

# Developing the 504 Plan for a Qualified Disabled Student

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## **Developing the 504 Plan for a Qualified Disabled Student**

Once a 504 Committee determines that a student is disabled as that term is defined under Section 504, it must develop an education plan for the student that allows the student to make educational progress. If the student is qualified for services under IDEA, the school district need only provide and comply with an IEP, which will satisfy its obligations under Section 504.<sup>1</sup>

### **1. *An Appropriate Education***

According to the regulations, “an appropriate education” in this context means:

Regular or special education and related aids and services that (i) are designed to meet individual educational needs of the handicapped persons as adequately as the needs of nonhandicapped persons are met and (ii) are based on adherence to procedures that satisfy the requirements of §§ 104.34, 104.35, 104.36.<sup>2</sup>

Thus, a disabled student could have a viable discrimination claim even if his/her academic performance is satisfactory if the student can show that the district did not provide him/her with equal access to its educational and/or extracurricular programs.<sup>3</sup> School districts can satisfy their obligation in this regard by ensuring that students with disabilities are provided meaningful access to its academic and extracurricular programs, which will not necessarily require a substantial change of such programs.<sup>4</sup> Nor must the school district provide services to allow a disabled student to attain the best education possible or to maximize the student’s potential. Rather, it is sufficient to provide special education and related services necessary to enable the student to realize educational benefit.

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<sup>1</sup> Of course, if a student is subjected to a hostile educational environment or is otherwise discriminated against because of his or her disability, the school district is obligated to take reasonable action to relieve the student of such harassment. Failure to do so would likely violate Section 504’s prohibition against discriminating against a qualified individual based solely on the person’s disability.

<sup>2</sup> 34 C.F.R. § 104.33(b)(1).

<sup>3</sup> See, e.g., *J.D. v. Pawlet School Dist.*, 224 F.3d 60, 70 (2d Cir. 2000).

<sup>4</sup> *Id.*

Typical 504 Plans provide students with an “appropriate education” by providing special education within general education classes (with or without related aids and services) or in separate programs or classrooms for a portion or all of the school day. Special education programs may include specially-designed instruction provided in classrooms, in the student’s home, or at another facility. It may be accompanied by related services, such as speech/language therapy, occupational or physical therapy, psychological counseling, and/or medical diagnostic services, as dictated by the needs of the child.

## **2.     *Section 504 Mandates Mainstreaming***

Section 504 mandates that public school districts educate disabled students with nondisabled students to the maximum extent possible. A school district’s removal of a student from regular education bears the burden of demonstrating that the student’s needs cannot be met satisfactorily with the use of supplemental aids and services in the regular education environment.<sup>5</sup> If necessary, school districts must provide disabled students with specific related aids and services to ensure an appropriate educational setting. Supplementary aids may include interpreters for students who are deaf, readers for students who are blind, and equipment to make physical accommodations for students with mobility impairments.<sup>6</sup>

**Practice Tip:** Peanut allergies are now common in schools. Schools sometimes promise a “peanut-free” classroom or school building, which is virtually impossible to guarantee. Schools should avoid such promises and adhere to a reasonable accommodation plan instead. The OCR has recently decided schools are not obligated to provide a “peanut-free” environment or to prohibit parents from bringing homemade baked goods into the school for special events. (*Cascade School Dist.*, 37 IDELR 300 (OR 2002)). In *Cascade*, the school district developed a plan with accommodations, like having teachers post a sign reminding students to wash their hands if they handle nut products. Providing such reasonable accommodations is the better practice, compared to over-promising.

special education, and/or related services or aids or other accommodations. Moreover, the

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<sup>5</sup> 34 C.F.R. § 104.34.

<sup>6</sup> Free Appropriate Public Education for Students With Disabilities, *supra*, pp. 5-6.

quality of education services provided to disabled students must be equal to the quality of services given to nondisabled students.<sup>7</sup> Accordingly, teachers of disabled students must be trained in the instruction of individuals with disabilities and facilities must be comparable. Similarly, disabled students must have comparable and adequate materials and equipment.

In addition, it is a cornerstone of Section 504 that students receive equal access to a school district's educational programs and extracurricular programs and activities. So, school districts must not permit students with disabilities to be excluded from participating in nonacademic services and extracurricular activities solely because of their disabilities. Rather, they must provide such students with a reasonable opportunity to participate in such programs and services equal to that provided to nondisabled students, to the extent it is reasonable to do so. Thus, public school districts must ensure that students with disabilities have an equal opportunity to access physical education, recreational athletics, transportation, health services, recreational activities, special interest groups or clubs sponsored by the school, and referrals to agencies that provide assistance to persons with disabilities and employment of students.

School districts may not exclude students through agreements coerced from parents.<sup>8</sup> In one case, the OCR found a district to have deprived a child of a FAPE because the assistant principal essentially told the child's mother that if she did not agree to keep the child out of school for the balance of the school year, he would have the child's teacher press criminal charges because the child had kicked her. The child was a third-grade student diagnosed with Asperger's Syndrome, ADHD, obsessive-compulsive disorder, oppositional defiance disorder,

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<sup>7</sup> 34 C.F.R. § 104.33.

