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Education Law into PracticePerry A. Zirkel, Ph.D., J.D., LL.M.^{aa1}

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IS AN IDEA-ELIGIBLE STUDENT ENTITLED TO BOTH AN IEP AND A 504 PLAN?^{a1}

Section 504, like the Individuals with Disabilities Education Act (IDEA),¹ has a free appropriate public education (FAPE) requirement² but, unlike the IDEA, Section 504 does not require documentation of its FAPE, i.e., in a student's 504 plan.³ Thus, unlike an individualized education program (IEP),⁴ there is no prescribed format, such as goals or objectives, for a 504 plan.⁵ Moreover, the Section 504 regulations expressly provide that implementation of an IEP under the IDEA is “one means” of meeting the Section 504 FAPE requirement.⁶

Therefore, Section 504 does not require a 504 plan for an IDEA-eligible student.⁷ It is permissible but not required. With the overall aim of not only complying with the requirements of Section 504, in tandem with those of the IDEA, but also doing so efficiently *904 and effectively in terms of practical implementation,⁸ school districts should consider 504 plans in comparison to other permissible options. With due attention to the complicated coverage of what may be regarded as the partial child find obligation of the IDEA,⁹ the other and often preferable options include:

1. If the child meets the three essential elements of disability under Section 504 for any area not related to the child's IDEA disability,¹⁰ the additional necessary reasonable services and/or accommodations¹¹ may be documented in the IEP.¹²
2. If the child does not meet all three essential elements of disability under Section 504 for any area not related to the child's disability, the district has its usual discretionary options in general education within state law (e.g., Response to Intervention (RTI) or Multi-Tiered System of Supports (MTSS))¹³ or local policy/practice. For documentation of additional necessary services and/or accommodations, the alternatives include, for example, a general education intervention plan or an individual health plan.¹⁴

Footnotes

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1 34 C.F.R. § 300.101: “A free appropriate public education [FAPE] must be available to all [eligible] children residing in the State between the ages of 3 and 21”; *id.* § 300.17 (“FAPE means special education and related services”).

2 34 C.F.R. § 104.33:

A recipient [of federal financial assistance] that operates a public elementary or secondary education program shall provide a free appropriate public education to each qualified ... person [with a disability] For the purpose of this subpart, the provision of an appropriate education is the provision of regular or special education and related aids and services that ... are designed to meet individual educational needs of ... persons [with disabilities] as adequately as the needs of [nondisabled] persons are met.

3 *E.g.*, Office for Civil Rights (OCR), Dear Colleague Letter and Resource Guide on Students with ADHD (2016) at *4, <https://sites.ed.gov/idea/idea-files/ocr-dear-colleague-letter-july-26-2016/> (“Though not explicitly required by the Department’s Section 504 regulations, school districts often document the elements of an individual student’s FAPE under Section 504 in a document, typically referred to as a ‘Section 504 Plan.’”); *cf.* Perry A. Zirkel, *Does Section 504 Require a Section 504 Plan for Each Eligible Non-IDEA Student?* 40 J.L. & Educ. 407 (2011).

4 34 C.F.R. § 300.320 (definition of and specifications for an IEP, such as measurable goals, present levels, and special education and related services).

5 OCR, *supra* note 3 (“[T]here is no specific Section 504 requirement for such a plan or what the plan should contain”).

6 *Id.* § 104.333(b)(2).

7 OCR, Parent and Educator Resource Guide to Section 504 in Public Elementary and Secondary Schools (2016) at *10, <https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/rr/policyguidance/index.html?page=3&offset=20>:

IDEA-eligible students with disabilities who have an IEP are not required to also have a Section 504 plan even though they are protected under Section 504. For these students, the IEP developed and implemented in accordance with the IDEA is sufficient.

8 The practical considerations include possible over-identification or inaccurate FAPE under § 504 along with paperwork-related implementation and confidentiality issues under both the IDEA and § 504.

9 20 U.S.C. § 1414(b)(3)(B) (requiring that the evaluation assess the child “in all areas of suspected disability”); 34 C.F.R. § 300.304(c)(4) (requiring that the evaluation assess the child “in all areas related to the suspected disability”).

10 The three successively narrowing required criteria are (a) physical or mental impairment (not at all limited to the classifications under the IDEA); (b) major life activity, which include various specified examples within and beyond learning but generally rather broad in scope; and (c) substantially (in relation to most people in the general population). *E.g.*, 28 C.F.R. § 35.108. For an illustrative § 504 eligibility form, *see* Perry A. Zirkel, *Identification of 504-only Students: An Alternate Eligibility Form*, 357 Educ. L. Rep. 39 (2018).

11 Although relying on the commensurate opportunity language in the Section 504 definition of FAPE (*supra* note 2), OCR generally does not review whether districts meet the substantive obligations under Section 504, instead pointing to the parents’ right to an impartial hearing. *E.g.*, OCR, Frequently Asked Questions about Section 504 and the Education of Children with Disabilities (2020) at item 5, <https://www2.ed.gov/about/offices/list/ocr/504faq.html>. Hearing officers are likely to follow the courts’ interpretation of the substantive standard for FAPE, which generally amounts to reasonable accommodation that provides meaningful access and

participation for the eligible child. *E.g.*, *Ridley Sch. Dist. v. M.R.*, 680 F.3d 260, 282 (3d Cir. 2012); *S.T. v. L.A. Unified Sch. Dist.*, 545 F. Supp. 3d 840, 853 (C.D. Cal. 2021).

- 12 Nothing in the IDEA or Section 504 prohibits identifying such accommodations or supports in the IEP, especially given the analogous items required in the IEP. *See, e.g., id.* § 300.320(a)(4) (“supplementary aids and services,” which is defined to include “other supports”); *id.* § 300.320(a)(6) (“individual accommodations” for districtwide assessments); *see also id.* § 300.323(d)(2)(ii) (mandating that each of the child’s teachers and service providers be informed of “that specific accommodations, modifications, and supports” that the IEP requires).
- 13 *See, e.g.,* Perry A. Zirkel, *The Law on RTI and MTSS*, 373 *Educ. L. Rep.* 1, 10-13 (2020) (providing an overview of state laws for RTI and, often without clear differentiation, for MTSS).
- 14 *See, e.g.,* OCR, *Frequently Asked Questions about Section 504 and the Education of Children with Disabilities* (2020) at item 41, <https://www2.ed.gov/about/offices/list/ocr/504faq.html> (“A regular education intervention plan is appropriate for a student who does not have a disability or is not suspected of having a disability but may be facing challenges in school”).

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