SECTION 504/ADA AND K-12 STUDENTS: PARTICIPANT MATERIAL

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STEP-BY-STEP REVIEW OF SECTION 504/ADA STUDENT ISSUES: OVERALL AGENDA

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1. Contextual Comparison: IDEA v. § 504 and the ADA

2. Threshold District- or School-Wide Issue: Grievance Procedure

3. ELIGIBILITY:
   A. Individual Child Find
   B. Evaluation
   C. Procedural Safeguards Notice
   D. “Protected-only” category

4. “ENTITLEMENT”:
   A. Scope (accommodations v. FAPE)
   B. Standard (reasonable v. commensurate)
   C. Procedures (e.g., who)

5. Significant Others:
   A. IST (“252” concept)
   B. Discipline
   C. IEP Interaction (“consolation prize” syndrome)
   D. “Double-covered” v. 504-only
      - Liability (e.g., bullying, retaliation, health-related injuries)
      - Enforcement (e.g., IHO and OCR)
### Overview Comparison of the IDEA with Section 504 and the ADA*

<table>
<thead>
<tr>
<th></th>
<th>IDEA</th>
<th>Sec. 504</th>
<th>ADA</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Federal funding</strong></td>
<td>partial</td>
<td>none</td>
<td>[same as § 504]</td>
</tr>
<tr>
<td><strong>Administering Agency</strong></td>
<td>Office of Special Education Programs (OSEP)</td>
<td>Office for Civil Rights (OCR)</td>
<td>[same as § 504]</td>
</tr>
</tbody>
</table>
| **District-wide requirements** | [none but typically special education policy, department, and coordinator] | • collective notice  
• coordinator  
• self-evaluation  
• grievance procedure | [same as § 504]  
[as of 1992] |
| **Procedural safeguards** | • detailed notice  
• IEP team with many specified members | • less detailed notice  
• streamlined “knowledgeable” team | [none specified] |
| **Eligibility:** **Definition of “disability”** | two parts:  
• 13 specified impairments  
• need for special ed | three parts:  
• any recognized impairment  
• that substantially limits  
• a major life activity (not limited to learning) | [same as § 504] |
| **FAPE document**        | IEP                         | [unspecified but typically a variously named document] | [none specified] |
| **FAPE contents**        | special education  
+ related services | special or regular education  
+ related services | [none specified] |
| **Dispute resolution**   | • state ed dep’t complaint resolution process  
• impartial hearing | • OCR complaint resolution process  
• impartial hearing | [same as § 504] |

Visual Organizer of IDEA (Original Red) and Section 504 (Blue Overlay)
SECTION 504/ADA CHECKLIST FOR DISTRICT-STUDENT COMPLIANCE

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1. Do you have a disability-related grievance procedure?

2. Have you updated your eligibility form and process in light of the ADAAA?
   - Do the major life activities” extend beyond within and beyond learning with carefully circumscribed additions under “Other”?
   - Does it generally include a “child find” process that dovetails on the one side with general education interventions (and, if used in your district, RTI) and on the other side with IDEA eligibility?
   - Does it specifically dovetail systematically, after prompt initial screening, with the use of individual health plans?

3. Do you have available and regularly use a procedural safeguards notice that is different from the one that the IDEA requires and that meets at least the Section 504 essentials?
   - including a pre-planned process for impartial hearings
   - including a readiness to respond to OCR complaints

4. Does the process for and the contents of individual 504 plans square with the Section 504 definition and standard for FAPE?
   - including reasonable necessity for a commensurate opportunity directly based on the identified basis for eligibility
   - including periodic review that includes the threshold issue of continued eligibility and the ultimate issue of long-term as well as short-term reasonableness

5. Does your suspension/expulsion procedure for Section 504-only students conform to the requirements that are different from those for students under the IDEA?
   - e.g., students using alcohol or illegal drugs
   - e.g., not interim alternate educational settings
CHECKLIST FOR SECTION 504/ADA GRIEVANCE PROCEDURE

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Does your school district have a grievance procedure Section 504 and the ADA and, if so, is it legally defensible? There are several reasons that your answer should be “Yes.” First, both the Sec. 504 and the ADA regulations require such a procedure, at least if your district has at least 15 employees or 50 employees, respectively. 34 C.F.R. § 104.7(b); 28 C.F.R. § 35.107(b). Second, parents or other individuals have had a high rate (75%) of success in OCR complaints concerning this requirement. See Perry Zirkel, Section 504 and Public School Students: An Empirical Overview, 120 WEST’S EDUC. L. REP. 369, 377 (1997). Third, and not at all least, such a procedure serves as an internal mechanism for resolving Sec. 504 and ADA complaints short of the costly involvement of OCR, due process hearings, and courts.

The pertinent Sec. 504 and ADA regulations only provide that the grievance procedure incorporate “appropriate due process standards” and be “prompt and equitable.” The LRP two-volume set – PERRY ZIRKEL, SECTION 504, THE ADA AND THE SCHOOLS (2011) – contains sample forms and related rulings for this requirement. As a supplement, this checklist provides operational criteria for a legally defensible Sec. 504/ADA grievance procedure.

1. Can you show that your district has both adopted and made this procedure generally available (e.g., in a parent handbook)?

2. Does the procedure expressly cover not only Sec. 504 but also the ADA?

3. Does it extend to not only student education issues, but also any individual’s complaint relating to the other applicable aspects of Sec. 504 and the ADA – nonacademic services, preschool and adult education programs, employment, and facilities (including communications)?

4. Is it separate from, and not confused with, other complaint resolution mechanisms, such as a student’s right to an impartial due process hearing and any individual’s right to file an OCR complaint?

5. Does it have a minimum of two, preferably three, levels, typically starting with a relatively informal step and ending with a formal central office (or, in small districts, school board) appellate decision?

6. Does it include expeditious and adequate investigation by the designated Sec. 504/ADA coordinator?

8. Does it specify time lines (e.g., 5 working days) for prompt processing of complaints, with a written reply to the grievant, at each level?
**SECTION 504/ADA STUDENT ELIGIBILITY FORM**

Child’s Name: ____________________________  
Birthdate: ____________________________

Eligibility Team Members: Fill in names and check whether knowledgeable about the:

<table>
<thead>
<tr>
<th>Names</th>
<th>...child</th>
<th>...meaning of evaluation data</th>
<th>...accommodations/placement options</th>
</tr>
</thead>
</table>

Sources of evaluation information (indicate each one used):

- _____ aptitude and/or achievement tests
- _____ adaptive behavior
- _____ teacher recommendations
- _____ others(specify):

1. Specify the mental or physical impairment
   (as recognized in DSM-V or other respected source if not excluded under 504/ADA, e.g., illegal drug use)*

2. Check the major life activity:
   - ___ seeing
   - ___ hearing
   - ___ walking
   - ___ breathing
   - ___ learning
   - ___ interacting with others
   - ___ manual tasks
   - ___ concentrating
   - ___ communicating
   - ___ speaking
   - ___ eating
   - ___ sleeping
   - ___ bowel functions
   - ___ bladder functions
   - ___ digestive functions
   - ___ immune system functions
   - ___ circulatory system functions
   - ___ endocrine system functions

   or specify alternative of equivalent scope and central importance: ________________________________

3. Place an "X" on the following scale to indicate the specific degree that the impairment (in #1) limits the major life activity (in #2):

   - • Make an educated estimate **without** the effects of mitigating measures, such as medication; low-vision devices (except eyeglasses or contact lenses); hearing aids and cochlear implants; mobility devices, prosthetics, assistive technology; learned behavioral or adaptive neurological modifications; and reasonable accommodations or auxiliary aids/services.
   - • Similarly, for impairments that are episodic or in remission, make the determination for the time they are active.
   - • Use **most** students in the general (i.e., national or state) population as the frame of reference.
   - • Interpret close calls in favor of broad coverage (i.e., construing Items 1-3 to the maximum extent that they permit). Thus, for an "X" at 4.0 or below, fill in specific information evaluated by the team that justifies the rating:

<table>
<thead>
<tr>
<th>5</th>
<th>Extremely</th>
</tr>
</thead>
<tbody>
<tr>
<td>4</td>
<td>Substantially</td>
</tr>
<tr>
<td>3</td>
<td>Moderately</td>
</tr>
<tr>
<td>2</td>
<td>Mildly</td>
</tr>
<tr>
<td>1</td>
<td>Negligibly</td>
</tr>
</tbody>
</table>

4. If the team's determination for #3 was less than “4,” provide notice to the parents of their procedural rights, including an impartial hearing. If the team's determination was a “4” or above, the team should determine and list on the 504/ADA Plan the specific accommodations and/or services that are necessary for the child to have an opportunity commensurate with nondisabled students (of the same age).

