

UNDERSTANDING AND COMPARING THE INDIVIDUALS WITH DISABILITIES ACT & SECTION 504 OF THE REHABILITATION ACT

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I. IDEA IS SPECIAL EDUCATION

Originally enacted in 1975, the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400, *et seq.*, now covers approximately five million children with disabilities in the country and has been successful in providing disabled children access to a free appropriate public education ("FAPE"). The general purpose of IDEA is to provide federal financial assistance to state and local education agencies to guarantee special education and related services to eligible children with disabilities.

IDEA regulations specifically state that the Act's purpose is:

(A) to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living;

(B) to ensure that the rights of children with disabilities and parents of such children are protected . . .¹

IDEA, therefore, is a programmatic statute that requires schools to provide specific, individualized special educational programs to students identified as having one of twelve (12) specific disabilities² that impact on the students' ability to be educated if schools wish to receive federal funding. Such programs must be free of charge and, to the extent possible based on the students' disabilities, provided in the regular school environment.

II. SECTION 504 OF THE REHABILITATION ACT IS NON-DISCRIMINATION

Section 504 of the Rehabilitation Act of 1973 prohibits discrimination on the basis of disability. Section 504 provides, in relevant part:

No otherwise qualified individual with a disability shall, solely by reason of his/her disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under, any program or activity receiving federal financial assistance . . .³

¹ 20 U.S.C. § 1400

²"Disability" for purposes of the IDEA includes: mental retardation, a hearing impairment (including deafness), a speech or language impairment, a visual impairment (including blindness), serious emotional disturbance (referred to in this part as emotional disturbance), orthopedic impairment, autism, traumatic brain injury, another health impairment, a specific learning disability, deaf-blindness, or multiple disabilities, and who, by reason thereof, needs special education and related services.

³ 29 U.S.C. 794(a).

Although this outline focusses on Section 504's application to students, the anti-discrimination prohibition of Section 504 also applies to teachers, staff, parents of students, and even to the general school district population.

During the first few years following the enactment of Section 504, most school districts viewed the main thrust of the law as requiring appropriate physical access to public buildings. As a result, many ramps were installed, elevators were added in multi-level buildings, curbs were cut and bathroom stalls were enlarged.

Two years after Section 504 was passed, Congress enacted what has now become the Individuals with Disabilities Education Act (the "IDEA").⁴ While Section 504 and the IDEA differ in scope and detail, the two laws have many similarities and often provide overlapping coverage. This often creates confusion between the two laws.

III. NUTSHELL COMPARISON BETWEEN IDEA AND SECTION 504

1. Section 504 is a broad anti-discrimination statute, designed to ensure that covered individuals have equal access to all programs offered by a school district. The IDEA, however, provides for specialized programming and services that may go well beyond the normal course offerings of the general curriculum.
2. A significant difference between Section 504 and the IDEA is in the area of eligibility for coverage. Every student with a disability who is eligible for coverage under the IDEA is automatically covered under Section 504. The opposite, however, is not always true. Students may be covered under Section 504, but not be eligible for special education and related services under the IDEA. This is because Section 504 is much broader than the IDEA and consequently covers a larger number of students.
3. In order to be eligible under the IDEA, a student must fall within one or more of the categories enumerated in that statute **and** must also require special education and related services because of the disability. By contrast, Section 504 does not enumerate specific categories of disabilities or require that the student need special education or related services. Instead, Section 504 broadly defines a disabled person as an individual with "a physical or mental impairment which substantially limits one or more major life activities."⁵ Section 504 also covers students who are regarded as, or who have a record of, having such impairment.⁶ For all of the foregoing reasons, the number of students eligible for coverage under Section 504 is larger than that under the IDEA.

⁴ 20 U.S.C. 1400, *et seq.*

⁵ 34 C.F.R. 104.3. (caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working).

