“Special” Issues Arising Under Section 504

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SECTION 504 & “EDUCATIONAL NEED”

1. Purpose of Section 504

The purpose of Section 504 and the ADAAA is to eliminate discrimination on the basis of disability.

No otherwise qualified individual with a disability shall, solely by reason of his or her disability be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

2. How do Section 504 and the ADAAA define “disability”?

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 (as described in paragraph (3)). 42 U.S.C. § 12102(4)(a)(1).
3. **What are “major life activities”?**

   …[M]ajor 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.
   

   It also includes “the operation of a major bodily function” as follows:

   a major life activity also includes 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.
   

4. **But we only have to worry about those students who have an educational need, right?**

   Wrong. “Educational need” is a term associated with the Individuals with Disabilities Education Act (IDEA). We often use the term “educational need” when referring to students who need “specially designed instruction” due to a disability. That’s IDEA-speak.

   Section 504 has always dealt with a much broader range of activities. Schools, 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 Section 504 may require you to accommodate the needs of a student who has a disability that has nothing to do with his or her instructional needs.**

5. **Some of the kids who meet the Section 504 definition will also be eligible for special education under IDEA. Under those circumstances, what is the school district’s legal responsibility?**

   We think that many of the students who meet the Section 504 definition of “physical or mental impairment” will qualify for special education under IDEA as well. The distinguishing factor is whether or not the physical or mental impairment satisfies IDEA eligibility criteria, and creates a need for “specially designed instruction.” If so, then the student is eligible for special education under IDEA.
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504 & PRIVATE SCHOOL STUDENTS

6. TEA’s Dyslexia Handbook provides in its Questions and Answers Section:

“[Q&A] 20. When a student does not attend the local school district, what procedures are followed for identification of dyslexia? State statute related to dyslexia, TEC §38.003, indicates that the law pertains to students enrolled in public schools. However, when formal assessment is recommended, the school district or open enrollment charter school completes the evaluation process as outlined in §504 (unless under IDEA 2004). Under §504, upon receiving notice of a parent’s belief that a child has a disability, the school should follow §504 procedures. The school has no duty to provide services unless the student is enrolled in public school.”

7. But, consider the Section 504 Child Find obligation

There is a child find responsibility under Section 504, but it is not as sweeping as the IDEA child find duty. Section 504 regulations say this:

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

(1) Undertake to identify and locate every qualified handicapped person residing in the recipient's jurisdiction who is not receiving a public education; and

(2) 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.

Note that the child find duty under Section 504 only requires (1) an annual effort to identify and locate those who are "not receiving a public education" and (2) an annual effort to inform students and their parents of the school's Section 504 responsibilities.

8. What does “identify and locate” require?

A number of times the Office of Civil Rights (OCR) has addressed this question: *Letter to Veir*, 20 IDELR 864 (OCR 1993), *Celina (TX) Independent School District*, 34 IDELR 41 (OCR 2000), and *Garland (TX) Indep. Sch. Dist.*, 4 ECLPR 138 (OCR 1999). In each instance, OCR has confirmed that the “identify,” “locate” and “notify” requirements are satisfied by posting notices in newspapers, on television and by radio, and conducting other forms of public outreach. In only one identifiable instance has OCR suggested *evaluation* of private school students is required (*West Seneca (NY) Sch. Dist.*, 53 IDELR 237 (OCR 2009)) and that letter seems to focus on other issues.
9. **Provision of evaluations**

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).

10. **D.L. v. Baltimore City Board of School Commissioners, 60 IDELR 121 (4th Cir. 2013)**

The court held that 504 does not require public schools to serve students who reside in the district but attend private schools. Nor does this rule infringe on parental rights to choose a private school. Key Quotes:

> Section 504 and its implementing regulations prohibit discrimination on the basis of disability, not on the basis of school choice.

> [The School District] has legitimate financial, curricular, and administrative reasons to require that D.L. enroll exclusively in a public school in order to take advantage of Section 504 services. The school board need not serve up its publicly funded services like a buffet from which [the parents] can pick and choose.

**SECTION 504 & REVOCATION OF CONSENT FOR SPECIAL EDUCATION**

Parents of students who have been receiving services under IDEA (special education) have the right to revoke that consent at any time for any reason. Upon receipt of such a revocation in writing, the school must provide the parent with a “prior written notice” outlining the services it will no longer provide, and then must cease providing IDEA services. Those students are still eligible for some level of protection under Section 504. Keep in mind that these students still have physical or mental impairments that substantially limit them in a major life activity—if that were not the case, they would not have been identified and placed in your special education program.

11. **Lamkin v. Lone Jack C-6 School District, 58 IDELR 197 (W.D. Mo. 2012).**

The court held that a parent cannot revoke consent under IDEA and then bypass exhaustion procedures by seeking relief under 504. The court also held that the parent who revokes consent under IDEA is not entitled to 504 services for the student. Key Quote:
The Court finds *Letter to McKethan* persuasive, and finds that the Plaintiffs’ revocation of services under IDEA was tantamount to revocation under 504 and the ADAAA.


