



2009 NYSSBA Annual Convention

October 17, 2009

Section 504 and Special Education Students

Presentation by

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A. What is Section 504?

Section 504 of the Rehabilitation Act of 1973 is a federal nondiscrimination statute which offers protection to persons with disabilities. Unlike the Individuals with Disabilities Education Act (“IDEA”), Section 504 is not an affirmative action statute. Rather, it aims only to “level the playing field” by providing equal opportunity and access.

B. Which Entities are Subject to Section 504’s Requirements?

Any entity that receives federal funding is subject to Section 504’s requirements. In nearly all instances, public school districts receive federal funding and are therefore subject to Section 504. In some instances, nonpublic schools receive federal funding and are therefore subject to Section 504, but their requirements under Section 504 are less stringent than those governing public schools. A nonpublic school subject to Section 504 has a general duty to accommodate students and employees with disabilities.

C. Enforcement of Claims Under Section 504

Claims alleging a violation of Section 504 may be raised in a federal lawsuit (after the student exhausts his administrative remedies by requesting a due process hearing) or submitted in a complaint to the United States Department of Education’s Office for Civil Rights (“OCR”).

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D. General Principles

- (i) *Purpose* -- The purpose of Section 504 is to enable students with disabilities to participate in school in the regular education setting. If a student cannot be educated in the regular education setting, even with accommodations and/or related services, then the district should strongly consider classification under the IDEA, not Section 504. As such, Section 504 students should not be placed in special classes, such as, for example, a 15:1+1 or 8:1+1 setting.
- (ii) *Services* -- Consistent with its goal of enabling students to participate in the regular education setting, Section 504 permits the following range of services: (a) an education in a regular classroom setting, (b) an education in a regular classroom setting with supplementary services, and/or (c) special education and related services designed to enable the student to participate in a regular classroom setting.
- (iii) *Modification of Curriculum Prohibited* -- Section 504 plans usually call for accommodations in a regular education classroom. Section 504 does not call for the lowering of academic standards or the modification of the student's program or curriculum. For example, if a Math class is assigned 30 homework problems, each one more difficult than the next, an appropriate Section 504 accommodation may be the assignment of all even or odd number questions, as opposed to the first 15 questions, so the student will be exposed to questions at all difficulty levels. If curriculum modifications are necessary, the district should strongly consider classification under the IDEA.

E. The Impact of the ADA Amendments Act of 2008

Section 504 is closely related to another federal nondiscrimination statute, the Americans with Disabilities Act of 1990 ("ADA"). The jurisdiction of the ADA is more broad than that of Section 504 as the ADA governs entities that receive federal funding as well as those that do not. The ADA Amendments Act of 2008 ("Amendments Act"), which went into effect on January 1, 2009, greatly expanded the scope of the ADA, and ultimately Section 504.

- (i) *Broader Coverage Under the ADA* -- The Amendments Act contains a declaration that the ADA's definition of disability "shall be construed in favor of broad

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coverage of individuals ... to the maximum extent permitted by the terms of this Act.”

- (ii) *Overturns U.S. Supreme Court Decisions* -- The Amendments Act expressly rejects several recent rulings by the United States Supreme Court which made it more difficult for claimants to be eligible for relief under the ADA.
- (iii) *The “Conforming Amendment”* -- Many of the ADA’s rules and requirements also apply to Section 504. The Amendments Act contains a provision known as the “conforming amendment,” which states that the amendments to the ADA also apply to Section 504.
- (iv) *Impact on Corresponding Regulations* -- Consistent with the “conforming amendment,” the federal government plans to amend the Section 504 regulations to reflect the changes in the Amendments Act. In the meantime, the Section 504 regulations, which were promulgated years before the Amendments Act, remain in effect. But OCR has stated that it will enforce the Section 504 regulations consistent with the Amendments Act.

F. Eligibility for Services Under Section 504

The IDEA applies what has been described as the categorical approach to determining eligibility. Eligibility under the IDEA is based on the following thirteen defined classifications: (i) autism, (ii) deafness, (iii) deaf-blindness, (iv) emotional disturbance, (v) hearing impairment, (vi) learning disability, (vii) mental retardation, (viii) multiple disabilities, (ix) orthopedic impairment, (x) other-health impairment, (xi) speech or language impairment, (xii) traumatic brain injury, or (xiii) visual impairment including blindness. *See* 8 N.Y.C.R.R. § 200.1(zz)(1-13). Under each classification, the student’s disability must adversely affect the student’s educational performance.

