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SECTION 504 GUIDANCE FOR SCHOOLS

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OVERVIEW¹

Section 504 of the Rehabilitation Act of 1973 (Section 504) prohibits discrimination against individuals with disabilities by entities receiving federal funding. This includes all public schools and state charters.

Section 504 compliance is enforced through the Office for Civil Rights (OCR) and requires applicable entities to provide qualified students under Section 504 with regular or special education and related aids and services that are designed to meet the individual educational needs of the student with a disability in the same manner the Local Education Agency (LEA) would provide for students without disabilities. LEAs are to make reasonable accommodations for students with disabilities to access free appropriate public education (FAPE). Therefore, students with qualifying disabilities are entitled to the development and implementation of a Section 504 Plan with appropriate accommodations. Though a written plan is not explicitly required by Section 504, it is recommended to document processes in place to identify and address the needs of the student. This documentation can also prevent unnecessary confusion or misunderstandings about the services being offered under the law.

To be protected under Section 504, a student must be determined to:

- (1) have a physical or mental impairment that substantially limits one or more major life activities; or
- (2) have a record of such an impairment; or
- (3) be regarded as having such an impairment.²

Each student suspected of having a physical or mental impairment that substantially limits one or more major life activities should be evaluated by the LEA, on a case-by-case basis, to determine whether they may qualify as having a disability under Section 504.

Section 504 requires that a group of knowledgeable persons draw upon information from a variety of sources in making this determination.³ This group of “knowledgeable persons” is often called the Section 504 Committee. While the composition of a Section 504 Committee will vary by school, teams often include the following knowledgeable persons:

- School administrator
- Teacher(s)
- Parent
- Student (as appropriate)
- Other relevant staff as appropriate (e.g., school nurse, social worker, etc.)

School districts and state charters must ensure that identification of students with disabilities occurs in a timely manner and that appropriate services and protections, according to Section 504, are provided to the students.⁴

Following the identification of a student with a disability and the appropriate individualized accommodations for that student, the team should conduct periodic reevaluations of the student’s

¹ Adapted from *New Mexico Multi-Layered System of Support Manual* (2021).

² 34 CFR § 104.3(j).

³ 34 CFR § 104.35 (c).

⁴ 34 CFR § 104.35 (a).

disability status and effectiveness of accommodations. The student must also be reevaluated prior to a significant change in placement.⁵

SECTION 504/ THE IDEA

Both Section 504 and the IDEA address students with disabilities and accommodations of special services. Both require special procedures. Both laws require educators to navigate the world of medical and psychological diagnoses. Some students who meet the Section 504 definition of “physical or mental impairment that substantially limits one or more major life activities” may qualify for special education services under the IDEA as well. The key factor is whether or not the physical or mental impairment satisfies the IDEA eligibility criteria and creates a need for “specially designed instruction.” If so, then the student is eligible for special education under the IDEA.

Examples:

Impairment	Is the Student Eligible Under Section 504?	Does the Student Require a Section 504 Plan?	Is the Student Eligible Under IDEA?
Hearing Impairment	YES: if the hearing impairment substantially limits a major life activity such as hearing/ communicating without the use of hearing aids.	YES: ONLY if, with the use of hearing aids, the hearing impairment still substantially limits hearing and communicating and requires accommodations to support both.	YES: ONLY if the hearing impairment, with or without the use of hearing aids, adversely effects educational performance and requires specially designed instruction.
Attention Deficit Disorder	YES: if attention issues substantially limit a major life activity such as concentrating/ attending to task without the use of medication.	DEPENDS: NO, if the use of medication mitigates the attention issues. YES, if the use of medication does not mitigate the attention issues and the ADD still substantially limits concentration and attending to task and requires accommodations to support both.	YES: ONLY if the chronic or acute health problem of ADD limits strength, vitality, or alertness, of the student and adversely affects educational performance requiring specially designed instruction under Other Health Impaired (OHI).

⁵ 34 CFR 104.35(d).

Section 504 considers a variety of major life activities, where IDEA focuses on only a few; learning, reading, concentrating, and thinking.

Keep in mind, that if a student is found to be eligible under IDEA, the student will also be eligible under Section 504, with no need for a separate Section 504 Plan. However, if a student is found eligible under Section 504 it does not mean that the student will be found eligible under IDEA. Again, the key factor is whether or not the physical or mental impairment satisfies the IDEA eligibility criteria and creates a need for “specially designed instruction.” Therefore, if the district (1) suspects a disability and (2) suspects a need for specially designed instruction, the district’s IDEA Child Find duty is triggered, and the district should seek consent to do an IDEA evaluation at any stage in the MLSS/SAT/Section 504 Committee process.

The student should be referred to the Section 504 Committee for consideration for eligibility under Section 504 if the parent refuses consent for initial IDEA evaluation or if the student is found IDEA eligible and parents reject the initial provision of special education services.

A family with a student eligible for services under IDEA may choose that the student receives services under either IDEA or under Section 504.

GLOSSARY OF TERMS

Below are key terms found in Section 504 under the Rehabilitation Act of 1973.

Disability The term “disability” means, with respect to an individual—

- A. a physical or mental impairment that substantially limits one or more major life activities of such individual;
- B. a record of such an impairment; or
- C. being regarded as having such an impairment.

42 U.S.C. § 12102(1).

Disciplinary Change of Placement means a disciplinary placement that results in the student being removed from his/her current educational placement for:

- More than 10 consecutive school days; or
- More than 10 cumulative school days if a series of short-term removals constitutes a pattern of removals because the child’s behavior is substantially similar and because of such additional factors as the length of removal, the total amount of time the child has been removed, and the proximity of the removals to each other.

Episodic Impairment means an impairment that only occurs periodically or is in remission. It is a disability if, when in an active phase, it would substantially limit a major life activity. 42 U.S.C. § 12102(4)(D).

Free Appropriate Public Education (FAPE) means the provision of regular or special education and related aids and services that are designed to meet the individual educational needs of [persons with disabilities] as adequately as the needs of [persons without disabilities] are met, and that are provided without cost (except for fees imposed on nondisabled students and their parents). 34 CFR §§ 104.33 (b)-(c).

Identified Student means a student with a physical or mental impairment which substantially limits a major life activity.

Major Life Activity means functions such as caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working. 42 U.S.C. § 12102(2)(A). Major life activities also include “the operation of a major bodily function” as follows: the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions. 42 U.S.C. § 12102(2)(B).

Mitigating Measures means measures which lessen the impact of the impairment, including:

1. medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics including limbs and devices,

hearing aids and cochlear implants other than implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies;

2. use of assistive technology;
3. reasonable accommodations or auxiliary aids or services; or
4. learned behavioral or adaptive neurological modifications.

42 U.S.C §12102(4)I(i).

Parent has the same meaning given under the Family Educational Rights and Privacy Act (FERPA.) 20 U.S.C. §1232(g).

Placement means regular and/or special educational program in which a student receives educational and/or related services.

Physical or Mental Impairment means

1. any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitor-urinary; hemic and lymphatic; skin; and endocrine; or
2. any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. 29 C.F.R. § 1630.2(h).

Record of Such an Impairment means that the person has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities, even though the person does not currently have a disability. 34 C.F.R. § 104.3(j)(2)(iii).

Regarded as Having Such an Impairment means that the person either:

1. has a physical or mental impairment that does not substantially limit a major life activity but that is treated by a recipient as constituting such a limitation;
2. has a physical or mental impairment that substantially limits a major life activity only as a result of the attitudes of others toward such impairment; or
3. does not have any impairment but is treated by an entity as having an impairment.

34 C.F.R. § 104.3(j)(2)(iv).

Related services means developmental, corrective, and other supportive services, including psychological, counseling and medical diagnostic services and transportation.

Section 504 of the Rehabilitation Act of 1973 (Section 504) is a Federal law designed to protect the rights of individuals with disabilities in programs and activities that receive Federal financial assistance from the U.S. Department of Education. Recipients of this Federal financial assistance includes public school districts, other state and local educational agencies, and institution of higher education. <https://www2.ed.gov/policy/rights/reg/ocr/edlite-34cfr104.html>

Student Assistance Team (SAT) a school-based group of people whose purpose is to provide additional educational support to students experiencing difficulties preventing them from benefitting from general education. 6.29.1.9(AI) NMAC (2020).

Substantially Limits

The determination of substantial limitation must be made on a case-by-case basis with respect to each individual student. The Section 504 regulatory provision at 34 C.F.R. § 104.35 (c) requires that a group of knowledgeable persons draw upon information from a variety of sources in making this determination.

Neither the Americans with Disabilities Act (ADA) nor Section 504 provide a definition of this critical term. The ADA amendments simply state: “The term ‘substantially limits’ shall be interpreted consistently with the findings and purposes of the ADA Amendment Act of 2008. 42 U.S.C. § 12102(4)(a)(4)(B).

