Section 504 for Special Education Leaders

Persisting and Emerging Issues

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- **Special education leaders need to be aware of long-standing general regulatory requirements under §504 for which school districts are often vulnerable.**
- **Special education leaders also have to keep current on recent legal developments for ''§504-only'' students, including the effects of the Americans with Disabilities Act Amendments Act on not only eligibility but also entitlement.**
- **Most directly within their area of responsibility, special education leaders can no longer treat §504 as solely or even primarily within the province of general education; recent court decisions illustrate the emerging advantages of §504 as an additional or additional source of legal claims for ''double-covered,'' or Individuals with Disabilities Education Act individual education program students.**

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Among the various other differences among the three federal disability laws affecting K–12 schools (e.g., Zirkel, 2007), the definition of disability under Section 504 of the Rehabilitation Act (§504; 2011) and its sister statute, the Americans with Disabilities Act (ADA; 2011), is broader than that under the Individuals with Disabilities Education Act (IDEA; 2011). The IDEA definition requires meeting the criteria of one or more of a specified set of impairments, such as autism or other health impairment, and having a resulting need for special education. In contrast, the §504 definition consists of three essential elements: (a) any physical or mental impairment (without a restricted list) that (b) substantially limits (c) one or more major life activities (with specified examples that extend beyond learning, such as walking or breathing). The recent developments include not only the ADA Amendments Act (ADAAA; 2011), which went into effect on January 1, 2009, and which expressly extends to §504, but also an emerging line of court decisions that illustrate additional or alternate claims that extend within and beyond the coverage of the IDEA.

The common conception is that §504 is the legal responsibility of general education, not special education. This conception is only partly correct. Indeed, the policy or practice of using ''educational need'' as an essential eligibility criterion for §504 plans (e.g., *Catoosa County School District*, 2011; *North Royalton City School District*, 2009) or otherwise considering §504 the exclusive legal responsibility of the local education agency's special education division contributed to this corrective conception. The problem, however, is that this conception was an overcorrection. First, continuing legal developments confirm the overlap between the broader definition of disability under §504, resulting in not only exclusive coverage of students with §504 plans (i.e., ''§504-only students'') but also additional coverage of students with IDEA individual education programs (IEPs; i.e., ''double-covered students''). Second, and more significantly, recent legal developments not only expand the scope of §504-only students but also reveal the alternative and additional legal claims of double-covered students. Primarily responsible for students in the second category and at least its intersection with the first category, special education leaders need to be legally literate about these continuing and recent developments.

The next three parts of this article distill for special education leaders the continuing and emerging legal developments under §504 that apply successively to (a) all students, (b) those who are

Table 1: Checklist of major general district requirements under Section 504

		Yes	No
1.	Do you have a designated (and effective) 504 coordinator?		
2.	Do you have an appropriate grievance procedure for disability-related issues, including those concerning students, employees, and facilities?		
3.	Do you have readily available procedural safeguards notice that is duly issued to the child's parents?		
4.	Do you have a timely procedure for providing an impartial hearing for student §504 issues upon parental request?		

§504-only, and (c) those who are double covered. More specifically, Part I canvasses the legal lessons under §504 that apply to both general and special education students, thus being of import to special education leaders. Part II reviews the recently revised eligibility and resulting entitlement standards for §504-only students, including the interaction with the IDEA. Finally, Part III traces the emerging legal developments under §504 for double-covered students (i.e., those with IEPs), who can no longer be solely viewed through the lens of the IDEA.

General Requirements

Unchanged requirements of §504 and the ADA sometimes cause compliance problems for school districts because of the failure to maintain appropriate policies and practices. As listed in the checklist in *Table 1*, three leading examples stand out for both school districts and their special education leaders. For the sake of simplicity, ''§504'' in this context also refers to the ADA because they apply hand-in-hand to public schools; the major difference, which is that the ADA extends to private, secular schools that do not receive federal financial assistance, is not within the scope of this article.

