

Speaking Education Language 504 vs IEP, FERPA vs HIPAA & Service Animals

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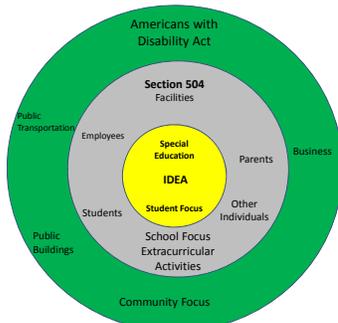
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Disability-Related Education Complaints Trending Up

Across the nation, disability-related education civil rights complaints are on the rise.

- 2014: There were 3,900 complaints.
 - FAPE (3,770)
 - Retaliation (2,850)
 - Different treatment, exclusion, or denial of benefits (1,746)
- 2009: There were less than 3,000 complaints.
- Factors influencing the rise of complaints:
 - Increased awareness of civil rights laws
 - Increased confidence in the Office for Civil Rights

OCR Report FY 2013-2014



IDEA and Section 504 both have “Child Find” and “FAPE” regulations

Child Find:

34 CFR 104.32 (a), to identify, locate and evaluate children that might have a disability. (IDEA, child find found at §300.109 and §300.111).

FAPE:

34 CFR 104.33 (c) *Free education—(1) General.* For the purpose of this section, the provision of a free education is the provision of educational and related services without cost to the handicapped person or to his or her parents or guardian, except for those fees that are imposed on non-handicapped persons or their parents or guardian. It may consist either of the provision of free services or, if a recipient places a handicapped person or refers such person for aid, benefits, or services not operated or provided by the recipient as its means of carrying out the requirements.

How long can a school take to complete an evaluation to determine eligibility?

- Under IDEA, the initial evaluation must be conducted within 45 school day of receiving parental consent for the evaluation.
- Guidance for Section 504 evaluation is, if the IDEA rule is followed then the school would be in compliance. (45 School days)

Who Can Make A Referral for IDEA/Section 504?

Either a parent or LEA may initiate a request for an initial evaluation to determine if a student is a student with a disability.

- Under IDEA the request must be written.
- Under Section 504 the request may be verbal. However, a written request provides documentation of when the 45 school days evaluation begins.

	IEP (Individualized Education Program)	504 Plan
Basic Description	Blueprint or plan for a child's special education experience at school.	Blueprint or plan for how a child will have access to learning at school.
What it Does	Provides individualized special education and related services to meet the unique needs of the child.	Provides services and changes to the learning environment to meet the needs of the child as adequately as other students.
What Law Applies	The Individuals with Disabilities Education Act (IDEA) , a federal special education law for children with disabilities.	Section 504 of the Rehabilitation Act of 1973 , a federal civil rights law to stop discrimination against people with disabilities.

	IEP (Individualized Education Program)	504 Plan
Who is Eligible?	<ul style="list-style-type: none"> Child must have one or more of the 13 specific disabilities listed in the IDEA. Child's disability must affect the child's educational performance and/or ability to learn and benefit from the general education curriculum. 	<ul style="list-style-type: none"> Child has a disability, i.e., a physical or mental impairment that substantially limits one or more major life activities Disability must interfere with a child's ability to learn in a general education classroom. Section 504 has a broader definition of disability than the IDEA.
Who Creates the Program/Plan?	Created by an IEP team that includes: parent, general education teacher, special education teacher, school psychologist or specialist who can interpret evaluation results, district representative with authority over special education services (LEA rep.).	Created by a team of people who are familiar with child and understand evaluation data and special services options. Might include parent, general education teacher, school counselor, and the principal or administrator. Team should include nurse if student has an Individual Healthcare Plan (IHP).

	IEP (Individualized Education Program)	504 Plan
What's in the Program/Plan?	<ul style="list-style-type: none"> Present levels of academic and functional performance (PLAAPF) Annual education goals Services (may include special education, related, supplementary, and extended school year) Timing of services – when they start, how often they occur, how long they last Accommodations – changes to child's learning environment Modifications – changes to what child is expected to learn and know Standardized test participation How child will be included in general education class and school activities 	<p>There is no standard 504 plan.</p> <p>Generally includes the following:</p> <ul style="list-style-type: none"> Specific accommodations, supports, or services for child Names of who will provide each service Name of person responsible for ensuring the plan is implemented