For many years the Equal Employment Opportunity Commission (EEOC) has defined “substantially limits” as follows:

(i) The term “substantially limits” shall be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA. “Substantially limits” is not meant to be a demanding standard.

(ii) An impairment is a disability within the meaning of this section if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population. An impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting. Nonetheless, not every impairment will constitute a disability within the meaning of this section.

...

(v) The comparison of an individual’s performance of a major life activity to the performance of the same major life activity by most people in the general population usually will not require scientific, medical, or statistical analysis. Nothing in this paragraph is intended, however, to prohibit the presentation of scientific, medical, or statistical evidence to make such a comparison where appropriate.

(vi) The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures. However, the ameliorative effects of ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment substantially limits a major life activity.

29 C.F.R. § 1630.2(j)(1).

Title II of the Americans with Disabilities Act (ADA) applies to public entities, such as school districts, and the standards of the ADA including its definitions of “disability” are incorporated into Section 504. 29 USC 794(d). ADA prohibits public entities (school districts/state charters), from discriminating against individuals with disabilities, including students with disabilities in services, programs, and activities. 34 CFR104.4 and 42 USC 12102.

SECTION 504 PROCEDURAL REQUIREMENTS⁶

Section 504 regulations extend procedural safeguards to the parents of students with disabilities or students who are suspected of having disabilities in connection with the provisions of identification, evaluation, or educational placement.⁷ These procedural safeguards are very similar to those afforded to parents of students with disabilities under the IDEA. In fact, the Section 504 regulation says that “compliance with the procedural safeguards of section 615 of the Education of the Handicapped Act [now IDEA] is one means of meeting this requirement.”⁸ The following procedural safeguards are required for districts/schools under SECTION 504:

- 1) Provide written assurance of nondiscrimination whenever the school receives federal money (e.g., on the LEA application). 34 C.F.R. § 104.5(a).
- 2) Designate an employee to coordinate compliance with Section 504 (required if there are 15 or more employees—recommended for all). 34 C.F.R. § 104.7(a).
- 3) Adopt and implement grievance procedures, which incorporate Section 504 due process standards, to resolve complaints of discrimination. While providing for mediation is a best practice, developing the grievance procedures for the complaint process and due process hearings are mandatory for a recipient of federal funds that employs 15 or more persons. 34 C.F.R. § 104.7(b).
- 4) Provide notice to students and parents stating that the agency does not discriminate on the basis of disability. The notification shall identify the employee responsible for coordination compliance with Section 504 (if more than 15 employees). Notice must be included in student/parent handbook. 34 C.F.R. § 104.8.
- 5) Identify and locate qualified children with disabilities within their jurisdiction who are not receiving a public education. 34 C.F.R. § 104.32(a).
- 6) Annually notify persons with disabilities and their parents or guardians of the school’s responsibilities under Section 504 to identify and locate every qualified child with a disability who is not receiving a public education. 34 C.F.R. § 104.32(b).
- 7) Provide parents or guardians with procedural safeguards ([Section 504-Parent Rights-Form-04](#)):
 - a. Notice of their rights [appropriate education, notice prior to district action regarding identification, evaluation, placement, least restrictive environment, examination of records, impartial hearing, file a complaint];
 - b. An opportunity to review relevant records;
 - c. An impartial hearing: it is required that parents or guardians be notified of their right to request a hearing regarding the identification, evaluation, or educational placement of individuals with disabilities and to be represented by counsel; and
 - d. Review procedures: compliance with the procedural safeguards under the IDEA is one way of meeting these requirements.

34 C.F.R. § 104.36

Section 504 and its accompanying regulations do not contain any consent requirements. However, OCR has taken the position that parental consent is required prior to initial evaluation and

⁶ Adapted from *New Mexico Public Education Department: Section 504 Guide* (2010), adapted from *Perry Zirkel*

⁷ 34 C.F.R. § 104.36.

⁸ *Id.*

placement.⁹ A district may also use due process hearing procedures to seek to override the parents' denial of consent for an initial evaluation.¹⁰ If the parent refuses to consent for the initial provision of services, OCR advises that the district may request a hearing to override the lack of consent, but is not required to do so.¹¹ The district may also initiate a due process hearing if a parent withdraws consent for Section 504 services after they are initiated if the district believes the services are necessary to receive an appropriate education.¹²

OCR receives complaints from parents, students, or advocates and conducts agency-initiated compliance reviews, and provides technical assistance to school districts, parents or advocates.¹³

SECTION 504 COORDINATOR

Under Section 504 of the Rehabilitation Act of 1973, each school district that receives federal financial assistance must designate at least one employee to coordinate the district's compliance with its responsibilities under Section 504.¹⁴ School districts are not required to designate a Section 504 coordinator at each school building within a school district; the designation of at least one responsible person for the entire district is sufficient.¹⁵ The role of a coordinator involves duties such as:

- providing notices and consent forms;
- coordinating referrals;
- coordinating policies and procedures;
- determining 504 team composition;
- developing 504 Plans;
- monitoring implementation of Section 504 Plans;
- scheduling annual reviews;
- serving as a 504 resource, advisor, and liaison;
- coordinating or providing staff trainings on Section 504 requirements and implementation;
- receiving and investigating complaints;
- attending district 504 trainings and meetings; and
- maintaining compliant records and documentation for all eligible Section 504 students and providing copies to the director and/or supervisor of student services.

⁹ *Letter to Zirkel*, 22 IDELR 667 (OCR 1995); DOE's March 27, 2009 Q and A.

¹⁰ 2009 DOE Q27 and Q41.

¹¹ 2009 DOE Q43.

¹² 2009 DOE Q32.

¹³ *Frequently Asked Questions About Section 504 and the Education of Children with Disabilities*, OCR (March 27 2009). This Q and A will be referenced as "2009 DOE Q__."

¹⁴ 34 CFR § 104.7(a)

¹⁵ *Dade County (FL) Sch. Dist.*, 23 IDELR 838 (OCR 1995).

IDENTIFICATION, EVALUATION AND DETERMINATION OF SECTION 504 SERVICES

Students with disabilities do not need to move through New Mexico’s Multilayers System of Support (MLSS) framework or the Student Assistance Team (SAT) process to be evaluated for a Section 504 Plan, although in some cases it may be appropriate for the evaluation to occur through this process.¹⁶ Accordingly, teachers are not necessarily expected to document interventions prior to a student being evaluated for a disability under Section 504.¹⁷ When a school is either aware of a student’s disability or has reason to suspect a student has a disability, and the student needs or is believed to need accommodations or modifications to access the general education curriculum, it would be a violation of Section 504 to delay or deny the evaluation.¹⁸ In addition, parents may request a Section 504 Committee be convened to evaluate a student for a qualifying disability; however, parents do not have an absolute right to have their child evaluated.¹⁹ Ultimately, a school must evaluate a student if the school has reason to believe the student is in need of special education or related services because of a disability.²⁰ If the school determines an evaluation is not to be conducted, they must notify the parent(s) of their right to challenge this decision, by providing parents with their procedural safeguards, including prior written notice (PWN).²¹

CHILD FIND

There is a Child Find responsibility under Section 504, which extends to students in private schools and students who are homeschooled. Although similar, it is not as comprehensive as the IDEA Child Find duty. Section 504 regulations say:

A recipient that operates a public elementary or secondary education program or activity shall annually:

- (a) Undertake to identify and locate every qualified handicapped person residing in the recipient’s jurisdiction who is not receiving a public education; and
- (b) Take appropriate steps to notify handicapped persons and their parents or guardians of the recipient’s duty under this subpart.

34 C.F.R. § 104.32.

Under Section 504, a district is obligated to evaluate students who need, or are believed to need, special education or related services because of a disability.²² Provision of interventions through a multi-layered system of supports does not supplant the district’s responsibility to evaluate under Section 504 (i.e., to conduct Child Find) nor can an evaluation be conditioned on completion of layers of support in a MLSS framework.

¹⁶ *New Mexico Multi-Layered System of Support Manual*, pg. 32 (2021).

¹⁷ *Id.*

¹⁸ *Parent and Educator Resource Guide to Section 504 in Public Elementary and Secondary Schools*, pg. 12 (December 2016).

¹⁹ *New Mexico Multi-Layered System of Support Manual*, pg. 32 (2021) citing *Parent and Educator Resource Guide to Section 504 in Public Elementary and Secondary Schools*, pg.18 (December 2016).

²⁰ 34 C.F.R. § 104.35(a).

²¹ *Parent and Educator Resource Guide to Section 504 in Public Elementary and Secondary Schools*, pg.35-36 (December 2016).

²² 34 C.F.R. § 104.35.

The Child Find duty under Section 504 requires every district to make annual efforts to identify and locate every child with a disability who is *not receiving a public education* and take appropriate steps to *notify those persons and their parents* or guardians of its duty under Section 504.²³ Such efforts may include the following: publishing a notice in a local newspaper of general circulation, publishing a notice on the district/school website, and/ or placing a notice in locations where a child with a disability and his/her parents or guardians are likely to see it (such as pediatricians' and doctors' offices, hospitals, grocery stores, convenience stores, city hall, the police department, and the post office).

