

Identification of Students 504-Only Students: An Alternate Eligibility Form*

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The key step for identifying students for so-called “504 plans”¹ under Section 504 of the Rehabilitation Act (§ 504)² and its sister statute, the Americans with Disabilities Act (ADA),³ is an evaluation⁴ to determine whether the individual student meets all three essential eligibility criteria.⁵ The interpretive standards of these three criteria expanded as a result of the ADA Amendments Act (ADAAA) of 2008⁶ and the resulting ADAAA regulations in 2016.⁷

Recent analyses of the U.S. Department of Education’s 2015–16 Civil Rights Data Collection (CRDC)⁸ for the rates of students with 504 plans at the state, district, and school levels strongly suggest over-identification and under-identification at both ends of a widely varying spectrum. The national average for 2015-16 was 2.3%, but the states ranged from 5.8% in New Hampshire to .10% in Kansas;⁹ school systems with enrollments of at least 1250 students ranged from 15.5% for Connecticut’s Newtown School District to 327 districts with 0%;¹⁰ and the schools with enrollments of at least 250 ranged from 34.7% at Joseph A. Craig Charter

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¹ E.g., Perry A. Zirkel, *Does Section 504 Require a Section 504 Plan for Each Eligible Non-IDEA Student?*, 40 J.L. & EDUC. 407 (2011) (showing that, unlike the IDEA, the § 504 FAPE provision does not require a specific form).

² 29 U.S.C. § 794 (2016).

³ 42 U.S.C. §§ 12101 *et seq.* (2016).

⁴ 34 C.F.R. § 104.35(a) (2018).

⁵ 29 U.S.C. § 705(20) (2016) (defining disability in terms of (a) a physical or mental impairment that limits (b) one or more major life activities (c) to a substantial extent). The other two prongs – “record of” and “regarded as” – are not applicable to FAPE. See *Protecting Students with Disabilities*, 67 IDELR ¶ 189 (OCR 2015) – item 37; Senior Staff Memorandum, 19 IDELR 894 (OCR 1992).

⁶ Pub. L. No. 110-325, 122 Stat. 3553 (2008), codified at 42 U.S.C. §§ 12101–12102 (2016). For the incorporation of the ADAAA standards in § 504, see 29 U.S.C. § 705(20)(B) (2016). The effective date of the ADAAA was Jan. 1, 2009. *Id.*

⁷ 28 C.F.R. § 35.108 (2018) (including effective date of Oct. 11, 2016).

⁸ For the CRDC public-use data file, see <https://www2.ed.gov/about/offices/list/ocr/docs/crdc-2015-16.html>

⁹ Perry A. Zirkel & Tiedan Huang, *State Rates of 504-Only Students in K–12 Schools: An Update*, 354 Ed.Law Rep. 621 (2018).

¹⁰ Perry A. Zirkel, *School District Rates of 504-Only Students*, __ Ed.Law Rep. __ (in press).

School in Louisiana to more than 12,000 schools with 0%.¹¹ The school level is the most important in terms of more accurate identification because it is the prevailing locus for these eligibility determinations.

The purpose of this brief article is to provide an updated eligibility form that (a) incorporates the 2016 regulations¹² and, more prominently, (b) provides an alternate guideline illustration of the substantial limitation element for eligibility,¹³ with accompanying practical pointers, with supporting legal authority.¹⁴ This alternative illustration is an option that is designed for selected schools in the over-identification group.

Figure 1 is the updated eligibility form. The shaded entries in items 2 and 3 are merely to show the additions in aforementioned¹⁵ regulations. They should be removed, along with any other customization, for local district use.¹⁶

The key difference between this form and its predecessor version¹⁷ is that as an alternative to a 1–5 Likert-type scale to illustrate that the “substantial”¹⁸ criterion is a matter of relative degree,¹⁹ this version provides a visual reminder that the frame of reference is the average person in the general population. The case law in the context of K–12 students both

¹¹ Perry A. Zirkel, *Public School Rates of 504-Only Students*, __ Ed.Law Rep. __ (in press).

¹² *Id.* For the previous version of the eligibility form, see Perry A. Zirkel, *Legal Perspectives: New Section 504 Student Eligibility Standards*, 41 TEACHING EXCEPTIONAL CHILD. 68 (2009).

¹³ For the previous version’s illustrative frame of reference, which was in the form of a 1-to-5 Likert-type scale, see *id.* For a parallel updated version that incorporates the alternative, 1-to-5 scale, see www.perryzirkel.com.

¹⁴ The parallel updated version (*id.*) is an alternative that may be more suitable in some school districts, depending on local practices and values.

¹⁵ *See supra* note 7.

¹⁶ In light of the copyright, please make sure to provide appropriate acknowledgement of this specific source in terms of the author and *West’s Education Law Reporter*.

