



Understanding the Fundamentals of §504 by Contrast and Comparison to IDEA

Presented by

Jose L. Martín, Attorney

Richards Lindsay & Martín, L.L.P.

Austin, Texas

jose@rlmedlaw.com

Copyright © 2017, 2018, 2019 Richards Lindsay & Martín, L.L.P.

Purposes of Each Law

- **§504**—prevents discrimination in programs or agencies receiving federal funds (e.g., public schools)

Elementary and secondary education regulations call for §504 FAPE (equal educational opportunity formulation)

- **IDEA**—provides funding for participating States to develop and maintain special education programs

Basic Processes

- **§504 and IDEA in a Nutshell:**

Child-find (where are they?)

Evaluation (what does the data say?)

Eligibility Determination (are they in?)

Section 504 Plan or IEP (if needed)

Periodic Reevaluation (at least every 3 yrs)

Procedural Safeguards (parent rights)

Non-discrimination obligations

Child-Find Requirement

- **§504**—Requires districts to identify all students suspected of having disabilities and need for services who reside within their boundaries

A coordinated set of activities (training, notices, referral process, outreach efforts)

- **IDEA**—Same obligation, triggered by suspicion of disability and need for special services

Eligibility Formulations

- **§504**—(1) Physical or mental impairments that (2) substantially limit major life activities

No list of qualifying disabilities

2008 ADAAA relaxed the “substantial limitation” portion of definition

- **IDEA**—Student (1) meets eligibility criteria under one of 13 categories, and (2) needs special education services (“specially designed instruction”—34 CFR 300.39(a))