	IEP (Individualized Education Program)	504 Plan
How Often is it Reviewed/Revised?	<ul style="list-style-type: none"> IEP team must review IEP at least once a year. Student must be reevaluated every three years to determine if services are still needed. 	<ul style="list-style-type: none"> Review at least annually, sooner if needed. Student must be reevaluated every three years to determine if they still qualify for a 504 Plan.
Parent Consent	<ul style="list-style-type: none"> Parent must consent in writing for school to evaluate/reevaluate a child. Parents must also consent in writing before school can provide services in IEP. 	<ul style="list-style-type: none"> Parent's consent required for school district to evaluate a child.
Parent Notice	<ul style="list-style-type: none"> School must tell parents in writing before a change in child's services or placement. Notice also required for any IEP meetings and evaluations. 	<ul style="list-style-type: none"> School must notify parents about evaluation or "a significant change" in placement. Written consent is considered a best practice.

	IEP (Individualized Education Program)	504 Plan
How to Resolve Disputes	<ul style="list-style-type: none"> IEP facilitation Mediation Formal state complaint Due Process Hearing Civil Lawsuit 	<ul style="list-style-type: none"> Mediation File a complaint with regional Office for Civil Rights (OCR) within 180 days of alleged discriminatory act Due Process Hearing
Funding/Costs	<ul style="list-style-type: none"> Students receive these services at no charge. States receive additional funding for eligible students. 	<ul style="list-style-type: none"> Students receive these services at no charge. States do not receive extra funding for eligible students. However, federal government can take funding away from programs (including schools) that do not comply. IDEA funds cannot be used to serve students with 504 plans.

What are the Parts of the Section 504 Regulations?

Section 504 has several areas of particular importance for schools:

- Subpart B: Employment Practices
- Subpart C: Program Accessibility
- **Subpart D: Requirements for Preschool, Elementary, and Secondary Education**
- Subpart E: Requirements for Post-Secondary Education

Who is Section 504 available to?

Section 504 is available to students with disabilities **who are not already eligible and receiving special education services under the eligibility requirements of the Individuals with Disabilities Education Act (IDEA).**

Criteria for Identification Under Section 504:

1. Has a mental or physical impairment that substantially limits one or more of such person's major life activities.

"Major life activities" include, but are not limited to:

- Walking
- Seeing
- Learning
- Breathing
- Sleeping
- Standing
- Lifting
- Reading
- Concentrating
- Thinking
- Communicating
- Eating
- Bending
- Operation of a bodily function
- Other

Criteria for Identification Under Section 504: (Cont.)

- 2. Has a record of such an impairment.**
- 3. Is regarded as having such an impairment.**

Important: *The second and third prongs of the definition become a factor if discrimination or negative action has occurred because of the "record" or "history" of being regarded as having an impairment.*

How Significant Is the Disability? Is It Substantially Limiting?

Definition of "substantial limitation":

The disability substantially **limits** the ability of an individual to perform a major life activity" compared to the average person in the general population.

(29 CFR 1630.2 (j), May 25, 2011)

Who Is eligible for a Section 504 Accommodation Plan?

A student is eligible for a Section 504 Accommodation Plan if an evaluation shows that the student has a mental or physical impairment that substantially limits one or more major life activities or major bodily functions, and it impacts the student's education.

NO medical diagnosis is required for Section 504 eligibility.

"Section 504 does not require that a school district conduct a medical assessment of a student who has or is suspected of having ADHD unless the district determines it is necessary in order to determine if the student has a disability."

Williamson County (TN) Sch. Dist., 32 IDELR 261 (OCR 2000).

Notices Required for Section 504/IDEA

- General non-description notice
- Annual Child Find duties notification
- Procedural Safeguards:
 - Notice of and participation in meeting
 - Notice of evaluation and re-evaluation
 - Notice of evaluation and eligibility decisions
 - Notice of Section 504 plan/Individual Education Plan (IEP) (accommodations, modifications, service placement)
 - Notice of termination of eligibility or services
 - Notice of right to due process

Section 504 Identification/Evaluation

The regulations, at 34 CFR 104.35(c) tell schools **how to develop 504 accommodation plans**. Three steps are required in interpreting evaluation data and in making placement decisions. A school shall:

1. Draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background and adaptive behavior.
2. Establish procedures to ensure that information obtained from all such sources is documented and carefully considered.
3. 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.

Can you consider mitigating measures?

