

# THE 1973 REHABILITATION ACT

## **Section 504: Legally Sound Solutions for Complex Section 504 Issues**

SECTION

**504**

**FOR  
MISSISSIPPI DEPARTMENT OF EDUCATION**

**BY  
JAMES F. MCKETHAN, ED.D.**

**2014-2015 SCHOOL YEAR**

## **GETTING STARTED**

Workshop content is a balance of content for the novice 504 coordinator as well as more advanced content for others with a more advanced understanding of Section 504. For will be at the basic level, much of the content is designed for professionals with the moderate to advanced expertise of Section 504. Workshop content is focused on steps to ensure compliance with Section 504's FAPE requirement. Consequently much of the content is focused on procedural and substantive requirements. Using a question and answer paradigm, practical solutions to real-world, every-day 504 issues will be generated.

## **REPRESENTATION OF SERVICES**

This professional development resource is designed to provide accurate and authoritative information on Section 504 implementation in the schools. The workshop is presented with the understanding that the presenter/author is not engaged in legal services. If legal advice is required, the services of a competent attorney should be engaged.

## **REPRESENTATION OF OCR POLICY**

Reported in these workshop materials on §504 are references to OCR Letters of Findings (LOF's). OCR LOF's contain fact-specific findings and dispositions of individual cases. LOF's are not formal statements of OCR policy and, as such, should not be relied upon, cited, or construed as such as OCR policy. OCR's formal policy statements are approved by a duly authorized OCR official and made available to the public.

*- From the Office of Civil Rights,  
OCR Complaint Processing Procedures, "Investigation of the Complaint,"*  
<http://www2.ed.gov/about/offices/list/ocr/complaints-how.html>

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## INTRODUCTION

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### Workshop Overview

#### **INTRODUCTION**

- Pre assessment.
- Topical brainstorming
- Background

#### **THE BASICS**

- Purpose of §504
- Discrimination
- Assurances
- Enforcement
- Grievance procedures
- Responsible employee
- Key terminology

#### **A FOCUS ON PARENTS**

#### **SUB PART A**

#### **SUB PART D**

- FAPE – procedural
  - ❖ Child Find
  - ❖ §504 Team
  - ❖ Evaluations
  - ❖ Eligibility
  - ❖ Procedural safeguards
- FAPE – substantive
  - ❖ Accommodations and services
  - ❖ Placement.

#### **SPECIAL TOPICS**

- Athletics & extracurricular activities
- Privacy and confidentiality
- You be the judge
- Case studies
- Post assessment

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### First Things First

- Unlike IDEA, Section 504 is not a funding law
- Section 504 is a civil rights law
- Section 504 is not a special education law
- Section 504 allows for considerable discretion
- Section 504 is not as structured the IDEA

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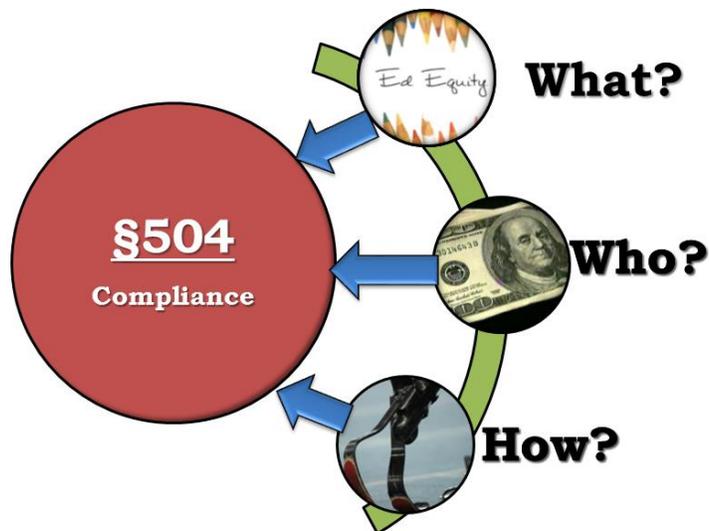
## A COMING §504 TSUNAMI?

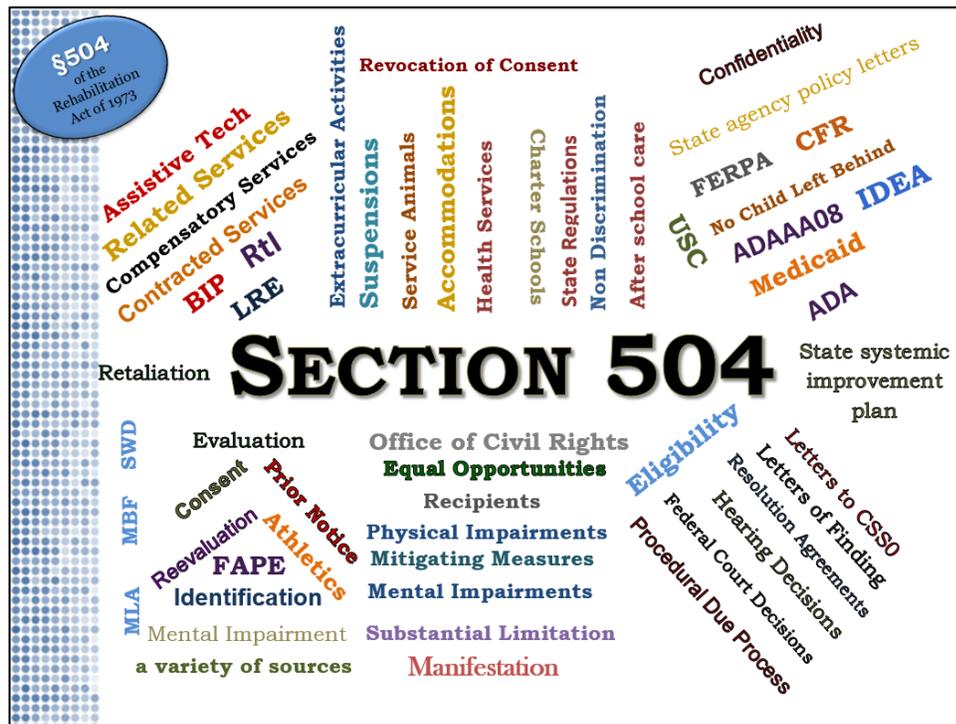


- Broader umbrella of coverage.
- Extensive analysis not required.
- Increasing ADHD diagnoses.
- Increasing Asperger-spectrum diagnoses
- Open-ended definition of the term “mitigating measures.”
- Slowing rates IDEA placements (successful RtI) mean more §504 students.
- Rising per-capita rates of obesity and concomitant medical issues.
- Increasing mental health diagnoses, e.g., bipolar disorder, ODD, PTSS, etc.

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## The Big Picture





## DISCRIMINATION

The purpose of §504 is to keep persons with disabilities free from discrimination. Section 504 is “designed to eliminate discrimination on the basis of disability in any program or activity receiving federal financial assistance.” (34 CFR §104.1)

**Section 504's Prohibition**

No otherwise qualified individual with a disability ... Shall, solely by reason of his or her handicap, 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. (29 USC §794)



Discrimination is the exclusion from participation in, the denial of benefits of, any program or activity receiving or benefiting from federal financial assistance. Students may not be denied participation in or be denied benefit from services that are afforded to nondisabled students. (34 CFR §104.4.)

Since its inception, OCR has investigated a wide range of complaints, including failure to conduct manifestation reviews and to properly evaluate students. OCR Letters of Finding (LOF's) cover related service topics such as service animals in schools, amount of time on buses, and the instructional days for students with disabilities. Health issues such as Tourette syndrome, asthma, diabetes, encopresis and juvenile rheumatoid arthritis have been among the impairments subject to OCR investigations. OCR LOF'S address programmatic issues such as overrepresentation of African-American students in programs for students with cognitive impairments, and conversely, under-representation in gifted programs. OCR also has addressed discipline of students on the basis of their disability and race, as well as disproportionate placement of African-American students in classes for the mentally impaired.

Special education attorney and consultant Julie Weatherly employs a bifurcated explanation of the term "discrimination." In her model, Weatherly classifies discrimination as either "active discrimination" or "inactive discrimination." (*Adapted with permission from materials presented by Julie J. Weatherly, Esq., at LRP's 32nd National Institute on Legal Issues of Educating Individuals with Disabilities®*)

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## Equal Opportunity

Lau v Nichols

***“Nothing is more unequal than  
the equal treatment of unequal people.”***

— Unknown —



## **Nondiscrimination**

**Section 504's requirement for equal opportunities extends beyond the instructional program.**

- Afterschool care
- Field trips
- Least restrictive environment
- Athletics
- Extracurricular activities
- Privacy and confidentiality
- Child nutrition
- Facilities
- Health and medical issues
- Disproportionality

### **Active Discrimination**

**Any differential treatment of students with disabilities may be discrimination.** Consider the case *Baldwin County (AL) Sch. Dist.*, 51 IDELR 141 (OCR 2008). A middle school student with disabilities requested permission for an exception to school policy that would allow him to bring who made a request for an exception to the school policy that would allow him to bring a quest from another school to a school event. The school administrator denied the request even though a similar request was approved for a nondisabled student. OCR determined the school district's disparate treatment constituted discrimination.

1. **Do school districts have an obligation to consider the needs of students with disabilities when planning for such things as magnet schools and afterschool child care, etc.?** School district's planning new programs should gauge parental interest for prospective programming. What this means is that in the same way parents of nondisabled children are afforded the opportunity to comment about participation and programming, parents of students with disabilities should have similar opportunities.
2. **Did the parent of an LD student have a valid discrimination claim based on the coach's discipline?** The student was required to run and dribble the

ball for more than an hour. The parent claimed the discipline constituted discrimination. Moreover, the parent alleged retaliation when the student was not selected as a starter based on the parent's engagement in a protected activity such as filing an OCR complaint, etc. OCR found no evidence of discrimination or retaliation. Tip: maintain written records related to disciplinary actions and team selection decisions. (*Adlai E. Stevenson Dist. #125 (IL)*, 38 IDELR 157 (OCR 2002))

### **Inactive Discrimination**

Inactive discrimination is the **differential treatment** regarding the provision of educational services (FAPE) or non-educational services (non-FAPE).

Examples of inactive (FAPE-based) discrimination include such things as: 1) **the failure to act** on a parent's request for an evaluation; 2) ineffective accommodations; and 3) administratively **shortening a student's school day**. Other examples of inactive discrimination (FAPE) could include the following:

- Long-term suspension of a student without first conducting a manifestation determination.
  - Failure to provide a notice related to identification, evaluation, or educational placement.
  - Failure to provide a student with teaching and learning materials geared to the student's instructional level.
  - Failure to make exceptions to the district's student absences policy when absences are the direct result of the student's medical condition.
  - Providing an auditory trainer for a student who requires an interpreter for the deaf.
1. **Do schools meet Section 504's equal opportunity standard if "grade-level" instruction is provided to students with disabilities whose instructional level is three to six years below their chronological age?** Grade-level materials do not provide students who are instructionally below grade level an equal educational opportunity.
  2. **Schools are required to provide equally effective accommodations. Does this mean resulting student performance must be similar to that of non-disabled peers?** Section 504 does not impose a duty to produce an identical result or level of performance for children with disabilities and non-disabled students. (34 CFR §104.4(b))

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## High Stakes Enterprise

“... the ADA’s four-step approach to ending discrimination through **education, negotiation, litigation...**”

— American Diabetes Association  
[www.diabetes.org/living-with-diabetes/know-your-rights/discrimination](http://www.diabetes.org/living-with-diabetes/know-your-rights/discrimination)

## Dispute Resolution

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## Dispute Resolution



- **District §504 coordinator**
- **Grievance procedures**
- **Due process hearing**
- **Federal courts:** §504 regulations do not require a person to file a complaint with OCR and exhaust his or her administrative remedies before filing a private lawsuit.

34 CFR §104.7(a); 34 CFR §104.7(b); 34 CFR §104.36

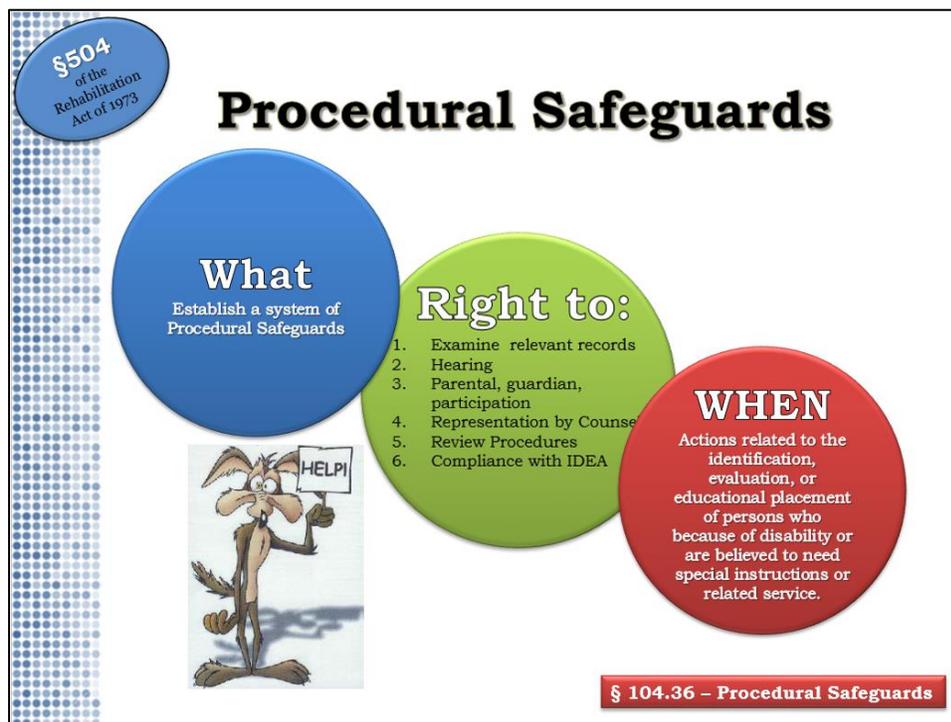
School districts (employing 15 or more persons) shall adopt grievance procedures that incorporate appropriate due process standards and that provide for the prompt and equitable resolution of complaints alleging any action prohibited by this part. (34 CFR §104.7(b))

**Is it a good idea to review our district's grievance procedures?** Even though your district has a grievance procedure in place, make sure that it incorporates appropriate due process standards and provides for the prompt and equitable resolution of complaints. (34 CFR §104.7(b)) Make sure your grievance process includes:

1. notice of grievance procedures;
2. Designate the person with whom complaints may be filed;
3. A thorough and impartial investigation;
4. A notice of decision to the parties. (*Berlin (NH) Pub. Schs.* 54 IDELR 205 (OCR 2009))
5. An appeal mechanism. The a
6. Finally, make sure your policy is accurately published in various district publications. (*Unidentified Co (WY) Schs.*, (OCR 2009, unpublished))

**Are aging local process manuals on OCR's radar?** The parent of a student with asthma filed a complaint after her son's §504 services were cancelled. The investigation uncovered an outdated training manual with erroneous statements of law including incorrect eligibility standards. Although OCR was told that the agency was in the process of updating its procedures, OCR noted that the incorrect procedures were still being used which amounted to a violation of §504. (*St. Clair County (MI) Reg'l Educ. Serv. Agency*, 53 IDELR 238 (OCR 2009))