¹⁷ *See supra* note 13.

¹⁸ *See supra* note 5. “Substantial” in the context is an abbreviation for “substantially limits” in the statutory eligibility definition: “a mental or physical impairment that substantially limits one or more major life activities.” 29 U.S.C. § 705(20)(B); 42 U.S.C. § 12102(1)(A) (2016).

¹⁹ On the predecessor version, the numbers 1, 2, and 3 are designated with qualifiers associated with lower levels, such as “minimal,” “slight,” and “moderate.” *See supra* note 13. In addition to degree, the second dimension of “substantially,” which is much less frequently at issue, is duration. *E.g.*, Perry A. Zirkel, *Are Students with Concussions Qualified for Section 504 Plans?*, 311 Ed.Law Rep. 589 (2015).

before²⁰ and after²¹ the ADAAA Amendments has consistently supported the applicability of this frame of reference. Similarly, the recent ADAAA regulations for local and state government entities define the “substantial” criterion²² in comparison to “most people in the general population.”²³ The visual illustration of this frame of reference is the classic Bell curve, which provides the normal distribution of general population characteristics and is used extensively in research.²⁴ It is generally understood that the average area is the range between one standard deviation on each side of the mathematical mean.²⁵ Although a reasonable interpretation of “substantial” on either side of the mathematical mean is to use two standard deviations as the guideline, as it typical for legal criteria for eligibility for gifted education.²⁶ However, to fit with the ADAAA’s interpretative standards that favor broad coverage within its specified criteria,²⁷ the visual representation uses one standard deviation below the mathematical mean, which

²⁰ E.g., *Costello v. Mitchell Pub. Sch. Dist.* 79, 266 F.3d 916, 157 Ed.Law Rep. 520 (8th Cir. 2001); *Bercovitch v. Baldwin Sch., Inc.*, 133 F.3d 141, 123 Ed.Law Rep. 1067 (1st Cir. 1998); *Marshall v. Sisters of Holy Family of Nazareth*, 44 IDELR ¶ 190 (E.D. Pa. 2005); *D.P. v. Sch. Dist. of Poynette*, 41 IDELR ¶ 6 (W.D. Wis. 2004); *T.J.W. v. Dothan City Bd. of Educ.*, 26 IDELR 999 (M.D. Ala. 1997).

²¹ E.g., *Lincoln-Sudbury Reg’l Sch. Dist. v. Mr. and Mrs. W.*, 2018 WL 563147 (D. Mass. Jan. 25, 2018); *H.P. v. Naperville Cmty. Unit Sch. Dist. #203*, 2017 WL 5585627 (N.D. Ill. 2017); *Moore v. Chilton Cty. Bd. of Educ.*, 1 F. Supp. 3d 1281, 307 Ed.Law Rep. 949 (M.D. Ala. 2014); *Rademaker v. Blair*, 2010 WL 5376263 (C.D. Ill. Dec. 22, 2010); cf. *Walter v. Birville Indep. Sch. Dist.*, 2018 WL 3974714 (N.D. Tex. Aug. 20, 2018) (using this criterion as the secondary reason for student not qualifying under § 504/ADA). The courts have also applied this frame of reference in student cases in the postsecondary context. E.g., *Glueck v. Nat’l Conference of Bar Exam’rs*, 2018 WL 3977891 (E.D. Pa. Aug. 20, 2018); *Bibber v. Nat’l Bd. of Med. Exam’rs*, 2016 WL 1404157 (E.D. Pa. Apr. 11, 2016); *Grabn v. Marymount Manhattan Coll.*, 2015 WL 4040823 (S.D.N.Y. July 15, 2015); *Healy v. Nat’l Bd. of Osteopathic Exam’rs*, 870 F. Supp. 2d 607, 286 Ed.Law Rep. 361 (S.D. Ind. 2012).

²² See *supra* note 18.

²³ 28 C.F.R. § 35.108(d)(1)(v) (2018). The corresponding and more long-standing regulation for the employment part of the ADA, which the courts have often used in student cases, uses the same language. 29 C.F.R. § 1630.2(j)(1)(ii) (2018).

²⁴ E.g., JAMES H. MCMILLAN, EDUCATIONAL RESEARCH: FUNDAMENTALS FOR THE CONSUMER 137 (2008).

²⁵ *Id.* at 141.

²⁶ For states with gifted education law, eligibility is generally based primarily on an IQ score of 130, which represents two standard deviations above the mean standard score of 100. E.g., PA. ADMIN. CODE § 16.21(d) (2017). For an overview of the eligibility and other provisions of gifted education laws, see, e.g., Perry A. Zirkel, *State Laws for Gifted Education: An Overview of the Legislation and Regulations*, 27 ROEPER REV. 228 (2005); see also Perry A. Zirkel, *Legal Update of Gifted Education*, 39 J. EDUC. GIFTED 315 (2016) (summarizing the limited changes in state laws along with recent related case law).