“Old-School” §504 Major Life Activities

- **Pre-2008 ADA AAA Listing (not exhaustive)—34 CFR 104.3(j)(2)(ii):**

Caring for one’s self

Performing manual tasks

Walking

Seeing

Hearing

Speaking

Breathing

Learning

Working

“New-School” §504 Major Life Activities

- **2008 ADA AAA Added:**

Eating

Sleeping

Lifting

Standing

Bending

Reading

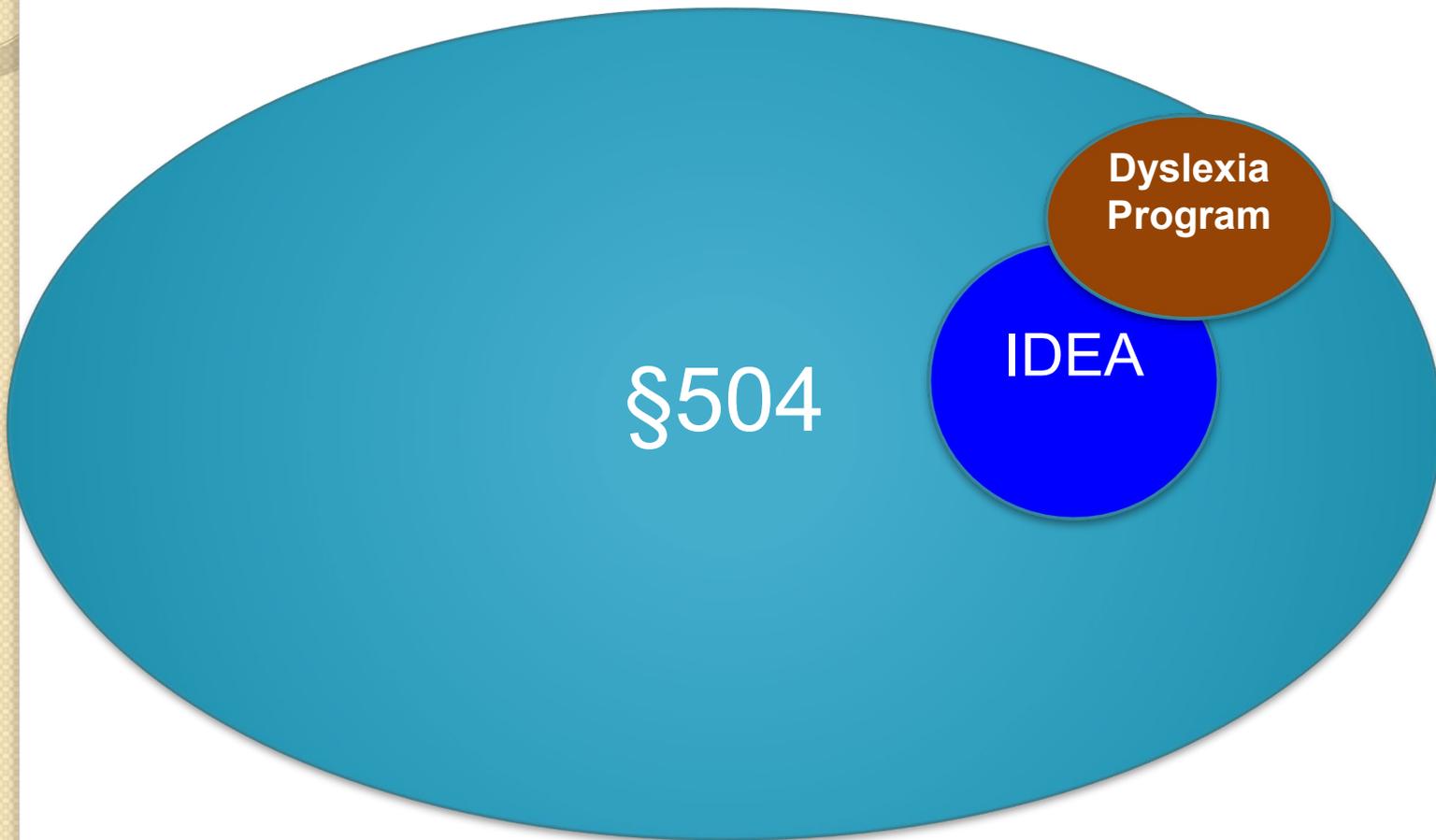
Concentrating

Thinking,

Communicating

All major body functions/systems

Visual Interplay of 504, Sp Ed, and State Dyslexia Program



Common §504 Conditions

- Dyslexia (if not eligible under IDEA)
- Chronic health conditions
- Diabetes (virtually always)
- Severe food allergies
- ADD, ADHD
- Psychological conditions (if not IDEA)
- HIV+ status, AIDS
- Fetal Alcohol Syndrome
- Traumatic brain injury (if not IDEA)

Eligibility Formulations

- **Disability/Eligibility Spectrum**

Depending on severity of disability, individual need for services, students with the same disability may be eligible under different laws

E.g., students with ADHD could qualify under §504 or IDEA depending where they lie in the severity/need spectrum

Eligibility Formulations

- **Disability/Eligibility Spectrum**

ADHD Scenario 1—needs only organizational aids, behavioral interventions, extra time, preferential seating, some counseling

Eligibility? **§504**, since no need for IDEA special education services

Eligibility Formulations

- **Disability/Eligibility Spectrum**

ADHD Scenario 2—Significantly below grade level, needs organizational aids, FBA/BSP (significant behavior issues), accommodations, and inclusion sped instructional assistance in two core academic areas

Eligibility? **IDEA**, as there is a need for IDEA special education services

Eligibility Formulations

- **Disability/Eligibility Spectrum**

ADHD Scenario 3—Serious behaviors, co-morbid ODD, need for structured low staff-to-student ratio sped instructional setting

Eligibility? **IDEA**, there is a need for IDEA special education services in a specialized sped setting

FAPE Formulations

- **§504**—Meeting the needs of eligible students as adequately as those of nondisabled students (34 CFR 104.33(b))

An equal educational opportunity standard

No guarantee of result or maximization

- **IDEA**—IEP that enables appropriate progress in light of child's circumstances (*Endrew*—

Evaluations

- **IDEA**—Testing-based process with detailed requirements and timelines

Written evaluation reports, administration of various test instruments (see 34 CFR 300.301, 304-305)

Stricter evaluation requirements, more structured process, more test data—due to funding, potential for segregated placement

Evaluations

- **§504** evaluations focus on review and consideration of various sources of relevant data (34 CFR 104.35(c))

A substantially different and more general evaluation model—may or may not include testing

Data sources mentioned—“aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, adaptive behavior”

Programs

- **§504**—Focus on accommodations, some services, modifications to policies

§504 “special education” services (34 CFR 104.33(b))

Services not limited to low-cost or free services (see 2016 OCR ADHD Resource Guide, at 27)

School policies that would discriminate against a student with disabilities may have to be modified (e.g., food in classroom, attendance)

Programs

- **IDEA**—“True” IDEA-funded specially designed instruction, lots of related services, continuum of placements, modified curriculum, accommodations, aids, alternate state assessments

Procedural Safeguards

- **IDEA**—Lots of extensive procedural safeguards: parent membership in ARDC, independent evaluations, SEA complaints, “big” due process hearings (state-funded), mediation, prior written notice of reasons for decisions, among others...
- **§504**—Basic rights: notice, review of records, local complaint, District-provided due process hearing, review procedure, OCR complaint

Major Changes to §504 Eligibility in 2008 ADA Amendments Act

1. Expands listing of major life activities

Adding all body functions/systems as individual major life activities makes it easy for students with chronic health conditions to qualify

Most students on health plans may need to be made §504-eligible, according to OCR, so that they have access to §504 process and safeguards (*OCR 2012 Dear Colleague Letter* at question 13)



2. Impairments that are episodic or in remission qualify students if they would substantially limit a major life activity when in active/full-blown state

Episodic (ups and downs); remission (gone but may come back)

Watch for variable ADHD, seasonal asthma

(Students in remission likely only qualify technically (i.e., eligibility but no §504

3. **Effects of mitigating measures must not be considered in determining eligibility (except for eyeglasses)**

This includes any aid that alleviates impact of impairment(meds, compensatory strategies, accommodations, tech, prostheses, Rtl services, etc...)