## PROCEDURAL SAFEGUARDS



In March 2010, OCR announced plans to beef up the enforcement of civil rights statutes in schools. Are our district's procedures aligned with district §504 procedures as well as the ADA Amendments Act of 2008. It is never too late to review school board grievance procedures for §504 and harassment/retaliation

Section 504 requires school districts to provide notice regarding the identification, evaluation and educational placement of students who because of a disability need or are believed to need special instruction or related services and a system of procedural safeguards. (34CFR §104.36)

1. **How often should due process rights be provided?** Neither §504 nor OCR specifies how often due process rights are to be provided to parents. In a 2010 complaint resolution agreement, OCR required the Muscogee County (GA) Schools to provide due process rights during the first meeting between parents and the §504 team. §504 teams should document the provision of rights when identification, evaluation and educational placement decisions are made. (34 CFR §104.36.) (*Muscogee County (GA) Sch. Dist.*, (OCR 2010))
2. **On what occasions are districts required to provide parents notice under 34 CFR §104.36?** When a school district makes decisions

regarding evaluations, identification or placement, it has an obligation under §504 to provide notice of the decision it reached and parental rights. In Stone County, Miss., a district rightfully determined an evaluation of a student with ADHD was not warranted; however, the district ran afoul of OCR by **failing to provide parent rights** when the decision was reached. (*Stone County (MS) Sch. Dist.*, 52 IDELR 51 (OCR 2008))

3. **One option for complying with §504's requirement for procedural safeguards is to use the IDEA due process procedures. Is that a good idea?** No; the devil is in the details. For example, using IDEA procedures obligates districts to: 1) use "stay-put" for contested placement changes; 2) provide an independent educational evaluation; and 3) provide a transcript of due process hearings at district expense.
4. **Is OCR the proper forum for unresolved disputes over the content of §504 accommodation plans?** OCR examines procedures used by school districts to identify and evaluate students with disabilities, as well as the procedural safeguards provided to students. OCR rarely intervenes in issues where content is disputed. The due process hearing is the proper forum for content issues. (OCR FAQ #5)
5. **Do all students eligible under Section 504 entitled to Accommodations?** No. Some students may be mitigated eligible, but may not require accommodations because mitigating measures eliminate the need for accommodations.
6. **Are mitigated eligible students, not requiring a §504 plan, entitled to procedural safeguards?** Neither the ADA Amendments Act nor OCR addresses this question. The safe bet is to provide mitigated eligible students with their due process safeguards. (34 CFR §104.36)
7. **What is a district's responsibility under §504 to provide information to parents and students about its evaluation and placement process?** §504 requires districts to provide notice to parents explaining any evaluation and placement decision affecting their children and explaining the parents' right to review educational records and appeal any decision regarding evaluation and placement through an impartial hearing. (OCR FAQ #45)

## ENFORCEMENT

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### The Office for Civil Rights

- ✓ **Enforcement:** §504 of the Rehabilitation Act of 1973 and Title II of the ADA:
  - Stepped-up enforcement.
  - Onsite investigation.
  - Desk audit.
  - Early resolution agreement.
- ✓ **Mediation:** OCR does not mediate but may offer an early resolution agreement.
- ✓ **Appeals:** The complainant may appeal to the Deputy Assistant Secretary for Enforcement.
- ✓ **Noncompliance:** OCR may: 1) initiate a termination of federal financial assistance; or 2) refer the case to the Department of Justice for judicial proceedings.



**RULES**

**OCR FAQ #7, 8, 10, 11.**

The Office for Civil Rights, a component of the U.S. Department of Education, has the jurisdiction to enforce §504 well as Title II of the 1990 ADA, which extends the non-discrimination on the basis of disability to state and local government services and programs.

1. **Does OCR have the authority to investigate a district's §504 implementation when there are no discrimination claims?** In 2010, a Wyoming school district was the object of a “desk audit” even though there were no discrimination claims. What triggered the OCR investigation in this circumstance was the low number of §504 students reported to OCR. (*Undisclosed District (WY) Schs. (OCR 2009, unpublished)*)
2. **Does OCR have the authority to investigate issues not part of a discrimination claim?** Yes! Parents of a student with ADHD filed a complaint with OCR alleging: 1) discipline of the student based on race; and 2) noncompliance with §504 requirements for procedural safeguards. In addition to the parent allegations, OCR found the fuzzy “interplay” between the intervention team and §504 team, coupled with a lack of timelines, amounted to a denial of services and consequently a denial of FAPE. (*Muscogee County (GA) Sch. Dist. (OCR 2010)*)

3. **Can the comments teachers make on the report cards of students with disabilities be the subject of an OCR investigation?** Maybe? Listen for the details.

## THE SECTION 504 TEAM

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### Assemble The Placement Team

Ensure that the placement decision is made by a group of persons:

**Who is on my child's 504 Team?**

- including persons knowledgeable about the child,
- the meaning of the evaluation data, and
- knowledgeable of placement options.

34 CFR §104.35(c)(3)

**Section 504 regulations do not require, per se, districts to make parents a member of the 504 team. So, how much parent involvement is required?**

The best practice is to make parents a member of the 504 team. The regulations require the participation of those who are knowledgeable of the student. Parents know more about their child than anyone else. Consider the case of a 14 year old North Carolina student with a traumatic brain injury. When school officials determined that the student was not eligible and informed the parents after the decision had been made, they filed a complaint with the OCR. OCR found that the team was comprised of the school counselor and thee of the student's teachers but no one who had special understanding of the evaluation data and the impairment. In its ruling that the district violated §504, OCR noted that the **parents had a special knowledge** of the student's impairment and were uniquely positioned to provide information about the student.

Ensure that placement decisions are made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options, and (4) ensure that the placement decision is made in conformity with 104.34.

1. Who are persons knowledgeable of the evaluation data?
2. Who are persons knowledgeable of placement options?
3. Who are persons knowledgeable of the student?

**Section 504 regulations do not require districts to make parents a member of the 504 team. So, how much parent involvement is required?**

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**What functions are 504 team responsibilities?**

- Scope of Evaluation
- Manifestations
- Annual reviews.
- Re-evaluations.
- Plan development

**§504 of the Rehabilitation Act of 1973**

## Blueprint for Conflict

- §504 sophisticated parents; limited staff understanding.
- Weak administrative understanding and support.
- Parent empowering web-sites.
- Murky local procedures.
- Inadequate parent information.
- Failure to implement accommodations.
- Failure to act when accommodations do not work.
- Inadequate school-central office communications.

## THE FOCUS ON PARENTS

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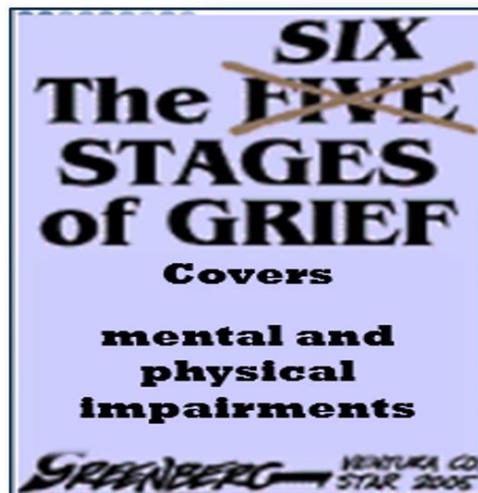
### A FOCUS ON PARENTS

WHAT CAN YOU DO TO IMPROVE PARENT/SCHOOL  
PLANNING? SOME PARENTS:

- Desire appropriate services for their child.
- Work the “system” (tilt the playing field).
- Have memories of negative school experiences.
- Mistrust school personnel.
- Are grieving their child’s impairment.
- Do not understand the 504 process.
- Have difficulty getting to school meetings.

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### The Emotional Connection



Cartoon by Steve Greenberg for  
the Ventura County (CA) Star,  
2005. Adapted and used here  
with artist's permission

# Key Terminology

## Free Appropriate Public Education

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### The FAPE Formula

Free Appropriate Public Education

**PROCEDURAL  
DUE PROCESS**

+

**SUBSTANTIVE  
DUE PROCESS**

=

FAPE

- Free
- Compliance with:
  - ❖ 34 CFR §104.34 – least restrictive environment,
  - ❖ 34 CFR §104.35 – evaluation and placement,
  - ❖ 34 CFR §104.36 – procedural safeguards

- Meet needs of disabled students as adequately as nondisabled students
- Appropriate regular education
- Appropriate special education and related services
- IEP developed in accordance to IDEA

DID I MENTION  
IT'S FREE?

## Students with Disabilities

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### STUDENTS WITH DISABILITIES

“STUDENT WITH DISABILITIES” MEANS ANY STUDENT WHO:

First prong

Second prong

Third prong

34 CFR §104.3(j)

**FAPE**

NON-FAPE

➔

has a physical or mental impairment which substantially limits one or more major life activities.

**NON-FAPE**

➔

has a record of such an impairment.

**NON-FAPE**

➔

is regarded as having such an impairment.

OCR Senior Staff Memo, 19 IDELR 894 (OCR 1992);

## Mental and Physical Impairments

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# IMPAIRMENTS



**mental health** Mental impairments: mental or psychological disorders, etc.

Physical impairments: physiological disorders or conditions, cosmetic disfigurement, or anatomical loss affecting one or more of the body systems.



Impairments that are episodic, intermittent or are in remission.



Short-term, temporary impairments (generally not substantially limiting).



Exclusions: current drug users, psychoactive substance abuse disorders,



34 CFR §104.3(j)(2)(i)  
29 CFR §1630.3.2(j)(8)  
29 CFR Appendix §1630.3.2(j)(8)

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# Other Factors

## Culture, Environment, Economics

“The first of the three parts of the definition (of a disabled person) specifies that only physical and mental disabilities are included. Thus, environmental, cultural, and economic disadvantage are not themselves covered.”

- Homeless
- Migrant
- Limited English proficiency
- Poverty
- Cultural factors
- Attendance Problems
- Lack of appropriate instruction in reading
- Transiency
- Divorce
- Death of a family member
- Military deployments
- Lack of motivation
- Lack of appropriate instruction in math

34 CFR §104 Appendix A  
Analysis of Final Regulation

## Major Life Activities – Bodily Functions

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### **Major Life Activities**

MLAs include caring for one's self, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating and working.

### **Major Bodily Functions**

Major bodily functions include functions such as the immune system, bowel, brain, endocrine, normal cell growth, respiratory, reproductive, digestive, neurological and circulatory systems are classified as major bodily functions. This list is not exhaustive; other functions may be considered major life activities.

29 CFR §1630.2(i).

### Mitigating Measures

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### **Mitigating Measures**

Mitigating measures are adjustments, accommodations, or services that eliminate or reduce the symptoms or impact of an impairment. Examples of mitigating measures include but are not limited to medication, medical equipment and devices, prosthetic limbs, low vision devices, reasonable accommodations and behavioral modifications.

OCR FAQ #21



The corrective effect of mitigating measures may not be used to rule out §504 eligibility.

42 USC Chapter 126  
§12102(E)(i)

With the ADAAA08, Congress intended that the identification and accommodation of individuals with disabilities would be made less complex. The expectation envisioned less effort on determining eligibility and a greater

focus on accommodating persons with disabilities. But is that really the case? The irony is that the process has become much more complex, in part, because school districts are prohibited from considering the corrective effects of mitigating measures when determining whether a student is 504 eligible, that is, has a mental or physical impairment that substantially limits one or more major life activities/major bodily function. So, how does the prohibition on the use of mitigating measures affect your district's 504 procedures?

The ADA08 and resulting regulations leaves the term "mitigating measures" undefined. Rather, it provides a non-exhaustive list which includes such things as medication, medical supplies, equipment or appliances; low-vision devices, etc. Interestingly ordinary eye glasses or contact lenses are not prohibited. Mitigating measures may be almost anything that corrects or improves the performance of a major life activity such as hand washing to reduce exposure to peanut products; the use of an epi-pen, etc.

1. **Can mitigating measures be a consideration when determining if accommodations and services are required?** If mitigating measures are successful and the student is thought to be disabled, the §504 team must evaluate to determine if there would be substantial limitation in the absence of the mitigating measures.
2. **Does the mitigated-eligible student require accommodations and services?** Maybe not, but if medication is being administered at school, an accommodation plan will be necessary to document the related service, e.g., medication administration.
3. **Many mitigated-eligible students require no accommodations or services; do they have any other rights entitlements?** Yes, the student is entitled to all due process protections accorded to eligible students including the right to notice, the right to examine relevant records and the right to an impartial hearing, etc.
4. **Is the student entitled to a re-evaluation?** Yes, the student will be entitled to a periodic re-evaluation and before a significant change of placement including the manifestation determination re-evaluation.
5. **Our district 504 plan includes annual reviews of 504-eligible students. Is the mitigated-eligible student entitled to the annual review?** The mitigated-eligible student would be entitled to an annual review according to local procedures. This step is critical. Make sure local procedures "keep up" with the student. The annual review process is one way of ensuring the student does not fall between the cracks.

6. **What other steps can be taken to prevent the mitigated eligible student from falling between the cracks?** Be prepared to reconvene the 504 team when requested either by parents or by teachers.
7. **Does the successful use of mitigating measures rule out eligibility under Section 504?** Students, who successfully use tiered interventions or other mitigating measures such as diabetic management protocols, etc., may be eligible under Section 504. Consider conducting an evaluation and making an eligibility decision for students thought to be disabled. Even when mitigating measures correct for limitations in a major life activity or major bodily function.
8. **Are commercial tutoring services mitigating measures?** Commercial tutoring services may be mitigating measures. As such, students who successfully perform a major life activity, e.g., learning or reading, as a result of the use of commercial tutoring may be eligible. Under these circumstances, school officials should conduct an evaluation to determine if the student would be disabled without the commercial tutoring.
9. **How does the mitigating measure prohibition affect the child find obligation?** Mitigating measures have the effect of reducing child find triggers to such things as a parent requests for evaluation or evaluation information about how students functioned prior to the use of a mitigating measure.
10. **Statutory requirement** – The individual’s impairment must substantially limit a major life activity or a major bodily function.
11. Neither the Section 504 statute nor regulations define the term “substantially”.
12. **EEOC regulations** added definition -- unable to perform, or *significantly restricted* in ability to perform, major life activity/major bodily function.
13. Limitation as to **condition, manner, or duration** of ability to perform function as compared to average person in general population.

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# Substantial Limitation

WHO DEFINES THE TERM "SUBSTANTIAL LIMITATION"?



- Congress did not define the term.
- OCR has not defined the term.
- Section 504 regulations do not define the term.

• 29 CFR §1630.2(J)(2)  
• OCR FAQ #22  
• Saginaw  
• Rowley

*Letter to McKethan, 23 IDELR 504 (OCR 1995)*

## Defining Substantial Limitation

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# Substantial Limit Framework

**EVALUATION**  
FREQUENCY INTENSITY  
AND DURATION

A group of people knowledgeable of the child, evaluation data and placement options makes the decision

- A substantial limitation is the inability to perform a MLA-MBF compared to how most people in the general population perform the same MLA-MBF. §1630 – 20)(1)(1)(I-V)
- substantially limits" shall be interpreted without regards to corrective effects of mitigating measures.