§504 Coordinator

First, §504 (and the ADA) require each district to have a designated coordinator. For all but the largest school districts, designating the coordinator as responsible for both §504 and the ADA makes sense because of their largely concurrent coverage. The large districts may find it efficient to divide responsibilities for student, employee, and/or facility issues under these sister statutes. Regardless of district size, designating not only an overall coordinator at the central office but also building-level coordinators is practically effective although not strictly required. At the central office level, the superintendent should think twice before appointing the district's special education director as the §504/ADA coordinator; it is the opposite of a reward for effectively addressing the challenging responsibilities under the IDEA, and it gives the wrong symbolic message to regular education personnel of the primary child-find and implementation issues for §504-only students. Similarly, at the school level, appointing the new counselor or a staff member without the requisite knowledge of the applicable legal requirements and school standing for effective implementation is legally permissible but practically imprudent.

Grievance Procedure

Second, each district needs a grievance procedure for disability issues—whether from students, parents, employees, or visitors. Both the §504 regulations (§104.7[b], 2011) and the ADA regulations (2011, §35.107[b]) require such a procedure, at least if the district has at least 15 employees or 50 employees, respectively. Because of a lack of continuing compliance, parents or other individuals have had a high rate of success in Office for Civil Rights (OCR) complaints concerning this requirement (Zirkel, 1997). The required grievance procedure need not be complicated or impartial, with the aforementioned regulations flexibly requiring that the procedure incorporate ''appropriate due process standards'' and be ''prompt and equitable.'' The typical procedure has three levels, starting with an informal complaint to the §504/ADA coordinator and ending with a semiformal appeal to a higher-level, central office administrator (e.g., Zirkel, 2011).

Impartial Hearing

Third, make sure that the district has a procedural safeguards notice that at least meets the minimum

requirements of §504 (§104.35), which includes, for example, the rights to an evaluation and an impartial hearing and which is issued to the parents upon the district's identification, evaluation, refusal to provide an evaluation, educational placement, denial of educational placement, and ''any significant change in educational placement.'' The most problematic required element in most states is implementing the parent's right for an impartial hearing; the reason is that only a few states provide the IDEA impartial hearing officers with jurisdiction for students' §504 claims (Zirkel, in press), thus leaving the school district—because it is the recipient of federal financial assistance (§104.1)—as entirely responsible for prompt implementation. It is not unusual for school districts to confuse the grievance procedure requirement with this separable impartial hearing requirement (e.g., *Leon County School District*, 2007; *Talbot County School District*, 2008). Compounding the possible noncompliance, especially because states further vary as to the jurisdictional coverage of IDEA hearing officers for §504 claims (Zirkel, in press), is that this impartial-hearing requirement applies to not only §504-only but also double-covered students.

§504-Only Students

Eligibility Issues

The ADAAA and OCR's policy interpretations of it warrant revisions of district policies with regard to not only eligibility but also services for §504-only students. For eligibility, as explained elsewhere in more detail (e.g., Zirkel, 2009), the ADAAA revisions include (a) expansion of the specified illustrative major life activities to extend to not only subareas of learning, such as reading and concentration, but also various health-related areas, such as eating and bowel functions; (b) determination of the substantially limiting connection between the impairment and the major life activity without—in contrast to the previously applicable with—mitigating measures, including not only medication but various other examples, such as learned behavioral or adaptive neurological modifications; and (c) determination of substantial limitation for major life activities that are episodic or in remission when active. The direct result will be significantly more students—as compared with the pre-ADAAA national average of approximately 1% (Holler & Zirkel, 2008)—in the §504-only category.

