How Good Must a 504 Plan Be to Pass Legal Muster?

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- **Although varying among and within the states, the percentage of students with 504 plans is steadily and significantly increasing as a national average.**
- **Although the professional literature addresses the legal standards for eligibility for 504 plans, it has not provided up-to-date information to practitioners as to the legal standard for the appropriateness of 504 plans.**
- **The prevailing substantive standard for Free and Appropriate Public Education under § 504 is reasonable accommodation, which is different from the corresponding substantive standard for IEPs under the IDEA.**
- **This article summarizes the case law basis for this § 504 standard and provides recommendations for the formulation of 504 plans and the closely related steps before and after the formulation stage.**

Key words: Section 504 Plans, Free and Appropriate Public Education, Individualized Education Plans.

For most school districts, § 504 of the Rehabilitation Act (2019) takes a distant second place to the Individuals with Disabilities Education Act ([IDEA], 2019). As a result, the professional literature and prevailing practice often neglect the latest legal developments under § 504.

Serving as a recent reminder of the overlapping and often confusing coverage of § 504 in relation to the IDEA, the U.S. Department of Education (2022) recently announced its intent to revise the § 504 regulations, which have not been updated since their issuance in the late 1970s.

Moreover, attributable in part to the liberalizing eligibility standards that Congress enacted in 2008 (e.g., Zirkel, 2009), the average percentage rate of K–12 students with 504 plans has increased rather steadily from 1.2% in 2009–2010 to 2.7% in 2017–2018, which is the last year of available data from the U.S. Department of Education's Office for Civil Rights (OCR) national surveys (Zirkel & Gullo, 2021). Using a straight-line projection based on this previous rate of increase, which is much higher than that for students with individualized education plans (IEPs), the current national average is estimated to be 3.5%.

Other contributing factors for this increase include (a) some jurisdictions' efforts to reduce overidentification under the IDEA; (b) states' expansion of dyslexia laws that require individualized interventions; (c) districts' overuse of 504 plans within informal or formal tiered interventions prior to IDEA evaluation as a consolation prize after an IDEA evaluation of non-eligibility or as a safety net after exiting from an IEP; and (d) parents' efforts to obtain accommodations for timed high-stakes tests, such as the ACT and SAT (Zirkel, 2018a). The repeating federal policy pronouncements specific to students with attention deficit/hyperactivity disorder (OCR, 2016; OCR & Office of Special Education and Rehabilitation Services [OSERS], 1991) and the recent effects of the pandemic, including but not limited to long COVID (OCR/OSERS, 2021), also serve to continue the inflating rate of 504 plans.

As a result, one of the increasingly important issues is the substantive standard for the appropriateness of 504 plans; i.e., beyond the applicable procedural requirements under § 504, how good must a 504 plan be to pass legal muster? The purpose of this article is to show that the answer to this question, although not yet crystal clear on a national basis, is now legally settled to a sufficient extent to serve as the foundation for practical recommendations.

The three subsequent sections of this article consist of (a) threshold considerations that serve as an overall framework, (b) an up-to-date analysis of the applicable judicial rulings, and (c) a set of general recommendations for customization at the local level. The focus is the courts' prevailing substantive standard for 504 plans although the recommendations extend to closely related areas of practice before and after the plan's formulation.

General Threshold Considerations

First, the focus here is on so-called "504 only" students, meaning those students eligible under the broad definition for disability under § 504 but not under the corresponding narrower scope of eligibility under the IDEA. In contrast, students eligible for an IEP under the IDEA are, in effect, "double covered," having the concurrent protections of § 504, which are often but not always less extensive than those under the IDEA.

Second, although § 504 does not require a document for Free and Appropriate Public Education (FAPE) (Zirkel, 2011), OCR (2020, p. 10) "encourages" use of a written plan, and it generally makes practical sense. The names vary, including the use in Pennsylvania's regulations of a "service agreement," but "504 plan" is used generically herein. Unlike the IDEA requirements for an IEP, there is no legally prescribed format, content, or review deadline for a 504 plan.