²⁷ 42 U.S.C. § 12102(4)(A) (2016) (“The definition of disability in this chapter shall be construed in favor of broad coverage of individuals under this chapter, to the maximum extent permitted by the terms of this chapter”). The applicable regulations added, in response to *Toyota Motors Manufacturing v. Williams*, 534 U.S. 184, 197 (2002), that “[s]ubstantially limits” is not meant to be a demanding standard.” 28 C.F.R. § 35.108(d)(1)(1) (2018).

equates to the 16th percentile in the general population.

As a result, as one option for eligibility evaluations under Section 504, particularly but not exclusively or uniformly for districts or schools that appear to have problems of over-identification,²⁸ this form provides guidance that a student whose physical or mental impairment(s) limit(s) one more major life activities at an estimated level in relation to the general population that is at or above the average range, eligibility is unlikely. Nevertheless, because it is abundantly clear that the determination is on an individual, case-by-case basis²⁹ and often without the necessity of scientific precision,³⁰ the 16th percentile is not an absolute cut-off but rather just a pertinent guideline for estimating the applicable frame of reference.³¹

This guideline is particularly useful for students who are not performing up to their potential or in comparison to their immediate peers, such as an advanced placement class, but nevertheless are doing relatively well for the major life activity or activities that the duly identified impairment(s) limit(s) in comparison to the much wider, general population. The sources for the determination include normed measurement instruments, with due regard for their psychometric properties for the major life activity or activities at issue, and professional judgment, with particular attention to extensive experience.

²⁸ *E.g.*, Douglas Belkin, *More Students Are Getting Special Help in Grades K–12*, WALL ST. J., July 3 2018, www.wsj.com/articles/more-students-are-getting-special-help-in-grades-k-12-1530646260

²⁹ *E.g.*, 28 C.F.R. § 35.108(d)(1)(vi) (2018) (“The determination of whether an impairment substantially limits a major life activity requires an individualized assessment.”).

³⁰ *Id.* § 35.108(d)(1)(5)(vii) (“The comparison of an individual's performance of a major life activity to the performance of the same major life activity by most people in the general population usually will not require scientific, medical, or statistical evidence. Nothing in this [subsection] is intended, however, to prohibit or limit the presentation of scientific, medical, or statistical evidence in making such a comparison where appropriate”).

³¹ *Cf. Glueck v. Nat'l Conference of Bar Exam'rs*, 2018 WL 3977891 (E.D. Pa. Aug. 20, 2018) (concluding with partial reliance on test score percentiles, that law school graduate with diagnoses of SLD and ADHD failed to show the requisite limitation “as compared to *most people* in the general population”; *Bibber v. Nat'l Bd. of Med. Exam'rs*, 2016 WL 1404157 (E.D. Pa. Apr. 11, 2016) (concluding, with partial reliance on test score percentile, concluding that “this failure to produce sufficient evidence that her reading process is slow, labored, and difficult *when compared to the general population* is fatal to [the plaintiff's] case”); *Curley v. City of N. Las Vegas*, 2012 WL 1439060 (D. Nev. Apr. 25, 2012) (concluding, in rejecting that employee's Tinnitus limited hearing to a limited extent based on diagnostic data, that “[i]f impairment at the levels experienced by Plaintiff amounts to ‘substantial’ limitation that word has no meaning”), *aff'd on other grounds*, 772 F.3d 629 (9th Cir. 2014).

Conversely, as a matter of prudent consideration, the requisite “knowledgeable”³² district teams that determine eligibility should implement its child find and evaluation obligations under Section 504³³ without predetermining that the child meets the three applicable criteria. For example, in a recent federal case, the hearing officer and magistrate judge concluded that school district’s refusal to conduct the required evaluation based on the student’s high grades engaged in predetermination, thus contributing to the remedies of compensatory education and tuition reimbursement.³⁴ However, although deferring to the determinations that the child was eligible under Section 504, the court did not agree that the district’s actions in this case constituted predetermination and, in any event, the requisite deliberate indifference, instead granting tuition reimbursement based on IDEA eligibility.³⁵

The determination of eligibility for a 504 plan³⁶ requires careful compliance with the applicable legislative, regulatory, and case law authority.³⁷ This eligibility form represents a locally customizable contribution that incorporates the most recent federal regulations. Moreover, it is one potentially useful way of representing the applicable frame of reference for the final and often critical eligibility criterion.³⁸

³² 34 C.F.R. § 104.35(c) (2018) (“In interpreting evaluation data and making placement decisions, a [the district] shall . . . ensure that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of evaluation data, and the placement options”).