Keep in mind that school districts/state charters also have an ongoing Child Find obligation for students enrolled within their jurisdictions through the MLSS framework. [NMAC 6.29.1.9 \(E\)](#)

EVALUATION

Section 504's regulations require evaluations in certain circumstances. The duty to conduct an evaluation is spelled out at 34 C.F.R. § 104.35(a):

A recipient that operates a public elementary or secondary education program or activity shall conduct an evaluation in accordance with the requirements of paragraph (b) of this section *of any person who, because of handicap, needs or is believed to need special education or related services before taking any action with respect to the initial placement of the person in regular or special education and any subsequent significant change in placement.* (Emphasis added).

The requirement to conduct an evaluation only applies when a need for “special education or related services” is suspected, and only “before taking any action with respect to the initial placement of the person.” OCR interprets this to require an evaluation of a student prior to identifying the student as a student with a disability.²⁴ Because a district may not take into account the ameliorative effects of mitigating measures when determining eligibility, the duty to evaluate a student with an impairment has been expanded to include the students with impairments who, due to mitigating measures, are not substantially limited in a major life activity.²⁵

Nevertheless, a Section 504 evaluation is only required when the district believes the student needs or may need special education or related services, without taking into account mitigating measures. OCR confirms that a student may have a disability and not need special education or related services and that a medical diagnosis alone does not trigger an obligation to evaluate a student.²⁶

Additionally, OCR notes that if “a teacher, (‘based on observation of or work with the student’) or a parent refers a student for a Section 504 evaluation, the district ‘may reasonably conclude’ the child needs or is believed to need special education and related services.”²⁷ If the district decides not to evaluate a student despite a referral by a parent or teacher, the district must advise the parent of its decision and provide the parent with procedural safeguards, including PWN.²⁸ In many

²³ 34 C.F.R. § 104.32.

²⁴ *Frequently Asked Questions About Section 504 and the Education of Children with Disabilities*, Q18, U.S. DOE (March 27, 2009)(hereinafter 2009 DOE Q_____).

²⁵ *Dear Colleague Letter*, 112 LRP 3621 Q9, (OCR 2012)(hereinafter 2012 OCR Q____). Found at <https://www2.ed.gov/about/offices/list/ocr/docs/dcl-504faq-201109.html>

²⁶ 2012 OCR Q12.

²⁷ 2012 OCR Q9.

²⁸ 2012 OCR Q10.

instances, the district conducts an IDEA evaluation for those students who are believed to need special education or related services. In other instances, the district may not conduct an IDEA evaluation, and will conduct a Section 504 evaluation instead, because mitigating measures such as medication or layered interventions are negating the need for special education.

Section 504 does not require an evaluation that meets the requirements of the IDEA. However, school districts and state charters must establish standards and procedures for initial evaluations and periodic reevaluations of students who need or are believed to need special education and/or related services because of a disability. Section 504 requires school districts and state charter schools to individually evaluate a student before classifying the student as having a disability or providing the student with services.²⁹

If formal tests are administered as part of an evaluation, Section 504 regulations require that:

- 1) Tests be selected and administered so as best to ensure that the test results accurately reflect the student's aptitude or achievement or other factor being measured rather than reflect the student's disability, except where those are the factors being measured;
- 2) Tests and other evaluation materials include those tailored to evaluate the specific areas of educational need and not merely those designed to provide a single intelligence quotient; and
- 3) Tests and other evaluation materials be validated for the specific purpose for which they are used and appropriately administered by trained personnel.

34 C.F.R. § 104.35(b).

The district must draw from a variety of sources in the evaluation process and is not required to administer formal tests.³⁰ “The information obtained from all sources must be documented and all significant factors related to the student's learning process must be considered. These sources and factors may include aptitude and achievement tests, teacher recommendations, physical condition, social and cultural background, and adaptive behavior.”³¹

The evaluation for Section 504 must be at no cost to the parent.³² A specific diagnosis is not necessary if the school determines a student is substantially limited in a major life activity, and that limitation is caused by a mental or physical impairment.³³ If the Section 504 evaluation team determines that a medical assessment is needed to determine whether the student has a disability under Section 504 the district must ensure that the medical assessment is offered and provided by the district/state charter at no cost to the parent.³⁴ OCR has reinforced the position by stating:

[] there is nothing in Section 504 that requires a medical assessment as a precondition to the school district's determination that the student has a disability and requires special education or related aids and services due to his or her disability. (In fact, [] the determination of whether an individual has a disability

²⁹ 34 C.F.R. 104.35(b).

³⁰ 34 C.F.R. § 104.35(c).

³¹ 2009 DOE Q19.

³² 34 C.F.R. § 104.33(c).

³³ OCR, *Dear Colleague Letter and Resource Guide on Students with ADHD*, 23 n.70 (July 26, 2016), www.ed.gov/ocr/letters/colleague-201607-504-adhd.pdf.

³⁴ 34 C.F.R. §§ 104.33(c), 104.35.

need not demand extensive analysis.)³⁵

If, however, a district believes a medical assessment is necessary and the parent volunteers to pay for a private assessment, the district must make it clear that the parent has a choice and can choose to accept a school-furnished assessment.³⁶

Section 504 requires a district to evaluate a student who needs or may need special education or related services before taking action regarding the student's initial placement. Section 504 does not impose a specific timeline for the evaluation process, but the district must conduct the evaluation without unreasonable delay. "Unreasonable delay" is not defined, however OCR often refers to IDEA for comparative timelines.

Section 504 also requires periodic reevaluations and a reevaluation prior to any "significant change of placement."³⁷ Complying with the reevaluation requirements under the IDEA with regard to frequency (i.e., at least every three years or sooner "if conditions warrant or if the child's parent or teacher requests a reevaluation, but not more than once a year (unless the parent and [district] agree otherwise)"³⁸ satisfies the reevaluation requirements under Section 504.

DETERMINATION OF SECTION 504 SERVICES

Free Appropriate Public Education:

Section 504 requires the provision of a free and appropriate public education to students who are identified as having a disability. The regulations define this as follows:

[T]he provision of an appropriate education is the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of [students with disabilities] as adequately as the needs of [students without disabilities] are met and (ii) are based upon adherence to procedures that satisfy the requirements of 104.34 [LRE], 104.35 [evaluation], 104.36 [procedural safeguards].

34 C.F.R. § 104.33(b)(1).

Remember that many students who meet Section 504 standards will also qualify for services under the IDEA. In that case, the district can serve the student under the IDEA and thereby comply with Section 504 as well. Implementation of an IEP developed in accordance with IDEA is one means of meeting the individualized education requirements of FAPE under the Section 504 regulations.³⁹ A student only requires one plan, an IEP or a Section 504 Plan, not both.⁴⁰

Although both Section 504 and the IDEA require a FAPE, the standard for what constitutes a FAPE under the two laws is not the same. The Ninth Circuit explained the difference in the standard between the two statutes like this:

³⁵ 34 CFR § 104.33(c), *see also* OCR, *Dear Colleague Letter and Resource Guide on Students with ADHD*, 23 (July 26, 2016), www.ed.gov/ocr/letters/colleague-201607-504-adhd.pdf.

³⁶ *Id.*

³⁷ 34 C.F.R. § 104.35.

³⁸ 2009 DOE Q29

³⁹ 34 CFR § 104.33(b)(2).

⁴⁰ *Guidelines for Educators and Administrators for Implementing Section 504 of the Rehabilitation Act of 1973-Subpart D*, NMPED 2010, App C-OCR FAQ Q36.

[U]nlike FAPE under the IDEA, FAPE under [Section] 504 is defined to require a comparison between the manner in which the needs of disabled and non-disabled children are met, and focuses on the 'design' of a child's educational program. *Mark H. v. Lemahieu*, 513 F. 3d 922, 933 (9th Cir. 2008), citing 34 CFR §104.33(b)(1).

While FAPE under IDEA focuses on students' progress in relation to their own potential, Section 504 requires consideration of whether students with disabilities are receiving educational services as effective as those made available to students without disabilities.⁴¹

Eligibility:

To be found eligible under Section 504, a student must be determined to:

- 1) have a physical or mental impairment that substantially limits one or more major life activities; or
- 2) have a record of such an impairment; or
- 3) be regarded as having such an impairment.⁴²

Although Section 504 covers these three types of people, there is a fundamental distinction between the first group and the other two groups (regarded as having, and record of having). The mere fact that a student has a “record of” or is “regarded as” having a disability is insufficient, in itself, to trigger Section 504 protections that require FAPE.⁴³ Only those who actually have a physical or mental impairment that substantially limits a major life activity are entitled to services under Section 504 as part of ensuring nondiscrimination.

