

"When is Section 504 Not Enough?": Understanding the Differences Between Section 504, IDEA and RTI

Presented by
David M. Richards
Attorney at Law
Richards Lindsay & Martin, LLP
13091 Pond Springs Road, Ste 300
Austin, Texas 78729
Copyright 2018, 2021 All rights reserved.

Housekeeping....

- I have a very short time to cover a very complex topic. My intent is to give you things to discuss with your school attorney.
 - The PowerPoint and Presentation will provide information about the law.
 - Neither the PowerPoint nor the Presentation is legal advice.
 - If you have a question about a particular set of facts and how the law applies, talk with your school attorney.

For Rtl, Section 504 & IDEA to work together, we must understand some basic ideas.

1. Regular education is the basis of everything schools do.
 - Think of regular education as the resources, policies, practices, procedures that allow the school to function (how and by what means does education occur).

 - Regular education likewise is founded on grade level statewide curriculum (what is taught)

 - That '70s Approach: Open Concept & One-Size Fits All.
 - Is the same educational experience always equal? Always fair?

3

For Rtl, Section 504 & IDEA to work together, we must understand some basic ideas.

1. Regular education is the basis of everything schools do.

2. Rtl recognizes that sometimes what regular ed routinely does is not enough for a particular child to progress at school.
 - Why don't kids do well at school? Let's consider some factors that interfere with educational success...
 - Because of one or more of these factors, some kids require regular education, together with something extra or perhaps a little different to progress.

4

For Rtl, Section 504 & IDEA to work together, we must understand some basic ideas.

1. Regular education is the basis of everything schools do.
2. Rtl: sometimes regular ed is not enough.
3. Section 504 is a federal nondiscrimination law designed to level the playing field for qualifying students with disability.
 - It requires that eligible students with a disability have the same opportunity to participate and benefit from the school's programs and activities as their nondisabled peers.

5

For Rtl, Section 504 & IDEA to work together, we must understand some basic ideas.

1. Regular education is the basis of everything schools do.
2. Rtl: sometimes regular ed is not enough. Let's add to it.
3. 504: level the playing field for "students with disability."
4. IDEA: is an entitlement and funding statute that provides:
 - Special education services, vast procedural protections and some federal funding
 - Eligibility based on severity of disability and educational need (finding that student could not benefit without "specially designed instruction").

6

For Rtl, Section 504 & IDEA to work together, we must understand some basic ideas.

- **A key principle from the President's Commission:**
 - **“Children placed in special education are general education children first.** Despite this basic fact, educators and policy-makers think about the two systems as separate and tally the cost of special education as a separate program, not as additional services with resultant add-on expense.”

7

For Rtl, Section 504 & IDEA to work together, we must understand some basic ideas.

- **A key principle from the President's Commission:**
 - “In such a system, children with disabilities are often treated not as children who are general education students and whose instructional needs can be met with scientifically based approaches; they are considered separately with unique costs — **creating incentives for misidentification and academic isolation** — preventing the pooling of available resources and learning.

8

For Rtl, Section 504 & IDEA to work together, we must understand some basic ideas.

- **A key principle from the President's Commission:**

- “General education and special education share responsibilities for children with disabilities. They are not separable at any level — cost, instruction or identification.”

- The President's Commission Report on Excellence in Special Education, titled “A New Era: Revitalizing Special Education for Children and Their Families”, July 1, 2002, p. 7.

9

How does 504 fit with regular ed and IDEA?

All LEA students and all regular education resources, practices, procedures, and grade level curriculum

Students with physical or mental impairments

Section 504 (ADA)

IDEA

10

So, if regular education isn't working for a student, what should happen?

- When School suspects that there is NO DISABILITY, Rtl is an appropriate next step.
 - This approach would be appropriate where a nondisability factor or factors are interfering with the student's education (homelessness, no interest in education, troubles at home, etc.).
 - Rtl adds interventions to regular education to take away the negative impact of the factors that interfere with this student's success.
- Lots of Rtl models and tiered structures exist; district practices vary

11

So, if regular education isn't working for a student, what should happen?

- When School suspects that there is NO DISABILITY, Rtl is an appropriate next step.

Components of Rtl, *Letter to Zirkel*, 62 IDELR 151 (OSEP 2013).

"There are a number of RTI models, and, while the Department does not endorse a particular RTI model, essential components must be present in RTI. These components include: (1) high quality, evidence-based instruction in general education settings; (2) screening of all students for academic and behavioral problems; (3) two or more levels (sometimes referred to as 'tiers') of instruction that are progressively more intense and based on the student's response to instruction; and (4) progress monitoring of student performance."

