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Avoiding Under- and Over-Identification of 504-Only Students: Pitfalls and Handholds*

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The most recent Civil Rights Data Collection (CRDC) results, which are from the 2015–16 school year,¹ reveal wide variance in the rates of so-called “504-only” students² across states,³ districts,⁴ and schools.⁵ For example, twenty schools with enrollments of more than 250 students have rates that are more than ten times the national average of 2.3%,⁶ while, at the other extreme, more than 12,000 schools with enrollments of more than 250 students are tied with zero identified as eligible for 504 plans.⁷

The key step for identifying students as eligible under Section 504 of the Rehabilitation Act (§ 504)⁸ and its sister statute, the Americans with Disabilities Act (ADA),⁹ is an evaluation¹⁰ to determine whether the individual student meets all three essential eligibility criteria—(1) physical or mental impairment, (2) major life activity, and, connecting the first two elements, (3) substantial.¹¹ The interpretive standards for these three criteria expanded as a result of the ADA Amendments Act (ADAAA) of 2008¹² and the limited additions of the resulting ADAAA regulations in 2016.¹³ More specifically, these successive sources extended the list of illustrative major life activities and liberalized the interpretation of substantial.¹⁴

This brief article provides legally based suggestions for avoiding undue under- and over-identification of 504-only students. The underlying foundation for due care in this matter are the competing considerations that (1) § 504 (and the ADA) are civil rights laws, thus being basic to the legal framework of our society, and, given the reality of far less than optimal funding for public schools generally¹⁵ and K–12 students with disabilities specifically,¹⁶ (2) § 504 (and the ADA) are unfunded mandates.¹⁷ Thus, false negatives constitute civil rights violations for which school districts are ethically responsible and legally vulnerable, and false positive raise questions of resource equity and efficiency.¹⁸ The interaction of both false positives and false negatives is particularly problematic.¹⁹ The recommendations to address these problems, which are subject to local consideration and customization, start with those that are overall in scope.

General Recommendations

Overall, as a matter of accurate legal identification, school districts should consider the following suggestions:

- Have an effective 504 coordinator at the building, not only the district, level.²⁰
- Have a similarly knowledgeable eligibility determination team.²¹
- Provide support and accountability to assure that the 504 coordinator and 504 eligibility team members are aware and compliant with current legal requirements.²²
- Have legally defensible and practically comprehensible eligibility and procedural safeguards forms,²³ with regular updating and training.²⁴
- Foster articulation between the elementary and secondary levels and among the schools within each level for consistency of the eligibility criteria and their application.²⁵
- Develop a general education program that builds trust and partnership with parents, so that meeting students’ diverse needs does not require resort to legal disputation.²⁶

Under-Identification

- Make clear to district personnel that child find obligation applies to § 504, just as it does to the IDEA, except that the frame of reference for potential eligibility is wider.²⁷
- Don’t over-rely on individual health plans, instead screening them to determine which ones raise a child find obligation.²⁸
- For both child find and eligibility, avoid a requirement of educational impact, which is specific to the IDEA²⁹ but is not an essential eligibility element for § 504.³⁰ Similarly, avoid an insistence on the recognized classifications of the IDEA rather than the relatively, although not entirely, open-ended impairments acceptable under § 504.³¹

* This article appeared in *West’s Education Law Reporter*, v. 395, pp. 715-720.

- If you have reason to suspect that a student may meet the three criteria for eligibility, do not condition an evaluation on parental submission of a medical diagnosis.³²
- Remember that the determination of the substantial-limitation criterion is without mitigating measures and, for episodic impairments, at the time of the episode.³³

Over-Identification

- For impairments, avoid generic symptoms, such as anxiety, depression, or absenteeism, rather than specific diagnostic classifications.³⁴
- For major life activities, avoid otherwise relevant student issues, such as organizational skills, processing speed, fine motor skills, and handwriting, that are either subsets of the identified examples in § 504 or narrower than their common broad scope.³⁵
- For the third and ultimate criterion of substantial limitation, focus on (1) not only the requisite degree but also duration³⁶; (2) the frame of reference of the corresponding level in the general population, not the potential of the individual child³⁷; and (3) the direct connection of the identified impairment as compared to other sources.³⁸
- Avoid using § 504 as a consolation prize for parents of students who do not qualify for an IEP or as a spillover to keep numbers down under the IDEA.³⁹
- For students who do meet all three of the requisite criteria, review the 504 plan every year or so,⁴⁰ including (a) whether not only the teachers provide but also the student uses the specified accommodations, and (b) whether the student continues to meet the current

standards for § 504 eligibility.