Third, § 504 is an unfunded mandate. Unlike the IDEA and its corollary state laws, neither the federal nor state government provides funding for students with 504 plans. Thus, it is a part of the local school district's budget, typically under general education.

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Fourth, many school leaders appear to have the impression that 504 plans are limited to accommodations, such as extra time or preferential seating, and not services, such as physical therapy or counseling. Thus, they may not realize that the § 504 regulations (2021) require FAPE. More specifically, the applicable regulation defines FAPE initially as a matter of scope: "regular or special education and related aids and services" (§104.33[a]). Thus, the appropriateness question extends to services, which may mean, as one example for a 504 plan—unlike an IEP—related services alone.

Fifth, although school leaders may know that OCR is the administering agency of § 504 in relation to the schools, including enforcement responsibilities for compliance, they may not realize that "OCR generally will not evaluate the content of a § 504 plan," leaving such matters to due process hearings (OCR 2020, Q/A 5).

Sixth, school leaders may not realize that, in most states, the § 504 regulatory requirement for a due process hearing is the direct responsibility of the local school district rather than the state education agency (e.g., Redding Public Schools, 2000). Thus, depending on the state, the resulting confusion includes the potential different implementation of this requirement for double-covered as compared with 504-only students.

Finally, school leaders may not realize, in relation to express or implicit threats of a lawsuit for alleged FAPE violations under § 504, plaintiff parents face the additional litigation hurdles of (a) fulfilling the prerequisite of exhaustion of IDEA due process hearings if the crux of the case is IDEA FAPE (*Fry v. Napoleon Community Schools*, 2017) even in some cases for 504-only students (Zirkel, 2021) and, (b) uniformly for money damages and increasingly for other relief, showing an approximation of intentional discrimination, such as bad faith/gross misjudgment or deliberate indifference by the defendant district (Zirkel, 2018b).

Prevailing Judicial Approach

Unlike the IDEA, which has a nationally uniform substantive standard for IEPs per the Supreme Court's successive decisions in *Board of Education v. Rowley* (1982) and *Endrew F. v. Douglas County School District RE-1* (2017), the courts have not yet established a consensus standard for the appropriateness of 504 plans. However, the trend has become increasingly settled in favor of a reasonable accommodation approach.

Commensurate Opportunity

In contrast, OCR has long relied on a commensurate opportunity standard based on the remaining part of

the above-cited definition of FAPE in the § 504 regulations: "designed to meet individual educational needs of [students with disabilities] *as adequately as the needs of [nondisabled students] are met*" (§104.33[a]) [emphasis added]. As the Supreme Court in *Board of Education v. Rowley* (1982, p. 186 n.8) clarified, this commensurate opportunity standard is inapplicable to the IDEA. Moreover, as the district court in *Rowley v. Board of Education* (1980, p. 534) acknowledged and as the Second Circuit's dissenting opinion in *Rowley v. Board of Education* (1980, p. 952) emphasized, this substantive standard is difficult to apply.

Even more importantly, as mentioned under threshold considerations, OCR generally does not enforce this standard due to its long-standing stance of not addressing substantive FAPE under § 504. On the courts' side, the judicial endorsement of this standard in relation to 504 plans is limited to one published court decision that is almost 30 years old. More specifically, in *Lyons v. Smith* (1993), a federal district court ruled that the child was eligible under § 504, not the IDEA, and the commensurate opportunity standard of the § 504 regulations applied. However, the court did not apply the standard, instead sending the case back to the hearing officer to decide the FAPE issue. The court also sidestepped determining whether the child was entitled to special education under § 504 although concluding as a general matter that the regulation's definitional reference to special education would apply under this substantive standard only if "necessary to eliminate discrimination" (p. 420).

