

Arizona School Boards Association
38th Annual Law Pre-Conference
September 3, 2014

Section 504: The Other Special Education Law

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I. BACKGROUND INFORMATION

Section 504 of the Rehabilitation Act (“Section 504”) is a federal civil rights law designed to protect the rights of individuals with disabilities in programs and activities that receive federal funding. Section 504 prohibits discrimination based on disability and disability-based retaliation. Federal funding for districts and/or charter schools from the Department of Education is conditioned on continued compliance with Section 504 requirements. The goal of Section 504 as it relates to students is to ensure “equal educational opportunity.” The Office for Civil Rights (OCR) enforces Section 504.

II. DUTIES UNDER SECTION 504

A. Duty to Provide FAPE

Section 504 regulations require that school districts and charter schools provide a Free Appropriate Public Education (“FAPE”) to every qualified student with a disability who resides in their jurisdiction, regardless of the nature or severity of the disability. For district’s, this includes all students residing in the district’s boundaries, while for charter schools, this requirement extends to all students enrolled in the school.

An appropriate education means the “the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of non-handicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of 104.34, 104.35, and 104.36.”¹

A denial of FAPE under Section 504 would occur if the district and/or charter school:

- Failed to implement all of the provisions in a student’s 504 Plan. This includes supplementary services, such as transportation;
- Failed to properly provide notification for changes in any of the provisions/services in the student’s 504 Plan; and/or

¹ 34 C.F.R. 104.33(b).

- Modified educational time without holding a meeting with group of knowledgeable persons.

B. Duty to Assign a Compliance Coordinator

The law requires schools to designate a Section 504 Compliance Coordinator and to provide notice of the Coordinator's title and contact information to all students. Districts/schools should provide the Coordinator's name, title, address, telephone number and email address on the district/school website and in parent/student handbooks.

The Compliance Coordinator will typically either direct or oversee the following responsibilities:

- Assists in identification of students.
- Participate in 504 referral process/meetings.
- Coordinates development of 504 plans.
- Implements and monitors implementation of 504 plans.
- Maintains 504 files and records.
- Provides training activities for staff.
- Collaborates on 504 due process hearing requests and OCR complaints.

C. Duty to Adopt a Grievance Procedure

Section 504 requires districts/schools to adopt a grievance procedure that incorporates appropriate due process standards and provides for the prompt and equitable resolution of complaints under Section 504. The grievance procedure should be posted on the district/school website and/or published in the parent/student handbook.

D. Duty to Provide Procedural Safeguards

Just like under the Individuals with Disabilities Act (IDEA), procedural safeguards must be given to parents of students eligible under Section 504. However, Section 504 safeguards require much less than what is required by the IDEA. For example, parents do not have the right to an independent educational evaluation (IEE), due process hearings need not be as formal as an IDEA due process hearing, and there are no timelines specified.

Section 504 procedural safeguards must include the following information:

- Notice requirements;
- Opportunity for parents/guardians to examine the student's relevant records;
- Opportunity and procedure for an impartial hearing, with opportunity for participation by the student's parents or guardian and representation by counsel; and
- A review procedure.

Schools may choose to use IDEA procedural safeguards or develop separate procedures specifically for Section 504. Schools would be wise to develop separate procedures because Section 504's requirements are much less burdensome than those required by the IDEA.

E. Duty to Prohibit Discrimination

Section 504 requires that, “No otherwise qualified individual with a disability in the United States...shall, solely by reason of his or her disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.”² Schools may violate the nondiscrimination provision of Section 504 when harassment based disability is sufficiently serious that it creates a hostile environment and such harassment is encouraged, tolerated, not adequately addressed, or ignored by school employees.

The nondiscrimination provisions in Section 504 also extend to students having a record of a disability and those regarded as having a disability. A “record of” a disability pertains to those students that have a disability, but are no longer impacted by their disability. For example, if a student has bone cancer that is in full remission, he could not be prevented from trying out for the football team simply because he has a “record of” having a disability. Students who have been exited from special education services are also protected as having a “record of” a disability under the nondiscrimination provisions of Section 504. “Regarded as” having a disability pertains to those students who have an actual or perceived disability, whether or not the disability impairs a life activity. For example, a student with a history of Tuberculosis (TB) cannot be forced to sit in the back of the class and avoid interactions with other students simply because he once had TB.

F. Duty to Prohibit Retaliation

Section 504 of the Rehabilitation Act protects disabled persons from retaliation by referencing Title VI of the Civil Rights Act of 1964, which states that a “recipient of federal funds shall not intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by the Act, or because the individual has made a complaint . . .” Section 504’s protection against retaliation does not just apply to students; it applies to parents, employees, and anyone who advocates on the behalf of a student with a disability.

Retaliation can be described as taking action in response to an individual’s advocacy of a student. Some examples of conduct that may be considered retaliatory are intentionally not returning phone calls or emails, refusing access to student records, continually cancelling meetings, disciplining a student more harshly than non-disabled peers, etc.

