

Section 504 or Special Education? Addressing Depression, Anxiety and Other Mental Disorders.

David Richards, Attorney at Law
RICHARDS LINDSAY & MARTIN, LLP
13091 Pond Springs Rd. Ste. 300
Austin, Texas 78729
© 2022 All Rights Reserved NELI June 2022

1

A little housekeeping...

- These slides are intended to summarize rules and cases that are often very complex. Neither the slides nor the presentation are legal advice.
- Please consult your school attorney for questions with respect to a particular set of facts.
- Note that a problem throughout this analysis is outdated language in IDEA

2

2

What was Congress thinking?

§ 504

Not focused specifically on public schools, but on disability discrimination by recipients of federal funds.

IDEA

Focused on public schools, concerned with two problems: exclusion & inappropriate services/funds for disabled students.

3

3

So how would you distinguish the two?

§ 504

A civil rights law.

IDEA

An entitlement law.

4

4

Why does that distinction matter?

§ 504

504 compares the student at issue with nondisabled peers, seeking equal opportunity to participate and benefit.

IDEA

IDEA isn't concerned about what others get, focuses on educational benefit for *this* child.

5

5

Why does that distinction matter?

§ 504

NO funding for civil rights statutes.

IDEA

NOT ENOUGH funding for entitlement statutes.

6

6

How is eligibility determined?

§ 504

Student must be both “qualified” & have a physical or mental impairment that substantially limits one or more major life activities.

IDEA

Student must be both disabled and in need of special education (“specially designed instruction”). and related services

7

7

Is there a list of impairments that give rise to eligibility?

§ 504

Specific physical or mental impairments are not listed in the regulations, “because of the difficulty of ensuring the comprehensiveness of any such list.”

-Appendix A to Regs.

IDEA

The impairment must fit one of the IDEA-recognized disabling conditions

8

8

In 504, what does physical or mental impairment include? 34 C.F.R. § 104.3(j)(2)(i).

Physical or Mental Impairment means

(A) "any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin and endocrine; or

(B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities."

9

9

In IDEA, what are the recognized disabling conditions?

- Autism,
- Deaf-blindness
- Hearing Impairment
- Auditory Impairment
- Intellectual Disability
- Multiple Disabilities
- Orthopedic Impairment
- Other Health Impairment
- Emotional Disturbance
- Learning Disability
- Speech Language Impairment
- Traumatic Brain Injury
- Visual Impairment
- Developmental Delay (optional).

10

10

IDEA Eligibility for Emotional Disturbance

11

- a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance:
 - (A) An inability to learn that cannot be explained by intellectual, sensory, or health factors.
 - (B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers
 - (C) Inappropriate types of behavior or feelings under normal circumstances.
 - (D) A general pervasive mood of unhappiness or depression.
 - (E) A tendency to develop physical symptoms or fears associated with personal or school problems.
- But, NOT social maladjustment

11

IDEA Eligibility for Emotional Disturbance The definition is problematic....

12

- It's old (1977), difficult to apply (how to we know the problem is ED vs. something else) and no agreement on a replacement.
- To qualify under IDEA as ED, we have to see:
 - a qualifying impairment (over a long period of time and to a sufficient degree...)
 - Because of the impairment, the student "needs" special education and related services?
- We'll focus more on the need for services in this presentation

12

Can an impairment qualify under § 504 but not IDEA?

- Absolutely. It can happen in a couple of ways:
 - The impairment was not sufficiently severe or lacked the necessary impact under IDEA, but was substantially limiting under 504
 - The student did not require special education as a result of the impairment.

13

13

What do eligible students get?

§ 504

Nondiscrimination protection, a few procedural safeguards + *some eligible* students get the Section 504 FAPE.

IDEA

Special education & related services, together with a host of procedural safeguards AND 504's nondiscrimination protection

14

14

What types of services are possible?

§ 504

Accommodations + related services + adaptations to school policy, practice & procedure (including MDR)

IDEA

“Specially designed instruction” + intensive related services + accommodations + supplementary aids/services (potentially in special settings) AND MDR

15

15

Child Find: Which way do we go?

- If the school suspects that there IS DISABILITY & Need for Services, 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).

16

16

“Specially Designed Instruction” under IDEA

- “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)).”

17

17

“Specially Designed Instruction” under IDEA

- 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:

18

18

“Specially Designed Instruction” under IDEA

“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.”

19

19

“Specially Designed Instruction” under IDEA

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).

20

20

“Specially Designed Instruction” under IDEA

- 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.”

21

21

“Specially Designed Instruction” under IDEA

- 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.