Reasonable Accommodation

The opposing and increasingly prevalent position is the more well-known § 504 standard of reasonable accommodation. The boundaries of this standard are generally understood to end at program changes that would constitute undue fiscal or administrative burdens or fundamental alterations (e.g., Dagley & Evans, 1995). OCR's long-standing and unchanged position is that this standard is, per the differentiation in the § 504 regulations, specifically and exclusively for employees, not students (Letter to Zirkel, 1993). However, the courts have imported this standard to student cases although sometimes in either higher education or in the double-covered context of IEP students in K–12 education. Closer to the focus here but not reaching the specific application to 504 plans, courts have applied reasonable accommodation to various other issues in relation to 504-only students, such as extracurricular activities (e.g., *S.S. v. Central Whitesboro School District*, 2012) and more general program accessibility (e.g., *Zandi v. Fort Wayne Community Schools*, 2012). Even closer was the Second Circuit's application of the reasonable accommodation standard for a district's unusual provision of an IEP under § 504 (*J.D. v. Pawlet School District*, 2000).

Directly on point, courts in recent years have addressed the substantive standard for 504 plans in a limited but sufficient number to be instructive. This examination requires the difficult sorting out of those cases that discuss FAPE under § 504 for double-covered students due to the interaction between the IDEA and § 504 standards. The major example is the Ninth Circuit Court of Appeals' formulation of the § 504 standard in *Mark H. v. Hamamoto* (2010), a case concerning two siblings with IEPs for autism. This formulation included not only reasonable accommodation but also "meaningful access," which the Ninth Circuit interpreted in this context to mean commensurate opportunity in the design of an IEP. Other courts have used a "meaningful access" or similar gloss for the § 504 standard without a clear relationship to the IDEA.

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For the cases specific to students with 504 plans, the courts within the Third Circuit Court of Appeals have been the primary locus of the substantive-standard rulings. These cases emanate from Pennsylvania for various reasons that combine to make this jurisdiction "ripe" for addressing this issue. More specifically, Pennsylvania is (a) one of the very few states in which the IDEA hearing officers also have jurisdiction for § 504 claims (including those on behalf of 504-only students), (b) one of the dwindling number of states that do not require a showing of intentional discrimination for § 504 FAPE claims for relief other than money damages, (c) perhaps the only state with a law requiring a 504 plan for 504-only students, and (d) one of the most active states for K–12 student disability litigation.

An early federal district court decision in Pennsylvania applied the reasonable accommodation standard in rejecting the parents' substantive FAPE challenge to a 19-point 504 plan for a first-grader with asthma, gross motor difficulties, and sensory issues (*Molly L. v. Lower Merion School District*, 2002). However, citing a Third Circuit decision in the double-covered context, the court confusingly imported the IDEA criteria of "significant learning" and "meaningful benefit" within this standard.

A decade later, in the leading decision in *Ridley School District v. M.R.* (2012), the Third Circuit Court of Appeals similarly mentioned these two IDEA FAPE criteria along with § 504 "meaningful access" and "meaningful participation" variations; however, the court seemed to apply the reasonable accommodation standard in a straightforward and streamlined way to the contents and implementation of a 504 plan for a first-grader with food allergies. In rejecting the parents' claims of denial of FAPE under § 504, the court concluded, "[The school district] took reasonable steps to accommodate [the child's] disabilities and include her in all class activities; it was not required to grant the specific accommodations requested by Parents or otherwise make substantial modifications to the programs that were used for all other students" (p. 282).

In the following year, a federal district court decision in Pennsylvania applied the *Ridley* standard in upholding the appropriateness of a 504 plan for a high school student with ADHD although mentioning the potential enhancements of "meaningful access" and "meaningful participation" (*Chelsea D. v. Avon Grove School District*, 2013).

In a subsequent decision, the Third Circuit upheld the appropriateness of a 504 plan for a first-grader with food allergies based on the *Ridley* "reasonable steps" formulation without any enhancement language at all (*T.F. v. Fox Chapel Area School District*, 2014).

The next two federal district court decisions in Pennsylvania were notably cursory in applying the *Ridley* standard. In *Karrissa G. v. Pocono Mountain School District* (2017), the court summarily upheld, under the *Ridley* standard, the appropriateness of a 504 plan for a high school student with anxiety, noting that the parents had provided scant evidence of inadequate formulation or implementation. In *S. v. West Chester Area School District* (2019), the court's analysis was even more perfunctory in upholding the appropriateness of a 504 plan for an elementary school student with epilepsy.