⁶ *Id.*

4. Like the IDEA, Section 504 mandates child find by requiring that school districts locate, identify and evaluate all children with disabilities residing within their jurisdictions. The evaluation procedures under Section 504 are generally similar to those set out in the IDEA. For example, like the IDEA, Section 504 does not specify a time period within which an initial evaluation must be completed. Therefore, under both Section 504 and the IDEA, a district must conduct an initial evaluation as soon as reasonably possible after it recognizes that a student may be eligible for coverage, and without unreasonable delay. A substantive difference between Section 504 and the IDEA concerning evaluations, however, is that unlike the IDEA, Section 504 does not explicitly give parents the right to an independent educational evaluation (IEE) at public expense.
5. Like the IDEA, Section 504 requires school districts to provide every eligible student with a FAPE. A significant difference between the FAPE requirements of the two laws, however, is that the IDEA describes FAPE as special education and related services provided in accordance with an individualized education program (IEP). The regulations implementing Section 504, on the other hand, describe "appropriate education," as:
 1. [r]egular **or special education** and related aids and services that . . . are designed to meet the individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met.⁷ (emphasis added)
 - ii. Therefore, FAPE under Section 504 may consist of either regular or special education and related aids and services as implemented by any appropriate means, including, but not limited to, an IEP.
6. Section 504's differing FAPE requirement stems from the fact that, unlike the IDEA, Section 504 is based upon a general prohibition against disability discrimination. A fundamental principle of this prohibition, however, is that nondiscrimination involves more than simply providing disabled students with an education that is identical to that provided to nondisabled students. Instead, the unique and particular needs of each eligible student with a disability must be considered in the development of an appropriate educational program. Therefore, in practice, the substantive requirement to provide FAPE to eligible students under Section 504 is virtually identical to that of the IDEA, with the exception that Section 504 does not require an IEP.

⁷ 34 C.F.R. 104.33(b).

7. Both Section 504 and the IDEA require that FAPE be provided in the least restrictive environment (LRE), and the standards under both are virtually identical. This means that both laws strongly favor the inclusion of children with disabilities in regular education programs. Unlike the IDEA's LRE provisions, Section 504 does not contain an express continuum of placements requirement. Nonetheless, the regulations implementing Section 504 state that eligible students must be educated "with persons who are not handicapped to the maximum extent appropriate" and every such student shall be placed "in the regular educational environment . . . unless it is demonstrated . . . that the education of the person in the regular environment with the use of supplementary aids and services cannot be achieved satisfactorily."⁸ Therefore, in practice, the LRE mandate of Section 504 should be considered identical to that of the IDEA.
8. A substantive language difference in the FAPE requirements under the two laws is that Section 504 does not expressly require the services provided by a district meet the standards of the state educational agency. Nonetheless, districts have been found to be in violation of Section 504 where the programming and services provided did not meet state educational standards.⁹ Therefore, districts are well-advised to ensure that programs and services provided under both Section 504 and the IDEA meet the standards of the state department of education. Districts should be aware, however, that Connecticut hearing officers have found non-approved private special education facilities to be "appropriate" placements for students, even though the private school indicated that it did not follow IDEA procedures and practices. See, e.g., *Student v. West Hartford Board of Education*, Dec. No. 05-257 (Feb. 3, 2006).
9. With regard to procedural safeguards, the requirements of the IDEA and Section 504 are similar. However, those imposed by Section 504 are generally considered less rigorous than those imposed by the IDEA. For this reason, the regulations implementing Section 504 provide that compliance with the IDEA's procedural safeguards is one means of complying with the procedural safeguards of Section 504. Therefore, if a district has complied with all of the procedural safeguards required by the IDEA, it will have necessarily complied with all of the procedural requirements of Section 504.

⁸ 34 C.F.R. 104.34(a).

⁹ See, e.g., *Granite (UT) School District*, 16 EHLR 1217 (OCR 1990) (school district failed to provide FAPE under Section 504 based upon, among other deficiencies, a lack of properly certified personnel).

10. Another significant difference between the two laws is that, unlike the IDEA, Section 504 does not contain a "stay-put" provision. Section 504 does, however, require districts to conduct a reevaluation prior to any "significant change of placement."¹⁰ In light of Section 504's absence of stay-put, this requirement provides parents with substantial protection.

11. In the area of discipline, the Office of Civil Rights (OCR) has not adopted the IDEA's 1997 or 2004 amendments. However, disciplining students under Section 504 has traditionally been treated by OCR and the courts in essentially the same manner as disciplining students under the IDEA. One major difference, however, concerns disciplining disabled students for drug and/or alcohol use. Students covered under Section 504 may be disciplined for drug or alcohol use in the same manner as their nondisabled peers because Section 504 does not protect **current** users. Although alcoholism and drug addiction are not covered disabilities under the IDEA, students who are current users are not disqualified from coverage under the IDEA if they otherwise meet IDEA's requirements.

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¹⁰ 34 C.F.R. 104.35(a).