- To the extent that obtaining extra time and other such competitively advantageous accommodations on college admissions exams and other high stakes tests is a significant motivating factor in some schools, parents and personnel should be reminded that although the determination of eligibility is *without* mitigating measures, the determination of FAPE, including accommodations, is *with* mitigating measures.⁴¹ Consider, for example, a student with ADD whose parents have duly arranged for medication without any school district pressure and who regularly takes the medication as prescribed.⁴²
- Promote a general education system that partners with parents to be responsive to individual differences such that the accommodations and interventions associated with 504 plans are widely available to the extent that they are in the best interests of students.

In sum, the avoidance of under- and over-identification of 504-only students is not an easy matter either legally or practically, particularly if the necessary steps are to correct rather than prevent such inaccuracy. The legal boundaries for eligibility are not bright lines, and some of the areas, such as measuring the major life activity of concentration and determining substantial limitation without mitigating measures in its broad meaning under the ADA amendments, inevitably are soft spots. Moreover, the pressures for and against identification are multiple and conflicting, including legally relevant concerns such as child find violations⁴³ and legally irrelevant concerns, such as fiscal resources. Nevertheless, finding a reasonable balance is in the long-range interests of both students with and without disabilities.

Endnotes

- ¹ For the CRDC public-use data file, see <https://www2.ed.gov/about/offices/list/ocr/docs/crdc-2015-16.html>
- ² This term, which CRDC uses, refers to K–12 students who are eligible under Section 504 but not the Individuals with Disabilities Education Act (IDEA). Under the IDEA, eligible students receive individual educational programs (IEPs), while those eligible under Section 504 receive a corresponding document often called a 504 plan. See, e.g., Perry A. Zirkel, *Does Section 504 Require a Section 504 Plan for Each Eligible Non-IDEA Student?* 40 J.L. & Educ. 407 (2011).
- ³ Perry A. Zirkel & Tiedan Huang, *State Rates of 504-Only Students in K–12 Public Schools: An Update*, 354 Ed.Law Rep. 621 (2018).
- ⁴ Perry A. Zirkel, *School District Rates of 504-Only Students*, 356 Ed.Law Rep. 11 (2018).
- ⁵ Perry A. Zirkel, *Public School Rates of 504-Only Students*, 356 Ed.Law Rep. 1 (2018).

