

Section 504 vs. IDEA: Understanding Key Areas of Comparison and Contrast

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Section 504 vs. IDEA

- ▶ See Materials for §504/IDEA Comparison Chart

Purposes of the Laws

- ▶ §504 prevents discrimination in public schools (and programs or agencies receiving federal funds)

Regulations call for equal educational opportunity (§504 FAPE)

- ▶ IDEA provides funding for participating States so they can develop and maintain special education programs

Child-Find

- ▶ §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 *sp ed* services

Eligibility Formulations

- ▶ **§504**—Physical or mental impairments that substantially limit major life activities

No list of qualifying disabilities

- ▶ **IDEA**—Student meets eligibility criteria under one of 13 categories, and needs special education services (34 CFR 300.39(a))

Eligibility Formulations

▶ Disability/Eligibility Spectrum

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

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

▶ **Disability/Eligibility Spectrum**

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

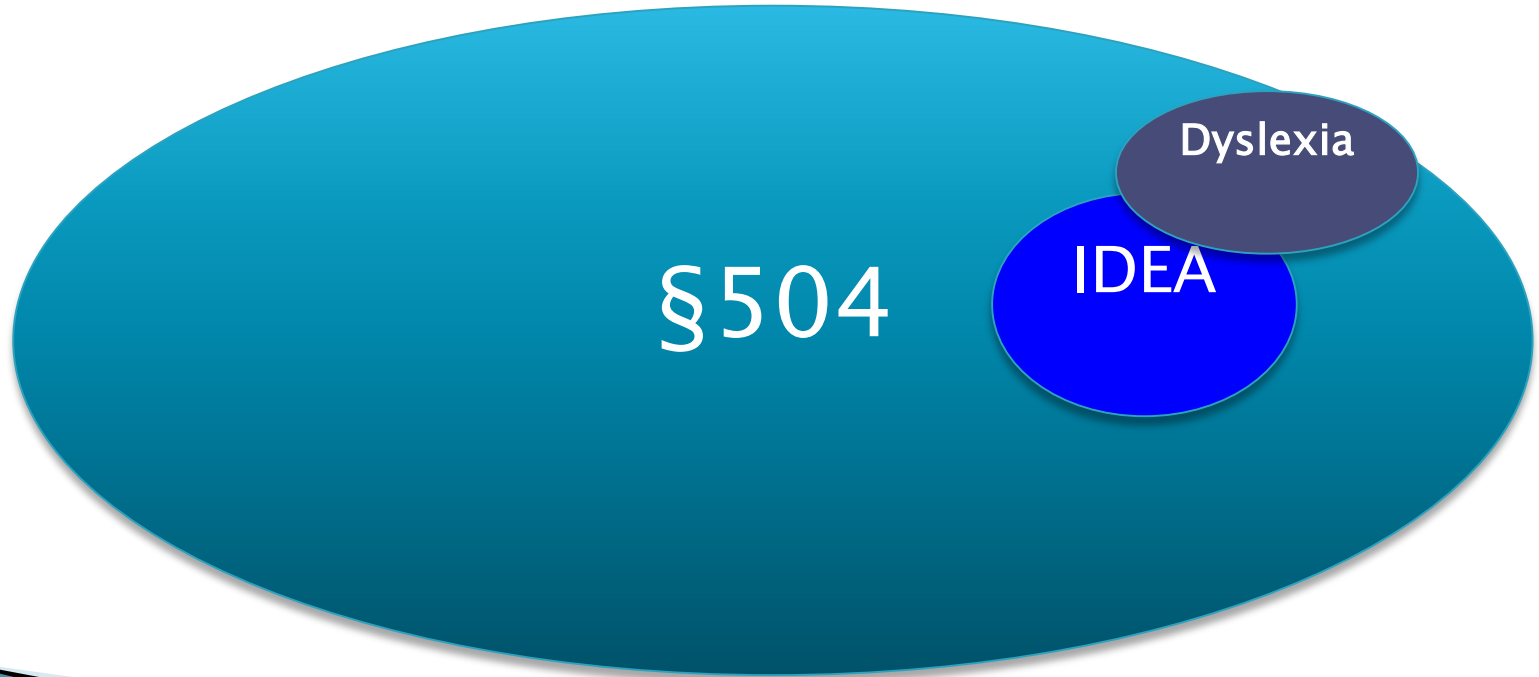
Eligibility? **IDEA**, as there is a need for IDEA special education services

▶ Disability/Eligibility Spectrum

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

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

Visual Interplay of 504, Sp Ed, and Dyslexia



FAPE Formulations

- ▶ **§504**—Meeting the needs of eligible students as adequately as those of nondisabled students

An equal educational opportunity standard

No guarantee of equal result or maximization of potential

- ▶ **IDEA**—IEP calculated for appropriate progress in light of circumstances (*Endrew*)

Committee Decision-Making

- ▶ §504 committees must include persons with knowledge of child, data, options

May vary depending on situation

Parent not required member (although most schools invite parents)

- ▶ **IDEA**—Firm IEP team with specifically required members and strict procedures

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”