Other, emerging results warrant careful attention. At least two concern eligibility. First, the less-than-bright boundaries of the ADAAA pose potential problems for school districts. For example, determining whether attention-deficit hyperactivity disorder substantially limits concentration presents a major evaluation challenge, which is compounded if the parents have consented and the student is taking medication. Similarly, determining eligibility for students with food allergies and those with individual health plans is of increased significance and difficulty based on not only the expanded list of major life activities and the reversed role of mitigating measures but also the new rule for impairments that are episodic or in remission (e.g., Zirkel, 2012).

Responding with broad identification is not the simple answer for several reasons. First, §504 is an unfunded mandate; unlike the IDEA, the federal (and state) government provides no financial support for implementation of the procedural and substantive requirements. Second, providing formal §504 protection for students who do not meet the eligibility criteria not only poses ethical and equitable issues of effectively creating false-positives but also expands legal vulnerability for overidentification or—to the extent of disproportionately identifying students with high socioeconomic status (e.g., Rado, 2012)—underidentification of racial/ethnic minority students. Third, broad overidentification of §504-only students increases exposure for child-find cases under the IDEA. More specifically, in some of these cases, the parents may successfully argue that the identification of disability under §504 shows that district personnel had reason to suspect that the student may have been eligible under the IDEA but short-changed the student by not providing the requisite safeguards, including notice and an evaluation, under the IDEA. Finally, overidentification increases the transaction costs of legalization; for the same reason that the parent may want ''a piece of paper'' under §504 to guarantee their child's legal rights, the school district has the legal obligation to comply with the various formal requirements, including meetings, forms, and the enforcement procedures—including not only impartial hearings but also the OCR complaint process—under §504. For students who have

impairments that do not substantially limit a major life activity, why not provide commonsense, individualized accommodations, such as preferential seating, differentiated instruction, or nursing services, just as a matter of effective general education? A residual part of this problem remains for accommodations on high-stakes tests, but the tradeoffs for overuse of §504 for this purpose include (a) the tightening up by the private and governmental testing authorities of their documentation and standards for test accommodations; (b) the underlying problems that extended time masks rather than resolves, such reading fluency with comprehension or test anxiety; and (c) the overlapping problem of increased demands in postsecondary education and employment that such band-aid solutions leave unaddressed.

Entitlement Issues

In any event, for students deemed eligible in this expanded §504-only category, the resulting entitlement or protection poses three major issues for school districts. First, many districts make the basic legal mistake of treating the ''consolation prize'' of §504 as entitling the student to only accommodations, not services. Instead, the §504 regulations entitle the qualified student with a disability to free appropriate public education (FAPE), defined as ''special or regular education and related aids and services'' (§104.33). Assuming that the district fulfills the special education need, via IDEA eligibility, that is, as a double-covered student, under one of the recognized classification, such as other health impairment, this regulation entitles the §504-only student to related aids and services, such as needed specialized equipment (e.g., FM tuners) or services (e.g., occupational or physical therapy). The only limitation, beyond the threshold issue of whether such aids or services are necessary as a result of the child's disability, is the substantive standard under §504. According to OCR, citing this same FAPE regulation, the standard is commensurate opportunity, that is, whether the district's proposed FAPE is ''designed to meet the [child's] individual educational needs … as adequately as the needs of [the child's nondisabled peers]'' (§104.35). However, according to the majority of the courts, the applicable substantive standard is reasonable accommodation (e.g., *R.K. v. Board of Education*, 2010; *S.S. v. Central Whitesboro School District*, 2012).

Second, many school districts, perceiving §504 too generally as ''IDEA lite,'' do not have policies and procedures that align with the discipline protections of §504-only students, which in some situations exceed those that the IDEA provides. For example, §504 requires reevaluation upon a disciplinary change in placement (§104.35[a]), and it does not include the 45-day interim alternate placements that the IDEA provides (Zirkel, 2008).

