

Section 504

FREQUENTLY ASKED QUESTIONS AND ANSWERS

What is Section 504?

Section 504 of the Rehabilitation Act of 1973 prohibits discrimination by federally funded programs on the basis of physical or mental disability. It is intended to “level the playing field” by eliminating disability related impediments for full participation in federally funded programs. The law protects individuals, whose physical or mental disabilities substantially limit one or more “major life activities,” such as caring for themselves, seeing, breathing, walking or learning. This statute protects students with physical and mental disabilities who are not, and should not be receiving special education services, as well as those receiving special education services. Virtually all public school districts receive some federal funding and so are covered by Section 504. Some examples of Section 504 services are administration of medication, monitoring students’ physical well-being, making facilities physically accessible, use of equipment like tape recorders and calculators, counseling, and test modifications or accommodations. Like the IDEA, Section 504 requires that students with disabilities be educated with their non-disabled peers unless such education cannot be achieved satisfactorily.

Who is eligible for 504 services?

Students who have a disability that substantially limits a “life activity” such as breathing, learning, eating, walking, playing, seeing or otherwise participating in school activities are eligible for section 504 services. Some disabilities that might require 504 accommodations include depression, attention deficit/hyperactivity disorder, diabetes, cerebral palsy, cystic fibrosis, severe allergies, asthma, epilepsy, AIDS or HIV, cancer and visual and hearing impairments.

How are section 504 services different from special education services provided under the IDEA?

Section 504 is an anti-discrimination statute. Section 504 services are supposed to “level the playing field” by eliminating any disability-related obstacles to a student’s full participation in the general education classroom. In contrast, special education under IDEA is an entitlement program under which school systems are given additional federal funding and in return must provide students with programs and services in addition to those available to persons without disabilities.

What do students who are eligible as having a “record of an impairment” or who are “regarded as” having an impairment get under 504?

Prongs two and three of the 504 disability definition exist to protect students with a record of a disability and students regarded as having a disability, from disability-based discrimination. Students qualifying for 504 in this way (and in the absence of a current physical or mental impairment) do not get educational services under Section 504. Instead, they only receive anti discrimination protection.

For example, if a student suffered from bone cancer in his leg at age six, and went into full remission a year later with no subsequent relapses, the football coach may not prevent the student from trying out for the team simply because of the student’s record of bone cancer. That would constitute discrimination based on the student’s record of a past disability. The student has a right to equal participation in extra curricular activities under Section 504, past disability or not.

In another situation, a student from a family with a history of tuberculosis enrolls in school. Although the student does not have tuberculosis, his teacher, who knows the family history, sits the student in the back of the class and neither interacts with the student, nor allows other students to be in close proximity of the student. That teacher is discriminating against the student on the basis of an incorrect perception that the

student is disabled. The student is protected from such discrimination under Section 504.

In both of the preceding scenarios the school is not under a duty to evaluate, place, or provide services to the students. The school is prohibited by Section 504 from discriminating against the students based on a record of disability or a perception of disability. In these cases, while 504 does not provide students with services (they are not currently disabled and in need of services), it provides them with legal protection from improper discrimination based on history of disability or persons' unfounded disability-related prejudices.

What duty does the school have to provide 504 services to students placed in private or home schools by their parents?

Once the District has offered the student a free appropriate public education, it has no duty to provide "educational services to students not enrolled in the public school program based on the personal choice of the parent or guardian." *Letter to Veir*, 20 IDELR 864 (OCR 1993); *Hinds Co. School Board*, 20 IDELR 1175 (OCR 1993). Note that the result is very different under the IDEA where a parent may unilaterally place the student in a private school and may be able to access OT, PT or other special education or related service components.

How does the school measure a student's limitation?

As part of its evaluation, the 504 team will determine whether a student has a substantial limitation in a major life activity. The 504 team will gather information for a variety of sources when evaluating a student.

Are there any special rules for PE & Athletics?

Disabled students must be given an equal opportunity to participate in physical education classes, interscholastic, club and intramural athletics. Section 104.37(c)(1). "Most handicapped students are able to participate in one or more regular physical education and athletics activities. For example, a student in a wheelchair can participate in a regular archery course, as can a deaf student in a wrestling course." *Appendix A*, p. 431. Where a disabled student cannot participate in the PE activities, an alternative activity, consistent with his abilities, should be provided. Separate or different physical education and athletic activities may be offered to disabled students "only if the separation or differentiation is consistent with the requirements of [LRE] and only if no qualified handicapped student is denied the opportunity to compete for teams or to participate in courses that are not separate or different." Section 104.37(c)(2). With regard to interscholastic teams that utilize performance criteria in determining who will participate, disabled students must be given the opportunity to compete for a spot on the team. For example, parents of a student with Tourette's Disorder claimed discrimination when the student was not picked for the baseball team. They alleged that the coach knew of the student's disability and resulting behavior problems, and discriminated against the student for those reasons. The coach was able to demonstrate that the student failed to meet regular performance criteria to participate on the team. Students wanting to join the team participated in a series of drills that the coach observed and analyzed. The coach ranked the students on a variety of performance criteria: speed, balance, coordination, hand-eye coordination, sprint speed, lateral movement, and softness catching the ball. Out of fourteen students trying out for two openings, the claimant finished eighth, and did not receive a position on the team. OCR found no violation as the "student was given an equal opportunity to compete for a position." *Maryville City (TN) School District*, 25 IDELR 154 (OCR 1996).

