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**SECTION 504, ADA and IDEA**  
**By: Matthew D. Cohen, Esq.©**

**IDEA**

**ADA**

**SECTION 504**

**I. How Schools are Covered**

<p>All states now accept funding through IDEA. As a result, all states and local school districts within each state are required to follow IDEA requirements</p>	<p>The ADA applies to all governmental entities (Title II), including public schools, and all places of public accommodation (Title III), including private schools, regardless of whether they receive federal funds. The only exception is private schools that are religiously controlled.</p>	<p>Section 504 applies to all entities that receive federal financial assistance, although Section 504 itself provides no funding. Because all public schools receive federal financial assistance, all public schools are covered under Section 504. It also applies to all private schools, if they receive federal funds.</p>
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**II. Eligibility - Who is Covered?**

<p>IDEA creates 13 categories of disability, each of which has its own criteria. A student must be determined eligible under at least one of the categories in order to qualify for special education.</p> <p>All categories other than speech and language impairment require that the child's disability adversely affect educational performance and require special education intervention.</p> <p>Note, however, that an adverse effect on educational performance could be in an area of school function other than academics, e.g., behavior. Note also that the need for special education instruction as a</p>	<p>Same as §504 but adds protection against associational discrimination if excluded or denied from any activity, service or program. See <i>Joey T. v. Azcoitia and Chicago Public Schools</i>, 94 C 4248 (N.D.Ill. 1996).</p> <p>Successful outcomes in school do not undermine a finding of disability. <i>Bartlett v. New York State Bd. of Law Examiners</i>, 2001 WL 930792</p> <p>2008 ADA Amendments expressly rejected the limiting authority of previous cases regarding qualifications for disability—instead reinstating broad protection of the ADA and the broader view of the definition of disability under the</p>	<p><b>A. Non-categorical</b></p> <p>Section 504 does not use categories for eligibility. Any student with an identified physical or mental disability that substantially limits a major life activity, e.g., learning, is entitled to protection under §504.</p> <p><b>B. Special Ed <u>OR</u> Related Services</b></p> <p>In contrast to IDEA, a student with a disability may qualify for the protection of §504 if the student requires special education <u>or</u> related services. §504 does not require that the student need special education in order to qualify.</p>
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<p>pre-requisite for eligibility does not mean instruction in a self-contained or resource class but can include special instruction within the regular education classroom.</p>	<p>Rehabilitation Act.</p> <p>A person with a disability is a person that has (a) “a physical or mental impairment that substantially limits one or more major life activities,” (b) “a record of such impairment,” or (c) is “regarded as having such an impairment.”</p> <p>2008 ADA Amendments state that “major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.” Major life activities also include major bodily functions, such as: “immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.”</p> <p>2008 ADA Amendments state that mitigating measures—except for eyeglasses or contact lenses—are not taken into account when determining if an impairment substantially limits a major life activity. This means that if a person uses items such as, but not limited to, medication, prosthetics, low-vision devices, hearing aids, mobility devices, assistive technology, reasonable accommodations, or behavior modifications in order to ameliorate the effects of a disability, those measures should not be taken into account when determining if the person has a disability or not.</p>	<p><b>C. History or Perception of Disability</b></p> <p>Section 504 also covers individuals with a history of disability or who are regarded as having a disability.</p>
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IDEA

ADA

SECTION 504

**III. Evaluation and Reevaluation**

<p><b>A.</b> IDEA describes in detail the multi-disciplinary evaluation procedures required to determine if a child is eligible for special education, as well as the requirement that the child be reevaluated at least every three years, using the same procedures.</p> <p>IDEA requires that the testing be non-discriminatory and in the child's primary language.</p> <p>IDEA requires schools to consider the findings of outside evaluators and, under some circumstances, requires the school to pay for the independent evaluation.</p> <p><b>B.</b> IDEA 2004 requires reevaluation as needed, but at least every three years. The school may decide not to reevaluate or to do a partial reevaluation when the three-year reevaluation is due but must advise the parents that they can request a full reevaluation. If this occurs, the school must comply with the request.</p>		<p><b>A. Types of Testing</b></p> <p>Section 504 requires the school district to establish evaluation procedures which are non-discriminatory, use tests which are validated for their stated purpose, accurately reflect the child's ability, and incorporate information from more than one test and from a variety of sources.</p> <p><b>B. Timing of Testing</b></p> <p>Section 504 requires that the child be evaluated prior to writing a §504 plan or making any significant change in the plan and “periodically thereafter.”</p>
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IDEA