How does a committee evaluate such a student (e.g., a student on ADHD medication, who is doing well)?...

Only ***technical*** eligibility if no need for accommodations (no services plan)

3. Effects of mitigating measures must not be considered in determining eligibility (except for eyeglasses)

Thus, for ADHD child on meds, eligibility question for 504 committee is:

Would ADHD substantially limit student's concentration, thinking, or brain function if he were not on meds?

See 2015 OCR Dear Colleague Letter and Q &



3. Effects of mitigating measures must not be considered in determining eligibility (except for eyeglasses)

Key Point—Mitigating measures must not be taken into account at the eligibility stage, but they are relevant in determining need for *services*

In determining need for a §504 plan, the necessary accommodations, services, or modifications to policies that should be in a plan, mitigating measures used by the student **can** be taken into account

4. Substantial limitation standard is relaxed

No longer a “significant restriction” standard.” *OCR 2012 Dear Colleague Letter and Q&A*, at question 4.

Congress does not want too much time spent analyzing this eligibility requirement

Rejects the “demanding standard” line of Supreme Court cases

Probable modern definition—
Impairment makes major life activity more difficult or burdensome than for average population of same age

5. Philosophy of “maximum eligibility”

Definition of disability shall be interpreted in favor of “broad coverage under this Act, to the maximum extent permitted by the terms of the Act.” 42 U.S.C. §12101 at §4(a)(4)(A).

“Students who, in the past, may not have been determined to have a disability under Section 504 and [ADA] may now in fact be found to have a disability under those laws.” *OCR 2012 Dear Colleague Letter and Q&A*, at question 4.

Modern §504 Eligibility Formulation

- 1. Does student have physical or mental impairment?**
- 1. If so, does impairment substantially limit a major life activity (with relaxed standard and expanded list of activities)?**

If answers to both are “yes,” then student is §504-eligible

Modern §504 Eligibility Formulation

3. **Does student need accommodations, services, or modifications to policies in order to receive a FAPE?**

A “needs-based” analysis—If “yes,” then student is §504-eligible and entitled to a §504 Services Plan that confers FAPE (meets the need of the §504 student as adequately as the needs of nondisabled peers)

Rtl Issues

- For both §504 and IDEA, USDOE takes position that while Rtl can be beneficial, it should not be implemented in a way that delays or denies child-find and evaluations to students with suspected disabilities

See Memorandum to State Directors of Special Education (OSEP—January 21, 2011); OCR Resource Guide on ADHD, at p. 15-17.

Rtl Issues

- The concern is particularly acute when students *known* to have disabilities are required to participate in Rtl programs prior to referral

See, e.g., *Indian River County (FL) Sch. Dist.*, 11 LRP 70055 (OCR 2011); *Bristol-Warren (RI) Regional Sch. Dist.*, 56 IDELR 303 (OCR 2010); *Harrison (CO) Sch. Dist. Two*, 57 IDELR 295 (OCR 2011); *Forest Hills (OH) Local Sch. Dist.* 111 LRP 70117 (OCR 2011) (“diabetes Rtl”)

Rtl is most safely applied with students

- **Per OCR, when do districts tend to get into child-find problems with Rtl?**
 1. Rigidly insisting on implementing Rtl in all cases (and all tiers) prior to referral
 2. Categorically requiring that data from Rtl must be collected and incorporated as a necessary element of an evaluation
 3. Overly lengthy implementation of multi-tiered system of interventions without either success or action

Tricky Areas of Intersection

- **Students that are evaluated for sp ed, but do not qualify, or that are dismissed from sp ed**

Likely candidates for §504 referral, as they may have disabilities and needs, although not IDEA-eligible

These students should all be *considered* for §504 referral

- **Students that are evaluated for sp ed, but do not qualify, or that are dismissed from sp ed**

Factors? IEP team recommendations, remaining diagnoses, performance, IEP accommodations, evaluation results

If in doubt, offer parents a §504 evaluation

Document child-find consideration, even if result is decision not to conduct §504 referral

- **Students that are evaluated for sp ed, but do not qualify, or that are dismissed from sp ed**

At times, a student evaluated under IDEA for a suspected LD may not qualify for sp ed, but may have test scores suggesting possible dyslexia (e.g, moderate weaknesses in word reading, phonemic awareness)

In these situations, §504 evaluation should be offered to parent, student likely to qualify under §504 (since dyslexia limits reading, and reading is a modern major life activity)

- **Students that are evaluated for sp ed, but do not qualify, or that are dismissed from sp ed**

***Challenging situation*—Students found to have low IQ and pervasively weak academic functioning**

“Flat line” achievement score profile (low in all academic areas, global academic deficits)

Thus, not SLD (requires pattern of strengths and weaknesses)

Is there a mental impairment?