Third and specific to the newly eligible §504-only students as a result of the ADAAA, is this issue: What is the child's entitlement to FAPE if the impairment substantially limits one or more major life activities only without mitigating measures or, for conditions that are episodic or in remission, at the active time? In its recently issued policy statement, OCR (2012) provided this related question and answer:

> Q11: What must a school district does for a student who has a disability but does not need any [FAPE]?
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> A: If, as a result of a properly conducted evaluation, the school district determines that the student does not need special education or related services, the district is not required to provide aids or services… . But the school district must still conduct an evaluation before making a determination. Further, the student is still a person with a disability, and so is protected by Section 504's general nondiscrimination prohibitions and [the ADA's] statutory and regulatory requirements.

Thus, in some but—depending on a defensible determination—certainly not all of the mitigation, episodic, and remission situations under the ADAAA, it appears that the child may be technically eligible, meaning that the entitlement is limited to procedural safeguards, such as notice, evaluation, and protections against discriminatory discipline, retaliation, or harassment. Moreover, OCR clarified that depending on the fact-dependent case-by-case analysis, the child may be entitled to ''a reasonable modification of policies, practices, or procedures'' (OCR, 2012, Q10). Further clarification not only depends on future legal developments but also pertains under the overlapping recent legal developments for double-covered students.

Conversely, §504 presents the potential for district liability for children with health-based impairments that substantially limit a major life activity other than learning, thus—unlike the IDEA—not having special education needs. For example, in *Taylor v. Altoona Area School District* (2007/2010), the federal court

dismissed the IDEA, constitutional, and—based on governmental immunity—negligence claims of the parents of a child with severe asthma who died in school allegedly because of the failure of the district to implement reasonable precautions for his safety; however, the court rejected dismissal of their §504 claim for money damages.

Finally, albeit only secondarily, special education leaders need to be aware that for students whom parents voluntarily—rather than unilaterally or via IEP teams—place in private schools, §504 (and the ADA) directly applies to the private, including parochial, schools that receive federal financial assistance (e.g., *Russo v. Diocese of Greenburg*, 2010), and the ADA extends this nondiscrimination obligation to secular private schools that do not meet this financial-assistance criterion (e.g., *Franchi v. New Hampton School*, 2009).

Double-Covered Students

In recent years, the attorneys for students with IDEA IEPs have creatively used §504 as a source of alternative or additional claims in litigation. Thus, the resulting new developments under §504 for double-covered students have arisen in courts rather than in Congress. These developments, which have arisen in suits on behalf of double-covered students but apply more generally to §504-only students, fit in two general categories.

Scope Extension

The first category, which is of more direct and immediate significance to special education leaders, concern their scope of liability or obligations. As a primary example, in cases arising with double-covered students, courts have agreed that money damages are not available under the IDEA (e.g., *A.W. v. Jersey City Public Schools*, 2007) but are available under §504 at least upon proof of the school district's deliberate indifference (e.g., *Chambers v. School District*, 2009/2011). Two related examples respectively address the standard and length of district liability for money damages. First is the aforementioned issue of the standard, or measuring stick, for the school district's §504 obligations. In a recent case, the parents—after obtaining FAPE services costing the district approximately $250000 per year for each of their two daughters with autism as the result of an IDEA impartial hearing—sought money damages under §504. After a denial of the district's motion for dismissal, the Ninth Circuit appeared to accept, in combination with deliberate indifference, both of the aforementioned competing standards—reasonable accommodation and, alternatively, commensurate opportunity (*Mark H. v. Hamamoto*, 2010).

Similarly, in some cases, the parents have invoked §504 to extend the length of liability, or the statute of limitations, beyond the uniform 2-year period under the IDEA. Because the §504 legislation does not specify a limitations period, the courts usually resort to using state law by analogy, thus causing variance from one jurisdiction to another and a significant advantage in some cases for the plaintiff-parents. For example, in *Bishop v. Children's Center for Developmental Enrichment* (2010), which arose in Ohio, the Sixth Circuit held that the statute of limitations for the parents' §504 claim was, based on the analogous state law, 2 years but that this period did not start running, under Ohio law, until the child reached the age of majority. Thus, the parents' IDEA claim expired, but their §504 claim was still viable.