ADA

SECTION 504

**IV. Child Find**

<p>IDEA places the burden on the school district to identify, evaluate, and where appropriate, provide services to all children suspected of having disabilities who reside in the school district.</p>		<p>Section 504 protects all children with disabilities from discrimination and requires that the school "undertake to identify and locate" all children with disabilities who are <u>not receiving a public education</u> and notify them of their rights under §504.</p>
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**V. Special Education and Related Services**

<p>IDEA requires that all eligible students receive a free appropriate public education, including special education and related services which are necessary for a child to benefit from education. These services must be provided pursuant to an Individual Education Plan (IEP) developed with parent participation</p>		<p><b>A. Right to FAPE</b></p> <p>Section 504 also requires a free appropriate public education designed to meet the child's individual needs as adequately as the needs of students without disabilities are met.</p>
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<p>and based on the child's unique needs.</p> <p>The IDEA regulations lay out very detailed provisions for developing IEPs and for the contents of IEPs, including that they contain annual goals, that the goals be measurable, and that the plan be reviewed at least annually.</p> <p>The IDEA requires that an IEP be developed within 30 days of when a child is determined eligible.</p> <p>IDEA also spells out who must attend IEP meetings, including the parent and, under most circumstances, the regular education teacher.</p> <p>IDEA also requires that the IEP address the child's functional and developmental needs, as well as academic needs. Further, the proposed program must be based on peer-reviewed research to the extent practicable.</p>		<p><b>B. Definition of FAPE</b></p> <p>Section 504 can include specialized instruction, related services, and/or accommodation within the regular education classroom. Contrary to popular belief, §504 is not limited to regular education-based services or modifications of regular education programs, although that is how it is typically used.</p> <p>1) In fact case law has established that where a school district has failed to provide FAPE, the family may be entitled to reimbursement for the unilateral placement of their child in a residential facility. <u>Palmyra Board of Education v. F.C.</u>, 28 IDELR 12 (D.N.J. 1998).</p> <p>2) Note that the §504 regulations allow school districts to use IDEA procedures as a means of implementing §504 requirements, but do not require them to do so. Check your school's §504 plan to determine this.</p> <p>3) Section 504 gives the parent the right to attend</p>
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**VI. Least Restrictive Environment**

<p>IDEA requires that the child, to the maximum extent appropriate, be educated with children who do not have disabilities and that the child be removed from regular education only if and to the extent that even with provision of supplementary aids and services, the child cannot be educated satisfactorily in regular education.</p> <p>It also requires that the child be educated in the class he or she would have been but for the disability, unless the IEP requires otherwise and that, in any event, the child be educated as close to home as possible.</p>	<p>ADA requires access to programs and services in as integrated setting as possible but cannot be an undue burden.</p> <p>Olmstead requires right to services within the community. <i>Olmstead v. L.C. ex rel. Zimring</i>, 527 U.S. 581 (1999).</p>	<p>Children with disabilities shall be educated to the maximum extent appropriate with children who do not have disabilities unless it is demonstrated that the education of the person in the regular environment with the use of supplementary aids and services cannot be achieved satisfactorily.</p>
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IDEA also requires that the child have access to the general curriculum.		
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**IDEA**

**ADA**

**SECTION 504**

**VII. Physical Accessibility**

The IDEA has no physical accessibility requirements.	Same as §504, with far more detailed regulations on structural accessibility. Title III requires readily achievable barrier removal in existing buildings and accessibility in new construction and alterations of places of public accommodation.	Section 504 requires access to programs and services but does not automatically require equal access to all physical locations.
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**VIII. Procedural Safeguards and Due Process**