Students in the other two groups (regarded as having, record of having) do not require services in order to ensure nondiscrimination. Nor does their status impose any affirmative duty on the district.⁴⁴ Instead, the law imposes a passive standard of nondiscrimination, just as other laws do with regard to religion, race, gender, and age. Only students covered by the first prong in the definition — those who actually have a disability — are entitled to services (e.g., accommodations to ensure nondiscrimination).

An example of a student who may be “regarded as having” a disability:

- A student who demonstrates facial tics as a result of Tourette Syndrome that might subject him to harassment from their fellow 6th graders. They do not have a physical or mental impairment that substantially limits him in any major life activity, and thus is not entitled to an affirmative plan of services or accommodations from the district. But they are protected from discrimination based on a perception of disability. Thus, if the student can establish that he has been subjected to harassment and that the district knew about it and failed to appropriately respond, the student may have a viable claim of discrimination based on their “regarded as” status.

A formal Section 504 Plan is not necessary for a student erroneously “regarded as” having a disability, but the district must be aware of its duty to ensure that no discrimination occurs based on incorrect perceptions.

⁴¹ See, e.g., Franklin (IN) Cmty. Schs., 117 LRP 10901 (OCR 01/19/17).

⁴² 34 CFR § 104.3(j).

⁴³ 2009 DOE Q37.

⁴⁴ 42 USC §12201(h).

Examples of a student who may have a “record of having” a disability:

- A student who was served under IDEA and then dismissed because they either no longer have the disability or no longer require specially designed instruction. Such students may no longer currently have a physical or mental impairment that substantially limits them, but they still have the record of one.
- A student who had mental illness, kidney disease or cancer, may have a record of the impairment, but no longer has the impairment which substantially limits a major life activity.
- A student is misclassified as a student with a learning disability, when further testing revealed the student’s issues were caused by the need for ordinary eyeglasses and the student does not have a learning disability.⁴⁵

A student who has a record of a disability may or may not need special education or related aids and services. Section 504 does not obligate a school district to provide aids or services that a student does not need. But, even if a student with a disability does not need services, the student is protected from disability-related discrimination under Section 504’s general non-discrimination requirements.⁴⁶

A Section 504 Plan is not necessary if there is no actual impairment that is substantially limiting, but the district must ensure that there is no discrimination based upon the record.

Major Life Activity

When determining whether a student is a student with a disability under Section 504, Section 504 Committees are instructed to “consider all the potential major life activities that may be impacted by the student’s impairment, not just learning, and review facts concerning the condition, manner or duration of a students’ performance of a major life activity.”⁴⁷

This list included in the definitions, covers some major life activities that are directly associated with education (learning, reading, concentrating, thinking, communicating) and others that are not (eating, sleeping, standing, major bodily functions). Educators are accustomed to dealing with students with disabilities through the special education programs required by the IDEA. In connection with the IDEA, educators often use the term “educational need.” Students are not eligible for services under the IDEA unless they have a listed IDEA disability that produces an “educational need.” The student must need special education (i.e., specially designed instruction) as a result of an eligible IDEA disability.

However, there is no “educational need” component in the Section 504. The law covers a much broader range of activities than does the IDEA. School districts, like any other covered entity, have to ensure that their services are equally available to those who are substantially limited *in any of these major life activities*. Thus, the Section 504 may require educators to accommodate the needs of a student who has a disability which has no direct connection to the student’s instructional needs but affects accessibility. OCR’s 2012 Q and A makes clear that school districts must consider all

⁴⁵ *Parent and Educator Resource Guide to Section 504 in Public Elementary and Secondary Schools*, pg.7 (December 2016).

⁴⁶ 2012 *OCR Q11, Questions and Answers on the ADA Amendments Act of 2008 for Students with Disabilities Attending Public Elementary and Secondary Schools* (FAQ11) (Jan. 19, 2012).

⁴⁷ *OCR, Dear Colleague Letter and Resource Guide on Students with ADHD*, pg. 24 (July 26, 2016), www.ed.gov/ocr/letters/colleague-201607-504-adhd.pdf.

major life activities, not just learning.⁴⁸ OCR provides the following three examples of students who are eligible under Section 504 due to an impairment that substantially limits a major life activity **other than learning**:

- 1) A student with a visual impairment who cannot read regular print with glasses is substantially limited in the major life activity of seeing;
- 2) A student with an orthopedic impairment who cannot walk is substantially limited in the major life activity of walking; and
- 3) A student with ulcerative colitis is substantially limited in the operation of a major bodily function, digesting food.⁴⁹

Other examples of impairments that may substantially limit a major life activity other than learning include:

- 4) A student with a mental health impairment of depression or anxiety who is substantially limited in the ability to concentrate due to distracting thoughts;
- 5) A student who has asthma who is substantially limited in the major life activity of breathing; and
- 6) A student with diabetes who is substantially limited in the operation of a major bodily function of processing sugar.

OCR concludes:

[R]ather than considering only how an impairment affects a student’s ability to learn, a [school district] must consider how an impairment affects any major life activity of the student and, if necessary, must assess what is needed to ensure that student’s equal opportunity to participate in the recipient’s or public entity’s program.⁵⁰

Substantially Limiting

Section 504 Committees are required to determine whether the student’s impairment substantially limits the identified major life activity. An impairment is not considered a disability unless “it substantially limits the ability of an individual to perform a major life activity as compared to people in the general population.”⁵¹ The Section 504 Committee makes the decision if the impairment causes a substantial limitation of a major life activity for a student. This decision is based on a comparison with “most people in the general population.”⁵² This “average person” or “most people” standard means that Section 504 requires the Committee to measure students against chronological peers in the entire state or country.

For example:

- The fact that the student does not do as well as her older sister does not mean that the student is “substantially limited.”

⁴⁸ 2012 OCR Q7. Found at <https://www2.ed.gov/about/offices/list/ocr/docs/dcl-504faq-201109.html>

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ 29 CFR § 1630.2(j)(1)(ii).

⁵² *Id.*

- The fact that the student is performing poorly compared to the kids in a very high performing district does not mean that the student is “substantially limited.”
- However, a student with asthma IS substantially limited in the major life activity of breathing as compared to students in the general population.

This isn't a comparison of grades or academic performance alone. A student who is academically successful may still be limited in a major life activity. “Grades alone are an insufficient basis upon which to determine whether a student has a disability.”⁵³ It is a comparison of the student’s ability to engage in any major life activity. For example, a student may be doing well in school but require Section 504 services for the major life activity of walking (e.g., use of an elevator, extra time to transition between classes) or bending (e.g., services in physical education), or caring for oneself (e.g., school health services).

“The term ‘substantially limits’ shall be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA. ‘Substantially limits’ is not meant to be a demanding standard.”⁵⁴

Mitigating Measures

“Mitigating Measures”, as defined under Section 504 are “measures which lessen the impact of the impairment.”⁵⁵ When Section 504 Committees are making a determination of whether an impairment substantially limits a major life activity, “[t]he determination [] shall be made *without* regard to the ameliorative effects of mitigating measures.”⁵⁶ “The ADAAA’s [Americans with Disabilities Act Amendments Act] prohibition on assessing the positive effects of mitigating measures applies *only to the determination* of whether an individual meets the definition of ‘disability.’”⁵⁷

Section 504 Committees are to evaluate students without taking into account mitigating measures. In other words, the issue is not “how are they doing?” but rather, “how would they be doing without mitigating measures?” Here are some examples:

- 1) A student with Attention Deficit/Hyperactivity Disorder (ADHD) who takes medication that allows the student to concentrate and make good grades may be eligible for Section 504 if, without the medication, the student is substantially limited in their ability to concentrate, and their grades are adversely impacted.
- 2) A student who has a hearing impairment, but with the use of hearing aids and an FM system is able to hear within normal levels, would be eligible for Section 504 if, without the hearing aids and FM system, the student’s ability to hear would be substantially limited.
- 3) “A student who has an allergy and requires allergy shots to manage that condition would be covered under Section 504 ... if, without the shots, the allergy would substantially limit a major life activity.”⁵⁸ (The major life activity that may be impacted by allergies would be breathing).

⁵³ 2012 OCR Q9.

⁵⁴ 29 C.F.R. §1630.2(j)(1)(i).

⁵⁵ 42 U.S.C §12102(4)(E)(i).

⁵⁶ 42 USC §12102(4)(E)(i) (emphasis added).

⁵⁷ U.S. Equal Employment Opportunity Commission: *Questions and Answers on the Final Rule Implementing the ADA Amendments Act of 2008*, Q 16, (March 25, 2011) (emphasis added).

⁵⁸ 2012 OCR Q4.

In many of these situations where the mitigating measure is provided outside of the school (e.g., medication administered outside of school, hearing aids provided and worn whether or not the student is in school), the student will not require services other than monitoring in the event the mitigating measures fail or are no longer effective.