The court held that a student was entitled to protection under 504/ADAAA even after the parent revoked consent for IDEA services. After such a revocation, while the student is not entitled to an IEP under IDEA, the school is still obligated to offer a “plan” under 504. In this case, the school did that, and effectively offered under 504 the same services it had offered under IDEA. The parent rejected the plan. Thus the parents could not hold the district liable for refusing to accommodate the student when the district had offered to do so.

13. **D.F. v. Leon County School Board, 62 IDELR 167 (N.D. Fla. 2013).**

The court held that withdrawal of consent for services under IDEA does not waive or forfeit the right to non-discrimination and/or services under 504 and the ADAAA. The court held that this was not a “waiver” because the parent specifically requested services for the hearing impaired student under 504 when she withdrew consent for IDEA services. The court noted that “waiver” is “an intentional relinquishment of a known right. An explicit request for services can hardly constitute a waiver of those services.” As to “forfeiture” the court noted that “there is no basis for asserting that by withdrawing consent to offered IDEA services, the plaintiff forfeited the right to different services that allegedly were available under a different federal statute.” Key Quote:

> So this plaintiff’s complaint states a claim on which relief can be granted. And that is so regardless of which side is right on a different issue: whether a parent’s withdrawal of consent to an IEP developed under the IDEA also terminates the right to a free appropriate public education (“FAPE”) under the Rehabilitation Act.

14. **Houston Ind. Sch. Dist, 65 IDELR 52 (OCR 2014).**

The district entered into a voluntary resolution, but it is worth noting the OCR pointed out that the district did not offer the parent an opportunity to request Section 504 services at the time she revoked consent under IDEA.
SECTION 504 & EXTRACURRICULAR ACTIVITIES

15. Do students with disabilities have the right, under Section 504, to an equal opportunity to participate in their schools' extracurricular activities like athletics?

Yes. the Department of Education’s Office for Civil Rights (OCR), which is responsible for the enforcement of Section 504, issued a “Dear Colleague” letter to help provide guidance to districts with questions on students with disabilities wanting to participate in extracurricular activities. U.S. Dep’t of Educ., Office for Civ. Rts., Dear Colleague Letter (Jan. 25, 2013). OCR explained that, under Section 504, a school district is required to provide a qualified student with a disability the opportunity to benefit from the same programs that it provides to its students without disabilities.

Simply because a student is a “qualified” student with a disability does not mean that the student must be allowed to participate in any program offered by a school district, as school districts may require a certain level of skill or ability in order for that student to participate. The selection criteria, however, may not be discriminatory. Specifically, OCR pointed out that school districts are prohibited from:

- denying a qualified student with a disability the opportunity to participate in or benefit from an aid, benefit, or service;
- affording a qualified student with a disability an opportunity to participate in or benefit from an aid, benefit, or service that is not equal to that afforded others;
- providing a qualified student with a disability with an aid, benefit, or service that is not as effective as that provided to others and does not afford that student with an equal opportunity to obtain the same result, gain the same benefit, or reach the same level of achievement in the most integrated setting appropriate to the student’s needs;
- providing different or separate aid, benefits, or services to students with disabilities or to any class of students with disabilities unless such action is necessary to provide a qualified student with a disability with aid, benefits, or services that are as effective as those provided to others; and
- otherwise limiting a qualified individual with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving an aid, benefit, or service.

When a district offers a particular extracurricular activity, it must make reasonable accommodations to ensure that students with disabilities are able to participate by providing aids and services unless those aids and services constituted a fundamental alteration of the program. Safety, for example, is of the utmost importance in all school extracurricular activities, and although some extracurricular activities can be modified to accommodate most students with certain disabilities, some cannot. A district confronting the issue of modifying an extracurricular must first engage in an individualized inquiry as to whether such a modification is necessary. If the modification is necessary, the district must allow the modification unless doing so would represent a fundamental alteration to the nature of the extracurricular athletic activity. A school district must also provide a qualified student with a disability with needed aids and services, if the failure to do so
would deny that student an equal opportunity for participation in extracurricular activities in an integrated manner to the maximum extent appropriate to the needs of the student.

Finally, OCR answered the question of whether separate or different athletic opportunities for qualified students with disabilities would be considered discrimination. The answer depends on whether the separate or different athletic opportunities are unnecessarily so. That is, if a qualified student with a disability can participate in the athletic event with a modification or aid and without a fundamental alteration to the athletic event, then that student should be allowed to do so. If, on the other hand, students with disabilities are unable to participate in the athletic event even with reasonable accommodations, that student should still be provided an equal opportunity to receive the benefits of extracurricular athletics. Furthermore, districts should support these programs equivalently. When the number of qualified students with a disability at a particular school is too small to field a particular athletic event, the district can develop district-wide or regional teams, mix male and female students with disabilities on the same team, or offer “allied” or “unified” sports programs in which students with disabilities play alongside students without disabilities.


The court denied a request for an injunction that would have allowed an autistic student to participate in interscholastic football for a 5th year. State rules limited to students to eight semesters of competitive athletics. The court denied the injunction because the student had already played football for four years and thus had already received the benefit to which he was entitled. Adding another year would have given him an advantage over non-disabled peers.