Equal Employment Opportunity Commission (EEOC) states: " if a mitigating measure eliminates or reduces the symptoms or impact of an impairment, that fact cannot be used in determining if a person meets the definition of disability. Instead, the determination of disability must focus on whether the individual would be substantially limited in performing a major life activity without the mitigating measure."

Can You Consider Mitigating Measures When Determining Eligibility for Section 504?

Can the LEA refuse services based on mitigating factors?

ADAAA states that whether an impairment substantially limits a major life activity is to be determined "without regard to the ameliorate effects of mitigating measures." 42 USC 12102(4)(E)(i)

ADA list of mitigating factors:

- Medication
- Medical supplies, equipment or appliances
- Low-vision devices (does not include ordinary glasses or contacts)
- Prosthetics
- Hearing aids or implants
- Mobility devices
- Oxygen therapy equipment
- Assistive technology
- Learned behavioral or adaptive neurological modifications

IDEA Disability Categories

- | | |
|-----------------------------------|--|
| 1) Autism | 8) Orthopedic Impairments |
| 2) Deaf-blindness | 9) Other Health Impairment |
| 3) Developmental Delay (ages 3-7) | 10) <u>Specific Learning Disability</u> |
| 4) Emotional Disturbance | 11) Speech/Language Impairment |
| 5) Hearing Impairment/Deafness | 12) Traumatic Brain Injury |
| 6) Intellectual Disability | 13) Visual Impairment (including blindness) |
| 7) Multiple Disabilities | |

Similarities in All Disability Categories

- Must adversely affect the student’s educational performance
- Student with the disability must require special education and related services
- Student must have an identified “primary” disability
 - Disability category only applies to eligibility (once eligible, the IEP must address all of the student’s educational needs)
- Multiple measures (formal and informal) must be used
- Team decision

Response to Intervention (RTI)

- A process based on the student’s response to scientific, research-based intervention, hereafter referred to as Method A—RTI
- RTI is defined as “the practice of providing high-quality instruction and intervention matched to student needs and using learning rate over time and level of performance to make important educational decisions.” (NASDSE, 2006, p. 5)
- Prior to use of the data from a response to scientifically based intervention as part of eligibility determination of SLD, RTI should be fully implemented as an instructional practice within the school.

Response to Intervention (RTI)

Additional Considerations:

- LEA should understand the essential components of RTI
- LEA should provide professional development in using data collected through an RTI process.
- LEA **cannot** delay or deny a parents request for referral for special education evaluation solely because a student has **not** completed an intervention or step in any process.

Discrepancy

b) Identification of a severe discrepancy between intellectual ability and achievement, hereafter referred to as Method B—Discrepancy

As part of eligibility determination for SLD, an LEA may choose to use Utah’s current discrepancy model as described under Utah State Board of Education Special Education Rules II.J.(c)(4)(h).

In determining eligibility, the discrepancy report is **one** data source that is considered along with all other evaluation data collected.

Discrepancy Requirement

- Discrepancy requirement:
 - Attach a report that shows confidence of a severe discrepancy between ability and achievement based on a commercial software program that employs a clearly specified regression formula that considers the relationship between intelligence and achievement as well as test reliability.
 - Document the team’s consideration of the discrepancy report and the team’s determination of whether or not it represents a significant discrepancy.
- Eligibility must be determined through multiple measures.
- Eligibility determination is a team decision based on all of the data.

Required Documentation for Methods A, B or C

- Must include all of the elements of a comprehensive evaluation
- Include the additional considerations outlined for SLD determination (II.H.10.(b))
- All components of the evaluation process must be:
 - Carefully considered,
 - Documented, and
 - Discussed with parent/guardian.

Documentation

Evaluation/eligibility team consisted of parents, general education teacher and qualified professionals

- At least one person qualified to conduct individual diagnostic examinations of students
 - Special Education teacher
 - School Psychologist
 - Speech Language Pathologist
 - Reading Teacher or Reading Specialist

FERPA vs. HIPPA

What is FERPA?

A federal law that protects students' "education records"

The law applies to: educational agencies/institutions that receive federal funds. It includes virtually all public schools, school districts and most private and public post secondary schools.

What is HIPPA?

A federal law to protect privacy and security of individually identifiable health information.

The law applies to: health plans, health care clearing houses, health care providers that transmit health information in electronic form in connection with covered transmissions.

