

SECTION 504 vs. IDEA:

WHAT EVERY SCHOOL PSYCHOLOGIST AND COUNSELOR NEEDS TO KNOW

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This outline is not all-inclusive, but is intended to provide an overview of the differences between Section 504 and the Individuals with Disabilities Education Act (IDEA) in those areas of common use.

I. OVERVIEW OF SECTION 504 AND THE IDEA

A. Section 504:

1. Focus is nondiscrimination since it is a civil rights law. It recognizes the historical discrimination against individuals with disabilities, preventing them from participating in or benefiting from programs receiving federal financial assistance. The law seeks equality of opportunity and benefit between the disabled and nondisabled students. However, Section 504 is not intended to be used to maximize a student's potential.
2. Students with disabilities under Section 504 may not be denied the right to participate in education. Students' needs are to be met as adequately as their nondisabled peers' needs are met. Section 504 relies on comparisons: compare the student being evaluated to his nondisabled peers.
3. Schools do not receive additional federal funding to meet the mandates of Section 504.

B. IDEA:

1. The IDEA is an entitlement law, where eligibility creates special rights and privileges.
2. The IDEA's educational standard is not measured by comparison with the performance or needs of nondisabled students. The educational needs of nondisabled students are irrelevant.

3. In the event a student qualifies for educational services under the IDEA, and the parents reject the services, the child does not have the right to receive accommodations under Section 504.
4. Limited federal funding is available for special education for IDEA students.

II. DOCUMENTING EDUCATIONAL PROGRESS: ASSESSMENTS, TESTING AND GRADUATION

A. Assessments and Testing:

1. Section 504:
 - a. Section 504 requires school districts provide appropriate test accommodations in order to “level the playing field.”
 - b. Generally, a district may use a different grading system for a student with a disability participating in the general curriculum only if the student’s IEP or 504 team adopts an alternate system in response to the student’s individual disability-related needs.
 - c. “As a general observation, it would be suspect if a school district discounted special education courses or otherwise depreciated special education course grades on a categorical basis.” *Letter to Runkel, 25 IDELR 387 (OCR 1996).*
 - d. Contrast with use of a grading system determined by the placement team on an individual basis and not as a result of systematic difference in treatment on the basis of disability. Such grading system was found not to be the result of systematic different treatment on the basis of disability. *North Hunterdon/Vorhees Regional (NJ) High Sch. Dist., 25 IDELR 165 (OCR 1996).*
 - e. Students may not be excluded from honor roll on the basis of the student’s status as having a disability, rather than on the content of the student’s curriculum. Notice of grading policies and honor roll eligibility must be clear and unambiguous.
 - f. A district may use a weighted grade system to compile a grade point average only if the system is based on objective rating criteria. *Letter to Runkel, 25 IDELR 387 (OCR 1996).*
 - g. Accommodations are reasonable when they provide students with disabilities an equal opportunity to participate without lowering or fundamentally altering a school district’s standards or procedure. School districts are not required to provide:

- (1) An accommodation or modification that lowers or substantially changes academic standards. *Southeastern Community College v. Davis*, 442 U.S. 397, 99 S. Ct. 2361 (1979).
 - (2) Accommodations or modifications to a student with disabilities who is not in need of such. *Letter to Anonymous*, 25 IDELR 632 (OSEP 1996).
 - (3) Accommodations when the disability is directly related to the construct being tested. *Educating One and All: Students with Disabilities and Standard-Based Reform* (National Research Council, 1997).
- h. Section 504 does not delineate the types of classroom testing modifications to be provided. Each student's individual needs must be determined by a team knowledgeable about the student, the meaning of the evaluation data, and the placement options.