<b>Substantial Limitation</b> No	<b>Substantial Limitation</b> <u>Slight-Minor</u> Loss of MLA/MBF Function No	<b>Substantial Limitation</b> An impairment need not prevent or severely or significantly restrict a MLA/MBF to be considered substantially limiting. Maybe	<b>Substantial Limitation</b> <u>Severe</u> Inability to perform MLA/MBF Function Yes	<b>Substantial Limitation</b> <u>Complete</u> Loss of MLA/MBF Function Yes
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1. **What is a substantial limitation?** At the core of the §504 is the term "substantial limitation." Eligibility for FAPE is based on a mental or

physical impairment that results in a “substantial limitation” of one or more major life activities or major bodily functions. Title II defines a substantial limitation as is the inability to perform a major life activity or major bodily compared to how most people in the general population perform the same major life activity or major bodily function. [Section 1630.2(j)(1)(i-v) and (viii)] (FAQ About §504 and the Education of Children with Disabilities #12)

2. **Is it permissible for school district’s to define the term “substantial limitation?”** . In the absence of a definition, OCR makes it the district’s responsibility to define the term. (*Letter to McKethan*, 23 IDE LR 504 (OCR 1994)) The other option is to adopt the Title II definition.
3. **If your §504 team has adopted the Title II definition, who are “most people in the general population”?** Students in the general population are a representative group of nondisabled peers, district-wide. If the comparative group is representative or “average” of nondisabled students, students in lower performing school, student may not be eligible. The comparison group of students in higher-performing schools may rule out eligibility for some students when it comes to learning-related MLAs. Make sure your comparison group is representative of the general student population in the district.

### **Tiered Interventions**

**Are tiered interventions considered mitigating measures?** OCR recognizes the value of intervention strategies to assist students. “School districts may always use regular education intervention strategies to assist students with difficulties in school. However, districts must refer a student for an evaluation for possible special education or related aids and services or modification to regular education if the student, because of disability, needs or is believed to need such services.” (*Frequently Asked Questions about Section 504 and the Education of Children with Disabilities* (March 27, 2009) (hereinafter referred to as “OCR FAQ”), Question #31)

A Mississippi district successfully employed tiered interventions for a student with ADHD. Even so, the student’s mother requested an evaluation. Based on the student’s successful response to Tier 2 interventions, the district determined that an evaluation was not necessary. The parent filed a claim alleging the district denied her son FAPE. In its investigation, OCR noted that the district reasonably believed the evaluation was not necessary and concluded that the district did not deny the student FAPE. (*Stone County (MS) Sch. Dist.*, 52 IDELR 51 (OCR 2008))



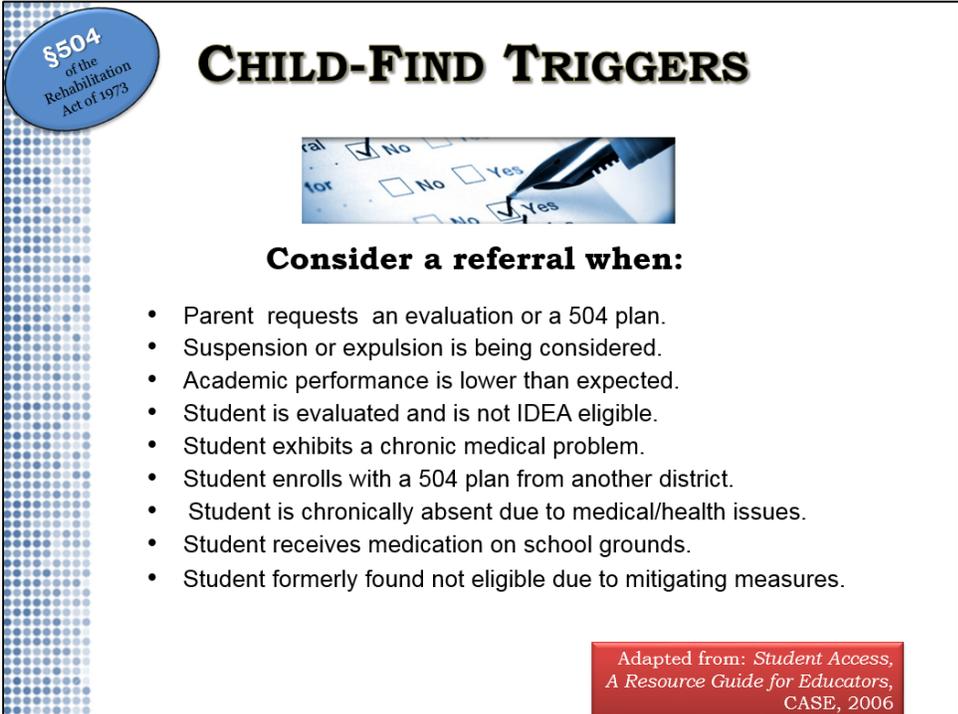
**Should Section 504 be used as an “intervention” that must be exhausted before considering IDEA?** No! The problem here is two-fold. Requiring students to be served fewer than 504 prior to an IDEA referral seems to be a replication of the intervention process that is already in place. Secondly, The USDOE Office of Special Education Programs makes clear that a Section 504 plan is not a legally sufficient substitute for an IEP. Requiring a 504 plan when the student should have an IEP increases the district’s legal jeopardy. See *Yankton v. Schramm*.

**What happened to information from a variety of sources requirement?** Here, a Texas student diagnosed with Asperger’s (*Fergusson-Florissant R-II*, 56 IDELR (OCR 2010)), was not eligible due to high academic performance. In the 7th grade the student had a 3.875 average and as well as a 4.00 on a 5-point scale in the eighth grade. In their complaint, the parents contended that too much focus was on academic performance and insufficient focus social interactions. OCR rejected the parent’s claim without consideration of the positive impact of mitigating measures.

**What is a timely evaluation under Section 504?** In a 2011 Colorado case of a with ADHD student and with a 504 plan from another district, the school district begins the RTI process rather than evaluate. In response to the parent’s repeated request for an evaluation, the school district intensifies the intervention process. Meanwhile, the student’s behavior results in 10 suspensions. OCR agreed with the parent’s contention that the failure to evaluate amounted to a denial of FAPE. (*Harrison (CO) School District Two*, 57 IDELR 295 (OCR 2011))

**Consider the following six steps to help avoid misunderstandings about the use of tiered interventions:**

1. In your district's §504 procedures and parent information, **describe the tiered intervention** process — including timelines and committee responsibilities.
2. **Hold §504 meetings** in response to parental requests even if your district's procedures call for a tiered approach to address struggling students.
3. Following IDEA guidance, **be prepared to conduct §504 evaluations** when requested or explain why the evaluation is not needed. (*Letter to Copenhaver*, 108 LRP 16368 (OSEP 2007))
4. When behavior is an issue and interventions are not working, conduct an evaluation and **determine if the misconduct is directly the result of the student's disabilities**. (*Section 504 Compliance Advisor*, "Prevent RTI strategies from delaying 504, IDEA evaluation," March 2012)
5. Evaluate and **determine eligibility** when tiered interventions do not result in improved school performance.
6. **Give procedural safeguards** at the first §504 meeting when the team determines eligibility and when an accommodation plan is developed.



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## CHILD-FIND TRIGGERS



**Consider a referral when:**

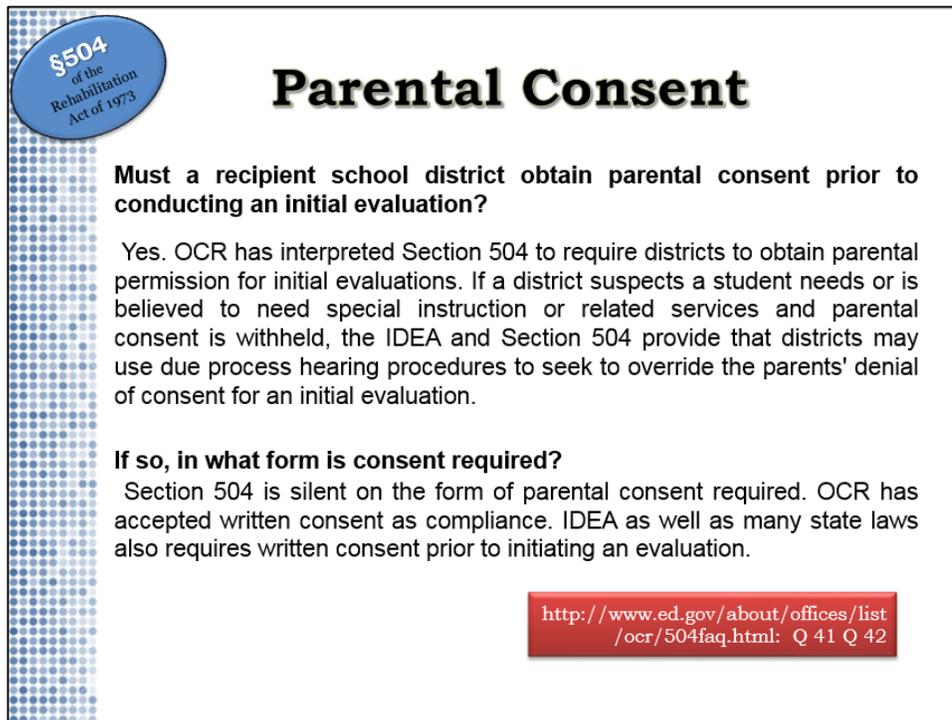
- Parent requests an evaluation or a 504 plan.
- Suspension or expulsion is being considered.
- Academic performance is lower than expected.
- Student is evaluated and is not IDEA eligible.
- Student exhibits a chronic medical problem.
- Student enrolls with a 504 plan from another district.
- Student is chronically absent due to medical/health issues.
- Student receives medication on school grounds.
- Student formerly found not eligible due to mitigating measures.

Adapted from: *Student Access, A Resource Guide for Educators*, CASE, 2006

“Section 504 requires ... **recipient school districts** to refer a student for an evaluation ... if the student, because of disability, needs or is believed to need such services.” (OCR FAQ #31) Consider an evaluation when:

- A student does not respond well to **tiered interventions**.
- An evaluation or 504 **plan is requested**. (*Springfield (MA) Pub. Schs.*, 54 IDELR 102 (OCR 2009))
- **Suspension** or expulsion is being considered.
- Academic **performance is lower** than expected.
- A student is evaluated and is **not IDEA-eligible**.
- Student exhibits an ongoing **medical problem**. (*Oxnard (CA) Union High Sch. Dist.*, 55 IDELR 21 (OCR 2009))
- Student enrolls with a §504 **plan from another district**. (OCR FAQ #38)
- An impairment of any kind is suspected, e.g., a student is chronically absent due to medical/health issues. (*Metro Nashville (TN) Pub. Schs.*, 110 LRP 49252 (OCR 12/18/09)) (*Student Access*, 2003, CASE)

## Parental Consent



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### Parental Consent

**Must a recipient school district obtain parental consent prior to conducting an initial evaluation?**

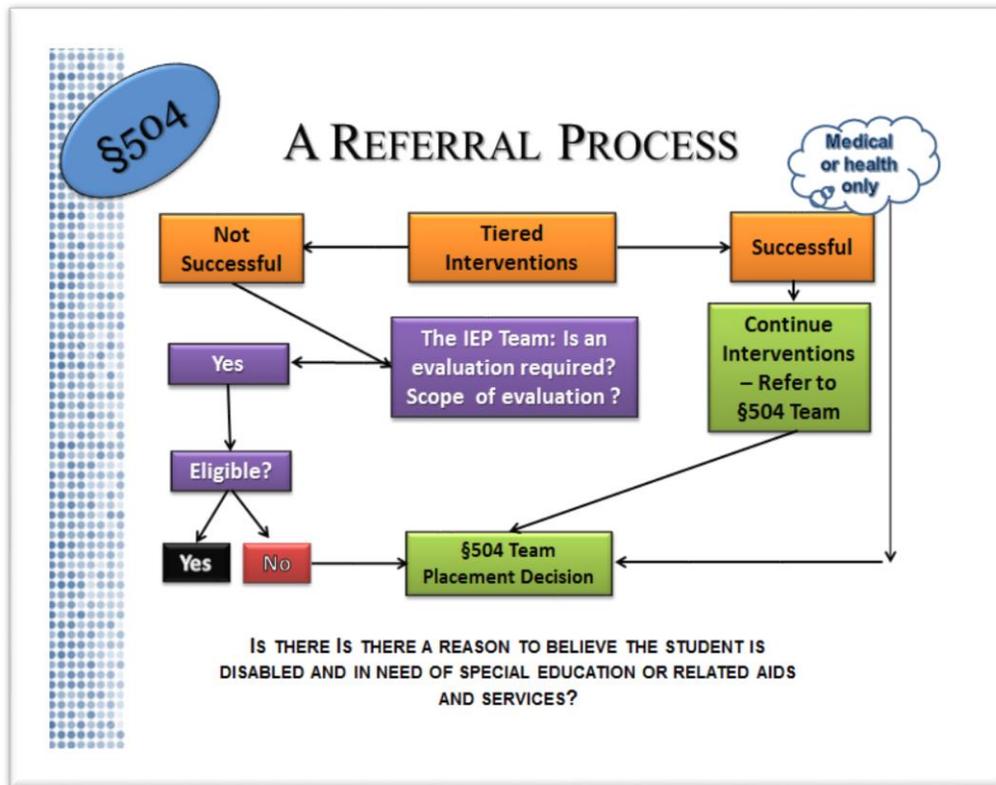
Yes. OCR has interpreted Section 504 to require districts to obtain parental permission for initial evaluations. If a district suspects a student needs or is believed to need special instruction or related services and parental consent is withheld, the IDEA and Section 504 provide that districts may use due process hearing procedures to seek to override the parents' denial of consent for an initial evaluation.

**If so, in what form is consent required?**

Section 504 is silent on the form of parental consent required. OCR has accepted written consent as compliance. IDEA as well as many state laws also requires written consent prior to initiating an evaluation.

<http://www.ed.gov/about/offices/list/ocr/504faq.html>: Q 41 Q 42

## REFERRAL AND EVALUATION



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## Evaluation Procedures

Interventions not successful, lower than expected academic and or behavioral performance, not IDEA eligible, on-going medical problems, transfer from another district or parent teacher concern.

