students with Disabilities in Public Charter Schools under Section 504 of the Rehabilitation Act of 1973 (Dec. 28, 2016), www.ed.gov/about/offices/list/ocr/docs/dcl-faq-201612-504-charter-school.pdf.

Dear Colleague Letter on Preventing Racial Discrimination in Special Education (Dec. 12, 2016), www.ed.gov/ocr/letters/colleague-201612-racedisc-special-education.pdf.

Dear Colleague Letter and Resource Guide on Students with ADHD (July 26, 2016), www.ed.gov/ocr/letters/colleague-201607-504-adhd.pdf.

Dear Colleague Letter: Responding to Bullying of Students with Disabilities (Oct. 21, 2014), www.ed.gov/ocr/letters/colleague-bullying-201410.pdf.

Dear Colleague Letter: Charter Schools, (May 14, 2014) www.ed.gov/ocr/letters/colleague-201405-charter.pdf.

Dear Colleague Letter: Equal Access to Extracurricular Athletics for Students with Disabilities (Jan. 25, 2013), www.ed.gov/ocr/letters/colleague-201301-504.html.

Dear Colleague Letter: ADA Amendments Act of 2008 and Students with Disabilities Attending Public Elementary and Secondary Schools (Jan. 19, 2012), www.ed.gov/ocr/letters/colleague-201109.html.

Questions and Answers on the ADA Amendments Act of 2008 for Students with Disabilities Attending Public Elementary and Secondary Schools (Jan. 19, 2012), www.ed.gov/ocr/docs/dcl-504faq-201109.html.

Dear Colleague Letter: Electronic Book Readers and Other Emerging Technologies (May 26, 2011), www.ed.gov/ocr/letters/colleague-201105-pse.html.

Frequently Asked Questions About the June 29, 2010, Dear Colleague Letter (May 26, 2011) www.ed.gov/ocr/docs/dcl-ebook-faq-201105.html.

Free Appropriate Public Education for Students with Disabilities: Requirements Under Section 504 of The Rehabilitation Act of 1973 (Aug. 2010), www.ed.gov/ocr/docs/edlite-FAPE504.html.

Student Placement in Elementary and Secondary Schools and Section 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act, www.ed.gov/ocr/docs/placpub.html.

Transition of Students With Disabilities To Postsecondary Education: A Guide for High School Educators (rev. Mar. 2011), www.ed.gov/ocr/transitionguide.html.

Nondiscrimination in Federally Assisted Programs, Policy Interpretations, 43 Fed. Reg. 18630 (May 1, 1978), www.ed.gov/policy/rights/reg/ocr/frn-1978-08-14.html.

Protecting Students with Disabilities: Frequently Asked Questions About Section 504 and the Education of Children with Disabilities (last modified Oct. 2015), www.ed.gov/ocr/504faq.html.

(with OSERS) *Dear Colleague Letter about the Rights of Students with Disabilities in Public Charter Schools* (Dec. 28, 2016), www.ed.gov/about/offices/list/ocr/letters/colleague-201612-504-charter-school.pdf.

(with DOJ) *Dear Colleague Letter: English Learner Students and Limited English Proficient Parents* (Jan. 7, 2015), www.ed.gov/ocr/letters/colleague-el-201501.pdf.

(with DOJ and OSERS) *Dear Colleague Letter and Frequently Asked Questions on Effective Communication for Students with Hearing, Vision, or Speech Disabilities in Public Elementary and Secondary Schools* (Nov. 2014), www.ed.gov/ocr/docs/dcl-faqs-effective-communication-201411.pdf.

(with DOJ) *Dear Colleague Letter on the Nondiscriminatory Administration of School Discipline* (Jan. 8, 2014), www.ed.gov/ocr/letters/colleague-201401-title-vi.html .