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“* Adapted with permission from Perry A. Zirkel, author of Section 504, the ADA and the Schools.”

[N.B. Highlighting based on ADA Title II regulations, effective 8/11/16, including the designation of impairments "easily" qualifying for eligibility include autism, bipolar disorder, diabetes, cancer, TBI, and OCD.]
§ 504ADA PROCEDURAL SAFEGUARDS NOTICE*

For students eligible or suspected to be eligible solely under § 504 and the ADA, but not under the IDEA, questions commonly arise as to compliance procedures with regard to parental notice. Not to be confused with the procedural safeguards requirements of the IDEA (34 C.F.R. §§ 300.503-300.504), the shaded contents below constitute the essential, or minimum, ingredients for such a form (per 34 C.F.R. § 104.36). In addition, districts may wish to consider adding other, discretionary features, such as the following:

1) an introductory section, citing and describing the nondiscrimination obligation of § 504 and the ADA

2) more details about the listed procedural rights, such as an explanation of the term “educational placement” and “significant change in placement” in this pure (rather than overlapping IDEA) § 504/ADA context and about the regulatory requirements for evaluation and placement

3) a list of the eligible child’s substantive rights, such as the § 504 definition of “free and appropriate education” and § 504 “least restrictive environment” requirements for academic and nonacademic settings

4) a reference to the more general requirements, such as your grievance procedure and 504/ADA coordinator

5) perhaps most importantly, a final section and related procedure to document parents’ receipt of this notice form

_________________

In accordance with Section 504 of the Rehabilitation Act of 1973 and the Americans with Disabilities Act of 1990, the ________________________ School District provides you, as the parent or guardian, with the following procedural safeguards in relation to your child.

1. You have a right to receive a copy of this notice upon the district’s identification, evaluation, refusal to provide an evaluation, educational placement, denial of educational placement and any significant change in said placement of your child.

2. You have the right to an evaluation of your child if the district has reason to believe that your child has a mental or physical impairment that substantially limits learning or some other major life activity …

   a) before the initial placement,
   b) before any subsequent significant change in placement.

3. You have the right to an opportunity to examine all relevant records for your child.

4. You have the right to an impartial hearing, with participation by you and representation by counsel, concerning the identification, evaluation or educational placement of your child.

5. You have the right to appeal the final decision of the impartial hearing officer to a court of competent jurisdiction.

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Interestingly, the relevant regulations do not mention “accommodations” or a 504 Plan, much less a required designation, or name, for such a document; rather, they only require that the district provide each eligible student “free appropriate public education” (FAPE), defined as “regular or special education and related aids and services.”

The following are my recommendations for local consideration and customization:

➔ For “504-alone” students, meaning those that are not also covered by the IDEA, it is advisable to have, for purposes of planning and proof, a § 504/ADA accommodations/services form – titled however your district chooses but showing that it covers both § 504 and the ADA.²

➔ Although neglected by many districts, the eligible child is entitled to any necessary related services as part of FAPE.

➔ The plan should be limited to those accommodations and/or services that are necessitated by the identified impairment, not just any accommodations that would benefit the student.

➔ The prevailing judicial standard is “reasonable accommodation,” which is the opposite of undue hardship or fundamental alteration.³ According to OCR’s most recent FAQ, the determination of FAPE—unlike that of eligibility—is without mitigating measures, such as medication.⁴ Thus, some students may be “technically eligible,” not having any accommodations or services listed on the plan, yet protected in terms of disciplinary changes in placement or other adverse actions based on disability.⁵

➔ In addition to identifying the child and specifying the necessary accommodations and services, the template, or form, for this purpose may contain other accountability features, depending on district discretion, such as the following:

  • identifying the team members, showing that as a group they meet the same three requisite criteria as the eligibility team.

  • identifying, by name, the person(s) responsible for implementing each accommodation or service

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¹ 34 C.F.R. § 104.33(a).

² OCR “encourages” the use of 504 plans, acknowledging that there is no legal requirement corresponding to the IDEA obligations for IEPs. See, e.g., OCR, PARENT AND EDUCATOR RESOURCE GUIDE TO SECTION 504 IN PUBLIC ELEMENTARY AND SECONDARY SCHOOLS 10 (Dec. 2016), https://www2.ed.gov/about/offices/list/ocr/docs/504-resource-guide-201612.pdf

³ However, based on the rest of the FAPE regulation, OCR opines that the applicable standard is commensurate opportunity. Thus, it is preferable to adhere officially to an “appropriateness” standard.

⁴ http://www2.ed.gov/about/offices/list/ocr/docs/dcl-504faq.201109html

⁵ Dear Colleague Letter, 68 IDELR ¶ 52 (OCR 2016).
• also identifying, in this case by role, the individual responsible for ensuring proper implementation

• listing an approximate time for review of the plan (typically at the end or start of the school year, but the standard for periodic review is reasonableness, which is more flexible than the IDEA standard for IEP reviews

• providing a space at the bottom for the parent(s) to acknowledge receipt of or agreement with the plan

→ Be wary about including a checklist menu of accommodations directly in your form. On the one hand, such a checklist invites over-identification of what is necessary in terms of the student’s disability (as compared with beneficial strategies that should be part of the child’s regular education program and subject to local, not federal, accountability). On the other hand, such a checklist often does not provide the specificity that OCR or a hearing officer might well expect if the parents choose to challenge the plan on the grounds of formulation or implementation.

→ Although high-stakes testing and the NCLB are undeniably a potent motivation, district should be careful about agreeing to overdoing testing accommodations as either the basis for eligibility or as a short-range substitute for more effective long-range interventions for the child.

→ The form should be reviewed and revised as needed, but generally at least annually. If it is as the end of the year, make sure that the staff members at the school where the student will be enrolled the following year are appropriately represented.

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6 In a relatively recent case, for example, OCR found a district’s requirement to violate § 504, reasoning as follows: “Moreover, the Section 504 regulations do not require a signature on a Section 504 plan for the plan to be valid. The committee's determination that the student needs certain related aids and services to ensure an appropriate public education establishes the district's obligation to implement the related aids and services.” Tyler (TX) Indep. Sch. Dist., 56 IDELR ¶ 24 (OCR 2010).
**SAMPLE SEC. 504/ADA PLAN**

Team (knowledgeable about the student, the evaluation, and the accommodations/services):

<table>
<thead>
<tr>
<th>Identified Impairment/ Major Life Activity</th>
<th>Necessary Accommodations and/or Services</th>
<th>Individual(s) Responsible for: Implementation Monitoring</th>
</tr>
</thead>
</table>

Describe location of accommodations/services if other than the regular classroom setting and justifying reason(s):

Beginning date: ___________  Ending (i.e., review) date ___________

I have received the Sec. 504/ADA Procedural Safeguards along with a copy of this Plan.