If, without the mitigating measures, the student's physical or mental impairment would substantially limit a major life activity, the Section 504 Committee would determine the student is a student with a disability under Section 504.

Placement and Services

Placement decisions must be made by a group of persons (i.e., more than one person). The Section 504 Committee must include persons knowledgeable about the child, the meaning of the evaluation data, and the placement options.⁵⁹ The Section 504 regulations do not require parental involvement in all decision making, as the IDEA does. Under Section 504 regulations, the parent is only entitled to notice of placement decisions, however, best practice is that parents are involved in all decisions regarding Section 504.

The Section 504 Committee must meet and consider a student's individual needs when placing the student in a program or changing the student's placement. When determining a student's *eligibility* under Section 504, through the evaluation process, the Section 504 Committee **must not** consider the positive or negative effects of mitigating factors. However, once the student is found to be eligible under Section 504, the Section 504 Committee **can** consider the mitigating factors to determine what type of Section 504 Plan/Services the student will require.⁶⁰

The Section 504 Committee must determine what developmental, corrective, and other supportive services are needed for the student's needs to be met as adequately as those of his/her nondisabled peers. Although there is no requirement under Section 504, it is recommended that those interventions and services be documented in a written Section 504 Plan. What interventions and services are needed is "fact-dependent and requires a case-by-case analysis."⁶¹ OCR provides the following examples:

- 1) Allowing a student who has a physical disability based on a lung condition that substantially limits walking and mobility to use the faculty elevator... even though the school rules generally prohibit student use of elevators;
- 2) Allowing a student who has a record of a disability, based on a heart condition that has been corrected by surgery, the opportunity to complete, without penalty, assignments missed during the student's surgery and extended convalescence, even though the student was absent... more than the district's attendance policy permits;
- 3) Providing or allowing the use of tactile chess sets and other adaptive materials and equipment so that a student with a visual disability can participate in the school's chess club;⁶²
- 4) Providing an opportunity to listen to music while working, frequent breaks, or writing in a journal so that a student with high level of anxiety can participate in completing assignments during individual work time;

⁵⁹ 34 C.F.R. § 104.35(d)(3).

⁶⁰ U.S. Equal Employment Opportunity Commission: *Questions and Answers on the Final Rule Implementing the ADA Amendments Act of 2008*, Q 16, (March 25, 2011) (emphasis added).

⁶¹ 2012 OCR Q10.

⁶² 2012 OCR Q10.

- 5) Allowing a student who had persistent symptoms of light sensitivity post-concussion to wear sunglasses while at school, even though school rules generally prohibit wearing sunglasses at school.

As part of an appropriate education under Section 504, related aids and services must be considered and provided to the extent they meet the individual educational needs of the student with a disability.⁶³ Unlike IDEA, Section 504 does not list specific types of related services. However, OCR has demonstrated, through their Letters of Findings that related services under both laws are substantially similar.

Related service refers to developmental, corrective, and other supportive services, including psychological, counseling and medical diagnostic services and transportation⁶⁴ provided to a student with a disability to enable the student to benefit from and/or access a school's education program. Related services under Section 504 can include, but are not limited to:

- School health services
- Counseling/social work services
- Transportation
- Audiology services
- Speech-language services
- Physical and occupational therapy
- Psychological/behavioral services
- Assistive technology device and/or service
- Orientation and mobility services
- Sign language interpreter
- One-to-one instructional assistant

Therefore, should a student who has a disability under Section 504 need only related services to meet his or her educational needs as adequately as the needs of students without disabilities, the student is entitled to those services if the student is not eligible under IDEA.⁶⁵ For example:

- 1) in order for a student to participate in an after-school program a related service could be one-to-one adult support;⁶⁶
- 2) a student may require specialized transportation to ensure equal access to and from school;⁶⁷
- 3) a student may require nursing services to accommodate for medication and health-related impairments;⁶⁸ or
- 4) a student with an orthopedic impairment which substantially limits her major life activity of walking may require direct physical therapy as well as assistive technology by adaptations to her desk and chair to assist with balance while seated.

For students with a medical condition (such as diabetes, epilepsy, or asthma) that substantially limits a major life activity, appropriate services will often include an individualized healthcare

⁶³ 34 CFR § 104.33(b)(1).

⁶⁴ *Frequently Asked Questions About Section 504 and the Education of Children with Disabilities*, U.S. DOE (March 27, 2009).

⁶⁵ 2012 OCR Q3.

⁶⁶ *Chattahoochee County (GA) Sch. Dist.*, 6 ECLPR 26 (OCR 2008).

⁶⁷ *New York City (NY) Dep't of Educ.*, 49 IDELR 229 (OCR 2007).

⁶⁸ *Prince William County (VA) Pub. Schs.*, 64 IDELR 153 (OCR 2014).

plan. Although a healthcare plan may be adequate as a Section 504 Plan, the student is also entitled to an evaluation, placement, and procedural safeguards under Section 504.⁶⁹

When designing a Section 504 Plan, mitigating measures and their effectiveness *will be* considered. If, as a result of a properly conducted evaluation, the school district determines that the student does not need special education or related services, the district is not required to provide aids or services. “Neither the Amendments Act nor Section 504 obligates a school district to provide aids or services that the student does not need.”⁷⁰

Section 504 Plans:

The Section 504 Committee may determine that a student requires a Section 504 Plan that requires monitoring and communication, a plan for contingency or emergency services for times when the mitigating measures are not in use, are not available, or are not working, or a plan for daily or regular services. For example:

- 1) If the disability does not presently substantially limit the student’s performance of a major life activity due to the effectiveness of mitigating measures currently being utilized by the student that lessen the effects of the impairment, the Section 504 Committee will document the mitigating measures and their effects.
 - a) If the mitigating measures are school-employed measures (i.e., an FM system or MLSS interventions/services), the Committee will consider and may incorporate these measures in the Section 504 Plan.
 - b) If the measures are independent of the school (e.g., medication, a prosthetic device or a piece of equipment such as a hearing aid that the child uses whether or not the child is in school), the Committee may incorporate as part of the Section 504 Plan what steps, if any, need to be taken to monitor the student’s use of these measures in the school setting (e.g., providing for contingency services if the student didn’t take their medication, checking for skin rashes related to a prosthetic device or battery check on a device such as a hearing aid).
- 2) If a student’s disability is episodic or in remission, the Section 504 Committee will discuss the nature of the condition including the frequency of episodes or the likelihood that the condition will not remain in remission, and any signs that the condition is becoming active. Based on this information, the Section 504 Committee may develop a Section 504 Plan to monitor the student’s functioning and communicate to the parent any important changes in the student’s performance. The Section 504 Plan may also include contingency or emergency measures for when the inactive or episodic impairment becomes active.
- 3) If a student’s disability substantially limits a major life activity that impacts daily their equal participation in their school program, then the Section 504 Committee will develop a Section 504 Plan to include necessary accommodations/services for success in the general classroom.

⁶⁹ 2012 OCR Q13.

⁷⁰ 2012 OCR Q11

Below is a table that represents the prongs of eligibility and the corresponding protections⁷¹

	Protection from Discrimination	Disciplinary Safeguards	Section 504 Plan
Impairment that substantially limits and requires services	✓	✓	✓
Impairment that substantially limits but does not require services	✓	✓	
Impairment that does not substantially limit	✓		
Record of having an Impairment	✓		
Regarded as having an Impairment	✓		

Temporary Impairments

Section 504 does not limit eligibility and services to students who have permanent disabilities. If a student’s temporary impairment limits one or more major life activities for an extended period of time, then the student may be eligible under Section 504. The issue of whether a temporary impairment is substantial enough to be a disability must be resolved on a case-by-case basis, [through an evaluation], taking into consideration: 1) the duration (or expected duration) of the impairment; and 2) the extent to which it actually limits a major life activity of the student.⁷²

In *Letter to Rahall*, OCR specifically addressed students with broken limbs, offering examples of how districts should approach the issue. If a right-handed student breaks their left arm and the break is expected to heal normally and without complications, there would likely be no disability, OCR stated. However, OCR opined, if a student breaks both legs, recovery is delayed by surgery, and the entire period of disability is expected to last for several months, the condition probably would be covered.⁷³

Another sometimes temporary impairment is a student who has experienced a concussion. As the student recovers from a concussion, academic and environmental adjustments are sometimes needed, as the post-concussive state substantially limits major life activities such as concentration, social emotional regulation, and organization.

Because pregnancy is not the result of a physiological disorder, it is not an impairment.⁷⁴ However, complications stemming from pregnancy, or pregnancy-related impairments could be a temporary disability if they substantially limit one or more major life activities for an extended period of time. For example, if a pregnancy substantially limits a major life activity such as walking, standing, and lifting, as well as major bodily functions such as the musculoskeletal, neurological,

⁷¹ Adapted from *Student Support Services Project*, FL (2015), <https://ss.usf.edu/resources/topic/section504/504course/Module2/ProngsTable.html>

⁷² *Protecting Students With Disabilities: Frequently Asked Questions About Section 504 and the Educ. of Children with Disabilities*, 67 IDELR 189 (OCR 2015).