When a 504 student moves into the district with an existing 504 plan, what is the new district's duty?

When a 504 student moves into a new school district, is eligible to attend and enrolls, the new district is obligated to provide a free appropriate public education (FAPE). That may prove a bit difficult since the

new district has no experience with the student. The safe course is to replicate the student's services received in the previous district while the new district's personnel gain experience with the student. After a few weeks, the new district should conduct a 504 reevaluation and make changes to the accommodation plan as necessary. If the student's program from the former district cannot be replicated, approximate it as closely as you can, and during the evaluation process, pay special attention to the student's needs that were met by that portion of the plan, which you could not duplicate. The 504 Team may find that other programs or services might meet the need. It is also possible that the newly arrived student, despite eligibility elsewhere, is not 504-eligible. Since every district determines for itself the definition of "substantial limitation" that it will use, differences in district approaches to the same student are very likely.

Can the 504 Team order accommodations to the ACT/SAT?

Not with any real authority. The testing services will review the modifications a student is receiving under 504 or IDEA, and then will make their own independent determination of whether modifications to college entrance exams will be allowed. Understandably, a student who receives modified testing in the school setting seems a more likely candidate to receive modifications on college entrance exams. Likewise, the longer the student has received the modifications, the more likely they will be considered favorably. As might be expected, a few juniors and seniors claim disability each year for the sole purpose of receiving extra time on these critical exams. The independent review by the testing services apparently is calculated to prevent that abuse.

What is the school district's duty to transport students under 504?

With respect to transportation, the district's duty to 504 students is twofold. First is the basic 504 nondiscrimination duty. Simply stated, a disabled student should not be denied access to transportation a similarly situated nondisabled student can access. In other words, a student should not be denied transportation for which he is otherwise eligible because he is disabled. If the district provides transportation to students who live a certain distance from the school or who must cross a dangerous road to get to school, that service must be offered equally to disabled and nondisabled students who meet the eligibility criteria.

Second, even if transportation services are not available to a population of students (because they live too close to school, for example), a disabled student's physical or mental impairment may require the district to provide transportation services so that the disabled student can access education at the school.

"Under Section 504, a school district is required to offer transportation services in such a manner as is necessary to afford students with disabilities an equal opportunity for participation in such services and activities." *Whitman-Hanson (Ma) Regional Sch. Dist.*, 20 IDELR 775, 779 (OCR 1993). For example, a student whose asthma is aggravated by certain climates/seasons may be unable to walk to school during certain times of the year without experiencing severe breathing problems. Similarly, a student who used to be able to walk to school but cannot do so now (due to broken leg or similar mobility impairment) may require transportation to school as a 504 accommodation. Note that in neither case would a special bus be required (unless the mobility impairment resulted in the temporary use of a wheelchair). Giving both students access to the regular bus (which they could not access earlier due to the short distance to school) is an appropriate accommodation.

Do we have to maximize a student's potential under 504 or IDEA?

Neither IDEA nor 504 requires the school to help the student "be all that he or she can be." A few federal court decisions provide language on maximizing potential. "The IDEA 'does not secure the best education money can buy; it calls upon government, more modestly, to provide an appropriate education for each disabled student.' *Lunceford v. District of Columbia Bd. Of Educ.*, 745 F.2d 1577, 1583 (D.C.Cir. 1984). "There is 'no requirement that services be sufficient to maximize each student's potential commensurate with the opportunity provided other students. ..The IDEA guarantees an 'appropriate' education, 'not one

that provides everything that might be thought desirable by loving parents.” *Weixel v. Board of Education of the City of New York*, ___ F.Supp. ___, 33 IDELR 31 (S.D.N.Y. 2000). On a 504 claim, the Second Circuit provided this language. “The heart of J.D.’s opposition to the proposed accommodation is that it was not optimal. However, Section 504 does not require a public school district to provide students with disabilities with potential-maximizing education, only reasonable accommodations that give those students the same access to the benefits of a public education as all other students.” *J.D. v. Pawlet School District*, ___ F.3d. ___, 33 IDELR 34 (2d Cir. 2000).

May school districts consider ‘mitigating measures’ used by a student in determining whether the student has a disability under Section 504?

School districts, in determining whether a student has a physical or mental impairment that substantially limits that student in a major life activity, must **not** consider the ameliorating effects of any mitigating measures that student is using. This is a change from prior law. Before January 1, 2009, school districts had to consider a student’s use of mitigating measures in determining whether that student had a physical or mental impairment that substantially limited that student in a major life activity. In the Amendments Act (see FAQ 1), however, Congress specified that the ameliorative effects of mitigating measures must not be considered in determining if a person is an individual with a disability.

Congress did not define the term “mitigating measures” but rather provided a non-exhaustive list of “mitigating measures.” The mitigating measures are as follows: 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 or other implantable hearing devices; mobility devices; oxygen therapy equipment and supplies; use of assistive technology; reasonable accommodations or auxiliary aids or services; and learned behavioral or adaptive neurological modifications.

Congress created one exception to the mitigating measures analysis. The ameliorative effects of the mitigating measures of ordinary eyeglasses or contact lenses shall be considered in determining if an impairment substantially limits a major life activity. “Ordinary eyeglasses or contact lenses” are lenses that are intended to fully correct visual acuity or eliminate refractive error, whereas “low-vision devices” (listed above) are devices that magnify, enhance, or otherwise augment a visual image.