OCR has jurisdiction to investigate complaints of retaliation and utilizes a 5-part test for determining whether retaliation occurred:

1. Has the complainant engaged in a protected activity?
2. Is the school aware of the protected activity?
3. Was the complainant subjected to an adverse action?
4. Is a causal relationship or connection between the protected activity and the adverse action?
5. Can the school offer a legitimate, nondiscriminatory reason(s) for the adverse action, which could be considered pretextual, i.e., a false pretense?

² 34 C.F.R. § 104.4

Here is an example using the 5-part test above: A student is on an IEP and the parent has filed a state complaint alleging that the school is not implementing the IEP appropriately (filing a complaint is a protected activity). Before the complaint was filed, the school completed the student's reevaluation and scheduled an eligibility meeting, which was held the same day the parent filed the complaint; however, the school was not aware that the complaint had been filed. At the meeting, the team determines the student is no longer eligible and dismisses her from special education (adverse action). There is an obvious connection between a student's eligibility and the implementation of an IEP. However, because the school was not aware of the complaint before the student was exited from services, it is likely to be found that the school had a valid, nondiscriminatory reason to exit the student from services, i.e., she was not exited because her parent filed a state complaint, but rather because she no longer met eligibility requirements.

III. IDENTIFICATION OF STUDENTS

Section 504 has a "child find" requirement similar to that required by the IDEA. Section 504 requires districts/schools to annually "identify and locate every qualified [individual with a disability] residing in the district's jurisdiction who is not receiving a public education."³ Because charter schools do not have attendance boundaries, the requirement extends to all students who enroll in and are attending the charter school.

Child Find Responsibilities include:

- Identifying children in need of services and/or accommodations.
- Referring students to the 504 Site Coordinator or designee.
- Educating parents and others with periodic announcements in newsletters, parent packets, teacher notices, etc.
- Posting notices of non-discrimination in visible places for parents, staff, and students.

The following are examples of students that may be protected under Section 504, but not the IDEA:

- Students with communicable diseases.
- Students with temporary disabilities arising from accidents who may need short term hospitalization or homebound recovery.
- Students with arthritis, allergies, asthma, diabetes, cancer, cerebral palsy, epilepsy, leukemia, obesity.
- Students who have drug or alcohol addictions, but not currently using drugs or alcohol.
- Students with ADD/ ADHD who are not otherwise IDEA eligible.
- Socially maladjusted students who are not ED.
- Students with special health care needs, e.g., Multiple chemical sensitivity, or MCS, characterized by severe reactions to ordinary chemicals commonly found in the home or school environment, is a disability under Section 504 if it substantially limits a student's major life activity, such as the ability to breathe or the ability to learn (because the student is unable to attend school).

The following are examples of students who may not be eligible and/or protected under Section 504:

³ 34 CFR 104.32.

- Students whose impairments do not substantially limit their learning to the degree that they need accommodations/modifications.
- Students with low-average IQs who do not meet criteria under the IDEA for Intellectual Disability.
- Slow learners who do not have suspected disabilities.
- Students with limited English proficiency.
- Students coming from bad family situations.
- Students who are pregnant (UNLESS the student suffers complications that substantially limit a life activity).

IV. ELIGIBILITY UNDER SECTION 504

The ADA Amendment Act (ADAAA) of 2008 increased the number of individuals who are eligible for protections and services under both the ADA and Section 504 of the Rehabilitation Act of 1973.⁴ An impairment in and of itself does not mean that a student has a disability. There must be a substantial limitation on one or more major life activities, which results from the impairment, to be considered as a disability under Section 504 and entitling a student to FAPE.

1. Eligibility Step #1 – Determine if Student Has A Disability

In order to be afforded the protections of Section 504, a student must meet the definition of a person with a “disability.” A student has a disability if he/she:

1. Has a physical or mental impairment that substantially limits one or more major life activities; or
2. Has a record of such impairment; or
3. Is regarded as having such an impairment; and
4. The impairment substantially limits a major life activity.

When determining whether a student has a disability/impairment, mitigating factors (i.e., medication taken) cannot be considered (exception: regular prescription glasses or contact lenses). However, when determining whether the student requires a 504 plan, mitigating measures can be considered.

Although medical or other documentation of the student’s impairment can be considered as part of the eligibility determination, a district/school cannot require the parent to provide such documentation in order to substantiate the student’s impairment. However, if the parent does not or is unable to provide documentation of impairment and the district/school believes medical documentation is necessary, then the district/school has a duty to provide for a medical evaluation, if needed to establish eligibility.

A physical or mental impairment includes, but is not limited to, the following:

- Any physiological disorder or condition;
- Cosmetic disfigurement;

⁴ 42 USC 12102 (4)(A) states, "The definition of disability in this Act shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act." (Emphasis Added)

- Anatomical loss affecting 1 or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory, including speech organs, cardiovascular, reproductive, digestive, genito-urinary, hermic and lymphatic, skin and endocrine;
- Any mental or psychological disorders, such as: mental retardation, organic brain syndrome, emotional or mental illness, specific learning disabilities; and
- An impairment that is episodic or in remission is a disability if it would substantially limit a life activity when active.