<sup>8</sup> *Lake Pend Oreille (ID) School Dist. # 84*, 38 NDLR 52 (OCR Western Division, Seattle (ID) 2008).

and reactive attachment disorder. The OCR found the coercive agreement to comprise a denial of a FAPE.<sup>9</sup>

Similarly, school districts cannot condition a child's access to educational programs upon the parents agreeing to accept services under a 504 Plan. One court held that a school district could be held liable under Section 504 for conditioning a third-grade student's return to school on his parents' acceptance of a special education placement.<sup>10</sup> The court held that such an attempt at coercing agreement to a placement effectively deprives students and their parents of their due process rights guaranteed under the statute, which could justify liability for money damages under Section 504.

#### **4. *Consequences for Failing to Provide an Adequate Placement***

School districts that neglect to provide students with disabilities with an appropriate education can be required to provide compensatory educational services or to refund parents for private school tuition they had to pay to unilaterally relocate their child to a private school that offered an appropriate educational placement for the student after the district failed to provide a FAPE. Such a private school may even be a residential placement if the evidence makes it apparent that the placement was necessary for the child to receive an appropriate education.<sup>11</sup>

It is well established, however, that school districts should not be held liable for money damages under Section 504 even if an offered placement is found inadequate. In order to state a

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<sup>9</sup> *Id.*

<sup>10</sup> *M.G. v. Crisfield*, Case No. 06-CV-5099 (FLW), 49 IDELR 217 (D.N.J. Mar. 5, 2008). In this case, the student was suspended indefinitely after committing an unspecified behavioral offense. His parents did not seek special education and related services or combinations under Section 504, but instead asserted the student's right against discrimination on the basis of a perceived disability (*i.e.*, being barred from attending any district school because of the perceived disability). The district moved to dismiss the claim, but the court denied the motion – finding that the attempt to coerce the placement violated the statutory rights of the student and his parents. *Id.*

<sup>11</sup> *In Re: K.M.*, 29 IDELR 1027, DP98-02 (SEAVT 1999) (officer found the school district liable for the tuition paid by a disabled student's parent because the evidence demonstrated that the student, who suffered from oppositional defiance disorder and substance abuse, required a residential placement in order to obtain an appropriate education.

*prima facie* claim for money damages under Section 504 (and the ADA), a parent/student must plead that the student (i) qualified under Section 504 as a student with disabilities; (2) was denied the benefits of a program or activity of a school receiving federal funds; and (3) suffered discrimination based the student’s disability.<sup>12</sup> If the plaintiff pleads such elements, the defendant school district must establish a legitimate, non-discriminatory reason for its acts or omissions, and courts have described this showing as “exceedingly light and easily established.”<sup>13</sup> If a defendant school district can make this showing, it then falls to the plaintiff to show that the nondiscriminatory reason is merely pretext, intended to hide the real reason – *i.e.*, a discriminatory animus or intent based on the student’s disability.<sup>14</sup>

Courts have repeatedly held that schools will not be held liable in money damages under Section 504 unless it is proven that they acted in bad faith or with “gross misjudgment.”<sup>15</sup> The reason for this rule was stated by the U.S. District Court for the District of Columbia:<sup>16</sup>

“The reference in the Rehabilitation Act to ‘discrimination’ must require, we think, something more than an incorrect evaluation, or a substantively faulty individualized education plan, in order for liability to exist.” A court’s conclusion that “an incorrect evaluation has been made, and that a different placement must be required under [IDEA], is not necessarily the same thing as a

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<sup>12</sup> *J.L. v. Francis Howell R-3 School Dist.*, Case No. 4:09-cv-457 MLM, 2010 U.S. Dist. LEXIS 13521, \*76 (E.D. Mo. Feb. 17, 2010) (quoting *Gorman v. Bartch*, 152 F.3d 907, 912 (8th Cir. 1998); *C. v. Missouri State Bd. of Educ.*, Case No. 4:08-cv-1853, 2009 U.S. Dist. LEXIS 81625 (E.D. Mo. Sept. 8, 2009) (citing *M.Y. v. Special School Dist. No. 1*, 544 F.3d 885, 888 (8th Cir. 2008); *Delaware Valley School Dist. v. P.W.*, Case No. 3:08-cv-1385, 2009 U.S. Dist. LEXIS 38152 (M.D. Pa. May 5, 2009); *Llewellyn v. Sarasota County School Bd.*, Case No. 8:07-cv-1712-T-33TGW, 2009 U.S. LEXIS 120786 (M.D. Fl. Dec. 29, 2009).

<sup>13</sup> *Llewellyn*, 2009 U.S. LEXIS 120786, *supra* (quoting *Perryman v. Johnson Products Co., Inc.*, 698 F.2d 1138, 1142 (11th Cir. 1983).

<sup>14</sup> *Llewellyn*, 2009 U.S. LEXIS 120786, *supra*.