______________________________  ____________________________
Parent/Guardian Signature  Date
Concussions. As with other relatively temporary health conditions, concussions merit careful attention that duly differentiates among individual health plans, 504 plans, and IEPs. In many cases, the otherwise implicit essential element of sufficient duration does not support § 504 eligibility.\(^7\)

Revocation Intersection. An occasional but potentially perplexing issue at the intersection between § 504 and the IDEA is if and when a parent revokes consent for an IEP and demands instead a 504 plan. Although the case law to date has not been entirely consistent, the prevailing bad faith/deliberate indifference standard seems to provide latitude for school districts to either deny or agree to this request based on what appears to be in the student’s educational interest.\(^8\)

Private Schools. Contrary to a common misconception, the § 504 obligations for students with disabilities voluntarily enrolled in parochial school do not, with the rare exception of a judicially connected state law,\(^9\) belong to the school district, whether of residence or location.\(^10\) Instead, they belong to the parochial school if it receives more than de minimis financial federal assistance (e.g., IDEA, Title I/NCLB, hot lunch program services, or E-rate grant).\(^11\) For secular private schools, not only does § 504 apply on the same basis, but also the ADA—which has an exemption for religiously controlled schools\(^12\)—fills the gap for those that do not received such assistance.\(^13\) Interestingly, the first published court decision that applied the ADAAA’s liberalizing interpretive standards arose in a private school.\(^14\)

OCR Enforcement. Parents of double-covered and 504-alone students may file a complaint with the regional OCR office, which triggers an investigation and resolution process that typically ends in either an informally mediated settlement or a formal “letter of findings.” Although parents often fail to substantiate the alleged violations of § 504, the process can be costly to districts in terms of staff time and legal resources. The long-standing OCR policy is to focus on procedural violations with the limited exception of extraordinary circumstances.\(^15\) Districts are advised to put in place procedures and practices

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\(^7\) See, e.g., Perry A. Zirkel, Are Students with Concussions Qualified for Section 504 Plans? 311 EDUC. L REP. 589 (2015). The ADA Title II regulations, effective 9/11/16, slightly mitigate the durational conclusion by commenting that “the effect of an impairment lasting or expected to last less than six months can be substantially limiting … for establishing an actual disability.” 28 C.F.R. § 35.108(d)(ix).

\(^8\) See, e.g., Perry A. Zirkel, Is a 504 Plan Required (or Permitted) in the Wake of Revocation of an IEP? 311 EDUC. L REP 623 (2015).


\(^14\) Franchi v. New Hampton Sch., 656 F. Supp. 2d 252 (D.N.H. 2009) (rejected dismissing student’s ADA suit against private school that allegedly expelled student for an eating disorder, preserving for trial whether her disorder substantially limited the major life activity of eating).

\(^15\) See, e.g., Frequently Asked Questions and Answers about Section 504 and the Education of Children with Disabilities-Item 5 (OCR 2011), http://www2.ed.gov/about/offices/list/ocr/504faq.html. For the unusual example of a procedure that is more rigorous under § 504 than under the IDEA, see the regulatory requirement for a reevaluation upon any significant change in educational placement. 34 C.F.R. § 104.35(b). For an example of extraordinary circumstances, see Gloucester Cty. (VA) Pub. Sch., 49 IDELR ¶ 21 (OCR 2007) (life-threatening food allergy).
that are proactive and preventive; nevertheless, the parents’ right to file a complaint may not be restricted in any way, including by the district’s grievance process, and districts should respond to OCR with cooperation and empathy while remaining firm— not fearful or intimidated— in terms of the specific requirements of § 504 and the ADA. Interestingly, the current administration recently announced a priority on OCR enforcement of race and sex issues.

Impartial Hearings. The most important procedural safeguard under § 504/ADA is the right to an impartial hearing; yet, parents have only infrequently exercised this right thus far. Such requests often cause confusion, because— unlike those under the IDEA—the district, not the state, has the responsibility for such hearings. Beyond the basics of impartiality and the parents’ rights to counsel, the requirements for such hearing are more flexible than for those under the IDEA. Moreover, unlike the IDEA, the district is ultimately responsible to arrange for such impartial hearings if the state does not, and there is not second tier of administrative review unless state law provides for it.16

Extracurricular Activities. A recent priority issue for OCR and the most active area of recent student litigation under § 504/ADA is interscholastic athletic eligibility.17 The lessons in the case law for extracurricular activities more generally, including field trips, are 1) the courts are still divided about this issue, but the Supreme Court’s decision concerning the professional golfer, Casey Martin, seems to have shifted the balance in favor of plaintiffs except where the requested accommodation would consist of a fundamental alteration; and 2) consideration should be given to individualized waivers, which bend but do not break rules in light of the relationship to the disability and the reason for the rule.

Retaliation/Harassment. Another active area of disputes, more often via OCR complaints than court suits, is alleged retaliation, typically as a result of parent advocacy of their child’s § 504/ADA rights, or harassment, predominantly in terms of hostile treatment of the child by personnel or peers. OCR and the courts use a multi-step process to evaluate such claims, including whether there was a causal connection between the parents’ advocacy (in retaliation cases) or student’s disability (in harassment cases) and the adverse action. Although districts have prevailed in the clear majority of the cases to date, having proactive procedures— including periodic staff training and prompt corrective action— is in the mutual interest of the district and the child with disabilities.18 Finally, note that disability-based bullying may amount to peer harassment under § 504/ADA depending on its severity, persistence, or

16 See, e.g., Basic Elements of Grievance Procedures and Impartial Hearings, in Perry A. Zirkel, Section 504, the ADA and the Schools App. 4:30-4:31 (2011). For an in-depth analysis, see Perry A. Zirkel, Impartial Hearings under Section 504, 334 Educ. L. Rep. 51 (2016); see also Perry A. Zirkel, The Public Schools’ Obligation for Impartial Hearings under Section 504, 22 Widener J. 135 (2012).

17 See, e.g., Dear Colleague Letter, 60 IDELR ¶ 167 (OCR 2013), clarified, 62 IDELR ¶ 195 (OCR 2013). For an analysis, see Perry A. Zirkel, Students with Disabilities and Extracurricular Athletics in the K-12 Context: OCR’s Recent “Significant” Guidance, 289 Educ. L. Rep. 13 (2013). For a recent decision denying a student with disabilities an injunction against the state interscholastic athletic association’s residency requirement, see Steines v. Ohio High Sch. Athletic Ass’n, 66 IDELR ¶ 15 (S.D. Ohio 2015). For another recent case, K.L. v. Mo. High Sch. State Activities Ass’n, 66 IDELR ¶ 152 (E.D. Mo. 2015) (denying preliminary injunction for student with disabilities who competed in track with a racing wheelchair and who sought creation of six new statewide events and development of safety guidelines and qualifying standards for wheelchair racers— fundamental alteration) further proceedings, 178 F. Supp. 3d 792 (E.D. Mo. 2016) (denying preliminary injunction for her to earn team points and also to have them assessed against school teams w/o para-athletes— fundamental alteration, or “affirmative action” relief, not cognizable under § 504 and the ADA).

18 For an example of one of the relatively few successful claims at the OCR level, see Hayward (CA) Unified Sch. Dist., 54 IDELR ¶ 63 (OCR 2009) (ruling that district transferred child with ED to another teacher’s classroom due to his parent’s advocacy). For a recent court decision, see Hicks v. Benton Cty. Bd. of Educ., __F. Supp. 3d __ (W.D. Tenn. 2016) (denied district’s summary judgment motion in special education aide’s retaliation claim under § 504 and the ADA when district nonrenewed her contract after she informed parents about services that their children failed to receive).
pervasiveness, and that OCR has issued more district-damending standards (e.g., negligence, constructive knowledge, and w/o disability connections) than the courts (e.g., deliberate indifference, actual knowledge, and disability-based).\(^{19}\)

**Service Animals.** The case law concerning whether students with autism or other such disabilities are entitled to bring their service dogs to public school was subject to mixed judicial outcomes, with parent victories largely limited to state law.\(^{20}\) However, the new Department of Justice regulations for Titles II and III of the ADA settle the matter in favor of access, with related specifics, such as safety and maintenance issues.\(^{21}\)

**Students with Vision, Hearing, or Speech Disabilities.** In its most recent “Dear Colleague Letter” and related policy documents, the Department of Justice and the Office of Special Education and Rehabilitation Services emphasized the special provisions for effective communication, including the provision of appropriate auxiliary aids and services, under Title II of the ADA, which applies to school districts and other public institutions.\(^{22}\)