In contrast, Section 504 uses a functional classification model. Eligibility under Section 504 is significantly broader than under the IDEA.

- (i) *Who is eligible for services under Section 504?* A student is considered to have a disability under Section 504 if he:
 - (a) has a physical or mental impairment that substantially limits one or more of his major life activities,

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- (b) has a record of such an impairment, or
- (c) is regarded as having such an impairment. *See* 34 CFR 104.3.

For years, it has been well accepted that students eligible for services under the IDEA are also eligible under Section 504. But recently, the United States Court of Appeals for the Tenth Circuit (which does not have jurisdiction in New York) ruled that IDEA-eligible students are not automatically eligible under Section 504. *See Ellenberg v. New Mexico Military Institute*, No. 08-2112, 2009 U.S. App. LEXIS 15595 (10th Cir. July 10, 2009). In that case, the court determined that in some instances, an IDEA-eligible student may not have a condition that substantially limits a major life activity. Based on that rationale, the court determined that there was no evidence in the record that the student's oppositional defiance disorder, which rendered her eligible for an IEP under the IDEA, also substantially limited a major life activity which is required for Section 504 eligibility. The court noted, however, that in most instances, IDEA-eligible students will also be eligible under Section 504.

(ii) *A Quick Note on "Having a Record of an Impairment" or "Being Regarded as Having an Impairment"*

Despite the above definition, the Amendments Act clarified that a student who has a record of an impairment or is regarded as having an impairment is not automatically entitled to a Section 504 plan, services or accommodations. To be eligible for classification under Section 504, a student must have an impairment that substantially limits a major life activity. A student who has a record of an impairment or is regarded as having an impairment is, however, entitled to protection under Section 504's anti-discrimination and provisions. As such, a student mistakenly perceived as having diabetes is not entitled to a Section 504 plan, services and accommodations based on his perceived condition, but he is protected from discrimination based on his perceived condition.

(iii) *Major Life Activities*

When the ADA went into effect in 1990, the statute did not define "major life activities." The same is true for the Section 504 statute, which went into effect in 1973. But the United States Department of Education developed regulations for

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the implementation of Section 504. Those regulations provided the following examples of major life activities:

- (a) Walking,
- (b) Talking,
- (c) Seeing,
- (d) Hearing,
- (e) Speaking,
- (f) Breathing,
- (g) Learning,
- (h) Working, and
- (i) Performing manual tasks. *See* 34 CFR 104.3(j)(2)(ii).

In a very significant development, the Amendments Act has statutorily expanded the definition of “major life activities” in the ADA and Section 504 to include:

- (a) Caring for oneself,
- (b) Performing manual tasks,
- (c) Seeing,
- (d) Hearing,
- (e) Eating,
- (f) Sleeping,
- (g) Walking,
- (h) Standing,
- (i) Lifting,
- (j) Bending,
- (k) Speaking,
- (l) Breathing,
- (m) Learning,
- (n) Reading,
- (o) Concentrating,
- (p) Thinking,
- (q) Communicating, and
- (r) Working. *See* 42 U.S.C. § 12102(2)(A).

The Amendments Act has also added a new group of major life activities referred to as “major bodily functions” which include:

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- (a) Functions of the immune system,
- (b) Normal cell growth,
- (c) Digestive,
- (d) Bowel,
- (e) Bladder,
- (f) Neurological,
- (g) Brain,
- (h) Respiratory,
- (i) Circulatory,
- (j) Endocrine, and
- (k) Reproductive functions. *See* 42 U.S.C. § 12102(2)(B).

(iv) *Mitigating Measures*

In the landmark case of *Sutton v. United Air Lines*, 527 U.S. 471, 119 S.Ct. 2139 (1999), the United States Supreme Court ruled that corrective measures that eliminate or reduce an individual's impairment should be considered when determining whether a disability substantially limits a major life activity. This mitigation rule applied to the ADA and Section 504, and was in effect for nearly ten years.

The Amendments Act effectively overruled the *Sutton* decision. The Amendments Act expressly directs that disability determinations are to be made without considering mitigating measures such as medication, assistive technology, or mobility devices. Similarly, the ameliorative effects of such mitigating measures may not be considered. There is one exception to this prohibition – ordinary eyeglasses and contact lenses may be considered.