Major Life Activities include, *but are not limited to*:

- Caring for one's self
- Performing manual tasks
- Walking
- Seeing
- Hearing
- Speaking
- Breathing
- Learning
- Working
- Eating
- Sleeping
- Standing
- Lifting
- Bending
- Reading
- Concentrating
- Thinking
- Communicating

A school must make an *individualized* determination as to whether a student has a physical or mental impairment that substantially limits a major life activity. In light of the ADAAA, the standard used to determine whether a physical or mental impairment substantially limits one or more major life activities is: whether or not “the individual's important life activities are restricted as to the conditions, manner, or duration under which they can be performed in comparison to most people.” It is important to remember that “substantial” doesn't really mean “substantial” since the ADAAA was passed.

2. Eligibility Step #2 – Determine the Student's Educational Needs

A student may or may not be in need a Section 504 plan, even if the student has a qualified disability/impairment under Section 504 (as determined by Step #1). A student's educational needs can be identified by looking to several sources and may, but not necessarily, include an evaluation. (i.e., achievement tests, teacher recommendations, physical condition, adaptive behavior...).

Evaluation procedures must be valid, appropriate, and administered by trained personnel. Unlike the IDEA, there is no time line requirement for evaluations under Section 504 and OCR takes the position that evaluations must be completed within a reasonable period of time.

Similar to the IDEA, the district/school should obtain the parent's written consent for evaluation. Parents may also request an evaluation under Section 504; however, the district/school is not obligated to evaluate upon parental request. The district/school must evaluate only when it has reason to suspect that the student may have a disability that substantially limits a major life activity.

V. IMPLEMENTATION OF SECTION 504 PLANS

Like the IDEA, Section 504 has a Least Restrictive Environment (LRE) requirement. The district/school must educate students with disabilities with students without disabilities to the maximum extent appropriate, based on the student's needs. The LRE requirement extends to non-academic and extracurricular services and activities, such as meals, recess, counseling, physical education, transportation, health services, clubs, special interest groups, etc.

Generally, a Section 504 plan must address the following areas:

- Nature of the disability and the major life activity it limits.
- Basis for determining the disability.
- Educational impact of the disability.
- Necessary accommodations.
- Placement in the least restrictive environment.

The types of accommodations will vary for each student, based on his/her needs. Some examples of accommodations contained in Section 504 Plans are as follows:

- Teaching Strategies
- Environment
- Schedule
- Learning Aids
- Assignments/Testing
- Behavior Intervention Plans (BIP)/Organizational Skills

If a student is refusing the accommodations or services set forth in the Section 504 Plan, the district/school should continue to offer the accommodations and services, until the Section 504 team is reconvened to readdress the student's needs. It is very important to maintain documentation of the student's refusal to use accommodations and the Section 504 Team's action in response to the refusals.

VI. REEVALUATION

Schools should reevaluate the effectiveness of students' 504 Plans periodically and at least annually to determine the student's current needs. If the district/school believes that an accommodation or service is no longer appropriate, the Section 504 Team should be reconvened to review the student's Section 504 Plan.

Section 504 requires that the student's eligibility under Section 504 also must also be reevaluated periodically. The timeframe for reevaluation can be same as for the IDEA, i.e., every three years, or

more frequently if conditions warrant, or if the teacher and/or parent request reevaluation; but no more than once per year (unless parent and school agree otherwise). If a student on a Section 504 Plan is suspended for more than 10 days, it will constitute a change in placement, and will require reevaluation.

VII. ENFORCEMENT OF SECTION 504 BY OCR

OCR is responsible for enforcing Section 504. A complaint must be filed within 180 days of last act of discrimination, unless complaint alleges continuing discriminatory policy or practice or OCR waives this requirement. OCR decides if the complaint is amenable to Early Complaint Resolution (ECR). ECR is a process that allows the parties to resolve the complaint prior to the commencement of an investigation. OCR assigns an individual to meet with the parties. If an agreement is reached, a written agreement is signed and OCR will close its file on the matter.

If the matter is not resolved through ECR, an investigator is assigned to:

1. Develop investigative plan.
2. Gather information.
3. Analyze data & prepare an investigative report.
4. If a violation is found, the district/school is given the opportunity to correct the violation before the issuance of a formal Letter of Finding (LOF). This allows the district/school to develop and incorporate a corrective action plan into a Settlement Agreement.
5. Issue a LOF of OCR's determination on each issue.

If the district/school does not voluntarily comply with remedial action mandated by OCR, OCR will initiate administrative proceedings to suspend, terminate or refuse to grant or continue Department of Education financial assistance; or will refer the case to the Department of Justice for judicial proceedings.

VIII. MORE INFORMATION ON SECTION 504

To access the statute:

<http://www2.ed.gov/policy/rights/reg/ocr/edlite-34cfr104.html>

To access the implementing regulations:

<http://www.ecfr.gov/cgi-bin/text-idx?rgn=div5&node=28:1.0.1.1.36#28:1.0.1.1.36.1.32.5>

Additional information and publicly issued policy guidance is available on OCR's website at <http://www2.ed.gov/about/offices/list/ocr/index.html>