- **Students that are evaluated for sp ed, but do not qualify, or that are dismissed from sp ed**

***Challenging situation*—Students found to have low IQ and global deficits**

If FSIQ is in average range (even low average), there is no cognitive impairment

If IQ is below average ranges, “borderline intellectual functioning” could be the mental impairment

- **Students that are evaluated for sp ed, but do not qualify, or that are dismissed from sp ed**

***Challenging situation*—Students found to have low IQ and global deficits**

No disability. But don't these students need services?...

For §504 eligibility, first, there must be a physical or mental impairment, **before** looking at substantial limitation

§504 not intended to address the needs of nondisabled students with academic deficits

- **Students that are evaluated for sp ed, but do not qualify, or that are dismissed from sp ed**

***Challenging situation*—Students found to have low IQ and global deficits**

All schools have a population of nondisabled students with academic deficits/difficulties (likely due to non-disability reasons)

IDEA and §504 are not for them—needs must be addressed through regular ed programs

Discipline

- **504**—Limits on excessive short-term disciplinary removals, manifestation determination review (MDR) requirement for disciplinary changes in placement (long-term removals)

Short-term removals— ≤ 10
consecutive school days

Long-term removals— > 10
consecutive school days

Discipline

- **504**

10 'free' short-term removal days
safely available per school year

Accumulations beyond a total of 10 may be seen as “***patterns of exclusion***” amounting to a collective disciplinary change in placement (depending on amount of total removals, proximity to one another, length of each)

Discipline

- **504**

MDR requirement prevents discriminatory disciplinary exclusions

Constitute a §504 *reevaluation* (various sources of data needed to conduct MDR)

Sources of doctrines are guidance documents issued by OCR—See *OCR Staff Memorandum*, 16 IDELR 491 (OCR 1989); *OCR Memorandum*, 307 IDELR 7 (OCR 1989).

Discipline

- **IDEA**—Same limits on short-term removals (34 CFR 300.530(b)), accumulations of short-term removals (34 C.F.R. 300.536) and long-term removals (34 CFR 300.530(e), (c))

1997 IDEA discipline provisions originated from §504 USDOE discipline guidance

Discipline

- **§504**—Different treatment for students engaging in drug or alcohol offenses:

If students commit a drugs/alcohol offense, and are determined to be a current user of drug/alcohol, then they lose (1) right to MDR, and (2) right to §504 DP hearing.

See 29 U.S.C. §706(20)(C)(iv); see, e.g., *Pinellas Co. (FLA) Sch. Dist.*, 20 IDELR 561 (OCR 1993).

Discipline

- **IDEA**—Special treatment for weapons, drugs/controlled substances, serious bodily injury:

Even if MDR determines such offenses are related to disability, LEA can nevertheless remove to an alternative setting for up to 45 school days

34 C.F.R. 300.530(g)

Non-FAPE Activities

- **§504**—Equal opportunity to access and participate in extracurricular and non-academic activities (34 CFR 104.37)

Including *reasonable accommodations* needed for participation (lower than regular FAPE accommodation standard)

- **IDEA**—Same (to mirror §504 rights, except accommodations must be made part of IEP)

Non-FAPE Activities

- **Aftercare Programs**

Subject to 34 CFR 104.37 equal opportunity to participate standard

Disabled students cannot be excluded with admission policies that discriminate on basis of disability (see, e.g., *McAllen ISD*, 48 IDELR 142 (OCR 2006)(district violated §504 in refusing to admit two students with disabilities who were not toilet-trained into afterschool program)

Non-FAPE Activities

- **Aftercare Programs**

Students cannot be excluded due to need for additional supervision or behavior strategies

See, e.g., *Ripon (CA) USD*, 46 IDELR 82 (OCR 2006)(district violated §504 in refusing behavior interventions for child with behavior issues in afterschool program); *Murrieta Valley (CA) USD*, 105 LRP 34909 (OCR 2005)(district violated §504 in failing to train staff on behavior interventions, since student was terminated from aftercare program due to

Non-FAPE Activities

- **Aftercare Programs**

If the program is associated with the LEA, the LEA is responsible for ensuring its compliance with 34 CFR 104.37

Thus, whether program is run by contract with outside provider is irrelevant to LEA's §504 duty

LEA must ensure non-discrimination in access, and provision of reasonable accommodations needed to