22

22

When Section 504 is enough.

Zamora v. Hays CISD, 79 IDELR 12 (W.D.Tex. 2021)

- Middle-schooler diagnosed with ADHD, depression and an anxiety disorder misses some school and goes to nurse a lot.
- When parents asked about § 504, a meeting was held, and a § 504 Plan put into place with accommodations (extra time, breaks, reminders, notetaking assistance).

23

23

When Section 504 is enough.

Zamora v. Hays CISD, 79 IDELR 12 (W.D.Tex. 2021)

- In high school parents ask for sp ed evaluation, but then refused to sign consent.
- Parents submitted a letter indicating student also had generalized anxiety disorder (GAD) and requesting an IDEA evaluation.
- Before giving consent to evaluate, parents filed for due process

24

24

When Section 504 is enough.

Zamora v. Hays CISD, 79 IDELR 12 (W.D.Tex. 2021)

- Parents placed student in a charter school (where he had attendance problems).
- HO had to order parents—twice—to submit the student for evaluation by the District.
- Evaluation concluded student was not IDEA-eligible and HO ruled for the District.

25

25

When Section 504 is enough.

Zamora v. Hays CISD, 79 IDELR 12 (W.D.Tex. 2021)

- On appeal, Court noted that parents asked for § 504 Plan, not sped, and that a district “does not commit a Child Find violation merely because it pursues § 504 accommodations before pursuing a special education evaluation.... There may be cases where intermediate measures are reasonably implemented before resorting to evaluation.”
- With his § 504 Plan, student received all As and Bs, including in AP classes, and scored at “Masters” level on State tests.

26

26

When Section 504 is enough.

Zamora v. Hays CISD, 79 IDELR 12 (W.D.Tex. 2021)

- Court found § 504 Plan was addressing student's needs.
- Moreover, Court found that District did not delay in evaluating the student under IDEA after he was formally diagnosed with GAD, but the parents failed to consent (a couple of times).

27

27

When Section 504 is enough.

Zamora v. Hays CISD, 79 IDELR 12 (W.D.Tex. 2021)

- *A little commentary:* Apparently, Court thought attendance problem not severe, as student continued to perform at a high level.
 - What if student was not making academic progress due to absences?
 - Does the student have to have bad grades to be eligible?
- Tactically, it can't help a parents' child-find claim to refuse consent for evaluation when offered it... (And only private eval does not recommend sped).

28

28

When the situation escalates beyond 504

Mr. F. v. MSAD #35, 78 IDELR 282 (D. Maine. 2021).

- In 7th grade, parents submitted medical diagnoses of their son's ADHD and anxiety, after they had trouble getting him to school.
- Parents had requested § 504, and staff responded that they needed medical documentation of disability, after which he was found not to be § 504-eligible.
- When the student showed a lack of effort toward the end of 7th grade, the § 504 team reconvened and put him on a § 504 Plan.

29

29

When the situation escalates beyond 504

Mr. F. v. MSAD #35, 78 IDELR 282 (D. Maine. 2021).

- In 8th grade, he had some missing assignments and was rushing through work, which was not unusual, and the § 504 Plan was modified.
- After the § 504 revision meeting, parents asked for sped evaluation, worried about executive function skills and peer relationships.
- At a referral meeting, parent stated she did not feel he needed special education, so the evaluation did not proceed.

30

30

When the situation escalates beyond 504

Mr. F. v. MSAD #35, 78 IDELR 282 (D. Maine. 2021).

- School psychologist conducted an evaluation under § 504 that was pretty much what would have been conducted for sp ed (just a couple of weeks later than the IDEA timeline).
- While eval was pending, student's demeanor worsened, parents reported trouble getting student to school, and they were considering hospitalization.
- School psychologist diagnosed ADHD and GAD, but found that § 504 Plan was sufficient to meet student's needs.

31

31

When the situation escalates beyond 504

Mr. F. v. MSAD #35, 78 IDELR 282 (D. Maine. 2021).

- Parents hospitalized student, where a psychiatrist diagnosed him with Asperger's Syndrome after a 70-min meeting.
- While student was hospitalized, § 504 Team met to review the school psychologist's evaluation. Psychologist noted no signs of Autism spectrum disorder (ASD).
- Hearing of the new ASD diagnosis, school began a new sp ed referral, as the hospital submitted a neuropsych evaluation finding "high probability" of ASD

32

32

When the situation escalates beyond 504

Mr. F. v. MSAD #35, 78 IDELR 282 (D. Maine. 2021).