In an intervening decision, another federal district court in Pennsylvania applied the *Ridley* standard with more detailed analysis of the facts but with similar deference to the district, including the school nurse, to uphold the 504 plan for an elementary school student with Ehlers–Danlos syndrome (*Rylan M. v. Dover Area School District*, 2017). The parents claimed that the 504 plan was not appropriate because it did not include an aide per their pediatrician's assessment of medical necessity. However, the court's reasoning included the following significant distinction:

> While the school nurse is not qualified to give an expert opinion on the medical necessity of a dedicated aide, the court finds that she is qualified to provide input on the interventions necessary to ensure [the student] receives appropriate care in school. This assessment is based on multiple factors, including her familiarity with [the student] and her [specialized] experience …(p. 5)

In its most recent relevant decision, the federal district court in eastern Pennsylvania applied the *Ridley* standard, including meaningful access and participation, to uphold the 504 plan of a middle school student with obsessive compulsive disorder and anxiety (*H.D. v. Kennett Consolidated School District*, 2019). Its comprehensive analysis included the conclusion that the snapshot approach applies to § 504 FAPE determinations, meaning that adjudicative review is based on what the 504 team knew or had reason to know at the time they formulated the 504 plan. Thus, the court explained, if a 504 plan failed, it would not necessarily or automatically mean a violation of the substantive standard for appropriateness. Similarly clarifying that the applicable substantive standard is more relaxed than rigorous, the court commented,

> It is immaterial that the [504 plan] may not have addressed every one of [the student's] anxiety triggers or used the best possible remedial techniques to address his absenteeism. The District's duty under § 504 was to mitigate the impact of [the student's] disability, not to erase it. (p. 20)

One other recent Pennsylvania decision addressed the appropriateness of a 504 plan only indirectly and in the obverse direction (*A.C. v. Owen J. Roberts School District*, 2021). In this case, the district unilaterally discontinued the 504 plan of a gifted

middle school student with complex medical conditions upon evaluating him as eligible instead under the IDEA and reaching an impasse with the parents about the evaluation and proposed IEP. The court ruled that the removal of the 504 plan was a procedural violation that, in this case, did not result in a denial of FAPE under § 504 because the parents had not proven a loss of meaningful benefits or significant learning under *Ridley*.

The most recent and weightiest ruling outside the Third Circuit, which encompasses Delaware, New Jersey, and Pennsylvania, is in *Doe v. Knox County Board of Education* (2023), an officially published decision of the Sixth Circuit Court of Appeals, which covers the four-state region from Michigan down to Tennessee. In this case, the school district provided a 504 plan for a high school student with misophonia, a hypersensitivity to specific sounds that, for her, results in migraines and elopements from everyday sounds of eating food and chewing gum. She had previously attended a private school that banned students from eating and chewing in classrooms and at which she earned straight "A"s. The 504 plan at the high school, which was a district magnet school for STEM with a particular culture and facility that made such a ban difficult, included noise-canceling headphones, preferential seating, a personal "break" system, and testing in isolation. Seeking a ban on eating food and chewing gum in all of her academic classes with a limited exception for students with special medical needs, her parents filed for a preliminary injunction in federal court. The lower court dismissed the case on other grounds, but on appeal, the Sixth Circuit reversed the dismissal, sending the case back to the lower court to apply the following standard under § 504: "[The] parents must show not just that their *preferred* accommodation was reasonable but also that the *provided* accommodation was unreasonable …giving due regard to the 'professional judgment' of school administrators" (p. 1088).

The remaining § 504 FAPE litigation in other jurisdictions concerning 504 plans were decisions that did not reach the substantive standard due to their focus on the prerequisite issue of bad faith/gross misjudgment (e.g., *Baker v. Bentonville School District*, 2022; *Doe v. Brighton School District 27J*, 2021; *K.D. v. Starr*, 2014; *Reid-Witt v. District of Columbia*, 2020). Yet the rulings that addressed inadequate implementation rather than formulation of the 504 plan were notably more favorable to the plaintiff parents (e.g., *B.D. v. Fairfax County School Board*, 2019; *Beam v. West Wayne School District*, 2016; *Bryant v. Dayton Independent School District*, 2021; *R.D. v. Lake Washington School District*, 2021).