³³ *Id.* § 104.35(a) (“A [school district] shall conduct an evaluation . . . of any person who, because of [disability], needs or is believed to need special education or related services”). Rooted in the “believed to need” part of this evaluation regulation under Section 504, child find is the obligation to conduct the evaluation within a reasonable period upon a reasonable suspicion of eligibility. *E.g., Krebs v. New Kensington Arnold Sch. Dist.*, 2016 WL 6820402 (W.D. Pa. Nov. 17, 2016).

³⁴ *Pocono Mountain Sch. Dist. v. S.D.L.*, 2018 WL 3521193 (M.D. Pa. Mar. 14, 2018).

³⁵ *Pocono Mountain Sch. Dist. v. T.D.*, 2018 WL 3518464 (E.D. Pa. July 20, 2018).

³⁶ Sometimes referred to as “504-only,” these students are differentiated from students with IEPs under the Individuals with Disabilities Education Act. *See supra* notes 9–11.

³⁷ For an earlier and broader synthesis of pertinent post-ADAAA legal authority, see Perry A. Zirkel, *A Step-by-Step Process for §504/ADA Eligibility Determinations: An Update*, 239 Ed.Law Rep. 333 (2009).

³⁸ It may be particularly useful in schools in which over-identification is a problem and in which the frame of reference warrants illustration. The alternative form is also updated so that it is an alternative available in situations where it may be more effective in reaching an accurate identification of eligibility.

SECTION 504/ADA STUDENT ELIGIBILITY FORM

Child's Name: _____ Birthdate: _____

Eligibility Team Members: Fill in names and check whether reasonably knowledgeable about the:

Names: _____ ...child _____ ...meaning of _____ ...accommodations/
 _____ : evaluation data _____ placement options

Sources of evaluation information (indicate each one used):

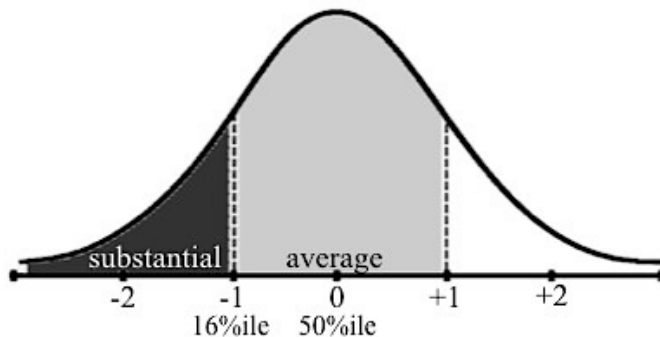
_____ aptitude and/or achievement tests _____ teacher recommendations
 _____ adaptive behavior _____ others(specify): _____

1. Specify the mental or physical *impairment* _____ -
 (as recognized in *DSM-V* or other respected source if not excluded under 504/ADA, e.g., illegal drug use)*

2. Check the *major life activity*: ___ seeing ___ hearing ___ walking ___ breathing ___ learning
 ___ reading ___ writing ___ thinking ___ concentrating ___ communicating ___ speaking
 ___ interacting with others ___ manual tasks ___ reaching ___ lifting ___ bending
 ___ eating ___ sleeping ___ bowel functions ___ bladder functions ___ digestive functions
 ___ immune system functions ___ circulatory system functions ___ endocrine system functions
 or specify alternative of equivalent scope and central importance: _____

3. Place an "X" on the horizontal bottom axis of the figure below to designate the specific degree that the impairment (in item #1 above) limits the major life activity (in item #2 above) per the following interpretive standards:

- Make an educated estimate **without** the effects of mitigating measures, such as medication; low-vision devices (except eyeglasses or contact lenses); hearing aids and cochlear implants; mobility devices, prosthetics, assistive technology; learned behavioral or adaptive neurological modifications; and reasonable accommodations or auxiliary aids/services.
- Similarly, for impairments that are episodic or in remission, make the determination for the time they are active.
- Use most students in the general (i.e., national or state) population as the frame of reference.
- Interpret close calls in favor of broad coverage (i.e., construing the illustrative guideline of the 16%ile as a relatively relaxed approximation). Thus, for an "X" in the "average" range or higher, document specific information evaluated by the team that provides adequate justification.



4. If the team's determination for item #3 was not in the "substantial" range, provide notice to the parents of their procedural rights, which include an impartial hearing. Conversely, if the team's determination in the "substantial" range, the team should not only provide the procedural safeguards but also determine and identify on the 504/ADA Plan the specific accommodations and/or services that are necessary for the child to have an opportunity commensurate with nondisabled students (of the same age) **with** the aforementioned mitigating measures.