Section 504 Students' Emerging Case Law Developments: Double Trouble?

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	IDEA	Section 504	ADA
Legislation Type:	funding act	civil rights act	SAME as § 504
Original Passage: **Amendments:**	1975 1986, 1990, 1997, 2004	1973 1990, 2008	1990 2008
Coverage:	students pre-K - 12	students K - postsec. + employees + facilities	SAME as § 504
FAPE:	special ed + related services	special or regular ed + related services	SAME as § 504
Administering Agency:	OSEP + SEAs	OCR (+ EEOC)	SAME as § 504
Eligibility Definition:	2 essential elements: 1) listed class'n 2) need for spec. ed	3 essential elements: 1) impairment 2) major life activity 3) substantial	SAME as § 504

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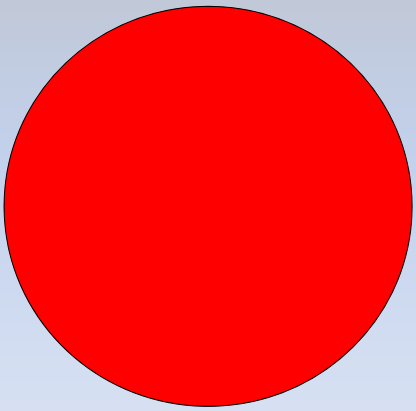
IDEA:
STUDENTS WITH IEPS



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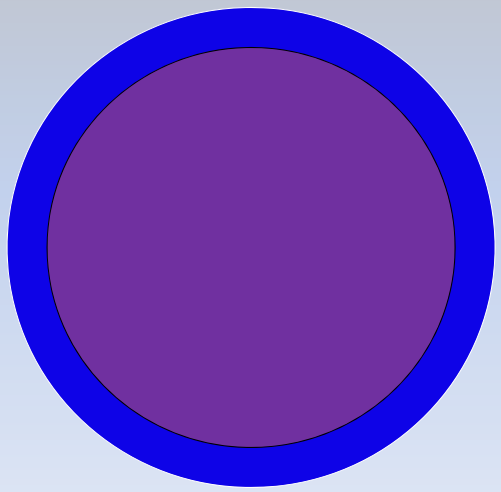
SECTION 504:
SINGLE AND DOUBLE COVERAGE



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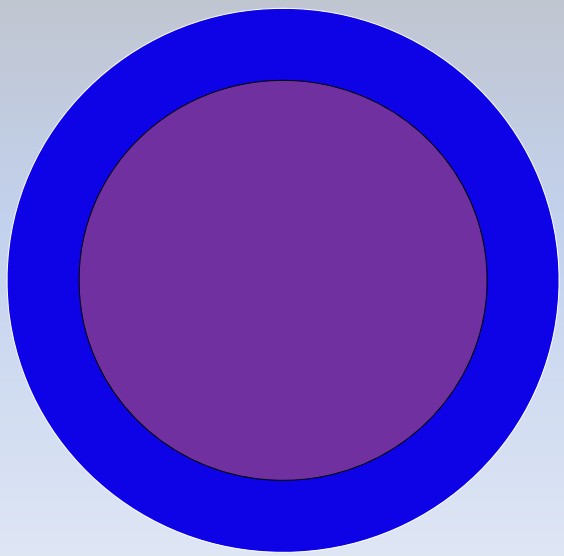
Section 504 Recent Expansion of Single Coverage



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Section 504 Major Changes For Single Coverage

← expanded list of major life activities (e.g., concentration and major bodily functions)

← determination of "substantial limitation" **without** mitigating measures and at the active time[1]

→ students with ADHD, food allergies, and individual health plans

[1] For the possibility of "technically eligible" students, on a limited basis, see Letter to Zirkel, __ IDELR ¶ __ (OCR 2011).

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Section 504 Unchanged Requirements

- collective notice with designated **Section 504/ADA coordinator**
- readily available Section 504/ADA **grievance procedure**
- **eligibility form** (updated); **procedural safeguards notice**[1]; and **504 plan**
- **OCR** complaint/compliance avenue – procedural emphasis[2]

[1] Make sure to have a procedure ready for an impartial hearing under § 504.
[2] See, e.g., Perry A. Zirkel & Brooke L. McGuire, "A Roadmap of to Legal Dispute Resolution for Students with Disabilities," *Journal of Special Education Leadership*, , September 2010, pp. 100-112.