- School agreed to IDEA eligibility as ED (based on school psych and private neuropsych), but not AU, as there was no apparent impairment in language.
- After a suicidal ideation, student was hospitalized again, where another psychiatrist questioned the prior ASD diagnosis as well.
- At the IEP meeting to develop an IEP, parents wanted AU eligibility, not ED, though team assured them any executive function issues could be addressed without AU label.

33

33

When the situation escalates beyond 504

Mr. F. v. MSAD #35, 78 IDELR 282 (D. Maine. 2021).

- At a follow-up meeting, IEP team proposed a “multiple disabilities” coding, with more testing to address ASD, and parents agreed.
- A second District psych eval found ASD, with psychologist noting that the diagnosis was “not obvious.”
- IEP was never implemented, as student did not return, and family moved to New Hampshire.

34

34

When the situation escalates beyond 504

Mr. F. v. MSAD #35, 78 IDELR 282 (D. Maine. 2021).

- Parents filed for due process, HO found no child-find violation.
- First, Court found that at the time the § 504 plan was implemented, “it was reasonable for the District to try to address these issues by implementing a § 504 plan.”
- When problems intensified, the District was prepared to evaluate, but parent “expressed resistance to special education.” This was the child-find trigger date.

35

35

When the situation escalates beyond 504

Mr. F. v. MSAD #35, 78 IDELR 282 (D. Maine. 2021).

- Proceeding with what was essentially a sped psych eval under § 504 in light of the parent’s resistance “seems reasonable and in keeping with the IDEA’s goal of a collaborative process that considers parental input,” although it caused a 3-week delay.
- Moreover, parents’ decision to hospitalize the student resulted in additional delays in determining IDEA eligibility.
- In sum, no child-find violation took place.

36

36

When the situation escalates beyond 504

Mr. F. v. MSAD #35, 78 IDELR 282 (D. Maine. 2021).

- Court noted Maine law states need for special education means “child can neither progress effectively in a regular education program nor receive reasonable benefit from such a program *in spite of other services available to the child.*” (Emphasis added).
- A little commentary: The Court here highlights the likely difference between a referral to 504 and a referral to special education. Does the student need “specially designed instruction”?

37

37

When the situation escalates beyond 504

Mr. F. v. MSAD #35, 78 IDELR 282 (D. Maine. 2021).

- *A little commentary:* It helped that the school took the unusual step of conducting a full psych eval under § 504 (not generally feasible in most districts). The District could have simply offered the IDEA evaluation and documented the parents’ refusal to consent.
- District’s development of a § 504 Plan as symptoms worsened, and timely revisions to that Plan were reasonable intervening steps.

38

38

Mixed bag of reasons for student's difficulties

D.T. v. Cherry Creek Sch. Dist., 79 IDELR 74 (D.Co. 2021).

- Florida high-schooler had difficulty transitioning into large high school in Colorado, with declining grades in 10th grade honors classes (he refused to consider switch to regular classes).
- Parent reported he had a suicidal ideation, which led school to do a Suicide Risk Assessment and a referral to a crisis center (parent did not follow up, saying student would not cooperate).
- In 11th grade, student reported family stress, was later hospitalized, was smoking pot, and parent requested a § 504 plan.

39

39

Mixed bag of reasons for student's difficulties

D.T. v. Cherry Creek Sch. Dist., 79 IDELR 74 (D.Co. 2021).

- After he commented that he was going to “shoot up the school,” he ran away, but was hospitalized again, diagnosed with depression and GAD.
- He transitioned to a home program after being expelled, upon which the parent requested a special ed evaluation.
- IEP team concluded student qualified as ED, student transferred to another high school, where in 12th grade his grades dropped (he was doing drugs, lost focus on academics), although he was able to graduate with his class.

40

40

Mixed bag of reasons for student's difficulties

D.T. v. Cherry Creek Sch. Dist., 79 IDELR 74 (D.Co. 2021).

41

- Parent filed for due process claiming untimely child-find.
- Court agreed with HO that IDEA child-find obligation was not triggered until the shooting threat, as prior problems appeared “situational” due to transfer to a different state and large school.
- Court noted that student refused considering non-honors courses, and that parent had not followed up with crisis center referral.
- Conclusion: no child-find violation.

41

Mixed bag of reasons for student's difficulties

D.T. v. Cherry Creek Sch. Dist., 79 IDELR 74 (D.Co. 2021).

42

- *A little commentary:* Similar to the Maine law, Colorado regulations indicated that ED eligibility does not exist unless general education interventions have first been tried and found wanting. Also, see citations to a similar California law in *A.P. v. Pasadena USD*, 78 IDELR 139 (C.D.Cal. 2021). To what degree can schools rely on such provisions in a child-find dispute?...
- Could not a claim had been made that § 504 child-find was violated even earlier, when schools learned of hospitalization and diagnoses?... Parent had actually asked for a § 504 plan, but staff just provided some informal assistance with assignments.

