

An Overview of Section 504's Dynamics and Characteristics, and Categories of Obligations

Prepared by:
James P. Evans
Barclay Damon, LLP



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INTRODUCTION

Section 504 of the Rehabilitation Act of 1973, as supplemented by regulations of the U.S. Department of Education (the “Department”)¹ is one of three federal statutes that govern the education of students with disabilities. It specifically applies to schools receiving federal financial assistance. The Americans with Disabilities Act (42 U.S.C. §§ 12102, *et seq.*) (the “ADA”) prohibits discrimination against students with disabilities, and it applies to public and private schools, regardless of whether they receive federal funds, except for religious schools. In addition, the Individuals with Disabilities Education Improvement Act (“IDEA”) governs public schools and requires them to identify, evaluate, and provide special education and related services to students with disabilities.² Under IDEA, public schools must provide students with disabilities with an individualized education plan (“IEP”) that provides “an educational program reasonably calculated to enable [the] child to make progress appropriate in light of the child’s circumstances.” *Endrew F. v. Douglas County School Dist.*, 137 S. Ct. 988, 1000 (Mar. 22, 2017). This paper will focus on requirements imposed on school districts by Section 504 and options available to school districts in regard to such obligations.

A. An Overview of Section 504’s Dynamics and Characteristics

Section 504 is often described as a civil rights statute. It prohibits federally-funded programs and institutions from engaging in or permitting discrimination against individuals with disabilities who are qualified to participate in an institution’s programs based on their disability. The Rehabilitation Act required federal agencies to issue regulations that enforce the requirements of Section 504. Its regulations impose a myriad of obligations on public

¹ Section 504 is codified at 29 U.S.C. §§ 791, *et seq.*, and the regulations of the Department are found at 34 C.F.R. Part 104 (collectively, “Section 504”).

² IDEA is codified at 20 U.S.C. §§ 1401, *et seq.*

elementary and secondary schools, as well as private schools receiving federal funds (*albeit* a much lower standard) and post-secondary schools.³

While it is the precursor of IDEA, its scope is much broader than IDEA, although it imposes many of the same obligations on schools relative to required programs and processes. Section 504 requires public schools to provide similar processes, compared to IDEA, but it permits greater flexibility than IDEA in the form such process takes.

B. Categories of Section 504's Obligations

Section 504 provides the following obligations on recipient K-12 schools:

↳ ***Obligations for Child Find, Evaluation, and Education Plans.*** Section 504 requires public K-12 school districts to adopt and implement child-find policies and procedures that will allow it to identify students that are suspected of having a disability and to evaluate such students within a reasonable period of time using appropriate evaluations to ascertain the extent of any impairment. Public school districts must provide students with disabilities with such special education, related services, and other accommodations that are necessary for the child to receive an “appropriate education” and access the school’s educational and extracurricular programs, as appropriate.

↳ ***Supervising and Implementing the Educational Plans.*** Once a school has designed an education plan for a student, it must supervise the plan’s implementation to ensure it is implemented appropriately. This requires the administration to disseminate the plan to those faculty and staff members who have a role in carrying it out – or at least providing such individuals with the portions for which they are responsible. The administration must also

³ Part 104 defines a recipient as “any state or its political subdivision, any instrumentality of a state or its political subdivision, [or] any public or private agency, institution, organization, or other entity, or any person to which Federal financial assistance is extended directly or through another recipient[.]” 34 C.F.R. § 104.3(f).

ensure that the individuals who must execute the plan understand how they are to do so and what is required. Finally, administrators must follow-up with such individuals to ensure they correctly understand what the education plan requires them to do and that they are, in fact, implementing it. Failure to properly supervise regarding such issues may lead to a finding of non-compliance by the Department's Office for Civil Rights ("OCR").

↪ ***Ensuring Access to Extracurricular Activities.*** Section 504 requires recipient schools to provide students with disabilities with an equal opportunity to participate in extracurricular programs that are appropriate for each such student. Recent guidance from the Department underscores this obligation and the importance that the Department attaches to it.⁴

↪ ***Re-evaluation of Student 504 Plans and Needs.*** Public school systems providing K-12 programs must also re-evaluate students who have been identified as students with disabilities under Section 504 to ensure they have a current understanding of each student's disability and needs. Re-evaluations must occur at appropriate intervals and before any significant change in a disabled student's placement – including disciplinary suspensions. A public school district can comply with this requirement of Section 504 by following the re-evaluation requirements of IDEA.

↪ ***Due Process Mechanisms.*** Section 504 requires public school districts to provide due process policies that provide parents and students with disabilities an appropriate hearing and appeal process to resolve disputes regarding the services provided to a student or the student's placement. In this regard, Section 504 affords school districts a little more leeway than IDEA, which allows districts to vary from the processes mandated by IDEA if they prefer.

⁴ U.S. Dep't of Educ., Office for Civil Rights, Dear Colleague Letter, dated January 25, 2013, available at <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201301-504.pdf> (August 28, 2017).

Alternatively, school districts can comply with this requirement by making their IDEA due process policies applicable to students classified as students with disabilities under Section 504.

➡ ***Cause of Action for Money Damages.*** Section 504 provides students with disabilities and their parents with a private cause of action for money damages for discrimination prohibited by Section 504 and failure to provide a free appropriate public education (“FAPE”). The Supreme Court recently held that parents of students classified under IDEA must first exhaust the administrative remedies under IDEA as a condition precedent to commencing a lawsuit under Section 504 when the “gravamen” of the parents’ claim is an issue that can be addressed by IDEA’s administrative hearing process. *Fry v. Napoleon Cmty. Schools*, 137 S. Ct. 743, 746 (Feb. 22, 2017).

In addition, Section 504 provides a cause of action for students with disabilities who have been subjected to discrimination or harassment sufficiently severe or pervasive to interfere with his/her ability to access a school’s educational or extracurricular programs. Like Title IX of the Education Amendments of 1972, this cause of action requires that an appropriate school officer (*i.e.*, one with the duty and authority to take corrective action) had actual knowledge of such discrimination or harassment and showed deliberate indifference in its regard. This potential liability could be significant, and recipient schools are well advised to be vigilant for such problems and, should they be identified, respond in a credible manner to stop the discrimination.

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