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Section 504: Potential Regulatory Differences From the IDEA

- **Procedural safeguards: similar but much more streamlined**:
  - unclear exceptions: stay-put,[1] consent for initial services,[2] and reevaluation upon significant change in placement[3]
  - problematic implementation: impartial hearing – exhaustion requirement[4]
- **Substantive standard for FAPE**:
  - reasonable accommodation v. commensurate opportunity?

[1] Letter to Zirkel, 22 IDELR 667 (OCR 1995).
[2] See, e.g., Tyler (TX) Indep. Sch. Dist., 56 IDELR ¶ 24 (OCR 2010)
[3] See, e.g., OCR Staff Memorandum, EHLR 307:05 (OCR 1988).
[4] See, e.g., Peter Maher, "Caution on Exhaustion," *Connecticut Law Review*, , v. 44 (in press).

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SECTION 504: POTENTIAL CASE LAW DIFFERENCES FROM THE IDEA

- **Private schools**[1]

  e.g., *Franchi v. New Hampton Sch.* (D.N.H. 2009); *Russo v. Diocese of Greensburg* (W.D. Pa. 2010)[2]

- **Accessibility**

  e.g., *Celeste v. E. Meadow Union Free Sch. Dist.* (2d Cir. 2010); *D.R. v. Antelope Valley Union High Sch. Dist.* (C.D. Cal. 2010)

- **Mis-Identification**

  e.g., *Durrell v. Lower Merion Sch. Dist.* (E.D. Pa. 2011)

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[1] For a broader discussion, see, e.g., Perry A. Zirkel, "Section 504 , the ADA, and Parochial School Students," *West's Education Law Reporter*, v. 211, pp.15-18 (2006).

[2] But see *Lower Merion Sch. Dist. v. Doe*, 931 A.2d 640 (Pa. 2007) (state dual-enrollment law).

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SECTION 504: POTENTIAL CASE LAW DIFFERENCES FROM THE IDEA (CONT.)

- **Statute of limitations**

  - depends on analogous state law, including "tolling"

  e.g., *Bishop v. Children's Ctr. for Developmental Enrichment* (6th Cir. 2010). *But see Piazza v. Florida Union Free Sch. Dist.* (S.D.N.Y. 2011)

  exc.: *P.P. v. W. Chester Area Sch. Dist.* (3d Cir. 2009)

- **Standing for parental rights**

  e.g., *D.A. v. Pleasantville Sch. Dist.* (D.N.J. 2008)

- **Different substantive standard for FAPE?**

  e.g., *Mark H. v. Hamamoto* (9th Cir. 2010)

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SECTION 504: POTENTIAL CASE LAW DIFFERENCES FROM THE IDEA (CONT.)

- **Disciplinary changes in placement?**[1]

  e.g., *Centennial School District v. Phil L.* (E.D. Pa. 2008)

  e.g., *M.G. v. Crisfield Sch. Dist.* (D.N.J. 2008)

- **Interscholastic athletic activities**

  e.g., *Cruz v. Pennsylvania Interscholastic Athletic Ass'n* (E.D. Pa. 2001); *Baisden v. W. Va. Sec. Sch. Activities Comm'n* (W.V. 2002)

- **School lunch**

  e.g., *C.D. v. New York City Dep't of Educ.* (S.D.N.Y. 2009)

[1] Section 504/ADA more widely differ from the IDEA not only in terms of removals but also other forms of discipline. See, e.g., Perry A. Zirkel, "Discipline of Students with Disabilities," *West's Education Law Reporter*, v. 235, pp. 1-10 (2008); Perry A. Zirkel, "Suspensions and Expulsions of Students under Section 504," *West's Education Law Reporter*, v. 226, pp. 9-13 (2008).

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SECTION 504: POTENTIAL CASE LAW DIFFERENCES FROM THE IDEA (CONT.)