**Discipline Policies.** § 504 and the ADA overlap with the IDEA such that they provide an alternate theory for double-covered students and particular confusion with regard to 504-alone students. Whereas the focus of IDEA discipline cases has been suspensions/expulsions, parents have used § 504/ADA in relation to a variety of forms of discipline. For disciplinary procedures other than suspensions/expulsions, the keys are avoiding differential adverse treatment of students with disabilities and following the pertinent provisions of the child’s IEP or 504 Plan.\(^{23}\)

For suspensions/expulsions, the primary question is whether the removals constitute a “significant change in placement.” The standard is the same as under the IDEA: 11 consecutive days of removal or a cumulative pattern of days in the school year that is the functional equivalent to 11 consecutive days, which depends on 1) the total number of days, 2) the length of each of these removals, and 3) their proximity. For those removals that meet this standard, Appendices I and II show the differences between the IDEA, which controls for double-covered students, and § 504/ADA, which controls for 504-alone students. The main differences are as follows

- whereas both require a manifestation determination (also known under § 504 as a relationship test), upon a removal of more than 10 consecutive days or an equivalent pattern of cumulative days in a school year,\(^{24}\) the team and criteria are much more detailed under the

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\(^{19}\) See, e.g., Dear Colleague Letter, 64 IDELR ¶ 115 (OCR 2014); Dear Colleague Letter, 61 IDELR ¶ 263 (OSERS/OSEP, 2013); Dear Colleague Letter, 55 IDELR ¶ 174 (OCR 2010).

\(^{20}\) See, e.g., Perry A. Zirkel, Service Animals in K–12 Schools: A Legal Update, 327 EDUC. L. REP. 554 (2016).

\(^{21}\) 28 C.F.R. §§ 35.104 and 35.136. The primary limitations on access are based on these two permissible questions, unless this information is readily apparent: 1) “if the animal is required because of a disability,” and 2) “what work or task the animal has been trained to perform.” On the other hand, the regulations do not allow the district to “require documentation, such as proof that the animal has been certified, trained, or licensed as a service animal.” Id. § 35.136(f). Examples of qualifying and disqualifying answers for question 1 respectively include “helping persons with psychiatric and neurological disabilities by preventing or interrupting impulse or destructive behaviors” and “the provision of emotional support, well-being, comfort, or companionship.” Id. § 35.104. For illustrative decisions, see United States v. Chili-Cent. Sch. Dist., __ F. Supp. 3d __ (W.D.N.Y. 2016); Riley v. Sch. Admin. Unit #23, 67 IDELR ¶ 8 (D.N.H. 2016); Alboniga v. Sch. Bd. of Broward Cty., 87 F. Supp. 3d 1319 (S.D. Fla. 2015); C.C. v. Cypress Sch. Dist., 56 IDELR ¶ 295 (C.D. Cal. 2011). For agency policy guidance, see Dep’t of Justice, Frequently Asked Questions About Service Animals and the ADA (July 2015), http://www.ada.gov/regs2010/service_animal_qa.html

\(^{22}\) Dear Colleague Letter, 64 IDELR ¶ 180 (DOJ/OSERS 2014) (including accompanying FAQ).


IDEA; the only § 504 requirements for the manifestation determination are that a knowledgeable team conduct it based on a variety of sources of relevant information

- if the misconduct is a manifestation of the disability, § 504/ADA provides a stronger bar because—unlike the IDEA—it has no 45-day interim placement authorized for weapons or other such danger-based violations

- the use or possession of alcohol or illegal drugs is an exception to any such procedural protection under § 504/ADA

- if the misconduct is not a manifestation of the disability, the 504-alone child is only entitled to the same notice, hearing, and—if any—alternative education that nondisabled students receive.

- with the exception of the six states of the Fifth and Eleventh Circuits—Alabama, Florida, Georgia, Louisiana, Mississippi, and Texas—the FAPE obligation does not continue in the wake of an expulsion for misconduct unrelated to the child’s disability

Additionally more stringent than the IDEA, § 504 regulations expressly contain a prerequisite for a significant, including disciplinary, change in placement not specified in the IDEA—a re-evaluation (34 C.F.R.104.35(a)).

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25 See, e.g., see Murray Cty. (GA) Sch. Dist., 55 IDELR 233 (OCR 2010).
RECENT COURT DECISIONS UNDER §504/ADA: K–12 STUDENTS

S Miller v. Bd. of Educ., 565 F.3d 1232 (10th Cir. 2009); see also Ellenberg v. New Mexico Mil. Inst., 572 F.3d 815 (10th Cir. 2009), cert. denied, 130 S. Ct. 1016 (2009)
• ruled that violation of IDEA is not necessarily § 504 violation – needs additional proof of eligibility and discrimination

S P.P. v. W. Chester Area Sch. Dist., 585 F.3d 727 (3d Cir. 2009)
• ruled that statute of limitations under § 504 is the same as under IDEA, i.e., two years

• rejected child find claim under § 504 that district did not conduct timely evaluation of IDEA-covered child due to failure to programmatic failure or discrimination beyond denial of FAPE

(P) C.D. v. New York City Dep’t of Educ. 52 IDELR ¶ 8 (S.D.N.Y. 2009)
• preserved for further proceedings re cost (i.e., whether undue fiscal hardship) of SLD student’s § 504/ADA claim that district must provide free delivered lunches to students that IEP team placed in private placements because it did so for students in public schools w/o cafeterias

• rejected dismissing student’s ADA suit against private school that allegedly expelled student for an eating disorder, applying the ADAAA’s liberalizing rules of construction and preserving for trial whether her disorder “substantially limited” the major life activity of eating

• dismissed ADA pattern or practice claims against private charter school operator with regard to its daycare, elementary, and secondary programs but not with regard to its preschool programs because 11 of the 12 plaintiff children with disabilities had been disenrolled or denied admission at the preschool level but only 1 at the other levels—also dismissed parents’ associational discrimination claim because it was only indirect

• dismissed § 504 retaliation claim that mirrored the parents’ IDEA FAPE claim

(P) Mark H. v. Hamamoto, 513 F.3d 922 (9th Cir. 2010)
• preserved for jury whether parents of child with autism (who settled the IDEA claim separately for the child) prove 1) failure to provide reasonable accommodation (statute) or commensurate opportunity (regulations), and 2) deliberate indifference on the part of the school authorities

26 The outcome of each case is coded as illustrated here:

(P) = Parent won inconclusively (i.e., subject to further proceedings)
S = School district won conclusively.

This case law compilation does not include court decisions concerning the problematic application of the exhaustion provision of the IDEA. See, e.g., Wood v. Katy Indep. Sch. Dist., 53 IDELR ¶ 10 (S.D. Tex. 2009). Similarly, it does not extend to employee cases. See, e.g., Walther-Willard v. Mariemont City Sch., 601 F. App’x 385 (6th Cir. 2015) (teacher with pedophobia).

Celeste v. E. Meadow Union Free Sch. Dist., 373 F. App’x 85 (2d Cir. 2010)
- upheld jury verdict under the ADA for district’s denial of meaningful facilities access to student with cerebral palsy, but vacated its damages award for retrial due to excessiveness

- upheld jury verdict in favor of district under §504/ADA when student with autism challenged the behavioral and social support services and peer harassment

Bishop v. Children’s Cir. for Developmental Enrichment, 618 F.3d 533 (6th Cir. 2010); see also Davis v. Blanchard, 175 F. Supp. 3d 581 (M.D.N.C. 2016)
- borrowed Ohio’s minority tolling statute to apply § 504 limitations period for child with autism

- rejected § 504 failure-to-train money damages claim on behalf of child with autism and other disabilities (who had IEP plus, for after-school program, 504 plan)—deliberate indifference standard

- ruled that § 504 applied to parochial school based on its participation in national school hot lunch program and federal E-rate program

- while rejecting liability under IDEA child-find and § 1983 constitutional claims, preserved for trial § 504/ADA claims on behalf of 504-plan child with asthma who died in school allegedly due to refusal to provide him with reasonable accommodation

- granted preliminary injunction to student with physical disability, concluding that she did not need special education, thus not qualifying under the IDEA, but that she was entitled to elevator key as a reasonable accommodation under § 504