2. IDEA:

- a. All students with disabilities who cannot participate in statewide and districtwide assessment programs must participate in "alternate assessments." 20 U.S.C. § 1412(a)(17)(A).
 - (1) The student's IEP team makes the decision regarding taking the alternate assessment.
 - (2) IEP team decision must reflect an informed evaluation of the individual circumstances of the student. IEP team must provide a statement as to why the child cannot participate in the regular assessment and why the particular alternate assessment selected is appropriate.
- b. Testing modifications must be agreed to by the IEP team, and become part of the student's IEP.
- c. Students receiving special education modifications or accommodations in the regular classroom should be graded in accordance with the district's generally applicable grading policies. Districts cannot modify grades solely on the basis of the student's special education status.
- d. Alternate grading systems might be appropriate in some instances. OCR determined that alternate grading did not constitute discrimination when:

- (1) The grade might be adjusted only when the student's modification was content based, not mechanical modification;
 - (2) The grading scale was part of IEP; and
 - (3) The student had an option to forego modification and be graded on same basis as other students.
- e. For students whose eligibility for IDEA services ends due to graduation or aging out, a school district is required to provide a summary of the student's academic and functional performance, including "recommendations on how to assist the child in meeting the child's postsecondary goals." 20 U.S.C. § 1414(c)(5)(B)(ii).
- B. Transcripts and Report Cards:
1. Transcripts—Section 504 and IDEA:
 - a. Generally, districts should avoid using course designations which appear to be used exclusively in connection programs for students with disabilities.
 - b. Districts should select terms that are, or could be, used to describe programs for nondisabled students as well. Examples: Basic Math; English I; Practical Math; Modified Reading.
 - c. If the student received a modified curriculum in a general education class, such modification may be noted in a neutral fashion. If the notation is only applicable to students with disabilities, use of it violates Section 504. However, if the notation is applicable to other students, it may be valid.
 2. Report cards: The district must use the same report cards and supply the same level of information for both disabled and nondisabled students.
- C. Graduation—Section 504 and IDEA:
1. Children with disabilities who have not graduated with a regular high school diploma are entitled to FAPE until the child ages out.
 2. A regular high school diploma does not include an alternate degree that is not fully aligned with state academic standards, such as a certificate or GED.
 3. For those children with disabilities who graduated with a regular diploma, FAPE need no longer be made available. 34 C.F.R. § 300.102.

4. There is no prohibition against states imposing reasonable standards for graduation with a regular high school diploma, such as passing a state or district competency test.
5. Eligible students with disabilities (those who have met the district's graduation requirements) have the same right to attend graduation ceremony as nondisabled peers.
6. The district's responsibilities regarding a student with disabilities who cannot pass a competency test vary.
 - a. If the student with a disability can pass the test with an accommodation that does not alter the nature, content, and integrity of the test, the district must provide such accommodation.
 - b. If the student cannot pass, even with accommodation, graduation may be denied.
 - c. Section 504 guarantees equal access, not equal results. Provision of accommodations, and their nature, must be decided by the MDT on an individualized basis. If the student has never used an accommodation, the request may be denied.

III. ELIGIBILITY

- A. Section 504: A student must have a physical or mental impairment that substantially limits a major life activity. There must also be an educational need.
 1. Eligibility is based on a disability rather than something that merely manifests itself like an impairment. The over-identification of students with limited English proficiency in special education and Section 504 has long been an area of concern and monitoring by OCR.
 2. Major life activities: The non-exhaustive list includes caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.
 3. Common thread in all major life activities is that they are activities of core importance to the average person.
 4. Substantial limitation requirement: The Section 504 regulations do not define as "the [U.S.] Department [of Education] does not believe that a definition of this term is possible at this time." EEOC's definition: "unable to perform a major life activity that the average person in the general population can perform." (29 C.F.R. § 1630(J)(1)(i)); or: "Significantly restrictive as to the condition, manner or duration under which an individual can perform a

particular major life activity as compared to the conduction, manner, or duration under which the average person in the general population can perform that same major life activity.” (29 C.F.R. § 1630(j)(1)(ii).)