- **Disability-based peer harassment**

  e.g., *K.M. v. Hyde Park Cent. Sch. Dist.* (S.D.N.Y. 2005); *K.R. v. Sch. Dist. of Philadelphia* (3d Cir. 2010)

- **Retaliation against parents**

  e.g., *P.N. v. Greco* (D.N.J. 2003); *M.M.R.-Z. v. Commw. of Puerto Rico* (1st Cir. 2008); *S.L.-M. v. Dieringer Sch. Dist.* (W.D. Wash. 2008); *Doe v. Wells- Ogunquit Cmty. Sch. Dist.* (D. Me. 2010)

- **Individual liability (retaliation)**

  e.g., *Alston v. Dist. of Columbia* (D.D.C. 2008)

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SECTION 504: POTENTIAL CASE LAW DIFFERENCES FROM THE IDEA (CONT.)

- **Availability of money damages**[1]

  e.g., compare *D.G. v. Somerset Hills Sch. Dist.* (D.N.J. 2008), with *H. v. Montgomery Cnty. Bd. of Educ.* (M.D. Ala.2011)

- **Service animals**[2]

  e.g., *Cave v. E. Meadow Union Free Sch. Dist.* (2d Cir. 2008); *cf. E. Meadow Union Free Sch. Div. v. New York State Div. of Human Rights* (N.Y. App. Div. 2009); *Kalbfleisch v. Columbia Cmty. Unit Sch. Dist.* (Ill. App. Ct. 2009) (state law)

[1] Many of these liability suits arise from either 1) severe discipline of double-covered students or 2) health-related issues of single-covered students. See, e.g., 1) Perry A. Zirkel & Caitlyn Lyons, "Restraining the Use of Restraints for Students with Disabilities," *Connecticut Public Interest Law Journal*, v. 10, pp. 323-353 ;and 2) *Taylor v. Altoona Area Sch. Dist.* (W.D. Pa. 2010); *A.P. v. Anoka-Hennepin Indep. Sch. Dist. No. 1* (D. Minn. 2008).

[2] *See* definition and access obligation in DOJ Titles II and III regulations (issued Sept. 15, 2010). See, e.g., *C.C. v. Cypress Sch. Dist.*, 56 IDELR ¶ 295 (C.D. Cal. 2011).

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SECTION 504: POTENTIAL CASE LAW DIFFERENCES FROM THE IDEA (CONT.)

- **Expert witness fees**

  e.g., *L.T. v. Mansfield Sch. Dist.* (D.N.J. 2009); *Neena S. v. Sch. Dist. of Philadelphia* (E.D. Pa. 2009)

- **Jury trial**

  e.g., *K.I. v. Montgomery Pub. Sch.* (M.D. Ala. 2010)

- **Attorneys' fees for administrative proceedings**

  42 U.S.C. § 12205 (ADA); *cf.* 29 U.S.C. § 794a(b) (§ 504 – lesser court limitations than under the IDEA)

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USEFUL SECONDARY REFERENCES

- **P.A. Zirkel, *Section 504, the ADA and the Schools.***
  - new edition of two-volume reference updated annually and available from www.lrp.com
- **P.A. Zirkel, "What Does the Law Say?: New Section 504 Student Eligibility Standards," *Teaching Exceptional Children*, May/June 2009, pp. 68-71.**[1]
  - a practical overview with sample eligibility determination form
- **P.A. Zirkel, "Does Section 504 Require a 504 Plan for Each Non-IDEA Student?" *Journal of Law and Education*, July 2011, pp. 407-416.**
  - a legal analysis of an old question in light of the new ADA amendments

[1] For a more thorough discussion, see Perry A. Zirkel, "The ADAA and Its Effect on Section 504 Students," *Journal of Special Education Leadership*, March 2009, pp. 3-8.

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USEFUL PRIMARY REFERENCES

- **npl.ly.gov.tw/pdf/6538.pdf**
  - one of the several sources for the specific statutory language, which on legal databases will be available under these official, alternative citations:

    122 Stat. 3554 and 42 U.S.C. § § 12101 *et seq.* (2008).
- **http://www.ed.gov/about/offices/list/ocr/504faq.html**
  - OCR's answers to frequently asked questions, updated in light of the ADAA
- **75 Fed. Reg. 56,163 *et seq.* (Sept. 15, 2010)**
  - new DOJ regulations for Titles II and III
- **75 Fed. Reg. 66,054 *et seq.* (Oct. 27, 2010)**
  - advanced notice of proposed additional DOJ regulations
- **76 Fed. Reg. 16,978 *et seq.* (Mar. 25, 2011)**
  - new EEOC regulations for Title I

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