In contrast, at least according to one recent court decision, one potentially troublesome extension, which is at the intersection of the IDEA and §504, has hit a dead end. More specifically, what if the parent of a child with an IEP under the IDEA not only revokes consent in writing—which the December 2008 amendments to the IDEA regulations require the district to issue a procedural safeguards notice and to exit the child, with no recourse to a due process hearing—but also in the same written notification insists that the child continue to receive special education under §504? In *Lamkin v. Lone Jack C-6 School District* (2012), the court ruled that the district need not abide by the second part of the parent's letter. The court found persuasive a 16-year-old OCR policy interpretation (*Letter to McKethan*, 1996). This policy letter reasoned that because the §504 FAPE regulation, which does include special education (§104.33[b][1]), provides that one means of compliance is by offering an IEP under the IDEA (§104.33[b][2], the district had fulfilled its obligation under both the IDEA and §504. Thus, by revoking the IDEA IEP, the parent had also revoked FAPE under §504.

Claim Extension

In recent years, parents of special education students have further extended the vulnerability of school

districts by advancing claims—often with notable success—under §504 (and the ADA) for disability-based bullying and harassment (e.g., *K.R. v. School District*, 2010; *Preston v. Hilton Central School District*, 2012), retaliation (*M.M.R.-Z. v. Commonwealth of Puerto Rico,* 2008), facilities accessibility (e.g., *Luciano v. East Central Board of Cooperative Educational Services*, 2012; *Celeste v. East Meadow Union Free School District*, 2010), and service animals (e.g., *C.C. v. Cypress School District*, 2011). Even more creatively, parent attorneys have used §504 to challenge common school district policies under theories of associational discrimination (e.g., *S.M. v. School District*, 2011), misidentification (e.g., *Durrell v. Lower Merion School District*, 2011), IEP-team private placements (e.g., *C.D. v. New York City Department of Education*, 2009), disciplinary changes in placement (e.g., *M.G. v. Crisfield School District* (2008), and constructive exclusion (e.g., *Bess v. Kanawha School District Board of Education*, 2009).

Adjudicative Advantages

Finally, in addition to multiple avenues for complaint filing (Zirkel & McGuire, 2010), parent attorneys have discovered or uncovered advantages under §504 in adjudication on behalf of double-covered students that increases the costs and odds of litigation, thus indirectly but notably affecting the budgetary resources for special education leaders. The leading example is the oft-considerable cost of expert witnesses in impartial hearings and court proceedings. Under the IDEA, the Supreme Court has held that prevailing parents may not recover these costs (*Arlington Central School District Board of Education v. Murphy*, 2006). However, the lower courts have ruled that expert witness fees are available to parents under §504 (e.g., *L.T. v. Mansfield School District*, 2009). Another example of a potential differential advantage of §504 in comparison to the IDEA is the plaintiff-parents' right to a jury trial (e.g., *K.I. v. Montgomery Public Schools*, 2010). Similarly, most of the carefully crafted limitations under the IDEA for attorneys' fees are absent in the corresponding §504 provision (§794a).

Conclusion

Special education leaders can no longer afford to consider §504 as a light version of the IDEA that is solely or even primarily of concern to their general education colleagues. New developments in Congress and in the courts have changed the proverbial playing field. Special education leaders need to keep current on both the persisting and emerging issues under §504 that apply in both general and special education. These developments include general compliance requirements, such as impartial hearings; the consequences of the ADAAA in terms of not only expanded eligibility but also differential entitlement; and the complicated but potentially costly new litigation developments under §504. Developing a carefully coordinated system that addresses the needs of students under the IDEA, under §504, and—via response to intervention, differentiated instruction, and other commonsense individualized responses—beyond these two overlapping laws is in the interest of all students.

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