- ⁶ *Id.* at 7.
- ⁷ *Id.* at 3.
- ⁸ 29 U.S.C. § 794 (2016).
- ⁹ 42 U.S.C. §§ 12101 *et seq.* (2016).
- ¹⁰ 34 C.F.R. § 104.35(a) (2018).
- ¹¹ 29 U.S.C. § 705(20) (2016). The “substantial” element in this context is shorthand for “substantially limits” in the first prong of the definition of disability. *Id.* The other two prongs of the § 504 definition of disability— “record of” and “regarded as” the same three essential elements—are not applicable to free appropriate public education (FAPE). See Protecting Students with Disabilities, 67 IDELR ¶ 189 (OCR 2015) – item 37; Senior Staff Memorandum, 19 IDELR 894 (OCR 1992).
- ¹² Pub. L. No. 110-325, 122 Stat. 3553 (2008), codified as effective at 42 U.S.C. §§ 12101–12102 (2016). For major life activities, the ADAAA specified various additional examples, including reading, concentrating, manual tasks, lifting, eating, sleeping, and the various major bodily functions. *Id.* For the incorporation of the ADAAA standards in § 504, see 29 U.S.C. § 705(20) (B) (2016).
- ¹³ 28 C.F.R. § 35.108 (2018) (including effective date of Oct. 11, 2016). For example, the regulations added the following to the non-exhaustive list of major life activities: writing, speaking, interacting with others, reaching, and immune system functions. *Id.*
- ¹⁴ For an analysis of the revisions in the ADAAA, which accounted for the vast majority of the new interpretive standards, see, e.g., Perry A. Zirkel, *The ADAA and Its Effect on Section 504 Students*, 22 J. Special Educ. Leadership 3 (2009). For an eligibility form that incorporates the revisions in both the ADAAA and the resulting regulations applicable to public schools, see Perry A. Zirkel, *Identification of 504-Only Students: An Alternate Eligibility Form*, 357 Ed.Law Rep. 39 (2018).
- ¹⁵ See, e.g., *Americans Say Inadequate Funding Is Biggest Education Issue*, 87 Am. Sch. & Univ. 1 (Sept. 2012); Michael Imber, *Adequacy in School Funding*, 191 Am. Sch. Bd. J. 46 (Nov. 2004); Allan Odden, *Equity and Adequacy in School Finance Today*, 85 Phi Delta Kappan 120 (Oct. 2003).
- ¹⁶ See, e.g., Nat’l Council on Disability, *Broken Promises: The Underfunding of IDEA* (Feb. 2018), https://ncd.gov/sites/default/files/NCD_BrokenPromises_508.pdf
- ¹⁷ Section 504 applies to school entities that received federal financial assistance but provides no federal (or state) funding. See, e.g., Zirkel & Huang, *supra* note 3, at 622.
- ¹⁸ Unlike under-identification, over-identification is not legally prohibited. However, it entails the distribution of limited local resources to (a) undue legalization rather than education and (b) students who are not entitled to this extra allocation at the expense of other students, including those who are under-identified. This extra allocation extends to legal protections against safety-related school discipline. E.g., Perry A. Zirkel, *Suspensions and Expulsions under Section 504: A Comparative Overview*, 226 Ed.Law Rep. 9 (2008). Finally, over-identification tends to pose problems of full implementation by teachers and escalating expectations of parents, especially but not exclusively in districts with litigious, competitive cultures.
- ¹⁹ The resulting distribution of institutional resources and legal protections, poses at least two fundamental problems. First, using the analogy of “handicap” in golf, it gives extra strokes to the reversely wrong group, thus doubly widening the gap rather than leveling the proverbial playing field. Second, this gap-widening effect is particularly suspect in light of the research showing differences in 504 rates in relation to race/ethnicity and wealth. E.g., Perry A. Zirkel & John M. Weathers, *K–12 Students Eligible Solely under Section 504: Updated National Data*, 27 J. Disability Pol’y Stud. 67 (2016).
- ²⁰ 34 C.F.R. § 104.7(a) (2018) (“A recipient that employs fifteen or more persons shall designate at least one person to coordinate its efforts to comply with this part”).
- ²¹ *Id.* § 104.35(c) (“In interpreting evaluation data and making placement decisions, a [the district] shall . . . 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”).
- ²² Among the various sources available for updated legal requirements, my website perryzirkel.com includes (1) publications available as free downloads under the subheading “Section 504 and the ADA” and (2) the annual announcement of the Lehigh University Section 504 Institute, a two-day training program that will continue each June until the registration level is no longer sustainable.
- ²³ 34 C.F.R. § 104.36 (“A recipient that operates an elementary or secondary education program shall . . . implement, . . . a system of procedural safeguards that includes notice, an opportunity for the parents . . . to examine relevant records, an impartial

hearing with opportunity for participation by the person's parents . . . and representation by counsel, and a review procedure").