Standing separately because the district had not identified the student at all and, thus, had not provided a 504 plan, a federal district court decision in California applied the substantive standard under § 504. In this case, the court concluded that the student met the broad definition of disability under § 504 due to her various health conditions that substantially limited her eating and ability to attend school. However, denying the rest of the parents' motion for summary judgment, the court concluded that a trial was necessary to determine whether the district failed to provide "reasonable accommodations …sufficient to provide … meaningful access to public education" (p. 853) when she was homebound (*S.T. v. Los Angeles Unified School District*, 2021). Additionally, for the remedy of money damages, the court observed that the plaintiff parents must prove that "the defendant intended to discriminate on the basis of his or her disability or was deliberately indifferent to the disability" (p. 849).

Practice Recommendations

The following set of recommendations have two distinct features in relation to the focus of the previous sections. First, the sequence starts and ends with the closely related steps that respectively and generally precede and follow the substantive formulation of the 504 plan. To distinguish the neighboring steps before and after the formulation stage, those items are in the form of self-assessment questions rather than recommendation declarations. Second, although each overall recommendation is largely a matter of law, the elaboration under each one provides more emphasis on prophylactic suggestions, which are for professional consideration and determination within the discretionary range above the legal minimum.

Preceding-Phase Questions

1. Does your district have at least an overall § 504 coordinator (§104.7[a])?

This regulation requires school districts to have "at least one" person to coordinate § 504, thus allowing for designating only one overall § 504 coordinator. However, many districts, especially those with

several schools, have found it effective to have a § 504 coordinator at each school with the overall coordination of a designated administrator at the central office. The selection of such individuals warrants careful consideration; in general, think twice before appointing the new counselor at the school level or the special education director at the district level. For effectiveness, the selected individuals must have solid administrative backing and clearly represent to the school community that § 504 is largely a responsibility of general education.

2. Does your district have a grievance procedure and a separate impartial hearing procedure that are reasonably known to the various members of the school community and that otherwise comply with the requirements of the § 504 regulations (§§104.7[b] and 104.36])?

The reason for these procedures is not just to avoid the particular vulnerability to OCR complaint enforcement, per its procedural priority, but also to have respective internal and third-party procedures for effective resolution of complainants' perceived problems, including the content of 504 plans. For the grievance procedure, various examples are available (e.g., Zirkel, 2022). For the impartial hearing, in most jurisdictions, the local school district is responsible for this mechanism separate from and not necessarily identical with the procedures for the state's applicable impartial hearing process under the IDEA (e.g., Zirkel, 2016).

3. Do the evaluation procedures for 504-only students at least meet the requirements under § 504 (§104.35[b]-[c])?

The evaluation requirements for 504-only students are less prescriptive than those under the IDEA. For example, the § 504 regulations do not have a specific time frame for the initial evaluation and only require "periodic" reevaluations as compared with the respective requirements under the IDEA of 60 days (unless different state law specification) and at least triennially. Moreover, one of the rulings in the aforementioned *H.D. v. Kennett Consolidated School District* (2019) decision was that the process for identifying 504-only students does not import the "more sweeping, thorough, and precise" evaluation standards of the IDEA (p. 17). This difference serves as a reminder against automatic use of IDEA procedures for 504-only students.

Plan Formulation

4. Make sure that a team of persons "knowledgeable about the child, the meaning of evaluation data, and the [FAPE] options" formulate the 504 plan (§104.35[c][3]).

Unlike the IDEA, the composition of the team, including the meaning of these "knowledgeable" criteria, is relatively flexible and dependent on the context of the individual student. For example, for many of the eligible students under the expanded illustrative list of major life activities, which connects with various medical impairments, the school nurse may well be the effective choice for "the meaning of evaluation data." Ultimately, the choice of knowledgeable members must only be *reasonable* although optimal may well be your aim.

5. Per the threshold considerations section above, avoid a policy or custom that limits the content of 504 plans to accommodations only.