- ruled that even if the failing grades of a high school student with SLD showed denial of access to education, the parent failed to provide evidence that they were attributable to the alleged denial of FAPE (via non-implementation)

- preserved for trial whether district’s purported failure to evaluate and update student's 504 plan constituted deliberate indifference, which is the standard for money damages under § 504 in the Eleventh Circuit

C.C. v. Cypress Sch. Dist., 56 IDELR ¶ 295 (C.D. Cal. 2011)
- upheld preliminary injunction for child with autism to be accompanied by trained service dog based on ADA—not a fundamental alteration

- ruled that student with ADHD was, pre-ADAAA and contrary to the district’s evaluation, eligible under § 504 before but not after taking medication and that compensatory education was available for this period if the parents’ proved that the lack of a 504 plan, despite informal accommodations, constituted a denial of FAPE under § 504

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28 For a similar but much older ruling, see Hickey v. Irving Indep. Sch. Dist., 976 F.2d 980 (5th Cir. 1992).
- upheld dismissal of parent’s § 504/ADA claim for money damages against school district and V-T school, because their respective decisions not to recommend or admit the student, who had an IEP, was not based on his disability

- rejected ADA (and 14th Amendment substantive due process) claim of parent on behalf of student with a disability who had been the target of bullying—lack of deliberate indifference

- denied preliminary injunction to high school student with anxiety attacks—her requested accommodation to leave the pool upon panic attacks (from fear of swimming) during practice was a fundamental alteration, not a reasonable accommodation

- rejected dismissal of § 504/ADA suit on behalf of homebound high school student with hereditary metabolic disorder based upon the district’s refusal to allow him to attend a senior class dance and other events because he was “too sick” to attend school

S Lamkin v. Lone Jack C-6 Sch. Dist., 58 IDELR ¶ 197 (W.D. Mo. 2012)
- ruled (alternatively to the dismissing for failure to exhaust) that in the wake of revocation of consent for an IEP under the IDEA, the child is not entitled to a 504 plan in its stead

- ruled that intentional discrimination (i.e., deliberate indifference) is required for money damages—distinct from other remedies—under Section 504 or the ADA

- rejected various § 504 claims including alleged district policy denying 504 plans to students with good grades and, due to lack of proof of deliberate indifference, liability for money damages

- preserved for trial § 504 money damages claim as whether district’s use of restraint chair constituted discrimination and, if so, whether district was deliberately indifferent to its use

S Weidow v. Scranton Sch. Dist., 460 F. App’x 181 (3d Cir. 2012)
- rejected disability-harassment claim of former student with bipolar disorder for failure to prove its substantial limitation on social interaction (pre-ADAAA)

- expert witness fees are available to prevailing parents under § 504

S D.B. v. Esposito, 675 F.3d 26 (1st Cir. 2012)
- ruled that § 504 has additional FAPE element of “disability-based animus,” thus not being coextensive with IDEA FAPE claim, and that § 504, like the ADA, provides for an independent retaliation claim—parent failed to prove either one in this case
(S) R.N. v. Cape Girardeau 63 Sch. Dist., 858 F. Supp. 2d 1025 (E.D. Mo. 2012)
- granted district’s motion for summary judgment for § 504/ADA suit by student in wheelchair for Perthes Disease of the hip, which healed within 2-3 years, because student had failed to exhaust hearing under IDEA (although no IEP) and/or his impairment was not permanent or sufficiently long-term (pre-ADAAA)

(S) M.R. v. Ridley Sch. Dist., 680 F.3d 260 (3d Cir. 2012)
- ruled that 504 plan for child with food allergies (as well as SLD) provided reasonable accommodations/meaningful access and that parent’s request to be allowed to prepare snacks for the entire class that met her dietary needs was a substantial modification, which is beyond Section 504’s scope

(P) Sher v. Upper Moreland Sch. Dist., 481 F. App’x 762 (3d Cir. 2012)
- vacated and remanded denial of dismissal of parents’ claim for money damages for discriminatory discipline

- denied dismissal of parents’ § 504 claim that district officials were deliberately indifferent to continuing disability-based peer harassment

- denied dismissal of § 504 (and IDEA) child-find claims of student with ADHD who made a sufficient showing of deliberate indifference (i.e., intentional discrimination)

- dismissed ADA accessibility § 504 accommodation claims of student with paraplegia for lack of deliberate indifference

- denied dismissal of § 504 and ADA Title III claims against interscholastic education association dues to sufficient allegations of federal financial assistance and “place of public accommodation,” respectively

- denied district’s motion for summary judgment based on factual issue of whether incomplete implementation of § 504 plan for second grader with diabetes constituted deliberate indifference—same for retaliation claim

(S) Zandi v. Fort Wayne Cmty. Sch., 59 IDELR ¶ 283 (N.D. Ind. 2012)
- rejected parent’s § 504 claim that lack of no-spray written policy was intentional discrimination, finding that the district had taken reasonable steps to accommodate the student’s severe allergies

- granted tuition reimbursement under § 504 for residential placement in the wake of child find and eligibility violations, using the statute of limitation cut-off as a significant equitable consideration (and while denying the same length of relief under the IDEA for other equitable considerations)

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29 In another relatively recent case concerning disability-based peer harassment, the Fifth Circuit initially distinguished bad faith/gross misjudgment from deliberate indifference for liability under § 504, but subsequently vacated this opinion, remanding the case for resolution of the exhaustion issue. Stewart v. Waco Indep. Sch. Dist., 711 F.3d 513 (5th Cir. 2013), vacated and remanded, 599 F. App’x 534 (5th Cir. 2013).
• rejected parent’s § 504 for money damages based on alleged denial of FAPE for former high school student with SLD because parents failed to prove deliberate indifference regardless of whether the more rigorous standard of bad faith or gross misjudgment applied

• rejected dismissal of § 504 harassment suit that alleged two districts were deliberately indifferent to students’ bullying of “seizure boy”

Greer v. Richardson Indep. Sch. Dist., 472 F. App’x 287 (5th Cir. 2012), further proceedings, 471 F. App’x 336 (5th Cir. 2012) (upheld attorneys fees sanctions under 28 U.S.C. § 1927 for unreasonable and vexatious conduct)
• held that district’s provision of alternative seating section in front of or immediately adjacent to the general seating section met the ADA standard for program accessibility for “existing” structures

• rejected various challenges (e.g., 14th Amendment equal protection and due process plus state law claims) by parent of nondisabled child to peanut-free policy of elementary school adopted for 504 student with severe, life-threatening allergy including airborne exposure to nuts after less intrusive measures, in the opinion of the child’s physician, did not alleviate the risk of harm

• ruled that requested accommodation of heating up the homemade food of student with diabetes was preferential, not necessary, for meaningful access to lunch, and in any event the district was not deliberately indifferent—also rejected retaliation claim for lack of evidence and § 504 procedural claims based on harmless error approach

D.L. v. Baltimore City Bd. of Sch. Comm’rs, 706 F.3d 256 (4th Cir. 2013)
• held that § 504 does not compel public schools to provide FAPE to children with disabilities in private schools (and that having a prerequisite that they enroll in public schools does not violate their First Amendment freedom of religion)—distinguished Lower Merion (supra) due to absence of state dual enrollment law

• granted district’s motion for summary judgment on § 504 liability claim of parent of student with autism allegedly subject to physical restraint 89 times (27 prone) in 14 months for aggressive and self-injurious behaviors—lack of intentional discrimination (i.e., deliberate indifference)

• issued summary judgment for district that offered § 504 plan identical to the IEP the parent revoked, although taking a different route from Lamkin (2012)—interpreted § 504 as permitting, indeed requiring, district to offer other educational modifications or accommodations that constitute FAPE under § 504
• preserved for trial § 504 retaliation claims of parent who filed OCR complaint on behalf of elementary school child with peanut allergy, diabetes, and learning problems—genuine factual issues as to whether the principal’s reporting of the parent for child abuse was retaliation for the parent’s repeated requests for monitoring the child’s glucose levels in the classroom rather than the school clinic