⁷³ *Letter to Rahall*, 21 IDELR 575 (OCR 1994).

⁷⁴ See 29 CFR 1630.2 (h).

cardiovascular, circulatory, endocrine, and reproductive functions, it could be found to be a temporary disability, establishing coverage under Section 504.⁷⁵

DISCIPLINE

Section 504 contains many of the same features as the IDEA regarding the discipline of students. OCR requires a manifestation determination prior to any disciplinary “change of placement.” If the misconduct that is the subject of the disciplinary action is not a manifestation of the student’s disability, the student is subject to the same discipline procedures applicable to nondisabled students, as long as the student continues to receive educational services.

Misconduct is a manifestation of the student’s disability if it is (1) caused by, or has a direct and substantial relationship to, the student’s disability or (2) a direct result of the district’s failure to implement the student’s Section 504 Plan. If neither of these conditions apply, the misconduct is not a manifestation of the disability. When the misconduct is a manifestation of the student’s disability:

- 1) The student must be returned to the placement from which he or she was removed, unless:
 - a. the parent and school agree otherwise as part of the modification of the Behavior Intervention Plan (BIP); or
 - b. the student’s misconduct involved weapons or the infliction of serious bodily injury to another person.
- 2) The Section 504 Committee must:
 - a. conduct a functional behavioral assessment of the student, unless one has already been done; and
 - b. develop a BIP, or review and revise the existing BIP if one has already been done, as necessary to address the misconduct.
- 3) If the misconduct was the direct result of the school’s failure to implement the Section 504 Plan, the school must take immediate steps to remedy the deficiencies in the implementation of the Plan.

There are special rules for the discipline of students based on drug use and/or alcohol. If a school disciplines a student based on the student’s use of illegal drugs, the student thereby loses the protection that Section 504 would normally provide. In other words, even if the student is qualified under Section 504 and is recognized as such by the school district, the student can be disciplined for illegal drug use to the same extent as any other student and without the procedural protections that Section 504 calls for. The definition of a student with a disability excludes illegal drug users when the district acts on the basis of such use. 29 U.S.C. § 705(20)(C)(i) and (iv).

⁷⁵ See 29 CFR 1630.2 (i); and 81 Fed. Reg. 53,227 (2016). See also 81 Fed. Reg. 53,227 (2016), footnote 4 “Pregnancy-related impairments may include, but are not limited to: Disorders of the uterus and cervix, such as insufficient cervix or uterine fibroids; and pregnancy-related anemia, sciatica, carpal tunnel syndrome, gestational diabetes, nausea, abnormal heart rhythms, limited circulation, or depression. See EEOC Enforcement Guidance on Pregnancy Discrimination and Related Issues, EEOC Notice 915.003, June 25, 2015, available at <https://www.eeoc.gov/laws/guidance/enforcement-guidance-pregnancy-discrimination-and-related-issues>

If a district disciplines a Section 504-eligible student for alcohol use or possession it may do so to the same extent as it would with a nondisabled student. The student is not excluded from the definition of a student with a disability, but the law specifically permits disciplinary action to the same degree that it would be taken with nondisabled students. 29 U.S.C. § 705(20)(C)(iv).

SECTION 504 HEARINGS

A parent who disagrees with the decisions of the Section 504 Committee is entitled to challenge the decision. The federal regulations include a section entitled “Procedural Safeguards” which reads as follows:

A recipient that operates a public elementary or secondary education program or activity shall establish and implement, with respect to actions regarding the identification, evaluation, or educational placement of persons who, because of handicap, need or are believed to need special instruction or related services, a system of procedural safeguards that includes notice, an opportunity for the parents or guardian of the person to examine relevant records, an impartial hearing with opportunity for participation by the person’s parents or guardian and representation by counsel, and a review procedure. Compliance with the procedural safeguards of section 615 of the Education of the Handicapped Act [now IDEA] is one means of meeting this requirement. 34 C.F.R. 104.36.

Section 504 requires “impartial” hearings. At a minimum, this means that the case must be heard by someone other than school district employees or board members.⁷⁶

OCR gives some general guidance about 504 hearings:

- Recipient school districts must afford parents an opportunity for a hearing under Section 504.
- The school district/state charter school is responsible to secure the hearing officer.
- If an individual is denied their right to a 504 hearing, they may file a complaint with OCR. Found at [OCR Complaint Assessment System- Colorado](#).
- The procedural safeguards under 504 are “very general.” They contain “no specific provisions for timelines or appointment of hearing officers.”
- OCR adheres to “a standard of fundamental fairness” and looks to the IDEA case law to determine what is reasonable and fair.
- OCR applies “judicially recognized principles of fairness” to the selection of hearing officers. This means that the hearing officer cannot be an employee of the school district or of a district that shares a contractual agreement with the school district. Nor can the hearing officer be a school board member of the district in question.⁷⁷

⁷⁶ *Leon County, Florida*, 50 IDELR 172, 108 LRP 34513 (OCR 2007).

⁷⁷ *Letter to Anonymous*, 18 IDELR 230, 18 LRP 1909 (OCR 1991).

Individuals disagreeing with the identification, evaluation, and/or provision of services have several options available under Section 504, including:

- Filing a complaint or grievance through the district's discrimination complaint procedure (required under Section 504);
- Requesting a hearing before an impartial hearing officer; or
- Filing a complaint with the Office for Civil Rights (OCR). The Regional Office with jurisdiction in New Mexico is:

U.S. Department of Education
Office for Civil Rights, Region VIII
1244 Speer Boulevard, Suite 310
Denver, Colorado 80204-3582
303-844-5695 (telephone)
303-884-3417 (TTY)
303-844-4303 (facsimile)
[Office for Civil Rights Colorado office](#)

THE SECTION 504 PROCESS

The following process should be implemented when a student's performance indicates a possible disability that substantially limits a major life activity.

IMPORTANT NOTE: When a student has a physical or mental impairment that substantially limits a major life activity, a Section 504 Plan may be developed. A referral to a Student Assistance Team (SAT) or the completion of the SAT packet is not required prior to a Section 504 Plan being completed.⁷⁸ There are circumstances where referral to the MLSS teacher team/SAT would not be appropriate (i.e., when the student's physical or mental impairment that substantially limits a major life activity clearly requires special education or related aids and services for the student to access education). Further, it would not be appropriate under New Mexico's MLSS framework to require students with physical conditions (e.g., asthma) who are not demonstrating academic or behavioral difficulties to go through layered interventions prior to considering whether the student has a disability under Section 504.

Child Find

- The district will annually make efforts to identify and locate every child with a disability who is not receiving a public education and take appropriate steps to notify those persons and their parents or guardians of the district's duty under Section 504. Such efforts may include the following: publishing a notice in a local newspaper of general circulation, publishing a notice on the district's website, and/or placing a notice in locations where a child with a disability and his/her parents or guardians are likely to see it (such as pediatricians' and doctors' offices, hospitals, grocery stores, convenience stores, city hall, the police department, and the post office).

⁷⁸ *New Mexico Multi-Layered System of Support – Student Assistance Team (Supplemental Manual)*, pg.8 (2021)

- To meet the academic and behavioral needs of all students and ensure that all children have access to high quality instruction and that struggling learners, including those in need of Section 504 services are identified, supported and served, the District will provide general education interventions through the New Mexico Multi-Layered System of Support (MLSS) for student intervention which provides high-quality instruction and scientific research-based layered intervention services aligned with individual student need, frequent monitoring of student progress, and use of student response data to make educational decisions. Data from the MLSS teacher teams will be considered in making decisions regarding the need to refer students to the Section 504 Committee.

Section 504 Committee Process

- When a student is experiencing difficulty, has a physical or mental impairment, or an Evaluation Determination Team (EDT) has dismissed a student from special education, the student should be referred to the school's Section 504 Committee. Referrals to the 504 Committee are accepted from parents and/or the student's teacher and filed with the building administrator ([Section 504-Referral- Form-01](#)). If a teacher is making the referral, request all of the student's teachers complete the Teacher Input form ([Section 504 Teacher Input-form-06](#)). Provide input form to the school nurse as well ([Section 504 School Nurse Input- form-07](#)).
- Upon receipt and review of referral, provide parent notification of Section 504 Committee referral and seek consent for Section 504 evaluation ([Section 504 Notice Intent to Evaluate-form-02](#)). Include with the Notice letter, the Section 504 Parent Input form to be completed by the parent ([Section 504 Parent Input- Form-05](#)), the Notice of Rights and Procedural Protections Under Section 504 and the Americans with Disabilities Act form, ([Section 504 Parent Rights- form-04](#)), and the Parent Informed Consent for Section 504 Evaluation ([Section 504 Informed Consent for Evaluation- form-03](#)).
- If parent refuses consent for initial evaluation and the school district suspects the student has a qualifying impairment, the school district may, but is not required to use Section 504 hearing procedures to override the parent's denial of consent.
- Upon receipt of parent written informed consent for initial Section 504 evaluation, the Committee shall conduct the evaluation.
 - Gather all available evaluation data, including information provided by the parent, and collect any additional data needed to answer the disability and need for services questions.
 - No formalized assessments are required unless the Committee determines it necessary.
 - If formal assessments are administered, tests must be selected and administered so as best to ensure that the test results accurately reflect the student's aptitude or achievement or other factor being measured rather than reflect the student's disability, except where those are the factors being measured.
 - The tests and other evaluation materials are tailored to evaluate the specific areas of educational need and not merely those designed to provide a single intelligence quotient.
 - All evaluation materials must be validated for the specific purpose for which they are used and appropriately administered by trained personnel.