Recipients shall establish evaluation standards and procedures.  
**34 CFR.104.34 (b)**

Is the student thought to be impaired and in need of regular education and supplemental services or special education and related services?  
**34 CFR104.35(a)**

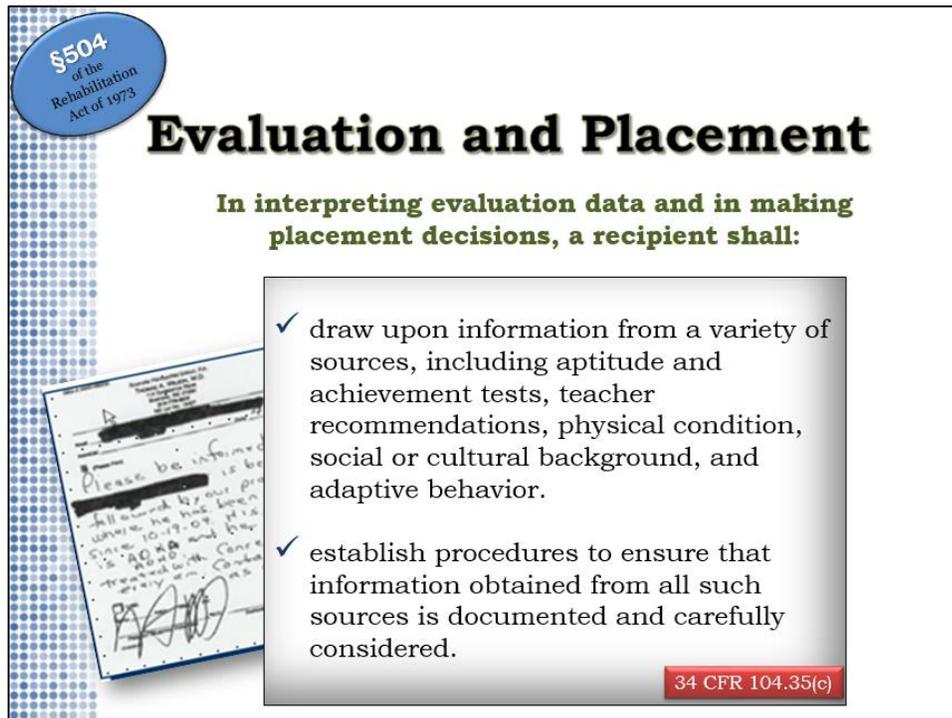
An evaluation must be provided before taking any action with respect to an initial placement.  
**34 CFR 104.35(a)**

Is the scope of evaluation tailored to assess specific areas of educational need?  
**34 CFR 104.34 (b)(2)**

1. **Evaluation Requirement:** School districts must evaluate and locate every qualified disabled person residing in the recipient’s jurisdiction who is not receiving a public education. (34 CFR 104.32(a))
2. **Is there a duty to evaluate nonresident students enrolled in private schools?** OCR ruled that a New York district had no obligation to evaluate a nonresident student with migraine headaches. Interestingly, OCR noted that the §504 child find obligation does not mirror that of IDEA, in that the IDEA child find obligation lies with the district in which the private school is located. (*West Seneca (NY) Sch. Dist.*, 53 IDELR 237 (OCR 2009))
3. **Is it permissible to use the IDEA evaluation process for Section 504?** The OCR FAQ permits the use of the IDEA evaluation system. If school districts elect not to use the IDEA system, an evaluation system must meet requirements at 34 CFR §104.35 (b)
4. **Is it permissible to “rule out” IDEA eligibility prior to considering Section 504?** Yes!
5. **Is Section 504 least restrictive placement option that should be considered before considering IDEA?** No, there is no policy, guidance or regulation requiring the use of Section 504 prior to considering IDEA eligibility.
6. **Section 504 requires a broad umbrella of coverage. Does this requirement lessen OCR’s expectation that evaluation procedures ensure that children are not misclassified unnecessarily labeled as having a disability, or incorrectly placed?** No! Referral and evaluation procedures must be designed to prevent misclassification of students as disabled.
7. **When should students suspected of having a disability be referred directly to the Section 504 team?** A student with a medical or health condition with no academic or behavioral issues may be referred directly to the §504 team.

The regulations at 34 CFR §104.33(a)-(b) require compliance with regulations at 34 CFR §104.34 (educational setting), 34 CFR §104.35 (evaluation and placement) and 34 CFR §104.36 (procedural safeguards). OCR’s investigation of complaints generally focuses on compliance with the procedural requirement and not the §504 team’s placement decision. So make sure your school personnel understand the importance of sticking to the procedures.

## Information from a Variety of Sources



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### Evaluation and Placement

**In interpreting evaluation data and in making placement decisions, a recipient shall:**

- ✓ draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior.
- ✓ establish procedures to ensure that information obtained from all such sources is documented and carefully considered.

34 CFR 104.35(c)

1. **Who determines the scope of an evaluation under Section 504?** The Section 504 team makes evaluation decisions.
2. **Does a physician's evaluation mean automatic eligibility under Section 504?** No.
3. **Should the 504 team consider information provided by parents?** It would be foolish not to consider parent information.

**How much evaluation information is enough?** At the elementary and secondary education level, the amount of information required is determined by the multi-disciplinary committee gathered to evaluate the student. The answer will vary according to the student and the areas of educational concern for the student. Take the case of a North Carolina eighth-grader with a traumatic brain injury. Even though the student had been hit by an automobile, he achieved satisfactory grades. Based on grades, satisfactory performance on standardized testing and classroom observations, the student was determined not eligible. However, the 504 team failed to consider the student's severe headaches, memory loss, dizziness and nausea. The team determined that the student was

not eligible because the student was not substantially limited in a MLA. (*Cabarrus County (NC) Schools, 59 IDELR 113 (OCRIV, Atlanta (GA) 2012)*)

**What information is required in order to determine the existence of a substantial limitation?** A substantial limitation is based on an evaluation that assesses all areas of educational concern which includes whether the student is substantially limited in nonacademic major life activities or major bodily function. Make sure your §504 teams understand that eligibility is not based exclusively on a substantial limitation in learning, reading, etc. In due course, substantial limitation decisions are based on a preponderance of the evaluation data from a variety of sources.

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## EVALUATION SOURCES

<u>Evaluation must be</u>	<u>Examples</u>
<ul style="list-style-type: none"><li>• Validated for their intended use.</li><li>• Administered in conformance with instructions provided by their producer.</li><li>• Tailored to <i>assess specific areas</i> of educational need.</li><li>• Accurately reflect the student's aptitude or achievement level, etc., rather than sensory deficits, e.g., impaired sensory, manual, or speaking skills.</li></ul>	<ul style="list-style-type: none"><li>• Scholastic Record.</li><li>• Report cards.</li><li>• Work samples.</li><li>• State assessment results.</li><li>• Psychological evaluation.</li><li>• Norm referenced assessments.</li><li>• Curriculum-based assessment.</li><li>• Academic &amp; behavioral interventions.</li><li>• Social and health history.</li><li>• Information provided by parent.</li><li>• Teacher anecdotal notes.</li><li>• Charting data.</li><li>• Parent Information.</li><li>• "Outside" evaluations.</li></ul>

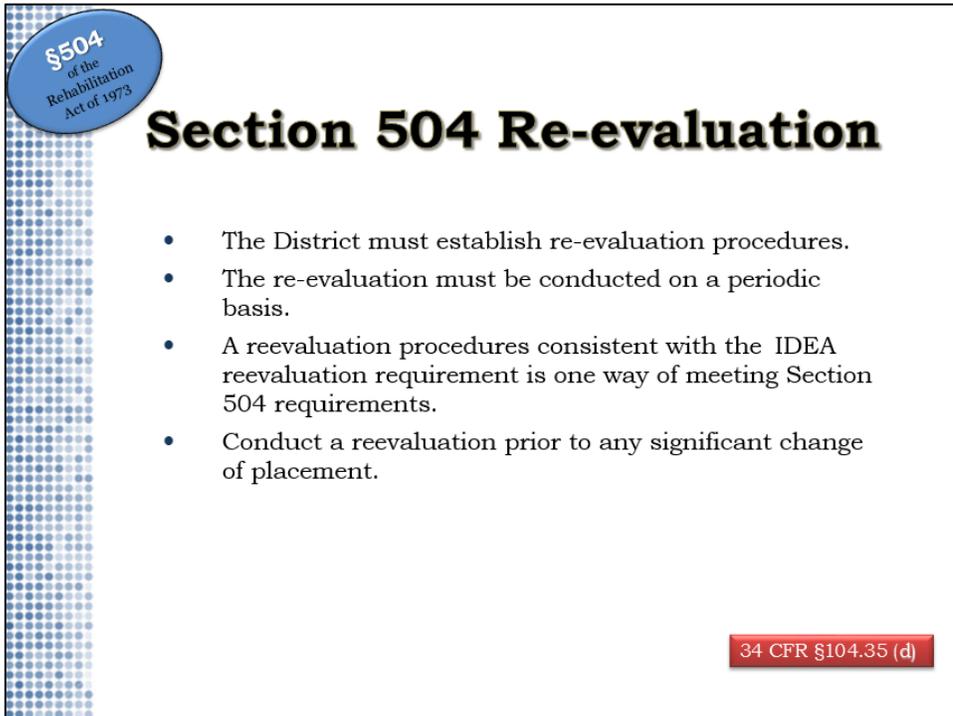


1. **Does OCR does endorse a single formula or eligibility rubric, such as a discrepancy formula, etc.?** No! In most instances, a scientific or statistical analysis is not required in order to know whether impairment substantially limits a MLA as compared to most people. (Q & A - Final Rule Implementing the ADA Amendments Act of 2008: [http://www.eeoc.gov/laws/regulations/ada\\_qa\\_final\\_rule.cfm](http://www.eeoc.gov/laws/regulations/ada_qa_final_rule.cfm))
  
2. **What information is required in order to determine the existence of a substantial limitation?** A substantial limitation is based on an evaluation that assesses all areas of educational concern including whether the student is substantially limited in a nonacademic major life activity or major

bodily function. Make sure your 504 team understand that eligibility is not based exclusively on a substantial limitation in learning, reading, etc. In due course, substantial limitation decisions are based on a preponderance of evaluation data from a variety of sources.

3. **Is the §504 team required to make substantial limitation decision when the student is taking medications?** Maybe! When a student is thought to have an impairment that requires accommodations and services, schools should conduct an evaluation and determine whether or not the student is substantially limited. Here the process may be tricky because an evaluation under these circumstances must focus on whether the student would be substantially limited without the medication.
4. **Is a severe limitation or loss of function required before concluding that a student has a substantial limitation?** No! The Section §504 team may conclude on a case-by-case basis that a student has a substantial limitation even though the limitation is less than severe.

Be careful about concluding that an ADHD student with high academic performance is not substantially limited in learning, reading, etc. Even when impairment fails to trigger a severe or total loss of function, the student may be substantial limited in one or more MLAs. Some students with disabilities invest significantly more time, energy and effort to reach higher than average level of performance when compared with the general student population. Under such circumstances the §504 team may still conclude that is substantially limited in a learning-related MLA. For example, a student with Tourette syndrome may have joint “popping” tic, which makes writing, key-boarding and other manual skills very difficult to perform. Similarly, students with Cerebral Palsy or Juvenile Arthritis or Sickle Cell anemia or other impairments may require considerably more effort to perform a major life activity than required of nondisabled students. Often students with these impairments may perform “on par” with non-disabled students but only because of their higher than the norm effort.



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## Section 504 Re-evaluation

- The District must establish re-evaluation procedures.
- The re-evaluation must be conducted on a periodic basis.
- A reevaluation procedures consistent with the IDEA reevaluation requirement is one way of meeting Section 504 requirements.
- Conduct a reevaluation prior to any significant change of placement.

34 CFR §104.35 (d)

**The**

### **Eligibility Decision**

**Who makes substantial limitation decisions?** The §504 team, comprised of people who are knowledgeable of the student, evaluation data and placement options, determines the scope of the evaluation and determines, on a student-by-student basis, whether a student has substantially limited MLA/MBF

**Does evaluation data indicate that the student with ADHD had a substantial limitation in one or more MLA/MBF's before using a mitigating measure?** If not, provide the parents with their procedural safeguards which include a notice explaining why the student was not eligible as well as their rights to an impartial hearing, etc. On the other hand, suppose the 504 team determined the student to have an impairment that substantially limited one or more MLA/MBFs.

**When a student is mitigated-eligible but does not require accommodations, how should the §504 document the team's decisions?** Structure your Notice of Eligibility so that the 504 team has three eligibility conclusions: (1) eligible and requires accommodations and services, (2) not eligible, and (3) eligible but does not require accommodations.

**Is there a formula or rubric used with evaluation data to determine the existence of a "substantial limitation"?** No! OCR states that the determination of a substantial limitation is made on a student-by-student basis. (See OCR FAQ

#12) OCR places the responsibility for defining the term in the hands of school personnel. (*Letter to McKethan*, 23 IDELR §504 (OCR 1995))

### **The Eligibility Decision**

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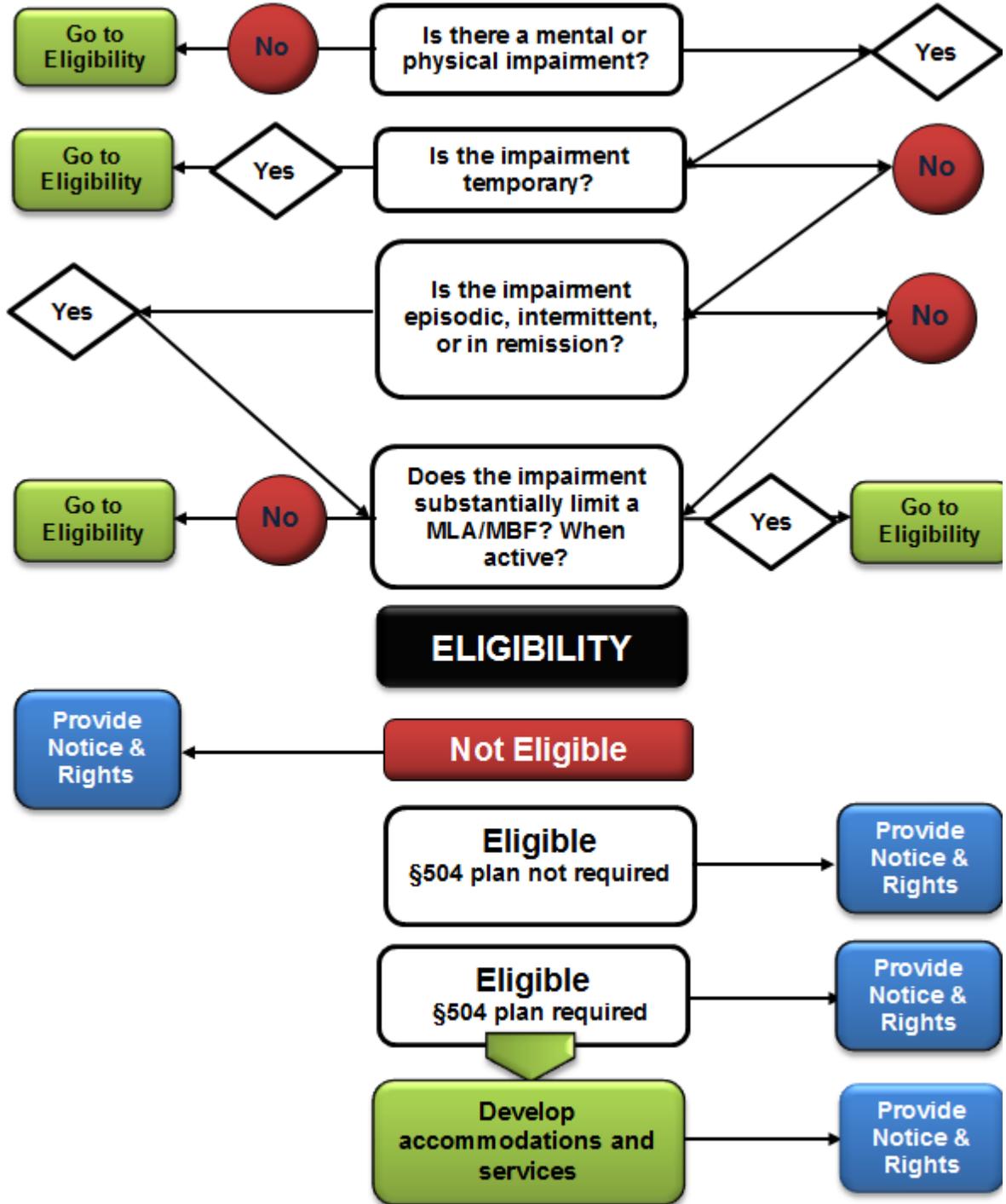
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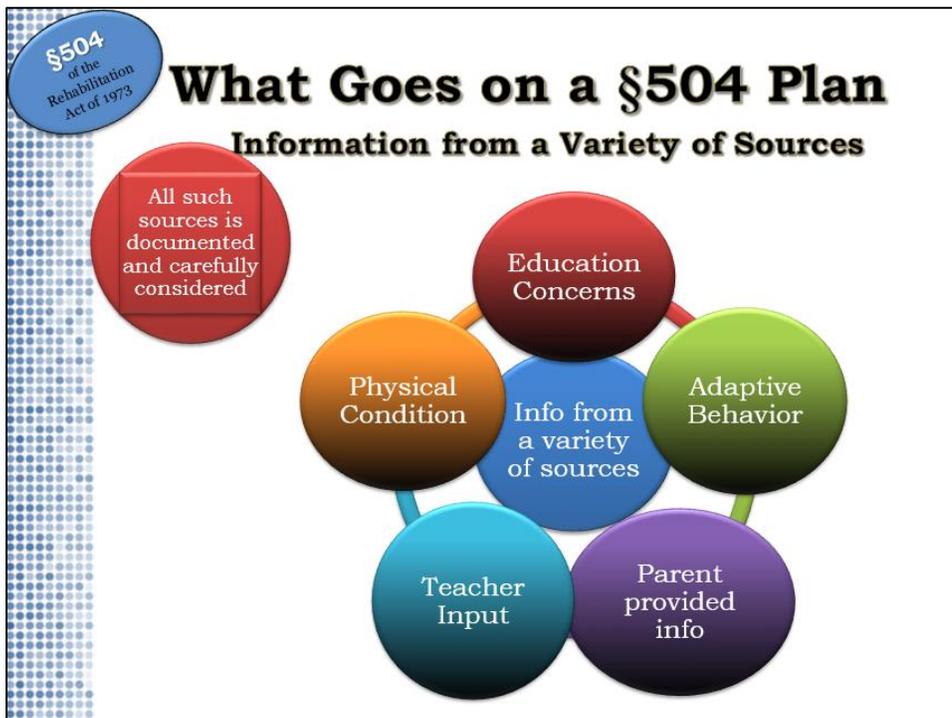
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**Is there a formula or rubric used with evaluation data to determine the existence of a "substantial limitation"?** No! OCR states that the determination of a substantial limitation is made on a student-by-student basis. (See OCR FAQ #12) OCR places the responsibility for defining the term in the hands of school personnel. (*Letter to McKethan*, 23 IDELR §504 (OCR 1995))