• denied preliminary injunction for student with ADHD as not being “otherwise qualified” for wrestling eligibility, having already wrestled for four years

• rejected parent’s child find claim under § 504 in absence of sufficient evidence of discrimination, i.e., bad faith or gross misjudgment

• denied preliminary injunction to student with anxiety disorder who challenged interscholastic athletic association’s transfer rule, reasoning that in some cases, even after the ADAAA, the § 504/ADA definition of disability is more stringent than the IDEA definition—psychologist’s diagnosis and conclusory statement about eligibility, standing alone, does not suffice

• upheld appropriateness of 504 plan for high school student with ADHD, concluding that it provided reasonable access to an education similar to that available to the average fellow student

• preserved for further proceedings where high school students with hearing impairment were entitled to Communication Action Real Time Transcription (CART) under Title II (public services) of the ADA even if not under the IDEA, ruling that a school district’s compliance with its obligations to a deaf or hard-of-hearing child under the IDEA does not necessarily establish compliance with the ADA Title II effective communication regulation

• rejected § 504 claim where allegations of bad faith or gross misconduct either amounted to repetition of denial of FAPE or speculation as to district’s motives

• ruled that district’s repeated failure to implement OT and SLT provisions of IEP for student with autism, who had received an IHO award of $209,000 in compensatory education under the IDEA (in the form of a trust fund), could constitute deliberate indifference, thus liability for money damages, under § 504

• rejected hostile environment claim under § 504/ADA based on principal’s alleged disciplinary berating of student with SLI where the principal did not know of the child’s behavior related disability until a diagnosis months later for Asperger disorder

30 Subsequently, the parties subsequently entered into a court-approved settlement for $198K, and the trial court awarded $370K (of the requested $443K) in attorney’s fees. K.M. v. Tustin Unified Sch. Dist., 78 F. Supp. 3d 1289 (C.D. Cal. 2015). In contrast, in some cases the student may be entitled to CART based on IDEA FAPE. See, e.g., DeKalb Cty. Bd. of Educ. v. Manifold, 65 IDELR ¶ 268 (N.D. Ala. 2015).
B.M. v. S. Callaway R-II Sch. Dist., 732 F.3d 882 (8th Cir. 2013)
- upholding summary judgment against parent’s §504/ADA claims, ruling that district’s delay in evaluating and providing 504 plan for child with alternate diagnoses of ADHD and dysthymic disorder, including insisting on prerequisite of IDEA evaluation, did not constitute bad faith or gross misjudgment

- ruled that § 504 is an available alternative for enforcing (i.e., responding to non-implementation of) an IDEA hearing officer decision

Estate of A.R. v. Muzyka, 543 F. App’x 363 (5th Cir. 2013)
- upholding rejection of liability lawsuit on 9-year-old child with disabilities who drowned while participating in summer enrichment program—lack of showing of bad faith, gross misjudgment, or deliberate indifference

- ruled that parent’s allegation that district removed her son based on his disability, which was SLD, sufficed for the intentional discrimination required to preserve the matter for further proceedings

- dismissed § 504 suit of parent of high school student with severe allergies and asthma based on insufficient accommodations—mere denial of FAPE is insufficient w/o allegations of discrimination

A.G. v. Lower Merion Sch. Dist., 542 F. App’x 194 (3d Cir. 2013); see also S.H. v. Lower Merion Sch. Dist., 729 F.3d 248 (3d Cir. 2013)
- summarily rejecting § 504 suit of first-grade student with diabetes due to lack of intentional discrimination or reasonable accommodation—minor deviations in implementing 504 plan or doctor’s orders that were not unsafe are not sufficient to meet these standards

- summarily rejecting § 504 liability for suicide of child with disability—lack of proof of deliberate indifference of district in response to bullying, which had allegedly led to the suicide

- summarily rejected parent’s ADA retaliation claim for failure to show any causal connection between her advocacy on behalf of her daughter with autism and the paraprofessional’s alleged abuse of child and supervisors’ alleged failure to report it

C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826 (2d Cir. 2014)
- ruled that a § 504 claim may be predicated on the alleged denial of access to FAPE as compared to nondisabled students but it requires proof of bad faith or gross misjudgment
S Estrada v. San Antonio Indep. Sch. Dist., 575 F. App’x 541 (5th Cir. 2014)
• in the context of an employee’s sexual assault on their son with cerebral palsy, rejected parents’ ADA accessibility claims as devoid of factual foundation and their § 504 claims with regard to the IEP as procedural only, lacking in requisite bad faith or gross misjudgment

S Shadie v. Hazleton Area Sch. Dist., 580 F. App’x 67 (3d Cir. 2014)
• upheld summary rejection of money damages suit under § 504 on behalf of student who autism, concluding the aide’s three instances of inappropriate verbal and/or physical treatment did not amount to the requisite deliberate indifference

S T.F. v. Fox Chapel Area Sch. Dist., 589 F. App’x 584 (3d Cir. 2014)
• rejected parent’s § 504 challenge to district’s proposed 504 plan for student with severe tree-nut allergy, concluding that the multiple meetings and revised proposals, including the last one submitted to and approved by the child’s physician, were reasonable even though they did not include the various additional accommodations that the parents wanted and the existing accommodations in the district-wide food allergy policy and training – “While we find that [the parents] cannot establish a denial of a FAPE even without consideration of the intentional-discrimination standard, we [hold] … that the higher standard of proof for intentional discrimination applies here because [they] seek compensatory damages in the form of tuition reimbursement”

S K.K. v. Pittsburgh Sch. Dist., 590 F. App’x 148 (3d Cir. 2014); see also D.E. v. Cent. Dauphin Sch. Dist., 765 F.3d 260 (3d Cir. 2014) (perhaps negligence or poor decision-making but lack of deliberate indifference)
• upheld summary rejection of money damages suit under § 504 on behalf of gifted graduate who had 504 plan for gastroparesis and, subsequently, anxiety disorder during senior year, concluding that the district’s occasional lapses did not amount to the requisite deliberate indifference

S Lebron v. Commonwealth of Puerto Rico, 770 F.3d 25 (1st Cir. 2014)
• upheld dismissal of § 504/ADA money damages suit against SEA/LEA on behalf of IEP student with Asperger disorder whom the parents voluntarily placed in a private school, ruling that SEA has no obligation under § 504/ADA for such students other than to avoid associational discrimination and, in any event, that the claim did not show any evidence of intentional discrimination or retaliation

• rejected bullying/denial of FAPE claim of student with disability based on lack of sufficient severity (and, implicitly, lack of deliberate indifference)

• ruled that mandatory report to child welfare authorities for student’s failure to attend school did not constitute retaliation under § 504

S S.P. v. Fairview Sch. Dist., 64 IDELR ¶ 99 (W.D. Pa. 2014)
• ruled that offer of cyber school, at-home placement of student who had incapacitating migraine headaches (w/o a 504 plan) did not violate the Section 504 LRE requirement (based on Oberti test)

• preserved for trial whether district’s actions, allegedly including repeatedly failing to adequately strengthen and consistently implement the 504 plan of middle school student with SLD upon declining academic performance and evaluated need for special education, constituted bad faith or gross misjudgment, which does not require personal animosity, ill will, or malice
S Held v. Northshore Sch. Dist., 64 IDELR ¶ 162 (W.D. Wash. 2014)
  • rejected, based on lack of deliberate indifference, claims of junior high school student that 1) district insufficiently formulated and inconsistently implemented his 504 plan and 2) failed to respond to staff members’ discriminatory treatment – also rejected, for lack of factual foundation (in terms of legitimate reasons) the alleged disparate treatment in disciplining him (via a detention)

  • dismissed ADA claim of peer harassment (i.e., bullying) where not based on student’s disability

  • ruled that parent, who revoked consent for IEP and received a 504 plan that included special education for her child, failed to prove that the district violated § 504 in the design or implementation of the 504 plan

  • rejected ADA denial-of-reasonable-accommodation claim of student with diabetes at charter school, ruling that single failure to ensure he ate lunch did not amount to requisite exclusion from participation or denial of benefits -- also rejected § 504 disability discrimination claim based on inadequate showing of requisite federal financial assistance in comparison to state statutes governing funding for charter schools coupled with the testimony of district business officials