<sup>15</sup> See, e.g., *J.L.*, 2010 U.S. Dist. LEXIS 13521, *supra* (citing *Heidemann v. Rother*, 84 F.3d 1021, 1032-1033 (8th Cir. 1996); *Lucas v. District of Columbia*, 683 F. Supp. 2d 16 (D.D.C. 2010); *M.B. v. Arlington Cent. School Dist.*, Case No. 99-cv-9973, 2002 U.S. Dist. LEXIS 4015 (S.D.N.Y. Mar. 11, 2002); *Hoekstra by and through Hoekstra v. Independent School Dist. No. 283*, 103 F.3d 624, 626 (8th Cir. 1996).

<sup>16</sup> *Torrence v. District of Columbia*, 669 F. Supp. 2d 68, 71 (D.D.C. 2009) (citing *Lunceford v. District of Columbia Bd. of Educ.*, 745 F.2d 1577, 1580 (D.C. Cir. 1984) [quoting *Monahan v. Nebraska*, 687 F.2d 1164, 1170 (8th Cir. 1982)]).

holding that a handicapped child has been discriminated against solely by reason of his or her handicap.” The court in *Monahan* specified that it did “not read § 504 as creating general tort liability for educational malpractice.” Rather, “either bad faith or gross misjudgment should be shown before a § 504 violation can be made out.” (Citations omitted.)<sup>17</sup>

Thus, the plaintiff cannot sustain a claim for money damages under Section 504 by proving mere negligence. Rather, an educator’s placement decisions are “presumptively valid” and “liability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice or standards as to demonstrate that the person responsible actually did not base the decision on such judgment.”<sup>18, 19</sup>

#### **A. Supervising Implementation of Section 504 Plans**

It is not enough to develop an adequate education plan for a student with disabilities. Public school districts must also ensure that they supervise the implementation of the plan – as well as IEPs. The OCR has frequently chided school districts for failing to ensure such implementation. For example, it found the Inglewood, California school district non-compliant with Section 504 because it failed to fully implement a student’s 504 Plan.<sup>20</sup> In that case, the district had provided a student with ADHD with a 504 Plan that provided fourteen

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<sup>17</sup> *Torrence*, 669 F. Supp. 2d at 71.

<sup>18</sup> *Id.* (quoting *Monahan*, 687 F.2d at 1170); accord *Maus v. Wappingers Cent. School Dist.*, Case No. 05-cv-5160, 2010 U.S. Dist. LEXIS 11206, 43-45 (S.D.N.Y. Feb. 9, 2010) (“[M]erely asserting that the district failed to appropriately classify a child, without any evidence of bad faith or gross misjudgment, is not sufficient to defeat summary judgment” on a Section 504 claim) (citing *Pinn v. Harrison Cent. School Dist.*, 473 F. Supp. 2d 477, 483 (S.D.N.Y. 2007)).

<sup>19</sup> Of course, this standard applies only to a school district’s obligation to provide an appropriate education. Schools must also ensure they protect their disabled students from discrimination and harassment based on their disability even if the school district does not have an obligation to provide the student with special education or related services. This obligation takes on an increased poignancy given the expansion of the definition of disabled individuals by the ADA. With this expansion comes an increased prospect of a student being classified under Section 504 as a disabled individual, but requiring no Section 504 Plan because, while the student is within the class of protected persons, the student’s disability is such that the student can access a school’s programs without a 504 Plan. Nonetheless, such a student is entitled to protection from discrimination or harassment.

<sup>20</sup> *Inglewood (CA) Unified School Dist.*, 2008 NDLR LEXIS 623, 39 NDLR 108 (OCR San Francisco (CA) 2008).



accommodations, including weekly progress reports to parents, listing key points from class on the board, and simplifying written directions. The student's counselor distributed the Plan to all of the student's teachers; but in response to a complaint filed by the student's mother, the OCR found that several teachers failed to consistently provide the required accommodations under the Plan.<sup>21</sup>

Although educators struggle with a number of collateral duties, ensuring that teachers and staff responsible for implementing 504 Plans are doing so correctly is an important task and risk management measure. Not all teachers appreciate the importance of compliance with such Plans, and the potential for enforcement action by the OCR or money damages is too significant to leave this issue to chance. Accordingly, it is an area where administrators should make every effort to ensure accountability and periodic supervision.

**Practice Tip:** Administrators should consider using information technology to improve their ability to supervise 504 Plan implementation. For example, administrators can use e-mail templates to help gather periodic teacher reports concerning the efficacy of a student's 504 Plan and whether the specified accommodations went unimplemented on occasion for some reason. E-mail can also be used as a useful periodic reminder for teachers regarding a student's accommodations. It is usually possible to schedule e-mails for delivery several weeks in advance, allowing administrators to create such e-mails and send them at the time the 504 Plan is approved – although the e-mails will not be delivered for several weeks later. There are also a number of other electronic and software devices specifically geared toward 504 Plan and IEP implementation and supervision, which a district may find helpful.

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<sup>21</sup> The OCR also found that the district did not have a formal process to ensure the prompt and secure transmission of 504 Plans from its middle school to its high school campus.

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