- ²⁴ As one of various relevant sources, the aforementioned website (id.) includes two alternate eligibility forms.
- ²⁵ In my experience, it is not uncommon, for example, for elementary school personnel to identify, without representation on the eligibility team of secondary school personnel, students as eligible for the first time upon the transition to the next level of schooling based on their perception of the nature of that level rather than an individualized evaluation of the child in relation to the three essential eligibility criteria.
- ²⁶ Unlike the other, law-based recommendations, this one shows that law has a more limited role when the system works effectively for students and their parents.
- ²⁷ 34 C.F.R. § 104.34(a) (requiring recipients to evaluate "any person who, *because of [disability]*, needs or is believed to need special education or related services") (emphasis added). Rooted in the "believed to need" part of this evaluation regulation under Section 504, child find is the obligation to conduct the evaluation within a reasonable period upon a reasonable suspicion of eligibility. *E.g.*, *Krebs v. New Kensington Arnold Sch. Dist.*, 2016 WL 6820402 (W.D. Pa. Nov. 17, 2016); *see also D.G. v. Somerset Hills Sch. Dist.*, 559 F. Supp. 2d 484, 496, 235 Ed.Law Rep. 112 (D.N.J. 2008) ("In establishing a [Section 504] claim, a plaintiff must demonstrate that the defendants knew or should have known about the disability") (emphasis added).
- ²⁸ *E.g.*, Perry A. Zirkel, *Section 504 Eligibility and Students on Individual Health Plans*, 276 Ed.Law Rep. 577 (2012).
- ²⁹ 34 C.F.R. §§ 300.8(a) ("by reason thereof") and 300.8(c)(1) ("adversely affects . . . educational performance").
- ³⁰ The impairments allowed and the major life activities illustrated in the original and amended eligibility standards under § 504 (and the ADA) extend well beyond the IDEA requirement of adverse educational impact. *See supra* notes 11–13 for the applicable sources.
- ³¹ The impairment criterion, according to the definition in the ADA regulations applicable to public schools and other governmental entities, would seem to suggest a diagnosis, with specific criteria, among the broad medical, psychological, and educational communities. 28 C.F.R. § 35.108(b)(1)–(2) (2018). Moreover, imposed various express exclusions for such as sexual disorders, including homosexuality and transsexualism, and current illegal drug use. *Id.* §§ 35.108(b)(3) and 35.108(g).
- ³² Expressing readiness to consider an outside diagnosis is fine, but requiring one in a situation in which you have the obligation to evaluate the student for § 504 eligibility exposes the district to a complaint to OCR, which takes the position that the district will be responsible for the cost of the diagnosis. Moreover, if the suspected impairment is ADD, OCR takes the position that a mental health professional with training is qualified to do the diagnosis for the purpose of § 504 eligibility. Letter to Williams, 21 IDELR 73 (OSEP/OCR 1994); Letter to Veir, 20 IDELR 864 (OC 1993).
- ³³ 42 U.S.C. § 12201(4)(D)–(E) (2016).
- ³⁴ Schools should certainly be alert and responsive to such symptoms as a matter of effective education as a general matter, but they do not suffice alone for the initial, impairment criterion of § 504 eligibility. *See supra* note 31.
- ³⁵ *See supra* notes 12–13. Although the identified major life activities under § 504 (and the ADA) are non-exhaustive examples, any alternative implicitly should be of the similar breadth per the common-denominator logic of the *ejusdem* generis guidelines for interpretation. However, the narrower areas of activity, such as fine motor skills rather than manual tasks, are again highly relevant to effective education in the absence of § 504 eligibility.
- ³⁶ *E.g.*, Perry A. Zirkel, *Are Students with Concussions Qualified for Section 504 Plans?* 311 Ed. Law Rep. 589 (2015).
- ³⁷ Zirkel 2018, *supra* note 14, at 40–41.
- ³⁸ Analogous to the rule-out exclusions for IDEA eligibility for specific learning disability (34 C.F.R. §§ 300.306(b)(1) and 300.309(a)(3)), this causal connection is a significant consideration, although often a difficult determination.
- ³⁹ The problem with the automatic consolation prize mentality is that if a student does not need special education, it is likely that the student does not have an impairment that substantially limits any academically-related major life activity, such as learning, reading, writing, or even concentration. The corresponding problem with the artificially reduced rate of IDEA eligibility is that it raises issues of not only child find violations under the IDEA but also the special education component of FAPE under § 504. 34 C.F.R. § 104.33(b) (defining FAPE as "regular or special education and related aids and services . . .") (emphasis added).
- ⁴⁰ Unlike the IDEA's specifications of annual review and at least triennial reevaluation, § 504 only requires "periodic reevalua

tion.” *Id.* § 104.35(d).

- ⁴¹ Dear Colleague Letter, 58 IDELR ¶ 79 (OCR 2012) (items 4, 11, and 12); *cf.* Dear Colleague Letter, 68 IDELR ¶ 52 (OCR 2016) (“If a school district determines that a student with ADHD has a disability as defined by Section 504, it could consider whether the student uses mitigating measures and whether those mitigating measures have an impact on the student's disability. This information could help the district determine whether the student needs special education or related services.”).
- ⁴² If the student's ADD substantially limits the major life activity of concentration with medication, the student is eligible under § 504. However, if in the student's mitigated state, the ADD does not substantially limit concentration (or any other major life activity), the student is not entitled to extra time.
- ⁴³ Child find is a risk of both under- and over-identification. For under-identification, the potential child find claim is based on § 504. For over-identification, the potential child find claim is based on the corresponding obligation under the IDEA (i.e., that the identification of the student as 504- may serve for impairments associated with some sort of educational impact, particularly in combination with other purported “red flags,” as reasonable suspicion for an IDEA evaluation).