5. Must also take mitigating corrective measures (medication, eye glasses, hearing aids, etc.) into consideration. *Sutton v. United Air Lines*, 119 S. Ct. 2139 (1999); *Murphy v. United Parcel Service*, 119 S. Ct. 2133 (1999); *Albertsons Inc. v. Kirkingburg*, 119 S. Ct. 2162 (1999).
6. Some employment cases had determined that the mitigating measure is required as a matter of due diligence.
7. In determining whether a disability is “substantially limiting,” how the disability affects the student across all domains (home, school, etc.) must be taken into account.
8. Temporary disabilities: may be substantially limiting to a major life activity such that Section 504 services might be required. The proper inquiry “is not whether the impairment is temporary or permanent; rather the appropriate inquiry is whether the impairment substantially limits one or more major life activities.” *Letter to Wright* (OCR 1993). “That determination must be made on a case-by-case basis, considering the nature, severity, duration or expected duration and the permanent or long-term impact resulting from the impairment.” *Id.*
9. A student can receive related services even if he does not need special education.

B. IDEA:

1. A student must have a disability as defined by state and federal law, and be in need of special education and related services. In other words, the disability must result in an “adverse effect on educational performance,” although a student has not failed or been retained in a course, and is advancing from grade to grade.
2. Disabilities are specified to include mental retardation, a hearing impairment (including deafness), a speech or language impairment, a visual impairment (including blindness), a serious emotional disturbance, an orthopedic impairment, autism, traumatic brain injury, an other health impairment, a specific learning disability, deaf-blindness, multiple disabilities, and, for children aged 3 through 9, developmental delays.
3. A student cannot receive only related services if he does not need special education.

IV. EVALUATIONS

- A. Section 504:
 - 1. The concept of an evaluation under Section 504 is essentially the same as under the IDEA. School districts are directed to establish a system of procedural safeguards regarding evaluation; compliance with the IDEA is one way to meet this requirement.
 - 2. While parent permission is required for initial evaluation, districts are not required to obtain parental consent for subsequent student evaluations. *Letter to Durham, 27 IDELR 380 (OCR 1997)*. Parents can disallow receipt of accommodations/related services.
- B. IDEA: An initial evaluation can only be conducted after receiving parent consent. A re-evaluation must occur at least once every three years and parent consent is required. A re-evaluation is required to determine whether a child continues to have a disability.
- C. A student exits 504/IDEA when no longer eligible, ages out, or graduates; however, proposed federal regulations would allow a parent to unilaterally exit a child from special education services.

V. INDEPENDENT EDUCATIONAL EVALUATIONS

- A. Section 504: Parents do not have a right to an IEE under Section 504. Failure to evaluate, however, may result in an order for reimbursement of IEE.
- B. IDEA: A parent has the right to obtain one IEE at public expense each time the district conducts an evaluation with which the parent disagrees. The district has the right to initiate a due process hearing to determine whether its evaluation is appropriate. If the hearing officer finds that the district's evaluation is appropriate, the parent has the right to an IEE, but not at public expense.

VI. PLANS

- A. Section 504: 504 plan—consisting typically of accommodations to be provided to the student in the regular classroom to provide an educational program as adequately as that provided to nondisabled peers. This plan is not required to be in writing; although it is in the school's best interest to do so.
- B. IDEA: Individual Education Program (IEP)—a written statement for each child with a disability that includes present levels of educational performance and functional performance; goals (benchmarks/objectives for children taking alternate assessments); statements of special education and related services; LRE explanation;

state-wide and district-wide achievement testing; progress toward goals; additional transition components for secondary-level IEPs, etc. This plan must be in writing.

- C. A student is not served by both a Section 504 team and an IEP team at the same time; to do so would be to deprive the student of his special education rights under the IDEA, since the IEP team is responsible for providing FAPE. Therefore, a student should not be on both an IEP and a 504 plan at the same time.

VII. TEAM MEMBERS

- A. Section 504: A group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options. (NOTE: Parent is not required to be invited to a 504 team meeting.) 34 C.F.R. § 104.35(c).
- B. IDEA: Parent, student (if appropriate), district representative, not less than one special education teacher, not less than one regular education teacher, individual to interpret evaluation results and implications, other individuals who have knowledge or special expertise regarding the child at the discretion of the parent or district, representative of private school (if applicable), representative of transition agency (if applicable).
- C. Evaluation and placement decisions made by anyone other than the appropriate IEP team or Section 504 team are in violation of 34 C.F.R. § 104.35(c).