12

So, if regular education isn't working for a student, what should happen?

- When School suspects that there is NO DISABILITY, Rtl is an appropriate next step.
 - If the student responds to Rtl, no referral is necessary at this time. *Joshua Ind. Sch. Dist.*, 111 LRP 4652 (SEA Texas 2010).
 - If the student does not respond to Rtl, additional/different interventions or a change in tier should be timely considered, along with possible Section 504 or IDEA referral (delay or deny language from OSEP!).
 - The parent can request a Section 504 evaluation or IDEA evaluation at any time. *Student v. Austin Independent Sch. Dist.*, 110 LRP 49317 (SEA TX 2010).

13

So, if regular education isn't working for a student, what should happen?

- If the school suspects that there IS DISABILITY, a referral to Section 504 or IDEA should be considered. WHY?
 - Section 504's affirmative child find duty: triggered by School's suspicion of 504 eligibility, together with need for services because of disability. *Letter to Mentink*, 19 IDELR 1127 (OCR 1993).
 - IDEA's affirmative child find duty: triggered by School's suspicion of IDEA-level disability together with suspicion of need for "specially designed instruction." 34 C.F.R. § 300.8(a); *El Paso ISD v. R. R.*, 567 F.Supp.2d 918 (W.D.Tex. 2008).

14

So, if regular education isn't working for a student, what should happen?

- If the school suspects that there IS DISABILITY, a referral to Section 504 or IDEA should be considered. WHY?
- But I thought RtI was a prerequisite to a referral?
 - “the use of RTI strategies cannot be used to delay or deny the provision of a full and individual evaluation...to a child suspected of having a disability under 34 CFR § 300.8.” *Memorandum to State Directors of Special Education*, 56 IDELR 50 (OSEP January 21, 2011).

15

So, if regular education isn't working for a student, what should happen?

- If the school suspects that there IS DISABILITY, a referral to Section 504 or IDEA should be considered. WHY?
 - The memorandum reiterates that the IDEA and its regulations currently only “allow” the use of RtI data, as part of the criteria for determining if a child has a specific LD.
 - Thus, the memorandum concludes “it would be inconsistent with the evaluation provisions... for an LEA to reject a referral and delay provision of an initial evaluation on the basis that the child has not participated in an RTI framework.” *Id.*

16

So, if regular education isn't working for a student, what should happen?

- If the school suspects that there IS DISABILITY, a referral to Section 504 or IDEA should be considered. WHY?
- **“What is reasonable justification for referring a student for evaluation for services under Section 504?** School districts may always use regular education intervention strategies to assist students with difficulties in school. Section 504 requires recipient school districts to refer a student for an evaluation for possible special education or related aids and services or modification to regular education if the student, because of disability, needs or is believed to need such services.” OCR Q&A #30, January 10, 2020.

17

Let's assume now we are looking at a Section 504 eligible student...

- **Eligibility:** The Section 504 Committee has determined that the student has a physical or mental impairment that substantially limits one or more major life activities, making the student eligible.
- **Need for Services:** If the student needs accommodations and services so that his educational needs are met as adequately as the school meets the educational needs of his nondisabled peers, the 504 Committee should create a 504 Plan.
- **Plan Creation:** The 504 Plan should be data-based, and level the playing field to create an equal opportunity to participate and benefit in the school's programs and activities.

18

Let's assume now we are looking at a Section 504 eligible student...

- When § 504 meets the student's needs, there is no need for special education and related services.
 - *Christopher B. v. Bishop ISD*, Docket No. 022-SE-996 (SEA TEX. 1996)(ADHD student making progress with § 504 modifications does not need to be identified under IDEA due to lack of educational need.).
 - *Wendy L. v. Gregory Portland ISD*, Docket No. 330-SE-0502 (SEA TEX. 2002) (Student with AD(H)D provided behavior management and accommodations under § 504 had no educational need and did not qualify under IDEA.).
 - *George West ISD*, 35 IDELR 287 (SEA TEX. 2001) (A student with a hearing impairment required an FM tuner and § 504 accommodations. She had great grades and academic recognition on the statewide assessment. "There is no educational need for special education and related services under these circumstances.")

19

So, if Section 504 isn't working for a student, what should happen?

- When 504 is not working, the Section 504 Committee should consider:
 - Do we need to make changes to the student's Section 504 Plan?
 - Note the underlying assumptions for this decision would have to be that:
 - The committee has data to understand the problem and what changes are required
 - The changes are possible under 504 and would provide a level playing field.
 - Do the student's needs exceed what Section 504 can do?
 - This is IDEA Child Find territory. Since we know the student has an impairment, the focus for referral should probably be on the student's need for "specially designed instruction."