Reevaluations

- ▶ §504 requires periodic reevaluation

But at least every 3 years (many schools opt for annual review/re-eval)

Also needed prior to significant changes in placement (including manifestation determinations prior to disciplinary changes in placement)

- ▶ **IDEA**—Every three years (unless conditions warrant otherwise)

MDR Reevaluations

- ▶ §504 requires manifestation determination evaluation prior to disciplinary changes in placement

Prior to removals of more than 10 consecutive school days

Also when short-term removals of less than 10 days each, accumulate to more than 10 total in school year, and constitute a pattern of removal

MDR Reevaluations

Whether accumulations of short-term removals constitute a pattern of removal depends on three factors:

Length of each removal

Proximity of removals to one another

Total removal days



MDR Reevaluations

MDR requires §504 committee to evaluate data to determine if behavior was related to disability

If behavior found related, disciplinary change in placement cannot take place

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)

§504 students entitled to *any* services §504 team deems needed for FAPE, no matter the cost, “and especially where such services have been provided to IDEA-eligible students in the past.” (e.g., some related services)

Programs

▶ §504—OCR’s Position on §504 Services

“OCR has learned that some educators have the mistaken impression that placement options under Section 504 are limited to free or low-cost services, that provide limited, additional resources to students but may not be as robust or comprehensive as the special education and related services a student could receive under the IDEA.” (*ADHD Resource Guide*, at p. 27)

Programs

- ▶ **§504—OCR's Position on §504 Services**

Question: If a §504 child needs special education services such as those provided under IDEA, why would they not be IDEA-eligible?...

OCR likely wants no pre-set limitations on type of services available to §504-only students

Programs

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

Note—Definition of special ed services is pretty outdated (*see* 34 CFR 300.34(b)(3)—adapting “content, methodology, or delivery of instruction”)

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 with (1) no known disability that (2) exhibit academic difficulties

Rtl Issues

Caution—Does Rtl apply outside of context of academic deficits? (USDOE has indicated that use of Rtl under IDEA is applicable only to assist in determinations of learning disabilities)

“The [IDEA] Part B regulations do not address the use of an RTI model for children suspected of having other disabilities.” *Letter to Clarke*, 108 LRP 65284 (OSEP 2008).

- ▶ **Per OCR, when do districts tend to get into child-find problems with RtI?**
 1. Rigidly insisting on implementing RtI in all cases (and all tiers) prior to referral
 2. Categorically requiring that data from RtI 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

Safeguards

- ▶ **§504**—General minimum safeguards

Notice, access to records, local grievance, impartial hearing, review procedure, OCR complaint

- ▶ **IDEA**—Loads of rights: detailed notice, mediation, “big” hearings, appeals to court, SEA complaints, IEEs, OCR complaint

Non-FAPE Activities

- ▶ **§504**—Equal opportunity to access and participate in extracurricular and non-academic activities

Including reasonable accommodations needed for participation

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

Post-Secondary Education

- ▶ **§504**—Applies to colleges and universities that receive federal funds

Reasonable accommodations only

- ▶ **IDEA**—Only applies to elementary and secondary public schools
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Mitigating Measures

- ▶ **§504**—Beneficial effect must not be considered in eligibility determination

Benefit of measures must be “subtracted” during eligibility determination

- ▶ **IDEA**—Eligibility determined “as is” (i.e., including impact of mitigating measure)

Episodic/Remission Conditions

- ▶ **§504**—Eligibility determined as if condition at its full-blown state

Watch for commonly episodic conditions...

- ▶ **IDEA**—Eligibility determined “as is” (i.e., impact of disability at time of evaluation)

Eligibility Philosophy

- ▶ **§504**—ADAAA calls for interpretation of eligibility definition to allow for “maximum eligibility”

Main policy underlying ADAAA’s reaction to restrictive Supreme Court cases limiting 504/ADA eligibility prior to 2008

- ▶ **IDEA**—Stricter eligibility standards (eligibility has decreased in last 8 years)

Key Areas of Intersection

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

Challenging situation—Students found to have low IQ

If FSIQ is in average range, there is no cognitive impairment

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

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

***Challenging situation*—Students found to not have LD, but have reading deficits**

Reading deficits, alone, do not equate to a reading disability (other assistance programs may be used, if available)

▶ Students with Health Plans

Tend to have chronic health conditions that impact body functions—Thus, 504 eligibility is likely

In most cases, OCR has held that students with health plans need to be in §504 and the plans need to be developed through the §504 process

To OCR, the §504 rights and status are as important as the services

▶ Students underperforming despite §504 Plan

Considerations—Is plan being consistently implemented? Is plan appropriate? Have §504 services and accommodations been exhausted?

If yes to all above, referral to sp ed should be discussed with sp ed dept (§504 committee has authority to refer student to sp ed, but parent must consent to eval)

▶ **Sp ed students with additional conditions aside from IDEA eligibility**

E.g., LD with diagnosis of ADHD and some behavior issues

§504 role? No. IEP team must address the student's behavior and full FAPE needs

There should never be both a §504 committee and an IEP team for one child