(45 CFR § 160.103)

FERPA vs. HIPPA

FERPA

What is in an education record?

1. Information directly related to a student
2. Maintained by an education agency/institution or by a party acting as an agency or institution.

Could include:

- Immunizations
- Individual Healthcare Plans (IHP), maintained by a school nurse

HIPPA

All health related information

Does HIPPA apply to K-12?

Since HIPPA covers any health entity that transmits personal health information, even though a school employs school nurses, doctors, psychologist or other health care providers, the school is not generally a HIPPA covered entity because the providers do not engage in any of the covered transactions.

- The school is a HIPPA covered entity but does not have "protected health information".
- Even in the case of schools billing for some services to Medicaid, they would not be required to comply with HIPPA privacy rule because schools maintain health records that are, "education records under FERPA and so they are not "protected health information."

What if the school contracts with a nurse and they are not employed by the district?

The records are still education records under FERPA.

Who can access Data?

FERPA

Health agencies can access education records which include student health data maintained by the school/staff only if the school has received written consent from the parent or eligible student (adult).

HIPPA

Schools may access students health information if only if the school has received written consent from the parent or eligible student (adult).

What Is the Definition of and Requirement for Service Animals in Schools?

“Service Animal” Defined as:

“Any dog that has been individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual or other mental disability. Note that other species of animals, whether wild or domestic, trained or untrained, are not service animals for the purposes of the regulatory definition.”

2010 ADA, Title II regulations at 28 CFR 35.104

Can a Student Have an Animal at School for Support?

“A pet or support animal may be able to discern that the handler is in distress, but it is what the animal is trained to do in response to this awareness that distinguishes a service animal from an observant pet or support animal.” —75 Fed. Reg. 56, 193 (2010)

However, in 2010 the Department of Justice stated, “support animals may be permitted as a reasonable accommodation under other laws, including the Fair Housing Act and the Air Carrier Act” (75 Fed. Reg. 56, 166 (2010)). This would suggest that an emotional support animal might, under certain circumstances, qualify as a reasonable accommodation if necessary for the students to receive FAPE, even if the animal does not fit the definition of a service animal under Title II.

What Questions Can You Ask When a Parent Requests a Service Animal Accommodation for His/Her Child?

1. Is the animal required because of a disability?
2. What work or task has the animal been trained to perform? (28 CFR 36.302(C)(6))

You **can't** require documentation from medical provider or anyone else. However, you can ask for proof that the required shots for the animal have been administered before the service animal comes to school with the student. (See sample policies and procedures checklist.)

When Can a Service Animal Be Excluded From the School?

- The animal is not within the handler’s control.
- The animal is not housebroken.
- The presence of the animal would create a fundamental alteration in the nature of the program (28 CFR 35.136(b)).
- A service animal may fundamentally alter a program if another student in the classroom is allergic to dogs. However, you should take steps to work around that issue—for example moving one of the students to another classroom.
- There may be times when the service dog is disruptive. For example, the student may want to play football, but his/her service animal jumps on other students when he/she gets tackled.

What if a student needs a service animal and another student/staff are allergic to animals

Under *Title II, 28 CFR 35.136(a)*, public entities must modify procedures to permit the use of a service animal by an individual with a disabilities.

- In Grand Rapids, MI Pub. Schs. 115 LRP 10965 (OCR 10/21/2014), a parent who had a visual impairment claimed the principal told him to remove his dog due to an individual with allergies.
- In an OCR review, the district agreed to submit policies regarding service animals and to train all staff members at the school.

What do you do if a student/parent need a service animal and there is a student/staff with allergies?

Ensure staff don't unlawfully bar service animals from campus using the following tips:

- Don't automatically exclude a service animal.
- Can only be excluded when:
 - The animal is not within the handler's control,
 - The animal is not housebroken, and/or
 - The presence of the animal would create a fundamental alteration in the nature of the program (28 CFR 35.136(b)).

Consider carefully when making decisions about service animals

Be careful about excluding a service animal due to a direct threat.

- A direct threat is a significant risk to health and safety of others that cannot be eliminated by a modification of policies, practices, or procedures or by provisions of auxiliary aides and services. *28 CFR 35.136(b);CFR 35.139*
- The determination should be made on an **individual basis**.
- Assign students/staff to different locations in the building.
- To prevent discrimination **don't isolate** either the student with allergies or a service animal.

Questions



Contact Information



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