## Section 504 Eligibility Decision Chart



McKethan, James, adapted from the *Keys to Compliance: Implementing Section 504 as Amended by the ADA08*, Section 504 professional development materials, 2011-2012.



## **FAPE – Substantive Requirements**

- **Appropriate regular education** - 34 CFR §104.33(b) (1).
  - Appropriate special education and related services - 34 CFR §104.33(b) (1).
  - Meet the needs of students with disabilities as adequately as the needs of non-disabled students are met - 34 CFR §104.33(b) (1) (i).
  - Implementation of an IEP developed in accordance with IDEA is one means of providing FAPE under §504 - 34 CFR §104.33(2).
1. **Is it wise to deny services based on a lack of funding?** Don't ever tell parents that certain accommodations cannot be provided because "we do not have funding." The district must provide accommodations if the accommodation or service is necessary in order for the student to receive FAPE. (*Washoe County (NV) School District*, 51 IDELR 52 (OCR 2008).)
  2. **The case for progress monitoring:** Be careful to monitor the success or lack of success of accommodations. If accommodations are not working, reconvene the §504 team and make any needed adjustments to the plan. (*Davie v. Barnegat Bd. of Educ.*, 54 IDELR 122 (D. N.J. 2010).)
  3. **Implement §504 plans with fidelity:** Make sure teachers, substitute staff and other responsible personnel have the plan *and* know how to implement accommodations. It is not unusual to find teachers who have not received a copy of the plan, are not aware of the accommodations, or may not have received training on specific accommodations. (*Temecula Valley (CA) Unified Sch. Dist.*, 54 IDELR 133 (OCR 2009).)
  4. **Is it OK to use an accommodation check-off form to record accommodations on the plan?** Remember that accommodations and services under 504 are data driven. It is OK to use checklists to identify and memorialize accommodations and services as long as what is selected is supported by evaluation information... Be careful that such a protocol does not turn into an accommodation "buffet line." Make sure teams limit accommodations to those necessary to address the substantial limitation of a major life activity/major bodily function.
  5. **How do we know whether an accommodation is appropriate?** Accommodations must be data driven reflecting the major life activities/major bodily functions in which the student has a substantial limitation. Implement and monitor how the student responds to accommodations. If, for example, student academic performance is

improved, the §504 team has can make the case that the accommodations are substantively appropriate.

- a. **Must district provide eligible students with “reasonable” accommodations?** A district may need to provide “reasonable” accommodations when it comes to child health or medically related accommodations, nutrition, athletics and extracurricular activities. However, when it comes to learning related accommodations, a FAPE must be provided which is required under Part D regulations. Rather than reasonable, Part D requires students be provided a FAPE. Interestingly the non-exhaustive list of mitigating measures includes “reasonable accommodations.” (OCR FAQ, # 21)
6. **Does §504 require licensed nurses to provide insulin injections to eligible students?** No, but many states have laws providing guidance to schools regarding diabetic students. Check your state general statutes for diabetes to determine if there are state laws for school-based diabetes management that extend beyond §504. (*American Nurses Ass’n v O’Connell*, 54 IDELR 259 (Cal. Ct. App. 2010))
7. **Does the prohibition on the use of mitigating measures apply to the development of accommodation plans?** No! If a student is eligible but has no substantial limitation of a MLA/MBF because of the use of mitigating measures, the student may not require accommodations.
8. **Are school officials obligated to do more than simply remind students with diabetes to check blood sugar levels?** In a North Carolina case, OCR investigated this issue and ruled that Buncombe County Schools violated §504 by not ensuring blood sugar checks were done and by failing to following up with the school office. Teachers or other school personnel have a greater obligation than just permitting blood sugar checks; for some students, staff may do the blood sugar checks. Older students may do a self-check. Districts should verify that the blood sugar checks and other health management requirements have been done. (*Buncombe County (NC) Schools*, 54 IDELR 235 (OCR 2009))

## Placement

The term “placement” refers to the regular and/or special educational programs an elementary or secondary student may receive following a referral, evaluation and eligibility determination.

(OCR FAQ, Terminology.)

1. **Who or what group of professionals makes identification, evaluation and placement decisions under §504?** Section §504

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requires that identification, evaluation and educational placement be determined by a group of people. This includes people who are knowledgeable about the student, the meaning of the evaluation data, and placement options. (34 CFR104.35(c) (3).)

2. **Does either Section 504 or OCR impose a timeline for the referral, evaluation and placement of students?** Neither Section 504 regulations nor OCR policy establish a time-frame for the referral, evaluation and placement process. OCR interprets the regulations to require evaluations be completed "within a "reasonable" time-frame". (<http://www.wrightslaw.com>) IDEA regulations at 34 CFR §300.301 give states the discretion for determining a special education referral-to-placement timeline. The time line to apply in Section 504 cases should be your **state's IDEA referral to placement timelines.**
3. **Are students with a substantial limitation in learning caused by cultural, environmental or cultural factors entitled to FAPE?** No. The first prong in the definition of a person with disabilities specifies that only physical and mental disabilities are included. Therefore, environmental, cultural, and economic factors are not themselves covered. (34 CFR §104 Appendix A - Analysis of Final Regulation)
4. **If an IDEA student requires accommodations, should a separate §504 plan be written?** No. A separate §504 plan is not required; The IEP is one means of satisfying §504 requirements. Accommodations necessary to provide the student FAPE should be included on the IEP. (OCR, FAQ #36.) (*Letter to Wilson*, 43 IDELR 165 (OSEP 2004))
5. **Is a §504 plan a legally sufficient substitute for an IEP?** The IDEA and its regulations set out specific requirements for the development and content of a student's IEP. Conversely, neither §504 nor OCR establishes required accommodation plan components. For that matter, §504 does not require a written "plan." In a 2001 case, the 8th Circuit of the U.S. Court of Appeals ruled that a school district erred when writing a §504 plan for a student who should have had an IEP. (*Yankton Sch. Dist. v. Schramm*, 24 IDELR 704 (8th Cir. 1996).) OSEP makes it clear that the §504 plan is not a legally sufficient substitute for an IEP. (*Letter to Morse*, 41 IDELR 65 (OSEP 2003))
6. **Is an individual health care (IHC) plan a legally sufficient substitute for a Section 504 plan?** Maybe and maybe not! If procedures used to develop the IHC comply with Section 504 FAPE requirements then the IHC plan should be legally sufficient.

7. **What can a recipient school district do if a parent withholds consent for Placement?**<sup>1</sup> When consent for placement is not provided, try to understand the parent's objections. If after your best efforts, document your attempts to obtain consent. Another option is for the school district to try to secure consent through a due process hearing this could include mediation and if necessary a due process hearing . . . last resort.

8. **A parent refuses consent or revokes consent for IDEA special education and requests a §504 plan. What processes should be used to field such requests?** Remember that OCR has opined that once an IEP is offered, the requirements for FAPE under §504 have been satisfied. (*Letter to McKethan*, 25 IDELR 295 (OCR 1996).) This line of reasoning was adopted by the court in Missouri a case involving a student with severe disabilities. (*Lamkin v. Lone Jack C-6 School District*, 58 IDELR 197 (W.D. Mo. 2012))

Process such requests through your §504 team. The team should review evaluation data including the student's IEP and make a determination as to whether the IEP would offer FAPE. Provide procedural safeguard notices required under 34 CFR §104.36. (See the next question). Keep in mind that the §504 plan is not a legally sufficient substitute for an IEP that was developed according to IDEA.

9. **Are parents who refuse to provide consent IDEA special education entitled to file a discrimination claim under Section 504?** The parents of a student with behavior problems sought money damages to compensate them for the cost of evaluations, compensatory education and adult supervision under Section 504. In this case the US District Court, Western District of Missouri, ruled that a parent may not circumvent IDEA's administrative procedures by withholding consent and the bringing suit under Section 504 and the ADA. The rejection of IDEA services did not prevent the parents from seeking relief under IDEA. (B.M. by *Miller v. South Callaway R-II Sch. Dist.*, 58 IDELR 253 (W.D. Mo. 2012))

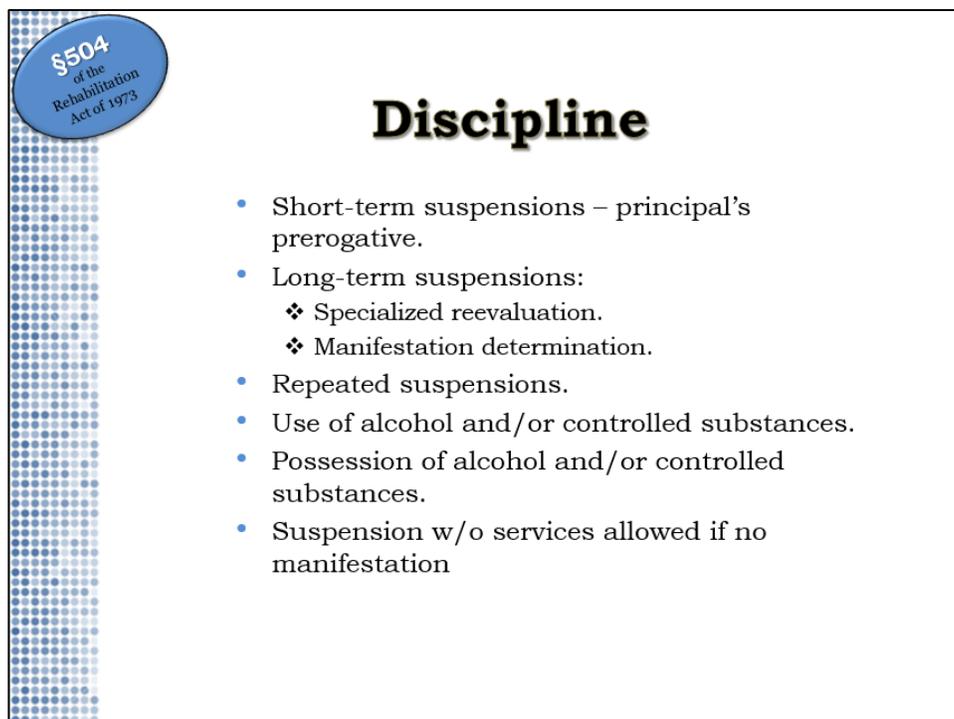
10. **Does §504 eligibility extend beyond the major life activity of learning?** A perception exists in many districts that a student cannot be §504 eligible unless he/she has a substantial limitation in learning. Make sure school personnel understand that a substantial limitation in any MLA/MBF, not just learning, is sufficient for §504 eligibility in elementary and secondary education. (*Oxnard (CA) Union High Sch. Dist.*, 55 IDELR 21 (OCR 2009))

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<sup>1</sup> Protecting Students with Disabilities: *Frequently Asked Questions about Section 504 and the Education of Children with Disabilities*, #43, the Office of Civil Rights, March 27, 2009, <http://www2.ed.gov/about/offices/list/ocr/504faq.html>.

11. **If a school district routinely provides “informal” accommodations for students with impairments, is a §504 plan necessary?** Remember, when an eligible student is successful as a result informal accommodations, consider these accommodations as mitigating measures. Under these circumstances, the district should evaluate the student and take into account how the student function prior to the onset of informal accommodations. If informal accommodations are successful, the student may not require a 504 plan. Students eligible under these circumstances may not require a 504 plan, but are otherwise entitled to a FAPE.

## DISCIPLINE



**Discipline**

- Short-term suspensions – principal’s prerogative.
- Long-term suspensions:
  - ❖ Specialized reevaluation.
  - ❖ Manifestation determination.
- Repeated suspensions.
- Use of alcohol and/or controlled substances.
- Possession of alcohol and/or controlled substances.
- Suspension w/o services allowed if no manifestation

1. **Do principals have the discretion to suspend students with disabilities without conducting a manifestation review?** Principals may suspend students with disabilities for up to 10 days without conducting a manifestation determination review. Keep in mind that a sound practice is to reconvene the §504 team during the suspension to determine if accommodations need to be adjusted or dropped or if new accommodations are needed.
2. **Are repeated suspensions that lead to a year-long suspension a violation of §504?** In a Georgia case, a student with a learning disability

was suspended for repeated assaults on female students and misconduct. The school district conducted a manifestation determination for each suspension exceeding 10 school days. The district provided home-bound services during the suspension. The student's father was unable to convince OCR that his son's suspensions for repeated harassment showed a failure to provide FAPE. In this case, the district had developed local policies and adhered to these policies. (*Gwinnett County (GA) Pub. Schs.*, 46 IDELR 291 (OCR 2006))

3. **Must school districts employ the manifestation determination process for students violating the school code for current use of alcohol or controlled substances?** No. School districts may take disciplinary action against an individual with a disability who currently is engaged in the illegal use of drugs or in the use of alcohol to the same extent that such disciplinary action is taken against nondisabled students who are not individuals with disabilities. Moreover, due process procedures at 34 CFR §104.36 shall not apply in this circumstance. (29 USC 705(20)(C)(iv))
4. **Must school districts employ the manifestation determination process for students violating the school code for possession of alcohol or controlled substances?** The manifestation process is not required when students "use" alcohol or controlled substances. Many assume a similar treatment is applicable for possession of alcohol and drugs. There is no statutory "waiver" of the manifestation determination process for possession. Therefore, the manifestation determination process and due process entitlements at 34 CFR §104.36 is applicable.
5. **Does the scope of a student's behavior intervention plan restrict disciplinary sanctions?** Possibly. A Pennsylvania elementary school principal did not violate section 504, Title II and other laws when he relied on state police to deal with a student's swearing. In *B.L. v. Boyertown Area School District*, 52 IDELR 42 (E.D. Pa. 2009). The court cited the broad discretionary language in the student's BIP in determining the principal acted appropriately.