- The evaluation must include information from a variety of sources sufficient to determine if the student has a physical or mental impairment that substantially limits a major life activity.
- The team must document and demonstrate careful consideration of the information used ([Section 504 Eligibility Determination- form-10](#)).
- When the evaluation is completed, the Committee will meet to determine if the student is an eligible student under Section 504. The district should provide the student's parent with a meeting invitation ([Section 504 Meeting Invitation -Eligibility- form-08](#)).
- During the meeting the Section 504 Committee will document the review of evaluation data and the discussion to determine the student's Section 504 eligibility ([Section 504 Eligibility Determination-form-10](#)).
 - Identify the specific physical or mental impairment;
 - Identify the major life activity or bodily function impacted by the impairment;
 - Determine whether a substantial limitation in a major life activity exists, and to what degree;
 - Determine whether a disability exists. Avoid basing this determination solely on a medical or clinical diagnosis with no evidence of the substantial limitation.
 - The determination of disability and the need for a Section 504 Plan should be individually based on current needs (validated by evaluation data) and not on anticipated future needs.
- If the student is determined to have a disability that substantially limits a major life activity, the Section 504 Committee will then need to determine if the student requires a Section 504 Plan to meet his/her educational needs as adequately as the educational needs of nondisabled students are met ([Section 504 Eligibility Determination-form-10](#)). Not all identified students will need a Plan to be implemented on a daily or regular basis. In general, the Section 504 Plans of identified students will fall into one of three categories:
 - **DAILY OR REGULAR SERVICES.** Some identified students will need a Section 504 Plan consisting of daily or regular services. These could include the provision of services and/or incorporating into the child's Section 504 Plan existing mitigating measures that are effectively being utilized in the school. These could also include regularly monitoring the mitigating measures the student brings to school such as conducting battery checks on equipment or checking for skin rashes related to a prosthetic device ([Section 504 Plan- form-12](#)).
 - **MONITORING AND COMMUNICATION.** Some identified students will not need services at the present time. The Committee will discuss these mitigating measures and design a Section 504 Plan to monitor, communicate and periodically review the student's situation ([Section 504 Plan- form-12](#)).
 - **NO SUPPORTS NEEDED.** If mitigating measures currently being used by the student outside of the school are effectively addressing the impairment without the need for any supports within the school and there is no need for supports within the school, the parents will be provided with the Notice of Student and Parent Rights and Procedural Protections under Section 504, ([Section 504 Parent Rights- form-04](#)), the Eligibility Determination form ([Section 504 Eligibility Determination-form-10](#)), the Notice of Eligibility Determination ([Section 504 Notice of Eligibility Determination- form-11](#)), and the Committee will reconsider the need for services at an annual meeting of the Section 504 Committee, and/or at any other time at school or parent request ([Section 504 Review- form-13](#)).

- **MONITORING AND COMMUNICATION ONLY.** If mitigating measures currently being used by the student outside of school (e.g., hearing aids, a prosthetic device, or medication) require some type of monitoring and communication, contingency or emergency measures or services by the school (e.g., battery check, device check, periodic checks for skin rash or allergic reaction, medication administration) so the student is able to continue to utilize or benefit from those measures while in school, the Committee will develop a Monitoring and Communication Plan ([Section 504 Plan- form-12](#)). The parents will also be provided with the Notice of Student and Parent Rights and Procedural Protections under Section 504, ([Section 504 Parent Rights- form-04](#)), the Eligibility Determination form ([Section 504 Eligibility Determination-form-10](#)), and the Notice of Eligibility Determination ([Section 504 Notice of Eligibility Determination-form-11](#)).
 - **CONTINGENCY OR EMERGENCY MEASURES.** Some identified students will need a Section 504 Plan that includes monitoring and communicating while the impairment is inactive, and contingency or emergency measures when the inactive or episodic impairment becomes active. For example, when a student is using mitigating measures (such as medication taken outside of school) that are effectively managing the impairment, the Section 504 Plan might include monitoring and communicating (including with regard to changes in the medication, or with respect to side effects from the medication), and contingency (e.g., the student did not take the medication that day) or emergency measures (e.g., the student has an adverse reaction to the medication) ([Section 504 Plan-form-12](#)). The parents will also be provided with the Notice of Student and Parent Rights and Procedural Protections under Section 504, ([Section 504 Parent Rights- form-04](#)), the Eligibility Determination form ([Section 504 Eligibility Determination-form-10](#)), and the Notice of Eligibility Determination ([Section 504 Notice of Eligibility Determination- form-11](#)).
- Section 504 Committee will provide notice to the parent of the disability determination meeting ([Section 504 Notice of Eligibility Determination- form-11](#)).
- The Section 504 Plan will be individualized for the student and may consist of monitoring and communication; contingency or emergency measures; and/or daily or regular services ([Section 504 Plan- form-12](#)).
- Parent informed consent is required prior to implementing the Section 504 Plan ([Section 504 Consent For Placement- form-14](#)).
- The Section 504 Committee will implement and monitor the student’s Plan and will review the Plan at least annually - sooner if needed ([Section 504 Review -form-13](#)).
- Reevaluation of eligibility and the need for a Plan will be conducted every three years or prior to any change of placement. OCR has interpreted “change of placement” to include: (1) transferring a student from one type of program to another, (2) terminating or significantly reducing a related service, and (3) exclusion from the educational program for more than 10 school days⁷⁹ ([Section 504 Eligibility Determination-form-10](#)).

⁷⁹ 2009 DOE Q30.

- Section 504 reevaluations do not require parent informed consent, however the Section 504 Committee should inform parents of the process and requirements ([Section 504 Notice Intent to evaluate- form-02](#)). If a parent refuses to provide consent for the reevaluation, the district may initiate due process.
- Even with a Section 504 eligibility and Plan, the student is entitled to continue to receive all appropriate MLSS layered interventions.
- If a student with a Section 504 Plan transfers from another school district, the receiving district is required to have a Section 504 Committee review the Plan from the prior district and (1) if the Section 504 Committee finds the Plan appropriate, implement it, or (2) if the Section 504 Committee finds the Plan inappropriate, develop an appropriate Plan.⁸⁰

SECTION 504 DUE PROCESS HEARING PROCEDURES

The process described in the following pages provides recommended timelines and procedures that may be adopted by a school district or charter school for Section 504 Due Process Hearings.

General. In accordance with the provisions of Section 504 and its implementing regulations, parents shall be given written notice of their due process right to an impartial hearing if they have a concern or complaint about the District’s actions regarding the identification, evaluation, or educational placement of a student with a disability. Claims of discrimination, harassment, and/or retaliation do not provide a right to a due process hearing but are subject to the grievance procedures under School Board Policy.

Request for Hearing. A request for a Section 504 Due Process Hearing must be made in writing and provided to the District’s Superintendent or his/her designee unless the parent or adult student is not able to write. If the parent or adult student is not able to write, the request for a Section 504 Due Process Hearing may be made in the primary mode of communication for the person requesting the hearing, and at the discretion of the District, a video or audio recording of such request may be made.

Native Language/ Interpreter. If the language of the Student and/or Parent is other than English, all notices and orders required by these Procedures will be provided in the Student and Parent’s native language (unless it is clearly not feasible to do so), and an interpreter will be provided for any Pre-Hearing Conference and hearing.

Appointment of a Hearing Officer. Within a suggested fifteen (15) school days from the date of receipt by the Superintendent or their designee of a written Request for Due Process Hearing, the District will respond to the request in writing and attach a copy of the *Section 504 Due Process Hearing Procedures*. The District will appoint an impartial Hearing Officer to preside over the hearing and to issue a decision. The District will notify the parent/guardian (“Parent”) in writing as soon as a Hearing Officer is appointed. The Hearing Officer will be hired by the District as an independent contractor at no expense to the Parent. The Hearing Officer shall not be a current employee of the District and shall not be related to any member of the School Board to a degree prohibited under the New Mexico Nepotism Statute. The Hearing Officer need not be an attorney

⁸⁰ 2009 DOE Q38.

but shall be familiar with the requirements of Section 504 and District's Hearing Procedures under Section 504. Parties or their representatives must not communicate directly or indirectly with the Hearing Officer regarding any issue of fact or law unless all parties receive notice of the communication and the opportunity to participate.