VIII. FREE APPROPRIATE PUBLIC EDUCATION

- A. Section 504: Having a record of a disability, or being regarded as having a disability, cannot be the basis on which the requirements of FAPE are triggered. The disability must interfere with a “major life activity.”
 - 1. FAPE is defined as 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 nondisabled students. 34 C.F.R. § 104.33(b).
- B. IDEA: Special education and related services provided at public expense, provided in conformity to an IEP, provided under public supervision and direction, and meets standards issued by the state education agency.

IX. LEAST RESTRICTIVE ENVIRONMENT

- A. Section 504: A student with a disability must be educated in the general education classroom to the maximum extent appropriate. In most situations, Section 504 students are in the regular classroom.

- B. IDEA: To the maximum extent appropriate, children with disabilities are educated with children who are nondisabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature and severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactory.
1. OSEP has determined that the LRE requirements in the IDEA and Section 504 are virtually identical. *Letter to Williams*, 21 IDELR 73 (OSEP 1994).

X. UNILATERAL PRIVATE SCHOOL PLACEMENT

- A. Section 504: Once a public school has offered a child FAPE under Section 504, it has no duty to provide “educational services to students not enrolled in the public school program based on the personal choice of the parent or guardian.” *Letter to Veir*, 20 IDELR 864 (OCR 1993).
- B. IDEA: A parent may unilaterally place the child in a private school, and may have the right to a service plan providing special education and related services based on a proportionate share of federal funds. The school district in which the private school is located is responsible for providing services.

XI. DISCIPLINE—SUSPENSIONS

- A. Section 504:
1. No 45-day interim placement applies; suspensions are limited to 10 consecutive days. It appears that Section 504 students might have more protections than IDEA students in the event the misbehavior is related to the student’s disability.
2. OCR generally counts in-school suspensions and school bus suspensions toward the total of 10 consecutive days suspension.
3. In determining whether a change in placement has occurred when a series of suspensions result in cumulative suspensions exceeding 10 school days, the following factors apply:
- a. The length of each suspension;
 - b. The proximity of the suspensions to one another; and
 - c. The total amount of time the student has been suspended from school.

4. For suspensions beyond 10 cumulative school days, but not resulting in a change in placement, no educational services need be provided if no services are provided to the general student population.

B. IDEA:

1. When weapons, drugs or serious bodily injury are involved, staff have the option of placing a student in a 45-day interim placement, regardless whether the misbehavior is related to the student's disability.
2. Days are counted as suspensions when a student is not receiving FAPE, as defined in the student's IEP, or if transportation is listed on the child's IEP.
3. For suspensions beyond 10 cumulative school days, but not resulting in a change in placement, school personnel, in consultation with at least one of the student's teachers, determine the extent of educational services needed so as to enable the student to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the student's IEP.

XII. MANIFESTATION DETERMINATION

A. Section 504:

1. Neither the statute nor the regulations set forth the manifestation determination process. The process evolved through case law, OCR policy letters, OCR letters of findings, and hearing officer decisions.
2. Before a significant change in placement can occur, a reevaluation must be conducted. The first step in the reevaluation includes a determination by a group of knowledgeable persons regarding whether the student's behavior is a manifestation of the student's disability. The group must be knowledgeable about the student and the meaning of the evaluation data. The group also must have available to it information that competent professionals would require. The relevant information must be recent enough to afford an understanding of the student's current behavior.
3. If it is determined that the misconduct is caused by the disability, the student may not be disciplined, and the evaluation team must determine whether the student's current educational placement is appropriate. If it is determined that the misconduct is not caused by the disability, the student may be disciplined just like a nondisabled student.
 - a. A manifestation determination under Section 504 and the ADA includes reviewing the student's misconduct, the student's disability, and the services being provided to the student. Two critical questions

must be asked during the manifestation determination; namely, whether:

- (1) The conduct in question was caused by, or had a direct and substantial relationship to, the student's disability; or
 - (2) The conduct in question was the direct result of the district's failure to implement the 504 plan.
4. The appropriateness or inappropriateness of the services or programming being provided to a student with respect to his behavior at the time of the misconduct does not appear to be a factor in deciding if there is a nexus between the student's disability and misconduct. *Discipline and the 504 Student* (LRP Publications 2002).
 5. A district must conduct a manifestation determination before suspending a student with a disability for more than 10 days. *OCR Staff Memorandum*, 16 IDELR 491 (OCR 1989).
 6. Since Section 504 does not list timelines for completing a manifestation determination, it is recommended that schools use the timelines listed in the IDEA. (The IDEA requires a manifestation determination be conducted either before the proposed disciplinary action or within 10 days after the disciplinary action which results in a significant change in placement.)
- B. IDEA: The manifestation determination has been statutorily and regulatory defined.
1. A "manifestation determination" is a review by parent and relevant members of the child's IEP Team (as determined by the parent and the LEA) of all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parent to determine—
 - a. If the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or
 - b. If the conduct in question was the direct result of the LEA's failure to implement the IEP.
 2. The manifestation determination must be conducted within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct.

XIII. USE OF DRUGS OR ALCOHOL

- A. Section 504:

1. If a student is currently using illegal drugs or alcohol, the 504 safeguards do not apply.
 2. OCR has held that a student can be classified as a current user of drugs or alcohol if: (1) the student confesses abuse or (2) there are juvenile records to support abuse.
 3. “Current illegal use of drugs” is defined as “illegal use of drugs that occurred recently enough to justify a reasonable belief that a person’s drug use is current or that continuing use is a real and ongoing problem.” *OCR Senior Staff Memorandum*, 28 C.F.R. § 35.104.
 4. Drug possession: Possession of illegal drugs does not result in a loss of protections unless the student is also currently using drugs. *OCR Staff Memorandum*, 17 EHLR 609 (OCR 1991); 29 U.S.C. § 705(20)(C)(iv).
 5. Current use of alcohol: A student currently using alcohol may be disciplined for use or possession of alcohol in the same manner as any other student, regardless of whether that student is disabled by any condition, including alcoholism. *OCR Staff Memorandum*, 17 IDELR 609 (OCR 1991).
 6. If alcoholism substantially impairs the student, he is entitled to a Section 504 plan. Since alcohol is not a drug, an evaluation must be conducted before any significant change in placement.
- B. IDEA: Regardless of whether a student is using or possessing drugs or alcohol, a manifestation determination is necessary to determine if the use or possession is directly related to his disability.

XIV. FUNCTIONAL BEHAVIORAL ASSESSMENT/BEHAVIOR INTERVENTION PLAN

- A. Section 504: The Section 504 regulations do not contain any reference to FBAs, nor BIPs. However, OCR has held that a district must develop an individual management plan “when a student who is disabled within the meaning of Section 504 manifests repeated or serious misconduct such that modifying the child’s negative behavior becomes a significant component of what actually takes place in the child’s educational program, [a district] is required to develop an individual behavioral management plan.” *Elk Grove (CA) Unified School District*, 25 IDELR 759, 761 (OCR 1997).
- B. IDEA: FBA and BIP required if a manifestation determination finds that the conduct in question was directly related to a student’s disability. Further, for disciplinary changes of placement, the FBA and BIP services and modifications must be designed to address the behavior violation so that it does not recur. An FBA is considered an evaluation and, typically, parent consent is necessary. *Letter to Christiansen*, 48 IDELR 161 (OSEP 2007).

XV. EXPULSION

- A. Section 504: If a student is expelled for behavior not related to his disability, no educational services need be provided if no services are provided to nondisabled students.
- B. IDEA: FAPE, consisting of special education and related services must continue to be provided.