42

Mixed bag of reasons for student's difficulties

***D.T. v. Cherry Creek Sch. Dist.*, 79 IDELR 74 (D.Co. 2021).**

- *A little commentary:* Note the recurring issue of students with anxiety that are taking high-stress advanced classes... Is that a good idea for this student?
 - While IDEA and Section 504 eligible students have equal access rights to advanced classes, that right of access doesn't mean that the class will be appropriate.
 - The absence of nondiscriminatory entrance criteria for admission into these classes continues to result in this type of problem.

43

43

The long, slow progression to IDEA?

***A.W. v. Middletown Area SD*, 65 IDELR 16 (M.D.Pa. 2015).**

- 17-year-old with GAD, social phobia, separation anxiety disorder.
- Diagnosed and received therapy since 3rd grade (school advised parents to have him evaluated due to absences).
- After various parent inquiries, District developed a § 504 plan after an IDEA evaluation concluded that his OK academic performance meant he was not eligible under IDEA.

44

44

The long, slow progression to IDEA?

A.W. v. Middletown Area SD, 65 IDELR 16 (M.D.Pa. 2015).

- In 8th grade, the student's emotional status deteriorated significantly, absences began to accumulate, disruptive behaviors emerged, and failing grades began
- Despite § 504 plan, but the absences continued, so District initiated a compulsory attendance action against the student.
- District proposed a psychiatric evaluation; parent agreed, but also asked for an IDEA eval.

45

45

The long, slow progression to IDEA?

A.W. v. Middletown Area SD, 65 IDELR 16 (M.D.Pa. 2015).

- Psychiatric eval confirmed diagnoses of anxiety, but added ODD, recommended IDEA eligibility as ED, and half days at school.
- District did not revise § 504 plan, but now initiated IDEA referral (psychiatric eval did not provide data to develop an IEP).
- After student was about to fail several classes, parents placed him in District's online program (no § 504 plan at the program).

46

46

The long, slow progression to IDEA?

A.W. v. Middletown Area SD, 65 IDELR 16 (M.D.Pa. 2015).

- An agreed-to independent eval found the student to be eligible under IDEA as ED
- In his now 9th grade, the student received an IEP, but parents requested a hearing, alleging untimely child-find.
- HO found that District violated child-find, since there were ample reasons to suspect disability and need for services as early as 7th grade.

47

47

The long, slow progression to IDEA?

A.W. v. Middletown Area SD, 65 IDELR 16 (M.D.Pa. 2015).

- Court agreed there was a child-find violation, as school did not evaluate the student within a reasonable time after suspicion of eligibility.
- “Because the District engaged in ‘an unnecessary two-step process in conducting its evaluation,’ it deprived A.W. of ‘needed educational supports and services.’”
- The Court remanded case to HO to determine award of compensatory services.

48

48

The long, slow progression to IDEA?

A.W. v. Middletown Area SD, 65 IDELR 16 (M.D.Pa. 2015).

- *A little more commentary*: Note factual ingredients present in the case quite a bit prior to IDEA referral: many absences, truancy action, behaviors, declining grades, outside services, concerned parents...
 - AND school's repeated suggestion that parents get the student evaluated?
- Treating absences as a truancy matter, when there are indications of disability that may manifest with attendance problems, adds to the child-find risk.
- No § 504 plan in online program? Likely a § 504 violation. Absences and failing grades and behavior issues don't necessarily disappear online.

49

49

How about a quick summary?

Child-Find Takeaways

- General ed interventions have to be applied early in the chronology of the problem, effectively, and with close monitoring and speedy follow-up.
- Don't over-rely on academic performance in making the child-find decision—attendance troubles, poor interaction with staff and students, and behavioral concerns can also justify referral.
- Developing a solid § 504 plan can help student's situation and assist in disputes involving timing of child-find, but its effectiveness must be monitored.
 - IDEA Child Find is an on-going duty!

50

50

How about a quick summary?

Child-Find Takeaways

- Hospitalizations due to mental health concerns or crises, violent threats, and suicidal ideation or attempts should trigger a school review of data to determine whether IDEA referral is necessary.
- Schools should seek consent for access to the student's private mental health information and pursue cooperation in addressing the student's needs to make education possible and effective.
- When in doubt, offer parents IDEA evaluation
 - When worrisome factors start coming together, it's time to offer IDEA evaluation.

51