Representation by Attorney. Both the Parent and the District have the right to be represented by an attorney throughout the proceedings. Each party will bear the sole cost of his/ her/ its attorney.

Scheduling of Hearing. The appointed Hearing Officer shall issue an Order setting the Hearing Date to the Parent and District's Superintendent or his/ her designee, in writing at his/ her earliest opportunity. Such Order shall set a date for a hearing to be held within a recommended thirty (30) school days of the date of the contract between the District and the Hearing Officer. The Order shall also set forth a mutually agreeable time and place for the hearing.

Pre-Hearing Conference. At the request of either the District or the Parent or at the discretion of the Hearing Officer, a Pre-Hearing Conference will be held within a suggested ten (10) school days from the date the Hearing Officer is appointed to clarify the issues at the hearing and to answer the parties' questions regarding the hearing process. The Pre-Hearing Conference will also serve to resolve preliminary matters, clarify jurisdictional issues (including the identification of any issues outside the jurisdiction of the Hearing Officer), and answer the parties' questions regarding the hearing process. Following the Pre-Hearing Conference, the Hearing Officer will issue an Order identifying the issues for hearing, identifying any issues outside his/ her jurisdiction, and setting out any other preliminary matters.

Dismissal. If, after the Pre-Hearing Conference, the Hearing Officer finds that the Parent, as a matter of law, alleges and raises no factual claims or legal issues that come within his/ her jurisdiction as a Section 504 Hearing Officer, he or she may dismiss the hearing and issue an Order to that effect explaining the basis for such finding.

Continuances. Upon a showing of good cause, the Hearing Officer, at his/ her discretion, may grant a continuance of the hearing date and set a new hearing date by issuing a written Amended Order Setting Hearing.

Documentary Evidence. Both parties shall make available to the Hearing Officer and the opposing party a copy of all documents that will be used as evidence during the hearing, a recommended five (5) school days prior to the date of the hearing. These documents should be marked numerically (Student 1, Student 2, District 1, District 2, etc.).

Witnesses. Both parties may present witnesses at the hearing. Both parties shall disclose a list of all potential witnesses to the Hearing Officer and opposing party a recommended five (5) school days prior to the date of the hearing. The Hearing Officer has no authority to subpoena witnesses or to compel their appearance. Witnesses may appear at their own volition. The District is not responsible for the appearance of any witness, including District employees.

Conduct of the Hearing. The hearing shall be conducted in an informal, non-adversarial manner. The hearing shall be closed, unless the Parent requests the hearing be open to the public and executes an appropriate consent for release of confidential information. The Parent shall present his/ her case first by, at the Parent's discretion, making an opening statement which outlines their position on all issues, presenting testimony personally, calling additional witnesses, presenting

documentary evidence, and making a closing argument. The presentation may be made personally or through legal counsel, except that personal testimony must be made personally and cannot be made through counsel. The District will then respond by, at the discretion of District's party representative, making an opening statement which outlines the position of the District on all issues, calling witnesses, presenting documentary evidence, and making a closing argument. As with the parent's case, District's presentation may be made personally or through legal counsel, except for witness statements. At the end of District's presentation, the Parent may offer a short response to District's case. The witnesses will present their information in narrative form. Although it is recommended cross-examination of witnesses not be allowed, the Hearing Officer, at a party's request, may ask a witness questions for purposes of clarification. The parties are free to provide the Hearing Officer with information or opinion as to the validity or weight to be given the information presented to him or her. Neither the Federal nor New Mexico Rules of Civil Procedure, however, will apply. The Hearing Officer is not required to entertain any legal evidentiary objections to the admissibility, authenticity, or probative value of either oral testimony or documentary exhibits offered at the hearing. In the exercise of his/ her discretion, however, the Hearing Officer may reasonably limit testimony and introduction of documentary exhibits for reasons of relevance. Following the hearing, the Hearing Officer at his/ her discretion may allow closing arguments to be submitted in writing.

Recording. It is recommended that instead of a formal written transcript produced by a court reporter, an audio recording will be made of the entire due process hearing. The Parent may obtain a copy of the audio recording at his/ her request. In order for an accurate recording to be made, the parties and witnesses shall introduce themselves at the beginning of their presentations. It is also recommended that at the discretion of either party, a court reporter may be used for the proceeding. The party who requests the court reporter will have the sole responsibility to hire and pay for the court reporter.

Decision. At the conclusion of all presentations, the Hearing Officer will close the hearing and set a date by which a written decision will be issued. The Hearing Officer must issue a written decision to both parties within a recommended fifteen (15) school days after the hearing.

The Hearing Officer may make an oral ruling at the conclusion of the hearing or take the case under advisement but must in all cases issue a written opinion addressing and ruling on all issues raised by the Parent and indicating what corrective action, if any, the District must take. Formal findings of fact and conclusions of law are not required. Any issue or claim raised by the Parent that is left unaddressed by the Hearing Officer in his/ her decision will be deemed to have been denied to the Parent.

The authority of the Hearing Officer ends when the decision is issued.

Remedies and Relief. The Hearing Officer must confine his/her orders and rulings to those matters which involved identification, evaluation, or placement of students with disabilities under Section 504. If a Parent raises issues or claims outside of the areas of identification, evaluation, or placement, that are not within the Hearing Officer's jurisdiction, the Hearing Officer will make appropriate findings to that effect either in the written decision, or at any time prior to issuing a decision (for example, at a Pre-Hearing Conference).

Appeal of Decision. If not satisfied with the decision of the Hearing Officer, either party may seek an independent review of the hearing decision by filing a written request for a review within a recommended thirty (30) school days after the date the decision of the Hearing Officer is issued. An appeal by the District must be delivered to the Parent. An appeal by the Parent must be delivered to the District's Superintendent or his/ her designee. Within a recommended fifteen (15) school days from the date of the appeal, the District will appoint an independent Review Hearing Officer to hear the appeal. The District will notify the Parent in writing as soon as a Review Hearing Officer is appointed. The Review Hearing Officer will be hired by the District as an independent contractor at no expense to the Parent. The Review Hearing Officer shall not be a current employee of the District, and shall not be related to any member of the School Board to a degree prohibited under the New Mexico Nepotism Statute. The Review Hearing Officer need not be an attorney but shall be familiar with the requirements of Section 504 and the District's Hearing Procedures under Section 504. The independent review will be based on the record of the hearing, but the parties may submit written statements outlining their positions.

Complaints to the Office for Civil Rights (OCR). At any time, a Parent may file a complaint with OCR if he or she believes the District violated any provision or regulation of Section 504. The filing of a complaint does not affect the hearing process. OCR addresses Section 504 complaints separately and independently of the local hearing process, in accordance with the guidelines set forth in OCR's Complaint Resolution Manual. The address of the Regional Office with jurisdiction in New Mexico is:

U.S. Department of Education
Office for Civil Rights, Region VIII
1244 Speer Boulevard, Suite 310
Denver, Colorado 80204-3582
303-844-5695 (telephone)
303-884-3417 (TTY)
303-844-4303 (facsimile)

<http://www.ed.gov/about/offices/list/ocr/index.html>

APPENDIX

SECTION 504 FORMS- HYPERLINKS

Individual Documents:

[Section 504 Referral-Form-01](#)

[Section 504 Notice Intent to Evaluate-Form-02](#)

[Section 504 Informed Consent for Evaluation-Form-03](#)

[Section 504 Parent Rights-Form-04](#)

[Section 504 Parent Input-Form-05](#)

[Section 504 Teacher Input-Form-06](#)

[Section 504 School Nurse Input-Form-07](#)

[Section 504 Meeting Invitation Eligibility-Form-08](#)

[Section 504 Meeting Invitation-Form-09](#)

[Section 504 Eligibility Determination-Form-10](#)

[Section 504 Notice of Eligibility Determination-Form-11](#)

[Section 504 Plan-Form-12](#)

[Section 504 Review-Form-13](#)

[Section 504 Consent for Placement-Form-14](#)

[Section 504 Physician Statement-Form-15](#)

[Section 504 FBA Consent-Form-16](#)

[Section 504 MDR-Form-17](#)

All Documents:

[All Section 504 Documents](#)

REFERENCE DOCUMENTS- HYPERLINKS

Questions and Answers on the ADA Amendments Act of 2008 for Students with Disabilities Attending Public Elementary and Secondary Schools, Office for Civil Rights (January 19, 2012) found at <https://www2.ed.gov/about/offices/list/ocr/docs/dcl-504faq-201109.html>

Frequently Asked Questions About Section 504 and the Education of Children with Disabilities, U.S. DOE (March 27, 2009) found at <https://www2.ed.gov/about/offices/list/ocr/504faq.html>