Is a health plan a mitigating measure? Yes. In March 2009, after the Amendments Act went into effect, OCR ruled that health plans, nursing plans and safety plans, which are very common in school, are mitigating measures under Section 504. *See Matter of North Royalton (OH) City School District*, Office for Civil Rights, Midwestern Division, Cleveland, Ohio (Mar. 30, 2009), 109 LRP 32541. As such, a Section 504 team should not consider if a student has such a plan, or more specifically the ameliorative effects of such a plan, when assessing whether the student is eligible for a Section 504 plan. For example, if a student with diabetes has a nursing plan for the provision of insulin, that plan should not disqualify him from a Section 504 plan, even if the nursing plan is meeting all of

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his needs. Notably, OCR did not ban the use of health plans, nursing plans or safety plans; but going forward, they should be used in conjunction with a Section 504 plan (if the student is in fact eligible for a 504 plan).

As a result of the prohibition against considering mitigating measures, a greater number of students will be eligible for a Section 504 plan. But some of these “newly eligible” Section 504 students will require only a nominal amount of Section 504 services because their disabilities have been mitigated, to some extent, by their health plan, nursing plan or safety plan.

- (v) *The Most Difficult Judgment Call -- Classification Under the IDEA as Learning Disabled vs. Classification Under Section 504 Based on an Impairment that Substantially Limits the Major Life Activity of Learning*

This is the most difficult judgment call for school personnel. Unfortunately, there is no general rule or magic formula to determine whether a student experiencing learning difficulties should be classified under the IDEA or Section 504. Following the IDEA Reauthorization in 2004, the rules governing the learning disability classification under the IDEA have become much more stringent, with a greater emphasis on the “response to intervention” approach and assurances that the student’s underachievement is not due to the lack of appropriate instruction in reading or math. No such requirements exist under Section 504. When determining which classification route to pursue for a student experiencing learning disabilities (Section 504 or IDEA), district personnel should ask the following two questions, which are premised on the two most fundamental Section 504 principles: (i) Will the student be able to succeed in the regular education setting, even with related services and/or accommodations? (ii) Will the student be able to succeed in school without program or curriculum modifications? If the answer to either of those inquiries is “no,” then the district should, at least initially, consider pursuing classification under the IDEA.

G. Illegal Drugs and Alcohol

- (i) *Illegal Drugs* -- Generally, an addiction to an illegal drug is not a disability under Section 504. The one exception to this rule is that an individual currently participating in a rehabilitation program may be eligible for classification under Section 504.

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- (ii) *Alcohol* -- An individual dependent on alcohol is eligible for classification under Section 504.
- (iii) *Student Discipline* -- Section 504 allows school districts to discipline Section 504 students using drugs or alcohol to the same extent as students without disabilities.

H. Temporary Disabilities

Under certain circumstances, a student with a temporary disability may be eligible for a Section 504 plan.

(i) *The Previous Standard*

Prior to the Amendments Act, OCR ruled that Section 504 may cover a temporary disability if it results in the substantial limitation of a major life activity “for an extended period of time.” OCR directed that when applying this standard, a Section 504 team should “not [consider] whether the impairment is temporary or permanent ... [but] whether the impairment substantially limits one or more major life activities.” *Letter to Wright*, (OCR 1993).

The most helpful advice previously provided by OCR on this topic was as follows -- each determination regarding a temporary disability should be made on a case-by-case basis, based on the “nature, severity, duration or expected duration and the potential long term impact resulting from the impairment.”

(ii) *The New Standard Under the Amendments Act*

OCR’s previous standard of review gave Section 504 teams considerable flexibility when determining whether a student was eligible for a Section 504 plan based on a temporary disability. But in the Amendments Act, Congress gave more explicit guidance. Under the Amendments Act, a temporary impairment does not constitute a disability unless it results in a substantial limitation of one or more major life activities for an extended period of time. The Amendments Act adds, however, that an impairment with *an actual or expected duration of six months or less is a “transitory impairment”* which does not render the individual eligible for services under the ADA or Section 504. Under the Amendments Act, a student with a minor or transitory impairment is not “regarded as disabled” under the ADA or Section 504.

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