## DEFINITION OF TERMS

**Accommodation Plan (AP)** — A plan that describes the adaptations, modifications and services made by classroom teachers and other school staff to enable the students with disabilities to benefit from their educational program. Such a plan may be titled the “Section 504 Plan, “Section 504 Accommodations,” Equal Education Opportunity Plan (EEOP), etc.

**Aggravating Measures (AM)** — Aggravating measures include medications, treatments, and devices, etc., while intended to improve a student’s performance of a MLA/MBF may actually result in the substantial limitation of another MLA/MBF. For example, a student with ADHD may be taking a medication that improves the level of “off-task” behaviors and concentration, but results in extreme lethargy, Aggravating measures should be considered when developing an accommodation plan for eligible students.

**Americans with Disabilities Act Amendments Act of 2008 (ADAAA08)** — The ADAAA08 is a civil rights law that amended the ADA by reversing the effects court decisions and administrative regulations which had the effect of restricting eligibility. The ADAAA08 restored the “broader” umbrella of coverage first envisioned by Congress in the ADA legislation.<sup>2</sup>

**Consent for Evaluation** — Written parental approval before conducting an evaluation. Consent for evaluations is required by both IDEA and Section 504. Consent is required prior to the conduct of an “active” evaluation to an individual student or prior to a “passive evaluation” in which existing student information is used to determine to §504 eligibility.

**Consent for Placement** — Consent for placement means parent permission is obtained before initiating services before initiating §504 services. Understand that neither §504 regulations nor OCR explicitly requires consent for placement. However, keep in mind that a consent requirement is implied in the following question addressed by OCR.

**Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition.**

**Cultural, Environmental, And Economic Factors (CEE)** — Cultural, environmental, and economic factors (CEE) include transiency, divorce, death of a close family member, military deployment. CEE may be may be the cause of student learning and/or behavioral problems. (CEE) disadvantages such as limited English proficiency, transiency, and divorce. Because CEE factors are

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<sup>2</sup> 42 USC§12102(4)(E).

not mental or physical impairments, resulting learning problems or behavior problems are not disabilities under Section 504.<sup>3</sup>

**Episodic** — Certain conditions that are loosely connected occurrences in which symptoms are displayed. Conditions such as leukemia may be active at times and other times in remission. An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active. Some medical conditions will become active as a result of the inconsistent use of medication. Consider the case of a student who is on medication for ADHD but who does not take the medication as prescribed. During the time when the student refuses medication or when the prescription lapses, symptoms of the ADHD will re-appear. An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active. A student with such impairment is entitled to a free appropriate public education under Section 504.<sup>4</sup>

**Free Appropriate Public Education (FAPE)** — Regular and special education developed according to 34 CFR §104.34, 34 CFR §104.35, 34 CFR §104.36 that are designed to meet individual educational needs of students with disabilities as adequately as the needs of nondisabled persons are met.<sup>5</sup>

**Major Life Activities/Major Bodily Functions (MLA/MBF)** — Functions such as caring for one's self, performing manual tasks, seeing, hearing, eating sleeping, walking standing, lifting, bending, speaking, breathing, learning reading, concentrating, thinking, communicating, and working. Now included are major bodily function including but not limited to functions of the immune system, bowel, brain, endocrine, normal cell growth, respiratory, reproductive digestive, neurological and circulatory systems. The list of examples is not exhaustive; other functions may be considered major life activities. In addition, the ADA08 makes it clear that one need have a substantial limitation in but one major life activity for eligibility purposes.<sup>6</sup>

**Mitigated - Eligible (ME)** — Mitigated-eligible refers to students who, notwithstanding the corrective effects of mitigating measures, are disabled under Section 504.

**Mitigating Measures (MM)** — Mitigating measures are methods or actions that eliminate or reduce the symptoms or impact of impairment. Examples of mitigating measures include but are not limited to such things as medication, medical equipment and devices, prosthetic limbs, low vision devices, reasonable

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<sup>3</sup> [Appendix A to Part 104 - Analysis of Final Regulation: Subpart A - General Provisions.](#)

<sup>4</sup> OCR Protecting Students With Disabilities, Frequently Asked Questions About Section 504 and the Education of Children with Disabilities, #35.

<sup>5</sup> 34 CFR §104.33(b)(i)(ii)

<sup>6</sup> 29 CFR §1630.2(i).

accommodations and behavioral modifications. The corrective effect of mitigating measures may not be used to rule out Section 504 eligibility.<sup>7</sup> Eye glasses or corrective lenses are not mitigating measures.

**Physical Or Mental Impairment** — (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; genitourinary; hemic and lymphatic; skin; and endocrine; or (2) any mental or physical disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.<sup>8</sup>

The term “physical or mental impairment” includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech, and hearing impairments; cerebral palsy; epilepsy; muscular dystrophy; multiple sclerosis; cancer; heart disease; diabetes; mental retardation; emotional illness; drug addiction; and alcoholism.

The following are not impairments: current drug use, pyromania, voyeurism, kleptomania, compulsive gambling, transvestitism, incarceration, pedophilia, sexual disorders, age, and sick building syndrome. Other conditions that are not impairments include pregnancy, lactose intolerance, homosexuality, bisexuality, gender identity, etc.<sup>9</sup>

**Placement** —Used in the elementary and secondary school context, the term “placement” refers to regular and/or special educational program in which a student receives educational and/or related services.<sup>10</sup>

**Program or Activity** — In the context of Section 504/ADA, a program or activity includes all operations, programs and services either provided directly or indirectly through contractual arrangements by recipients of federal funding including all state and local agencies including colleges, universities, school districts, and charter schools, etc.

**Qualified Student** — “Qualified student with a disability” means an elementary or secondary student with a disability is (1) of an age during which non-disabled persons are provided services, (2) or any age during which it is mandatory under state law to provide such services, or (3) to whom a state is require to provide a FAPE under the IDEA.<sup>11</sup>

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<sup>7</sup> 42 USC §12102(4)(E).

<sup>8</sup> 34 CFR §104.3(j)(209i)(A,B).

<sup>9</sup> 29 CFR §1630.3(d)(1-2).

<sup>10</sup> (OCR, Protecting Students with Disabilities: Frequently Asked Questions about Section 504 and the Education of Children with Disabilities, terminology.

<sup>11</sup> 34 CFR §104.3(k)(1)(2)(3)(4).

**Recipient** — a recipient is a state, state agency, quasi-agency of the state, or a public or private entity, or organization, or other entity, or any person to which Federal financial assistance is extended directly or through another recipient, including any successor, assignee, or transferee of a recipient. The individual who is an ultimate beneficiary of the Federal assistance is not a recipient for the purposes of this act.<sup>12</sup>

**Response to Intervention (RtI)** — RtI is a tiered intervention process that begins with classroom interventions and progresses to special education. In many circumstances, Response to Intervention should be employed before considering Section 504 or IDEA eligibility. The RtI process is managed by a building-based student support team.

**Slow Learner** — the term “slow learner” refers to students who function in the low range of average of cognitive capacity, academic achievement and in the low range of adaptive skills. Slow learners generally have no severe discrepancies under the LD classification and may be performing at or slightly above their ability or cognitive capacity.<sup>13</sup> Children in need of remedial instruction, such as children who are behind a grade level or who are ‘slow learners’ but who have not been diagnosed as having a specific learning disability or other disability are NOT considered persons with disabilities.”<sup>14</sup>

**Section 504** — Section 504 of the 1973 Rehabilitation Act of 1973 prohibits discrimination on the basis of disabilities. The law states that no student with disabilities ... "shall, solely by reason of a 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.”<sup>15</sup>

**Self-Evaluation** — Section 504 and the Americans with Disabilities Act require recipients of federal funds to evaluate their programs, physical accessibility, and employment practices to determine the extent to which programs and activities require modification to ensure full participation by students with disabilities. These evaluations should be revisited annually by the Section 504/ADA Coordinator.

**Students with Disabilities (SWD)** — A student with a disability is anyone (1) who has a physical or mental impairment which substantially limits one or more

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<sup>12</sup> 34 CFR §104.3(f).

<sup>13</sup> Durkheim, Mary, What Inquiring Minds Want to Know - Section 504, 16th Annual State Dyslexia Summer Institute Coming Together for Students with Dyslexia, August 1, 2011.

<sup>14</sup> U.S. Commission on Civil Rights Report, Sept. 1997.

<sup>15</sup> 29 U. S. C. § 794.

major life activities, (2) who has a record of such an impairment, or (3) is regarded as having such an impairment.<sup>16</sup> Students eligible under IDEA are also SWD

**Substantial Limitation** — “Substantial limitation” is not defined either by OCR or the §504 regulations. As a consequence, OCR defers to the school district to define the term “substantial limitation.”<sup>17</sup> Many school districts look to Title II of the ADA for a definition of the term. A person with a substantial limitation in a MLA is substantially limited in the performance of a major life activity as compared to most people in the general population.<sup>18</sup>

**Suspensions: Short-term** — A short-term suspension may be a single suspension or multiple suspensions that of up to ten days. The principal has the discretion to impose short-term suspensions, pursuant to state and local board of education procedures, without any Section 504 review or intervention.

**Suspensions: long-term** — Long-term suspensions are either a single suspension or multiple suspensions of more than ten days. Here, Section 504 requires a manifestation determination in addition to any state and local procedural requirements. Following the initial manifestation determination, subsequent determinations are required prior to any further suspensions.

**Temporary Impairments** — a temporary impairment is an impairment of short duration with limited or no residual effect that does not result in substantial limitation of one or more major life activities/major bodily functions for an extended period of time. Whether a temporary impairment is substantial enough to be a disability under Section 504 must be determined on a case-by-case basis, taking into consideration both the duration (or expected duration) of the impairment and the extent to which it actually limits a major life activity of the affected individual.

### **Miscellaneous Q & A**

**Eligibility** — A chief responsibility of the 504 team is to determine if the student “currently” has a mental or physical impairment that substantially limits one or more major life activities/major bodily functions. The successful use of mitigating measures does not automatically mean a student is non-disabled. To determine eligibility for a student who is successfully using mitigating measures, the evaluation focus shifts from the student’s current condition to how the student performed major life activity/major bodily function prior to the onset of mitigating measure. Consider the following hypothetical case:

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<sup>16</sup> 34 CFR §104.3(j).

<sup>17</sup> OCR Letter to McKethan, 23 IDELR 504 (OCR 1994).

<sup>18</sup> 29 CFR§ 1630.2(j).

**Evaluations and Mitigating Measures:** In early September, the 504 team received a parent referral for a 5<sup>th</sup> grade student who was successfully treated with medication for ADHD beginning at about mid-4<sup>th</sup> grade. Because the medication therapy is successful, the student has no substantial limitation of a MLA/MBF. Here, the 504 team is going to examine evaluation from a variety of sources of information about the student's performance prior to using the mitigating measure. This approach works well for the student who has been enrolled in the same school for a number of years.

**It is not difficult to evaluate a student whom we've previously taught, but what about the student who just enrolled in our school?** Consider the following:

1. **Contact the last school** enrolled to expedite the transfer of records.
2. **Review the cumulative folder** to discern information about the student's school performance before beginning medication.
3. **Talk with former teachers** and other school staff in the previous school of enrollment. Interview the parents.
4. **Obtain consent** for release of information in order to talk with medical or mental health personnel.

Based on **information from a variety of sources**, the §504 team should have sufficient evaluations on which to make an eligibility decision. Evaluations should:

- The use of evaluation procedures that ensure that children are not misclassified, unnecessarily labeled as having a disability, or incorrectly placed, based on inappropriate selection, administration, or interpretation of evaluation materials.. (OCR FAQ, Evaluation.)
  - Reflect information provided by parents. Make sure to receive the information and document that it was considered by the §504 team. (OCR FAQ #26)
  - be comprised of information from a variety of sources (34 CFR §104.35(c)) that is tailored to assess specific areas of educational need (34 CFR §104.35(b))
1. **Are districts required to pay for a medical evaluation when parents refuse access to such information?** No, not according to OCR. In the

case of a second grader with IBS, the parent requested a §504 evaluation. Rather than allow the district to contact the student's physician, the parent produced a letter from the physician with a list of recommendations. Without medical information, the district found the student ineligible. After investigating the parent's claim the district denied the student a FAPE, OCR concluded the district acted properly and as such found no evidence of a §504 violation. (*Ottawa Kan.*) USD #290, 49 IDELR 230 (OCR VII, *Kansas City (Kan.) 2007*)

2. **Is it permissible for districts to place a “shelf-life” on evaluations?** Remember that district evaluations must address areas of educational concern. So, if evaluation data is thought to be invalid or does not sufficiently address areas of educational concern, then additional evaluations may be required. However, arbitrary requirements that limit consideration of evaluation information may be a violation of Section 504. Take the case of a Florida school district that required a parent to obtain an additional diagnosis after a year elapsed. In this case the parent provided a diagnosis according to school district policy and the 504 team subsequently determined the student eligible. However, the parent did not consent to placement. Shortly more than a year later the parent requested services to be initiated; however, school district administrators required the tiered intervention process be replicated and that the parent provide an up-to-date diagnoses. OCR found these procedures to be a violation of Section 504. (*Broward County (FL)*58 IDELR 92 (OCR IV), *Atlanta(FL) 2012*)
3. **Is a school district in violation of §504 when it refuses to schedule meetings after regular school hours?** (*B.H. by SH v Joliet Sch. Dist. No.86*, 54 IDELR 121 (N.D. Ill. 2010)) No, but consider alternatives to traditional face-to-face meetings. Include parents via telephone or with the use of technology-based meetings.
4. **Is it a sound practice to rely exclusively on parents’ “provided” evaluation data?** No! Keep in mind that regulations require information from a variety of sources. Also be mindful that decisions are based on the preponderance of the information and not just parents' provided information. Nonetheless, receive information provided by parents and consider the evaluation data as well as other evaluation data from a variety of sources.
5. **Should the expanded list of MLAs have a bearing on the evaluation process?** You bet. Depending on the student and the areas of concern, an evaluation may focus on thinking, reading, concentration, learning, etc. While much of the evaluation information may be existing student information, concerns about reading, thinking, etc., may require formal evaluations.