<p><b>A. Notice, Participation and Consent</b></p> <p>IDEA confers on parents a wide variety of detailed procedural rights, including:</p> <ol style="list-style-type: none"> <li>1) the right to participate in all staffings;</li> <li>2) the right to consent to initial evaluation and placement in special education;</li> <li>3) the right to notice of procedural safeguards whenever the school proposes to take or refuses to take action with respect to the child;</li> <li>4) notice of any proposed change in placement or services;</li> <li>5) the right to request a due process hearing.</li> </ol> <p><b>B. Due Process Hearing</b></p> <ol style="list-style-type: none"> <li>1) right to an impartial hearing using an independent hearing officer;</li> <li>2) right to present testimony and cross-examine witnesses;</li> <li>3) right to exclude evidence not presented by the opposing side at least 5 days prior to the hearing;</li> <li>4) the right to counsel;</li> </ol>		<p><b>A. Notice</b></p> <p>Section 504 requires notice (to the parent) of actions regarding the identification, evaluation or educational placement of children with disabilities who need special instruction or related services.</p> <p><b>B. Right to Hearing</b></p> <p>Section 504 provides for an impartial hearing but does not provide detail as to how it should operate. Further, although the hearing officer is supposed to be impartial, they are appointed by the school district.</p>
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- 5) the right to a written decision within 10 days and a verbatim written or taped transcript;
- 6) the right to appeal to court;
- 7) the right to recover attorneys' fees if you prevail.

**C. Stay-Put (Frozen) Placement**

IDEA provides that if either party requests a due process hearing, the child remains in the last agreed upon placement until all administrative and legal proceedings are resolved.

The parent must receive notice 10 days prior to any proposed change of placement. If the parent requests a hearing within that time span, the placement cannot be changed, except for disciplinary exclusion.

Under IDEA Reauthorization 2004, a child with a disability may, under some circumstances be moved to an alternative educational setting. The school may unilaterally move a child to an AES for up to 45 days for bringing a dangerous weapon to school or possessing, receiving, or selling drugs or causing serious injury to others. As well, a school may obtain an expedited due process hearing to move a child to an AES for up to 45 days if the school can prove by more than a preponderance of the evidence that the student is likely to harm himself or others. However, there can be no cessation of services and intervention to address the problem behavior must be provided.

**C. No Stay Put**

1) Neither Section 504 nor its regulation contain an explicit stay put placement provision, although OCR has interpreted §504 to imply a stay-put right. Thus, if a child is only covered under §504, but not under IDEA, and requests a hearing to challenge a proposed change of placement, suspension in excess of 10 school days or expulsion, it is unclear whether the school district may go forward with the placement change, suspension or expulsion while the hearing is pending.

2) Under IDEA Reauthorization 1997, if a school knew or should have suspected an unidentified IDEA disability was present, stay put procedures may apply if an IDEA hearing is requested, even though the child was only covered by a Section 504 plan.

3) Note, however, that OCR interprets a suspension in excess of 10 school days or several suspensions which total more than 10 days, if close in time or part of a pattern of behavior, to be a change of placement which requires a reevaluation to determine if the behavior is related to the child's disability. If the behavior is related to the child's disability, the group must determine if the child's placement is appropriate.

**IX. Enforcement**

<p>In addition to due process, IDEA can be enforced through complaints to the SEA and the U.S. Department of Education under EDGAR. When these complaints are received, the agency conducts its own investigation and makes an administrative determination of compliance or non-compliance and can order corrective action.</p>	<p>Under the ADA, complaints can also be filed with the U.S. Department of Justice. Note that all public entities must have an ADA coordinator, an ADA Action Plan, and an ADA grievance procedure. A person may sue in federal court for violation of the ADA and can obtain injunctive relief, but not money damages.</p>	<p>In addition to requesting an impartial hearing under §504, parents can also file complaints with the U.S.D.O.E. Office for Civil Rights. Currently, however, OCR is prioritizing systemic, as opposed to individual, complaints. A person can also sue in federal court for violation of §504 and may obtain injunctive relief and/or money damages.</p>
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Document31

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