Although the definitional component of "special education" in the FAPE definition may be problematic, the relatively broad scope of the IDEA classification of other health impairment (OHI), especially after the addition of ADHD in the 1999 IDEA regulatory definition of OHI, would seem to largely address this component via the overlap of double-covered students. The provision of related services alone, other than the administration of medication, may raise a cost issue, but the limits of or alternative options within the reasonable accommodation standard may resolve it.

6. Per the focus of this article, the likely substantive standard is "reasonable accommodation," which will depend on not only the nature and severity of the student's identified disability, but also the size and budget of the district.

Consult with local legal counsel for the applicable standard in your jurisdiction, including the possible applicable variations or enhancements. Moreover, even the application of the straightforward reasonable accommodation standard requires careful consideration from an objective viewpoint, i.e., one of a hypothetical hearing officer or court rather than from school district colleagues.

Yet duly consider that the analysis in the key court decisions were all rather cursory in their

application of this standard, and every one of the substantive FAPE rulings that reached a definitive determination was in favor of the appropriateness of the district's 504 plan for the child.

7. Although the eligibility determination is without mitigating measures, such as medication, the FAPE formulation is with mitigating measures.

The basis for this initially confusing but ultimately sensible "with" is OCR's repeated (e.g., 2012, Q11) policy interpretation. For example, OCR's (2016) Dear Colleague Letter for students with ADHD offered this example:

> If the student has a disability, but does not need any special education or related aids or services from the school district, e.g., the student is taking medication that adequately treats the student's ADHD, the school district is not required to provide aids or services. (p. 22)

Although not legally binding on courts and not addressed in foregoing case law, this interpretation is likely to be regarded as persuasive in court.

8. The focus is FAPE, not formalities.

Although some attorneys and companies have developed detailed forms that largely parallel the more legally prescribed process under the IDEA, districts should weigh the cost–benefit of such formalities against the much more flexible legal requirements of § 504. For example, beware of software for 504 plans that offer a buffet-style checklist of accommodations and services without careful need-based connection to the identified impairment and major life activity of the student. Similarly, 504 plan formats that include goals/objectives, progress reports, or transition services should be reconsidered in relation to the lack of any documentation requirements for FAPE in § 504. Instead, both the format and contents should focus on reasonable accommodations and services necessitated by the identified disability that are clearly understandable to all parties for purposes of implementation.

General Post-Plan Issues

9. Do you have effective procedures in place for the implementation of 504 plans with fidelity?

First, as the case law overview above reveals, the frequency and parental success rate of court rulings specific to FAPE under § 504 are much higher for implementation than formulation of 504 plans. Second, implementation issues serve as practical reminders against overidentification of 504-only students and ineffective formulation of 504 plans. Third, implementation information is critical for reviewing and revising the 504 plan to meet the substantive standard for appropriateness.

Here, for example, are some questions for implementation consideration: Did you consult with the child's teachers in the eligibility and formulation determinations? Should you identify the responsible staff members for each FAPE item in the 504 plan? Did you timely provide the responsible staff members with at least their relevant parts of the 504 plan? Did you provide effective monitoring of not only whether the staff member(s) offered the identified accommodations/services, but also whether the student used them? For any implementation shortfalls, did you provide remedial actions for the responsible staff members and affected student?

Remember too that the applicable substantive standard is the legally required minimum. Exceeding the minimum is desirable, but whatever the 504 plan ultimately specifies is the baseline for implementation claims. Cost and personnel limitations could have been the defense at the formulation stage, but—as with overidentification—the district is bound by its formal determinations unless and until legally undone. Thus, consider providing individualized accommodations and interventions as part of responsive general education beyond the required contents of the 504 plan.

10. During and after the 504 plan formulation, did the school staff's words and actions consistently demonstrate not only reasonableness, but also good faith?

The reasons are again twofold. First, as a legal matter as shown above, courts require in § 504 FAPE cases that parents prove bad faith/gross misjudgment or a similar proxy for intentional disability discrimination if they seek money damages and, in an increasing number of jurisdictions, if they instead seek other relief, such as compensatory education. Second, as a professional matter, reasonableness and good faith build trust and collaboration, which prophylactically exceeds legal requirements.

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