6. **How should districts respond when a parent does not give consent for an IDEA evaluation but insists on a §504 evaluation?** Parental refusal of an IDEA evaluation is essentially a rejection of a §504 evaluation. Evaluation standards under both the IDEA and §504 are very much the same. Both require an evaluation tailored to assess areas of educational concern, both require information from a variety of services, and both require all information be carefully considered and documented. (34 CFR §300.304 and 34 CFR 104.35.) Before an initial placement can take place, an evaluation to determine eligibility is required. Section 504 teams may use the due process hearing to compel consent for an evaluation. (OCR FAQ #27)
7. **Must a reevaluation take place before reassigning a student to independent study?** A California school district denied a student FAPE when the district moved a student with migraine headaches from her mainstream classes to independent study. (*Yosemite (CA) Unified Sch. Dist.*, 55 IDELR 111 (OCR 2010))
8. **Are health care protocols mitigating measures? If so, does this mean that students currently on health care plans will be eligible under §504?** Health care protocols are intended to lessen the negative effects of impairments such as diabetes, asthma, allergies, etc. As such, they are mitigating measures. Take diabetes, for example. If without health or medical management protocols, a student with diabetes would have a substantial limitation in the body's ability to metabolize glucose, the student would likely be eligible under §504. As a consequence, an accommodation plan would be developed in adherence to §504 FAPE requirements.
9. **Does a district run the risk of violating §504 by not providing services to a student with a transfer §504 plan during the six months it took to secure an evaluation?** (*South Pasadena (CA) USD*, 109 LRP 31670 (OCR 03/17/09); (OCR FAQ #38))

## ASSESSMENT

Statement	True	False
1. To be “equally effective,” an accommodation must result in a certain level of performance.		
2. An individual health plan that addresses key medical and health issues is all that is required to satisfy §504 requirements.		
3. §504’s protections apply to students with learning or behavioral problems caused by environmental factors.		
4. Re-evaluations are required every three years.		
5. Child find is required under §504		
6. Minor and transitory impairments are generally not covered under §504.		
7. An impairment must prevent, or severely restrict the performance of a MLA/MBF in order to be substantially limiting.		
8. §504 requires a review once annually and more often if necessary.		
9. The corrective effects of mitigating measures may be used to make decisions about the need for accommodations and services.		
10. Bus suspensions under §504 are considered in the same way as out-of-school suspensions and expulsions.		
11. Both §504 and IDEA regulations require evaluations be tailored to assess areas of educational need.		
12. Evaluations may not be conducted while interventions are underway.		
13. In-school disciplinary interventions, e.g., study carrels, time-outs, and other constraints constitute changes of placement.		
14. Related services are available under §504.		
15. A physician’s script makes a student automatically 504 eligible.		
16. Parental consent is required before using existing evaluation information as a “pre-placement” evaluation		
17. When a parent refuses an IEP, school districts must provide a §504 plan.		
18. When a parent refuses an IEP, school districts must provide a §504 plan.		
19. Districts may be required to provide special diets for disabled students.		
20. The FERPA regulations prohibit anything in a report card that identifies the student as being disabled.		
21. Certain eligible students may not require an accommodation plan.		
22. A 504 plan is a legally sufficient alternative to an IEP.		

## **ATHLETICS**

### **Student with a Learning Disability - Example 1:**

A student has a learning disability and is a person with a disability as defined by Section 504. While in middle school, this student enjoyed participating in her school's lacrosse club. As she enters the ninth grade in high school, she tries out and is selected as a member of the high school's lacrosse team. The coach is aware of this student's learning disability and believes that all students with the student's particular learning disability would be unable to play successfully under the time constraints and pressures of an actual game. Based on this assumption, the coach decides never to play this student during games. In his opinion, participating fully in all the team practice sessions is good enough.

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### **Student with a Hearing Impairment - Example 2:**

A high school student has a disability as defined by Section 504 due to a hearing impairment. The student is interested in running track for the school team. He is especially interested in the sprinting events such as the 100 and 200 meter dashes. At the tryouts for the track team, the start of each race was signaled by the coach's assistant using a visual cue, and the student's speed was fast enough to qualify him for the team in those events. After the student makes the team, the coach also signals the start of races during practice with the same visual cue. Before the first scheduled meet, the student asks the district that a visual cue be used at the meet simultaneously when the starter pistol sounds to alert him to the start of the race. Two neighboring districts use a visual cue as an alternative start in their track and field meets. Those districts report that their runners easily adjusted to the visual cue and did not complain about being distracted by the use of the visual cue.

After conducting an individualized inquiry and determining that the modification is necessary for the student to compete at meets, the district nevertheless refuses the student's request because the district is concerned that the use of a visual cue may distract other runners and trigger complaints once the track season

begins. The coach tells the student that although he may practice with the team, he will not be allowed to participate in meets.

**Student with One Hand - Example 3:**

A high school student was born with only one hand and is a student with a disability as defined by Section 504. This student would like to participate on the school's swim team. The requirements for joining the swim team include having a certain level of swimming ability and being able to compete at meets. The student has the required swimming ability and wishes to compete. She asks the school district to waive the "two-hand touch" finish it requires of all swimmers in swim meets, and to permit her to finish with a "one-hand touch." The school district refuses the request because it determines that permitting the student to finish with a "one-hand touch" would give the student an unfair advantage over the other swimmers.

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**Student with diabetes - Example 4:**

An elementary school student with diabetes is determined not eligible for services under the IDEA. Under the school district's Section 504 procedures, however, he is determined to have a disability. In order to participate in the regular classroom setting, the student is provided services under Section 504 that include assistance with glucose testing and insulin administration from trained school personnel. Later in the year, this student wants to join the school-sponsored gymnastics club that meets after school. The only eligibility requirement is that all gymnastics club members must attend that school. When the parent asks the school to provide the glucose testing and insulin administration that the student needs to participate in the gymnastics club, school personnel agree that it is necessary but respond that they are not required to provide him with such assistance because gymnastics club is an extracurricular activity.

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<http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201301-504.html>

## **YOU BE THE JUDGE**

### **Student with Diabetes**

#### **Does student's §504 plan justify delaying an evaluation?**

An Alabama high school student with diabetes transferred to a new district in August 2007. His mother gave the new district an individual health plan from the prior school.

The nurse developed an IHP on her own, and told the 504 coordinator that the parent asked for a plan. The coordinator did not schedule an evaluation, but told the nurse to have the parent call him.

In August 2008, the parent again requested a 504 plan. The district finally developed one in March 2009.

The coordinator later explained that he did not respond to the parent's initial request because she did not contact him, and because she did not report any problems with the IHP. He also said the student was extremely capable, and had no need for either academic accommodations or special equipment.

The parent claimed the district violated Section 504 by failing to evaluate her son and develop a 504 plan sooner.

#### **Does the district's delay violate Section 504? You be the Judge!**

- A. **Yes.** An evaluation must occur within 45 days after a district learns that a student may have a qualifying disability.
- B. **Yes.** The district should have initiated the evaluation process shortly after the student enrolled.
- C. **No.** The student already had an IHP.
- D. **No.** The student had good grades, and therefore did not require a 504 plan.

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## **A Deaf Student**

### **May district bow out of providing interpreter?**

A student who was deaf wanted to attend a ballet performance at his high school. He asked the school district to provide him with a sign language interpreter for the performance. The district said it was the ballet company's responsibility to provide accommodations, and he told the student to ask the company to provide someone to interpret. The student did not make the request.

The district leased its theater and its dressing rooms, to the ballet company, which funded, hosted, and organized the event. The contract and charges were consistent with the district's policies for leasing its facilities. The rental fee was \$1,973 - - the market rate.

The student's parent alleged the district violated Section 504 and the ADA.

### **Was the district's conduct discriminatory?**

- A. **Yes.** The ADA requires districts to furnish aids and services necessary to afford students equal participation in their services, programs and activities.
- B. **Yes.** The district was supporting an entity that discriminated.
- C. **No.** The rental agreement didn't give the company any special treatment and the district didn't assist it other than leasing the space.
- D. **No.** Section 504 and the ADA don't hold districts accountable for the behavior of private entities.

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## **A Student with an Undisclosed Impairment**

A parent sought to participate in an upcoming 504 team meeting. She had attended her son's prior meetings. This time, the district did not invite her. It explained that, given her daily communications with the district, the team would be more productive without her. The assistant principal and school counselor met with the parent to discuss her requested accommodations a month before the team meeting. The team meeting included the AP, the counselor, a nurse and four teachers.

The team discussed all of the parent's requests. Within two weeks, the AP and counselor met with the parent to review what occurred at the meeting. The parent appealed the ensuing 504 plan internally, and the district accommodated all but one of her requests.

The parent filed an OCR complaint, alleging that her exclusion violated Section 504 implementing regulations at 34 CFR 104.35. That regulation requires that placement decisions be made by a group of individuals knowledgeable about the student.

### **Does the parent's exclusion from meeting violate Section 504?**

- A. **Yes.** Section 504 requires that districts always permit parents to participate in 504 team meetings.
- B. **Yes.** By excluding the parent, the district failed to utilize a group of individuals knowledgeable about the student to make the decision.
- C. **No.** The district involved her sufficiently in a decision made by knowledgeable individuals to comply with 504.
- D. **No.** A district is never required to include a parent at a 504 meeting.

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## **A Student with Pancreatitis**

### **Must district evaluate child with health plan?**

The parent of a seventh-grader with pancreatitis enrolled the child in a new district. She said she gave the receiving district medical documentation and asked for a 504 plan. The district disputed both assertions. Nevertheless, it created an “individualized health management plan” addressing the student’s need for a low-fat diet to prevent pain associated with pancreatitis.

The parent also claimed that she gave the district her daughter’s 504 plan from her prior district. She said she sought a new plan that would not only address diet but also would provide extended time to make up missed assignments.

Following enrollment, the student continued to have extended medical-related absences. The district did not dispute that the child’s pancreatic condition caused the absences. But her grades were so good there was not need to evaluate her, it said. Thus, it did not evaluate her or comply with 504’s procedural requirements.

### **Must district evaluate and create a 504 plan for absence-prone student?**

- A. **No.** The district had no reason to suspect a disability, given her grades.
- B. **No.** The parent never requested an evaluation.
- C. **Yes.** The document the district created was not titled “504 plan.”
- D. **Yes.** The district knew that the student had a condition that substantially impaired how her pancreas functioned.

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## **A Student with Hearing Impairment**

### **Does cutting disabled player from team violate 504?**

A student with a hearing impairment played on the girls' basketball team during the 2005-06 school years. The next year, the district gave the head coach permission to make roster changes. The coach was aware of the student's hearing loss. He reduced the size of the team, and held tryouts. During the tryouts, coaches separately scored each player on the same basketball skills. The student came up short on her ball-handling and physical conditioning.

The head coach cut her from the team, even though another player trying out for a different position received a similar score and made the team. That player did not have a disability.

The student's father complained that the district treated his daughter differently than students without disabilities when it cut her. He also asserted that the district change the size of the team in order to eliminate the student. The head coach responded that he changed the size of the team to make it more competitive.

### **Does cutting player with a hearing impairment violate Section 504?**

- A. **Yes.** The fact that a nondisabled athlete received a similar score and made the team indicated that the district's decision was based on the student's disability.
- B. **No.** There was no evidence that any coach considered the student's disability.
- C. **No.** OCR determined that the coach made the right decision because the student had poor ball-handling skills.
- D. **Yes.** The coach knew of the student's disabilities.

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## **A Student with Type I Diabetes**

### **Does nurse's intermittent present mean the school is unsafe?**

A sixth-grader with Type I diabetes depended on insulin and faced life-threatening emergencies if his blood sugar dropped. His 504 plan provided that two employees trained to administer insulin and respond to his health needs – the nurse and principal – would be present at the school during the day. The nurse was not a school every moment, but she was never more than 15 minutes driving distance. Although the principal resigned halfway through the school year, other staff members were “designated diabetic assistant.” They were trained solely to administer glucagon following diabetic shock.

In an OCR complaint, a student's mother argued that the district violated Section 504 by not implementing the student's plan and by failing to provide the medically safe environment he required to receive FAPE.

### **Is constant, immediate availability of care needed for student to receive FAPE?**

- A. No. The 504 plan did not state that a health care provider would be physically present at all times.
- B. No. There were other staff members available to provide the care.
- C. Yes. Only the continual presence of someone trained to give insulin shots would meet the student's medical needs.
- D. Yes. Districts must always have someone present qualified to inject insulin if a student has diabetes.

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- *"Does nurse's intermittent presence render school unsafe for diabetic", (October 2009)**"Does student's diabetics plan justify delaying 504 evaluations?"*, (October 2011)
- *"May district bow out of providing interpreter at ballet for teen?"*, (May 2012)
- *"Must district evaluate child with a health plan, pancreatitis"*, (July 2012)
- *"Is failure to invite parent to 504 team meeting a denial of FAPE"*, (July 2009)
- *"Does cutting player with hearing impairment from team violate 504"*, (January 2009)

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## STUDENT WITH ADHD

- 11th grade
- Diagnosed ADHD; mother's concern is concentration.
- Given preferential seating and extended time
- Except for math, the student generally completed tests and written assignments within the allotted time.
- An "outside" psycho-educational evaluation and Nelson-Deny reading assessment report indicated that the student did not "learn smoothly up to his potential" due to an unspecified learning disorder and significant distractability issues.
- The student's grade point average ranged from 2.85 (first semester) to 3.28 (second semester) during the **2002-2003** school year.
- The student performs academically at the average or above average level.
- The student performed well-above proficiency on state NCLB assessments.
- Performance on bench mark assessments and curriculum based assessments was well above the performance of the average student.
- The Connor's screening protocol (teacher's version) revealed the student was not distractable.
- The student's final grades for the first and second semesters of the **2002-2003** school year (11th grade) were:

Subject	1st Semester	2nd Semester:
English	A	A
- Latin	A	A
- Modern World History	C	A
- Software Application Design	B	B
- Algebra	C	C
- Chemistry	B	A
- Speciality Physical Education	A	A.

- The SST reviewed the student's progress and considered teacher reports, report card grades, private psychological report, as well as a physician's letter concerning the student and other information.

Mental or Physical Impairment(s)? \_\_\_\_\_

Major Life Activity (ies)? \_\_\_\_\_ Major Bodily Function(s)? \_\_\_\_\_

Evidence of a Substantial Limitation? \_\_\_\_\_

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Accommodations? \_\_\_\_\_

## Student with Diabetes

- Sixth Grade student.
- Diagnosed with mild-to-moderate Type II diabetes when she was 6 years old.
- The diabetes compromises her ability to metabolize glucose.
- Lack of glucose metabolism may result in hyperglycemia (too much) or hypoglycemia (too little) which could result in blindness, impaired circulation, cardiovascular disease, etc.
- The student must check blood-sugar levels 3 times or more during the school day.
- The diabetes protocol has been effective; but there have been occasions when the student could not concentrate because blood sugar levels were not within the desired range.
- If blood sugar levels are low, the student must eat a snack designed to adjust the levels.
- Academically the student performs average to above average.
- Her performance on state assessments for reading and math are above minimal proficiency levels.
- The student averaged six absences a year since enrollment in kindergarten.