20

Is Section 504 enough? What is “specially designed instruction?”

- **Important Update:** On May 26, 2021 (the day before this presentation was recorded) the Texas Legislature passed a dyslexia bill that changes the Texas Education Code’s definition of specially designed instruction.
- The bill is not law without the Governor signature. The impact of that bill is not considered in the following slides or presentation.

21

Is Section 504 enough? What is “specially designed instruction?”

- **“Specially designed instruction** is defined under IDEA as ‘adapting... the content, methodology, or delivery of instruction’ to a child eligible under IDEA. This instruction must address the unique needs of the child that result from the child’s disability and must ensure access to the general curriculum so that the child can meet the state’s educational standards (34 C.F.R § 300.39(b)(3)).

22

Is Section 504 enough? What is “specially designed instruction?”

- The U.S. Department of Education had the chance to update the definition of “specially designed instruction” in the IDEA regulations following the 2004 Reauthorization of IDEA.
- The following comment to the proposed federal regulations framed the question nicely:

23

Is Section 504 enough? What is “specially designed instruction?”

“One commenter requested modifying the definition of *special education* to distinguish special education from other forms of education, such as remedial programming, flexible grouping, and alternative education programming. The commenter stated that flexible grouping, diagnostic and prescriptive teaching, and remedial programming have expanded in the general curriculum in regular classrooms and the expansion of such instruction will only be encouraged with the implementation of early intervening services under the Act.”

24

Is Section 504 enough? What is “specially designed instruction?”

The U.S. Department of Education’s response was almost too simple:

“We do not believe it is necessary to change the definition to distinguish special education from the *other forms of education* mentioned by the commenter.” 71 Federal Register No. 156 p. 46,577 (emphasis added).

25

Is Section 504 enough? What is “specially designed instruction?”

- This definition is a problem, as it has not kept up with the rise of Section 504, or the expansion of regular education initiatives to individualize instruction for a variety of learners.
 - The courts have provided little help. *Copperas Cove*, 75 IDELR 124 (W.D. TX. 2019). “As the Fifth Circuit highlighted, the line between ‘special education’ and ‘related services’ is murky; however, case law suggests that where a child is being educated in the regular classrooms of a public school with only minor accommodations and is making educational progress, the child does not ‘need’ special education within the meaning of the IDEA.”

26

Is Section 504 enough?

- The President's Commission described a dynamic where changes to regular education policy, practice, procedure, resources and curriculum are only made where necessary to meet the student's needs.
- Since 504 does not reduce expectations but provides accommodations and services to help students meet grade-level expectations, severity of disability and need may require more than 504 can do.

27

Is Section 504 enough?

Talk with your school attorney about this...

- The language of IDEA recognized this problem by referring to the student's need for "specially designed instruction."
- Since "specially designed instruction" no longer creates a helpful border, consider looking to the student's needs together with what is possible in regular education and Section 504.
 - Is the problem or interference correctable with the resources and options available under 504 and regular education?
 - When the answer is no, IDEA referral is required. The student needs more.

28

**Consider with your school attorney this approach:
Can Section 504 provide what the student needs?**

- **Example:** Section 504 cannot reduce the amount of grade level curriculum for which the student is responsible. 504 requires participation in all of the grade level curriculum– that’s the essence of nondiscrimination.
 - Result: If the Section 504 Committee believes that the curricular demands on the student must be reduced so that the student can benefit, IDEA referral will be appropriate. Once IDEA-eligible, pieces of the curriculum can be replaced by the ARDC with IEP goals for this student.

29

**Consider with your school attorney this approach:
Can Section 504 provide what the student needs?**

- **Example:** Section 504 generally cannot place students in IDEA-B funded settings like resource classes, autism units, behavioral units, life skill classes, or access IDEA-B dollars.
 - Result: If the Section 504 Committee suspects that these specialized settings with special education certified personnel are necessary for the student to benefit, IDEA referral is appropriate.

30

**Consider with your school attorney this approach:
Can Section 504 provide what the student needs?**

- **DO NOT FORGET:** The parent may request a special education evaluation at ANY time.
 - That Parent request can be made when Section 504 is not working
 - That Parent request can be made when the school thinks everything is ok.

31

The IDEA Child Find Takeaway

- All kids are regular ed kids first, but sometimes getting what everyone else gets is not enough.
- Section 504 accommodations and services added to regular education can make a difference for some students with a disability.
- Some students with disability need specially designed instruction. That may include reduced exposure to and responsibility for regular curriculum or perhaps a specialized classroom or setting with special education certified teachers that is only available under IDEA. For these students, Section 504 is not enough.

32