  • rejected parents’ peer-harassment claim based on lack of disability connection and their retaliation claim based on lack of causal connection

  • interpreted the ADA Title II regulation for service dogs to enjoin the district from requiring the parents to maintain additional liability insurance, to obtain vaccinations beyond those required by state law, and to provide a handler for the dog—ordered the district, as a reasonable accommodation, to provide the assistance that the child required to provide his service animal with routine care such as feeding, watering, and walking

  • ruled that parent of deaf child who exited child under the IDEA but requested assistive technology did not show either discrimination (via deliberate indifference) or retaliation under § 504 (differentiating and not definitively deciding the McKethan issue)

  • rejected claim that the district’s placement of student with ED at residential treatment program violated the ADA integration mandate

  • rejected parents’ peer-harassment claim based on lack of disability connection and their retaliation claim based on lack of protected conduct
• preserved for trial whether district retaliated against parent for advocating on behalf of his child with SLI

• rejected money damages suit under § 504/ADA of high school graduate who experienced concussions and other injuries on the football team—failure to exhaust child find and accommodation claims and lack of bad faith or gross misjudgment for safety claim

• rejected § 504/ADA claim of hostile environment, based on alleged single incident of physical restraint and alleged peer bullying, due to lack of sufficient severity and pervasiveness

• provided nudging authority, to the extent of barely surviving dismissal, in sketchy support of manifestation-determination requirement for 504-only students upon a significant change in educational placement

Stanek v. St. Charles Cnty. Unit Sch. Dist. No. 303, 783 F.3d 634 (7th Cir. 2015)
• preserved for further proceedings parent’s, not student’s, retaliation and student’s discrimination (based on failure to implement IEP) claims under § 504 against the district, not its personnel

Doe v. Darien Bd. of Educ., 65 IDELR ¶ 194 (D. Conn. 2015)
• preserved for further proceedings § 504 issues whether the district had notice the special education child’s allegations of teacher’s sexual abuse and, if so, whether its failure to act to stop the abuse was because of the child’s disability

• denied dismissal of parent’s claim that district was deliberately indifferent to disability-based bullying

T.B. v. San Diego San Diego Unified Sch. Dist., 795 F.3d 1067 (9th Cir. 2015)
• in latest decision in 10-year dispute for graduated 21-year-old student with multiple disabilities, affirmed summary judgment for district on § 504 g-tube and retaliation claims but denied summary judgment for district on § 504 g-tube nurse claim, all based on deliberate indifference standard

• rejected § 504/ADA claim for lack of actual knowledge and/or deliberate indifference—simple failure to provide FAPE (here via improper implementation) is not sufficient for discrimination liability

• upheld hearing officer’s decision that rejected parent’s child find, evaluation, and eligibility claims on behalf of student who had incurred two concussions within a four-month period, with Section 504 largely subordinated within the IDEA analysis

• upheld expert witness fees (approx. $10K) in addition to reduced attorneys’ fees (approx. $130K) under § 504 as a consequence of denial of FAPE under IDEA for twice-exceptional child
(P)  *W.H. v. Tenn. Dep’t of Educ.*, 67 IDELR ¶ 6 (M.D. Tenn. 2016)
  • ruling that parents’ systemic LRE claim, on behalf of three students with pervasive developmental disabilities, that state’s funding system and school district’s segregative practices, including its software, met the *gross misjudgment/bad faith* standard under § 504/ADA, thus preserving for further proceedings their request for an injunction and money damages

  • refused dismissal of § 504 claim on behalf of student with autism, concluding that allegations of repeated nondisciplinary exclusions from IEP’s general education placement and district denials of these exclusions at IEP meetings and involuntary mental health evaluation rather than appropriate private school placement met bad faith or gross misjudgment standard

S  *R.K. v. Bd. of Educ. of Scott Cty.*, 637 F. App’x 922 (6th Cir. 2016). *But cf. Snell v. N. Thurston Sch. Dist.*, 66 IDELR ¶186 (W.D. Wash. 2015) (preserved for further proceedings issue of whether the timing and the transition period for the transfer was a reasonable accommodation)
  • upheld summary judgment for district in dispute between parents’ request for nursing services, including insulin pump monitoring, to kindergarten child with Type I *diabetes* in neighborhood school and district’s offer to do so in another school where parents relocated, thus making injunctive relief moot, and failed to show deliberate indifference, thus not qualifying for money damages (note that earlier 6th Cir. decision required *individualized assessment* per the § 504 evaluation regulation)

(P)  *A.G. v. Paradise Valley Unified Sch. Dist.*, 815 F.3d 1195 (9th Cir. 2016)
  • reversed summary judgment for district, finding genuine issues as to the meaningful access and reasonable accommodation claims of middle school gifted student with autism and the *deliberate indifference* requisite for money damages—parents claimed that district was liable (after settling IDEA claim) for not providing FBA-BIP and 1:1 aide to child in middle school placement that included gifted program rather than changing the placement to private psychiatric school

  • failure to modify and implement student’s 504 plan may fulfill the requisite liability standard of *deliberate indifference* under § 504 and the ADA (here for student who committed suicide after school’s knowledge of his emotional state)

S  *C.C. v. Hurst-Euless-Bedford Indep. Sch. Dist.*, 641 F. App’x 423 (5th Cir. 2016)
  • ruled that placement of special ed student with ADHD in 60-day interim alternate education setting after manifestation determination did not constitute hostile environment under § 504 – lack of requisite *deliberate indifference*

  • denied preliminary injunction for student with disabilities who competed in track with a racing wheelchair and who sought to earn team points and also to have them assessed against school teams w/o para-athletes—a *fundamental alteration* under § 504 and the ADA

S  *J.C. v. Cambrian Sch. Dist.*, 648 F. App’x 652 (9th Cir. 2016)
  • brief decision affirming that charter school’s denial of admission to nonresident second grader was due to lack of space, not student’s disability

  • dismissed § 504 claim of student with SLD suspended by parochial school – merely conclusory allegations that did not sufficiently meet standards for liability (including alternative of disproportionate impact)
• reversed dismissal of harassment (bullying) liability claim under § 504/ADA for student with Tourette Syndrome and ADHD who committed suicide after being bullied—acknowledged liberalizing eligibility standards under ADAAA

S Atkins v. Utica City Sch. Dist., 68 IDELR ¶ 7 (N.D.N.Y. 2016)
• dismissed § 504/ADA claims of alleged delay in evaluating and failure to implement 504 plan because parents did not show requisite bad faith or gross misjudgment by district

• denied § 504/ADA liability claims of student with disabilities (on IEP) who was excluded first from school (via homebound) and then from classroom (via school library) based on his fear of teacher who had physically assaulted him

S B.C. v. Mount Vernon Sch. Dist., 837 F.3d 152 (2d Cir. 2016)
• ruled, in a disparate impact case, that students with IEPs, i.e., eligible under the IDEA, do not necessarily qualify for eligibility under § 504/ADA due to triable issue of substantial limitation

(P/S) F.C. v. N.Y.C. Dep’t of Educ., 68 IDELR ¶ 63 (S.D.N.Y. 2016)
• rejected dismissal of the claim limited to a systemic policy of pull-out related services that allegedly shortened the state-required core instruction for students with IEPs

(P) Pollack v. Reg’l Sch. Unit 75, 660 F. App’x 1 (1st Cir. 2016)
• remanded for further proceedings § 504/ADA retaliation and failure-to-modify (specifically, refusal to allow child to carry recording device) claims of parent of child with autism

(P) Chadam v. Palo Alto Unified Sch. Dist., ___ F. App’x ___ (9th Cir. 2016)
• reversed dismissal of § 504/ADA claim on behalf of student with genetic markers for cystic fibrosis whom district had excluded for two weeks based on perceived direct threat to other students w/o individualized medical assessment — “regarded as” prong
AN EMERGING VIEW OF WHO IS ENTITLED TO A 504 PLAN: “TECHNICALLY ELIGIBLE”

Perry A. Zirkel
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“Who is entitled to a 504 plan in the wake of the ADAAA?” is an important and not entirely settled question. According to some school district attorneys, the answer is that some students are “technically eligible,” meaning that these students meet the new interpretive standards for the § 504/ADA definition of disability, but do not need special education, related services, or accommodations. Surprisingly, contrary to what inferably has been the agency’s traditional stance but in line with the lack of an explicit requirement for a 504 plan in the Section 504 regulations (as compared with the detailed requirements for an IEP under the IDEA) OCR’s recently issued interpretation seems to support the separation of eligibility and FAPE. More specifically, although the determination of eligibility is without mitigating measures and at the active time for impairments in remission, the determination of FAPE is with mitigating measures and, if applicable, in remission. Thus, analogous to Prongs 2 and 3 under the Section 504 definition of individual with a disability, some children are entitled to protection, including procedural safeguards and nondiscrimination, but if the child does not need special education or related services, she or he would not be entitled to a 504 plan.