Mental or Physical Impairment(s)? \_\_\_\_\_

Major Life Activity (ies)? \_\_\_\_\_ Major Bodily Function(s)?  
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Evidence of a Substantial Limitation? \_\_\_\_\_  
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Accommodations? \_\_\_\_\_  
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**Student with Cerebral Palsy**

**Yankton School District v. Schramm  
U.S. Court of Appeals, Eighth Circuit  
August 22, 1996**

- Tracy was enrolled in special education since pre-k.; Orthopedic impaired in 3rd grade.
- Tracy had cerebral palsy.
- Tracy is eighteen years old and will be a senior.
- She writes and types slowly: Her hand strength is weak.
- Her right hand is stiff and lacks dexterity; Tracy’s hand-eye coordination is limited.
- Although she has learned to play the saxophone, she cannot play at certain speeds.
- Her grades were A’s: Tracy studies 4-5 hours a night.
- She was active in the school band, newspaper, and a public speaking program.
- Tracy aspired to attend college: civil engineering & computer science.
- Tracy used a walker for short distances; On occasion Tracy used a wheelchair.
- She cannot function independently in her personal life: needs help in getting dressed, putting on her shoes, pouring beverages, cooking, and cleaning; Tracy cannot drive a car.
- Her last written IEP included only adaptive physical education, physical therapy, and transportation.
- Other accommodations: assistance in moving between classes, getting on and off the school bus, going up and down stairs in the school building, carrying a lunch tray, setting up the saxophone she plays in the band, shortened writing assignments, photocopies of her teachers' class notes, computers for certain classes, special instruction on how to type with one hand, and four separate sets of text books for her home and school.

Mental or Physical Impairment(s)? \_\_\_\_\_

Major Life Activity (ies)? \_\_\_\_\_ Major Bodily Function(s)? \_\_\_\_\_

Evidence of a Substantial Limitation? \_\_\_\_\_

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Accommodations? \_\_\_\_\_

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## Student with Orthopedic Impairment

Perthes is impairment in children characterized by a temporary loss of blood supply to the hip. Without an adequate blood supply, the rounded head of “ball and socket” joint of the hip dies. The area may become intensely inflamed and irritated. Treatment of Perthes may require periods of immobilization or limitations on usual activities. The long-term prognosis is good in most cases. After 18 months to 2 years of treatment, most children return to normal activities without major limitations.

Six year old student.

- Diagnoses: a permanent disability of Perth’s disease of the right hip.
- Physician’s report indicates that the child will have a permanent disability
- Dr. recommended the use of “Buck’s” traction leg support and commode chair with drip arms and a wheelchair walker.
- The physician provided details of surgery.
- During the 91-92 school years, the student required the use of a special hip brace which required transportation and a special aide to help with toileting.
- Transportation was temporary; discontinued after it was no longer needed.
- The physician placed no physical limitations on school activities for the 92-93 school years.
- The school did not see the student exhibit mobility impairment while at school.
- n history of excessive absences.
- No evidence was noted regarding the student’s academic performance.

Mental or Physical Impairment(s) \_\_\_\_\_

Major Life Activity (ies)? \_\_\_\_\_ Major Bodily Function(s)? \_\_\_\_\_

Evidence of a Substantial Limitation? \_\_\_\_\_

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Accommodations? \_\_\_\_\_

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## Student with ADHD & Tourette's Syndrome

- Sixth Grade student.
- Determined to be 504 eligible: 5<sup>th</sup> grade.
- Academically Gifted: fifth grade.
- Diagnoses: Tourette's Syndrome (some head and shoulder movements) and ADHD
- Medications: Adderall, Risperdal, Paxil (not administered at school).
- Legal Guardian – grandparents.
- Currently has 504 accommodations: Rest breaks during the day to relieve tics caused stress. Test modifications on classroom and state tests, small group, extended time and multiple sessions.
- Evaluation data:
  - ☑ Physician's diagnosis and recommendations for extended time, structured assignments and use of assignment planner.
  - ☑ Fifth grade teacher comment: "He has had a very tough time with various authority figures in life and has a tendency to *demand his way.*"
  - ☑ Cognitive Abilities Test Verbal 99<sup>th</sup> %ile.
  - ☑ EOG's for reading and math: IV's in 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, and 6<sup>th</sup> grades.
  - ☑ Grades: kindergarten, S+'s; First all P's; Second all P's, 2.2 reading level; third, all A's, one B in reading; fourth, 5 A's, 1 B & 1C (language); fifth 2 A's, 4 B's, 1 C (science).
  - ☑ The student is now living with mother since the beginning of the school year.
  - ☑ It is reported that the mother does not provide the structure and support that the student experienced while living with his grandmother and grandfather.
  - ☑ The student's current grades are 3 C's (reading, pre-algebra, science), 2 A's & 1 D.
  - ☑ No history of absences.

Mental or Physical Impairment(s)? \_\_\_\_\_

Major Life Activity (ies)? \_\_\_\_\_ Major Bodily Function(s)? \_\_\_\_\_

Evidence of a Substantial Limitation? \_\_\_\_\_

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Accommodations? \_\_\_\_\_

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## Student with Learning Disorder

- 11th grade.
- From an examination provided by parents, the student was reported to have a low average performance (89) IQ; the full scale IQ was in the upper average range (115).
- Woodcock-Johnson achievement test indicated the student reading achievement was average.
- Nelson-Denny Reading Test indicated the student was below average in reading ability.
- The “outside” psychologist diagnosed the student with a learning disorder, not otherwise specified as well as perceptual organization problems.
- The student was given occasional extra time on final examinations.
- Ninth grade: Spanish A's & B's, Honors English A's & B's, Honors US History A's, Honors Geometry B's, Honors Math/Energy A's.
- Tenth grade: Honors Spanish A & B, Honors English A's, AP Govt B & A, Honors Algebra B's, Honors Biology B's, Honors Chemistry B's.
- 11th grade: Honors Spanish B, Honors AP Language A, Honors AP World History B, Pre-calculus A, Honors AP Biology B.

Mental or Physical Impairment(s)? \_\_\_\_\_

Major Life Activity (ies)? \_\_\_\_\_ Major Bodily Function(s)? \_\_\_\_\_

Evidence of a Substantial Limitation? \_\_\_\_\_

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Accommodations? \_\_\_\_\_

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## **Student with Cerebral Palsy & Juvenile Arthritis**

- 11th grade student.
- Prekindergarten through grade 2 as developmentally delayed.
- Parents revoked consent for special education.
- Cerebral Palsy & Juvenile Arthritis.
- Unable to write legibly after 2-3 minutes
- Academically gifted.
- AP US History exam - scored a 4 (scribe).
- Grades A's & B's.
- Honors and Advanced Placement curriculum.
- III & IV above & well above minimal proficiency on NC End of Course tests.
- Participates in school dance team.
- Minimal absences due to medical issues.
- Teachers provide a variety of accommodations.

Accommodations: extended time on writing assignments, lecture notes provided by teachers, alternate formats, e.g., PPT, video presentation, etc. for written reports. Reduced number of problems for math problems

Parents secured outside physical and occupational therapy.

Mental or Physical Impairment? \_\_\_\_\_

Major Life Activity (ies)? \_\_\_\_\_ Major Bodily Function(s)? \_\_\_\_\_

Evidence of a Substantial Limitation? \_\_\_\_\_

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Accommodations? \_\_\_\_\_

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## Student with Peanut Allergy

- 4th grade *student*.
- Severe allergy to peanuts and tree nut products.
- Physician reports, Ingestion of peanuts, tree nuts, peanut or tree nut products, or products which include or have been processed with peanuts or tree nuts cause life threatening symptoms such as difficulty breathing and may lead to an anaphylactic reaction.
- Touching an item which has been touched by someone who has touched peanuts, tree nuts or peanut or tree nut products or products which include peanuts or tree nuts may cause hives or a rash around R.P.'s mouth and at the place of contact.
- Student has had an **allergy specialist** since she was 13 months old.
- The **allergy specialist** verifies that student had a severe peanut allergy.
- **Allergy specialist** acknowledged that exposures could result in life threatening symptoms which would respond only to Epinephrine.
- Other than having student carry an "Epi-Pen" at all times, the **allergy specialist** made no recommendation for accommodations.
- Pediatrician suggested that either ingestion or touching could cause an anaphylactic reaction.
- Pediatrician recommended that all peanut and/or tree nut products be eliminated from R.P.'s diet and that USDA substitution guidelines for protein replacement is followed.

Mental or Physical Impairment(s)? \_\_\_\_\_

Major Life Activity (ies)? \_\_\_\_\_ Major Bodily Function(s)? \_\_\_\_\_

Evidence of a Substantial Limitation? \_\_\_\_\_

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Accommodations? \_\_\_\_\_

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**Student with ADHD**  
**Copperas Cove (TX) Independent School District**

- The student is in the 3rd grade.
- Diagnosed as ADHD in kindergarten.
- Kindergarten academic and behavioral performance satisfactory.
- First grade academic and behavioral performance satisfactory.
- Second grade academic and behavioral performance satisfactory.
- 3rd grade, parents' divorce.
- 3rd grade, military deployment to Middle East.
- 3rd grade - behavioral issues emerge with kicking, spitting and non-compliant behavior toward teachers and students
- 3rd grade - academic performance below expectations
- No history of absences
- Satisfactory performance on curriculum-based assessments.

Mental or Physical Impairment(s)? \_\_\_\_\_

Major Life Activity (ies)? \_\_\_\_\_ Major Bodily Function(s)? \_\_\_\_\_

Evidence of a Substantial Limitation? \_\_\_\_\_

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Accommodations? \_\_\_\_\_

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## Student with a Nut Allergy

- Nine year old with a life-threatening peanut and nut allergy.
- Anxiety disorder related to allergies.
- Prior to current enrollment, the student was enrolled in a private school and was home-schooled during the 2007-2008 SY.
- Currently enrolled in third grade at the District's Elementary School.
- District was put on notice of the student's severe allergy in spring 2008 prior to enrollment in the fall of 2008.
- The evaluation included a review of information: parent provided information; teacher observations: (1) student's social interactions; (2) attention span, (3) and occasions when the student mentioned his peanut allergy.
- Other evaluation data included: (1) observations by the school counselor and (2) school psychologist's review of a 2006 report by a private doctor about the son's anxiety disorder;
- In addition, evaluation information included (1) the frequency of student visits to the school health clinic (none of which related to his peanut and tree nut allergy or his anxiety disorder); (2) research regarding the effectiveness wipes to eliminate the protein that triggers allergic reactions, (3) conversation with the student's treating allergist.
- Academically and instructionally, the student's school performance was acceptable.

Mental or Physical Impairment? \_\_\_\_\_

Major Life Activity (ies)? \_\_\_\_\_ Major Bodily Function(s)? \_\_\_\_\_

Evidence of a Substantial Limitation? \_\_\_\_\_

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Accommodations? \_\_\_\_\_

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## 100 EFFECTIVE EDUCATIONAL ACCOMMODATIONS

1. Provide study carrels
2. Use room dividers.
3. Provide headsets to muffle noise.
4. Seat student away from doors/windows.
5. Seat near model (student or teacher).
6. Provide time-out area.
7. Rearrange student groups (according to instructional needs, role models, etc.).
8. Group for cooperative learning.
9. Vary working surface (e.g., floor or vertical surface such as blackboards).
10. Simplify/shorten directions.
11. Give both oral and written directions.
12. Have student repeat directions.
13. Have student repeat lesson objective.
14. Ask frequent questions.
15. Change question level.
16. Change response format (e.g., from verbal to physical; from saying to pointing).
17. Provide sequential directions (label as first, second, etc.).
18. Use manipulatives.
19. Alter objective criterion level.
20. Provide functional tasks (relate to student's environment).
21. Reduce number of items on a task.
22. Highlight relevant words/features.
23. Use rebus (picture) directions.
24. Provide guided practice.
25. Provide more practice trials.
26. Increase allocated time.
27. Use a strategy approach.
28. Change reinforcers.
29. Increase reinforcement frequency.
30. Delay reinforcement.
31. Increase waits time.
32. Use physical warm-up exercises.
33. Use specific rather than general praise.
34. Have a peer tutor program.
35. Provide frequent review.
36. Have student summarize at end of lesson.
37. Use self-correcting materials.
38. Adapt test items for differing response modes.
39. Provide mnemonic devices.
40. Provide tangible reinforcers.
41. Use behavioral contracts.
42. Establish routines for handing work in, heading papers, etc.
43. Use timers to show allocated time.
44. Teach self-monitoring.
45. Provide visual cues (e.g., posters, desktop number lines, etc.).
46. Block out extraneous stimuli on written material.
47. Tape-record directions.
48. Tape-record student responses.
49. Use a study guide.
50. Provide critical vocabulary list for content material.
51. Provide essential fact list.
52. Use clock faces to show classroom routine times.
53. Use dotted lines to line up math problems or show margins.
54. Provide transition directions.
55. Assign only one task at a time.
56. Provide discussion questions before reading.
57. Use word markers to guide reading.
58. Alter sequence of presentation.
59. Enlarge or highlight key words on test items.
60. Provide daily and weekly assignment sheets.
61. Post daily/weekly schedule.
62. Use graph paper for place value or when adding/subtracting two digit numbers.
63. Provide anticipation cues.
64. Establish rules and review frequently.
65. Teach key direction words.
66. Use distributed practice.
67. Provide pencil grips.
68. Tape paper to desk.
69. Shorten project assignments into daily tasks.
70. Segment directions.
71. Number (order) assignments to be completed.
72. Change far-point to near-point material for copying or review.
73. Put desk close to blackboard.
74. Incorporate currently popular themes/characters into assignments for motivation.
75. Repeat major points.
76. Use physical cues while speaking (e.g., 1, 2, 3, etc.).
77. Pause during speaking.
78. Use verbal cues (e.g., "Don't write this down," "This is important").
79. Change tone of voice, whisper, etc.
80. Use an honor system.

81. Collect notebooks weekly (periodically) to review student notes.
82. Reorganize tests to go from easy to hard.
83. Color code place value tasks.
84. Use self-teaching materials.
85. Do only odd or even numbered items on a large task sheet.
86. Use a primary typewriter or large print to create written material.
87. Provide organizers (e.g., cartons/bins) for desk material.
88. Teach varied reading rates (e.g., scanning, skimming, etc.).
89. Provide content/lecture summaries.
90. Use peer-mediated strategies (e.g., “buddy system”).
91. Call student’s name before asking a question.
92. Use extra spaces between lines of print.
93. Color code materials/directions.
94. Use raised-line paper.
95. Provide calculators.
96. Circle math computation sign.
97. Use hand signals to cue behavior (e.g., attention, responding).
98. Establish a rationale for learning.
99. Use advance organizers.
100. Teach students to develop their own learning strategies.

Adapted from [Guidance Document](#), Section 504 of the 1973 Rehabilitation Act, Supplemental Information, Wyoming Department of Education, 2010

## Resources

- Section 504 Regulations - <https://www2.ed.gov/policy/rights/reg/ocr/edlite-34cfr104.html>
- Questions and Answers on Report Cards and Transcripts For Students with Disabilities Attending Public Elementary and Secondary Schools - <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-qa-20081017.html>
- Protecting Students With Disabilities - <http://www2.ed.gov/about/offices/list/ocr/504faq.html>
- Questions and Answers on the ADA Amendments Act of 2008 for Students with Disabilities Attending Public Elementary and Secondary Schools - <http://www2.ed.gov/about/offices/list/ocr/docs/dcl-504faq-201109.html>
- A Comparison of ADA, IDEA, and Section 504 - <http://dredf.org/advocacy/comparison.html>
- Students with Disabilities Preparing for Postsecondary Education: Know Your Rights and Responsibilities - <http://www2.ed.gov/about/offices/list/ocr/transition.html>

**§504**  
of the  
Rehabilitation  
Act of 1973

## QUESTIONS AND ANSWERS



I'm now going to open the floor to questions!

Cartoon used with  
permission from CSL  
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