XVI. STAY PUT

- A. Section 504: Neither the Section 504 statute nor its regulations have a specific “stay-put” requirement, nor should one be implied, according to OCR. However, OCR has stated “Although the Section 504 regulation contains no similar specific stay-put requirement, the Section 504 regulation does require school districts to provide procedural safeguards to students and their parents or guardians regarding the identification, evaluation and placement of students with disabilities who need special instruction or related services. . . . Thus, OCR believes that a fair due process system would encompass the school district waiting for the results of the process before making the change.” *Letter to Zirkel*, 22 IDELR 667 (OCR 1995).
- B. IDEA: A student “stays-put” in his current educational placement (including an interim alternative educational setting) if a due process hearing is requested or (Idaho) a parent objects in writing within 10 days to proposed changes.

XVII. EXTRACURRICULAR ACTIVITIES

- A. Section 504: Schools must provide nonacademic services or benefits in a nondiscriminatory manner that allows students with disabilities an equal opportunity to participate. 34 C.F.R. § 104.37(a)(1).
- B. IDEA: Provides that the IEP must address student’s participation in the general curriculum and participation “in extracurricular and other nonacademic activities.” 34 C.F.R. § 300.347(a)(3)(ii).

XVIII. PROCEDURAL SAFEGUARDS

- A. Section 504: Regulations devote only one short section to procedural safeguards. A school must maintain a system of procedural safeguards that includes: 1) notice; 2) an opportunity for parents to examine relevant records; 3) a right to a due process hearing; and 4) a right to the review of an adverse hearing decision.
 - 1. Districts must provide for an impartial hearing to review evaluation and placement decisions, with opportunity for participation by parents and representation by counsel. The hearing process set forth under IDEA is one method to fulfill this requirement.

- B. IDEA: Separate regulations outline due process procedures, evaluation procedures, procedures for evaluating students with learning disabilities, least restrictive environment requirements, confidentiality safeguards, and more. The system of procedural safeguards is extensive, well-delineated, and full of legal protections and provisions for full parental participation. A copy of the procedural safeguards must be given to the parent only one time a year, except that a copy must also be given upon initial referral or parent request for evaluation, upon request by the parent, and upon receipt of the first State complaint or due process complaint.

XIX. DISABILITY HARASSMENT

- A. Section 504: Disability harassment is a form of discrimination under both Section 504 and Title II of the ADA. Disability harassment may result in denial of FAPE to a student or may deny the student an equal opportunity to education.

XX. PARENT NOTICE

- A. Section 504: The notice should explain the action the district proposes to take, and the reasons it has decided to proceed in that fashion. The notice must be detailed enough to allow parents to meaningfully evaluate whether they wish to consent to the proposed action, refuse to act, or request a due process hearing.
- B. IDEA: Detailed Special Education Rights Statement, as set forth in the State Department of Education's Special Education Manual, must be provided. The rights statement should not be used in Section 504 matters.

XXI. PROGRAM AND FACILITY ACCESSIBILITY

- A. Section 504: Requires that all programs and activities must be accessible.
- B. IDEA: No accessibility requirements.

XXII. GRIEVANCE AND HEARING PROCEDURES

- A. Section 504: Requires both a grievance procedure and a due process hearing procedure. No required exhaustion of administrative remedies (unless intertwined with IDEA claims).
- B. IDEA: Requires a due process hearing procedure, and exhaustion of administrative remedies.

XXIII. PRIVATE SCHOOLS

- A. Section 504: Applies to private schools to the extent they receive federal funds and the private schools cannot exclude a qualified student with a disability, if that student can, with minor adjustments, be provided an appropriate education. Additionally,

students with disabilities cannot be charged more than nondisabled peers except to the extent that any additional charge is justified by a substantial increase in cost to the private school. 34 C.F.R. § 104.39.

- B. IDEA: Private schools are not required to follow IDEA requirements, nor are they required to have highly qualified staff.

XXIV. RETALIATION

- A. Section 504 prohibits any acts of retaliation and intimidation against any person(s) who have exercised a right secured by Section 504. Retaliation can consist of intimidating, threatening, coercion, or discrimination against any individual in order to interfere with federally-mandated protections or because the individual has made a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing.
- B. IDEA does not address retaliation.