The following three-part classification is a preliminary view of this emerging restrictive view of the answer to this arguably procedural question:

32 Perry A. Zirkel, Does Section 504 Require a Section 504 Plan for Each Eligible Non-IDEA Student? 40 J. L. & EDUC. 407 (2011). In a recent LOF, OCR straddled the fence with this comment: “While Section 504 does not require a ‘Section 504 Plan’ or prescribe the contents of written plans that school districts must develop, it does require that decisions of the team be documented, that parents have sufficient information to understand the specific services that will be provided to their child, and that staff must have sufficient information to ensure that they reliably implement the services intended by the team.” San Dieguito (CA) Union Sch. Dist., 53 IDELR ¶ 242 (OCR 2009). In a more recent LOF, OCR concluded: “The regulation implementing Section 504 does not require that the district name the plan for providing services a ‘Section 504 Plan,’ or any other particular name.” Roselle Park (NJ) Sch. Dist., 59 IDELR ¶ 17 (OCR 2012). In a recent decision, a hearing officer rejected a parent’s FAPE claim for a student wrongly identified as ineligible under § 504 but who received 1) multiple services and accommodations, and 2) a contemporaneous initiation of the IDEA evaluation. Fox Chapel Sch. Dist., 59 IDELR ¶ 208 (Pa. SEA 2012).
33 See Dear Colleague Letter, 58 IDELR ¶ 79 (OCR 2012) (also available as FAQ - http://www2.ed.gov/about/offices/list/ocr/docs/dcl-504faq-201109.html) - item Q11 (protection but no FAPE/ reasonable modifications if not needed). But see id. Q10 (“Even though a school district does not believe that a student needs special education or related services, it must still consider whether the student is entitled to a reasonable modification of policies, practices, or procedures”). For the most recent iteration of this policy interpretation, specifically in relation to students with ADHD, see Dear Colleague Letter, 68 IDELR ¶ 52 (OCR 2016).
<table>
<thead>
<tr>
<th>Definitely Entitled</th>
<th>Individual Health Plan</th>
<th>Not Entitled (&quot;Technically Eligible&quot;)</th>
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<tr>
<td>i.e., limited automatic approach</td>
<td>i.e., functional approach</td>
<td>negative-only protection approach</td>
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<tr>
<td>students who met the pre-ADAAA interpretive standards for the Prong 1 criteria plus those who additionally need FAPE beyond merely health accommodations under the post-ADAAA standards</td>
<td>students newly eligible under the Prong 1 criteria as a result of the ADAAA but who only need nurse-specific accommodations but not related services</td>
<td>students newly eligible but who obviously do not need FAPE</td>
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The ultimate defensibility of this approach will depend on whether districts manage to have the courts address the issue. A related issue is whether the students in the second and third categories are entitled to notice of procedural safeguards, but the courts have already seemed to take a much less strict approach\(^{35}\) and OCR’s recent FAQ seems to signal a more supportive position than in the past.\(^{36}\)

In the rare states that have specific designations for 504 plans (e.g., “service agreement” in Pennsylvania), the second category would seem to be less defensible. In any event, this entire three-part conception is tentative at this point.

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\(^{34}\) *Id.* – item Q12 (right to evaluation, placement, and procedural safeguards only if student has an impairment “and needs or is believed to need special education and related services”). For a synthesis of the earlier OCR LOFs, see Perry A. Zirkel, “Section 504 Eligibility and Students on Individual Health Plans,” *West’s Education Law Reporter* v. 276, pp. 577-586. Conversely establishing a hybrid category between this column and there previous one for situations where child find is triggered, OCR clarified in a recent LOF that “an IHP may meet the requirements of the regulation implementing Section 504 if the District followed the procedural requirements of the regulation implementing Section 504, at 34 C.F.R. § 104.34 [evaluation/placement], 104.35 [LRE], and 104.36 [procedural safeguards, including notice], in developing the IHP.” *Roselle Park (NJ) Sch. Dist.*, 59 IDELR ¶ 17 (OCR 2012). For other relevant OCR LOFs, see, e.g., *Hanover Cty. (VA) Pub. Sch.*, 115 LRP 37657 OCR 2015 (finding a violation for not providing procedural safeguards, including an evaluation, for child with peanut allergies on IHP); *Clarksville-Montgomery Cty. (TN) Sch. Dist.*, 60 IDELR ¶ 203 (OCR 2012) (finding that that at a minimum 235 of the district’s 1206 students on IHPs should have been referred for an evaluation by a knowledgeable team).


\(^{36}\) OCR FAQ ([http://www2.ed.gov/about/offices/list/ocr/docs/dcl-504faq-201109.html](http://www2.ed.gov/about/offices/list/ocr/docs/dcl-504faq-201109.html)) - Q13.
APPENDIX I: OVERVIEW OF SUSPENSIONS/EXPULSIONS UNDER THE IDEA: 2004 REVISIONS HIGHLIGHTED*

ELIGIBLE STUDENT:
1. BRINGS A WEAPON TO OR POSSESSES IT AT SCHOOL
2. POSSESSES OR USES ILLEGAL DRUGS AT SCHOOL
3. SERIOUS BODILY INJURY
4. OTHERWISE IS SUBSTANTIAL DANGER TO SELF OR OTHERS, AS DETERMINED BY IHO
5. IS SUSPENDED/EXPELLED FOR > 10 DAYS*

DISTRICT:
REGULAR SUSPENSION/EXPULSION PROCEDURES APPLY BUT FAPE OBLIGATION CONTINUES

FOR #1-4 ONLY:
FUNCTIONAL BEHAVIORAL ASSESSMENT AND BEHAVIOR INTERVENTION PLAN

+ 45-SCHOOL-DAY INTERIM ALTERNATE EDUCATIONAL PLACEMENT

LEA/PARENT+
MANIFESTATION DETERMINATION

NO
YES
APPENDIX II: SUSPENSIONS/EXPULSIONS UNDER § 504/ADA: COMPARISON TO IDEA

ELIGIBLE STUDENT:

1. BRINGS A WEAPON TO OR POSSESES IT AT SCHOOL

2. POSSESES OR USES ILLEGAL DRUGS OR ALCOHOL AT SCHOOL

3. SERIOUS BODILY INJURY

4. OTHERWISE IS SUBSTANTIAL DANGER TO SELF OR OTHERS AS DETERMINED BY IHO

5. IS SUSPENDED/EXPELLED FOR > 10 DAYS

HEP TEAM 504 TEAM:

MANIFESTATION DETERMINATION

FOR #1-3 ONLY:
FUNCTIONAL BEHAVIORAL ASSESSMENT AND BEHAVIOR INTERVENTION PLAN

45-DAY INTERIM ALTERNATE EDUCATIONAL PLACEMENT

DISTRICT:

REGULAR SUSPENSION/EXPULSION PROCEDURES APPLY
BUT FAPE OBLIGATION CONTINUES

NO

YES

The two-volume reference, *Section 504, the ADA and the Schools—Fourth Edition*, is available from LRP Publications at:

www.shoplrp.com (1-800-341-7874)