

Parent and Educator Resource Guide to Section 504 in Public Elementary and Secondary Schools



U.S. Department of Education
Office for Civil Rights
December 2016

400 MARYLAND AVE. S.W., WASHINGTON, DC 20202-1100
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U.S. Department of Education
Office for Civil Rights
Catherine E. Lhamon
Assistant Secretary
December 2016

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Parent and Educator Resource Guide to Section 504 in Public Elementary and Secondary Schools

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UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

Dear Superintendents and Other School Administrators:

Thank you for the essential work you do to ensure that students with disabilities in the United States have an equal educational opportunity. As school leaders, you are invaluable resources for people in your district regarding the rights of students with disabilities under Section 504 of the Rehabilitation Act of 1973 (Section 504). The U.S. Department of Education's Office for Civil Rights (OCR) supports your efforts to help your schools comply with Section 504, including the Department's implementing regulations, and looks forward to working with you to provide students with an educational environment free from disability-based discrimination.

The attached resource guide reminds all educational institutions receiving Federal financial assistance from the Department that they must vigilantly work to ensure compliance with Section 504 and other Federal laws that protect students with disabilities. We intend this resource guide to also help parents of students with disabilities understand the obligations imposed under Section 504. In particular, the resource guide summarizes key requirements of Section 504, and aims to increase understanding of these requirements for both parents and members of the school community alike. If you need technical assistance, please contact the OCR regional office serving your State or Territory by visiting wdcrobcolp01.ed.gov/CFAPPS/OCR/contactus.cfm or call OCR's Customer Service Team at 1-800-421-3481; TDD 1-800-877-8339.

Thank you for your commitment to assisting your schools in complying with Section 504 and to ensuring that all your schools' students have safe and healthy environments in which to learn and thrive. We in OCR look forward to continuing to work with you to help prevent and address disability discrimination in our nation's schools.

Sincerely,

/s/

Catherine E. Lhamon
Assistant Secretary for Civil Rights

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Introduction

Every year, public school teachers, leaders, parents, students, and other interested parties contact the U.S. Department of Education's Office for Civil Rights (OCR) asking questions about the educational and civil rights of students with disabilities who are enrolled in public elementary and secondary schools.

In this resource guide, the term *parent* includes guardians and others with the authority to act on behalf of and in the interest of a student.

During these exchanges, OCR often hears (1) uncertainty about the Federal civil rights obligations of public schools and individual school employees in a wide range of situations involving students with disabilities; (2) a lack of awareness of required processes and procedures for securing services and access to programs and opportunities for students who have or may have disabilities; or (3) confusion about student rights under the applicable Federal disability laws. As a result, some school officials may violate the Federal civil rights laws that are designed to protect students with disabilities. Similarly, some parents do not know what services and protections their children with disabilities may be entitled to receive or how to appropriately initiate or follow the process and procedures for securing disability services for their children from the school.

To facilitate efforts to eliminate discrimination against students with disabilities, OCR offers this resource guide to provide answers to questions that OCR has received and increase understanding among parents and members of the school community of the Federal civil rights laws that protect students with disabilities in public schools, and in particular, Section 504 of the Rehabilitation Act of 1973 (Section 504).¹

Imbedded in the discussion of key provisions of Federal law, the resource guide repeatedly asks parents, teachers, and others to think about how they might respond in different scenarios. For example:

What should parents do when their child appears to need extra help in school, and they believe their child may have a disability?

What kinds of assistance are available?

Who should parents speak with about their concerns and questions?

What are teachers, administrators, and other school employees required to do for a student who has or may have a disability?

¹ 29 U.S.C. § 794; 34 C.F.R. pt. 104.

Section 504 is a Federal law that prohibits disability discrimination by recipients of Federal financial assistance.² All public schools and school districts, as well as all public charter schools and magnet schools, that receive Federal financial assistance from the Department must comply with Section 504.

Section 504 provides a broad spectrum of protections against discrimination on the basis of disability. For example, all qualified elementary and secondary public school students who meet the definition of an individual with a disability under Section 504 are entitled to receive regular or special education and related aids and services that are designed to meet their individual educational needs as adequately as the needs of students without disabilities are met.³ Section 504 also requires, among other things, that a student with a disability receive an equal opportunity to participate in athletics and extracurricular activities, and to be free from bullying and harassment based on disability.

Specifically, this resource guide:

- Highlights key requirements of Section 504 in the area of public elementary and secondary education, including available services and complaint procedures;
- Explains how Section 504 applies in various hypothetical situations within public elementary and secondary schools;⁴ and
- Discusses two other Federal laws that address the rights of students with disabilities: (1) Title II of the Americans with Disabilities Act of 1990 (Title II);⁵ and (2) Part B of the Individuals with Disabilities Education Act (IDEA).⁶

You can go to page 40 for information about key differences among Section 504, Title II, and the IDEA.

²*Id.* All references to schools, public schools, and districts in this resource guide mean recipient public schools and school districts. Also, the terms schools, school districts, and districts are used interchangeably.

³ 34 C.F.R. § 104.33.

⁴ Although Section 504 covers a larger age range than the typical age of students in kindergarten through 12th grade, this resource guide focuses on the timeframe from kindergarten through high school graduation.

⁵ 42 U.S.C. §§ 12131-12134; 28 C.F.R. pt. 35.

⁶ 20 U.S.C. §§ 1400-1419; 34 C.F.R. pt. 300. Part B of the IDEA addresses the obligations of States and school districts to provide special education and related services to eligible children with disabilities. The Office of Special Education Programs (OSEP) in the Department's Office of Special Education and Rehabilitative Services (OSERS) administers the IDEA. For information about the IDEA, please see osep.grads360.org and www.ed.gov/osers/osep/index.html.

The Meaning of Disability Under Section 504

Below is a discussion of what it means to be a student or individual with a disability, and of related terms that help to comprehensively define *disability* as it is used in Section 504 and its implementing regulations.

Disability. Under Section 504, an individual with a disability (also referred to as a *student with a disability* in the elementary and secondary education context) is defined as a person who: (1) has a physical or mental impairment that substantially limits a major life activity; (2) has a record of such an impairment; or (3) is regarded as having such an impairment.⁷

The determination of whether a student has a physical or mental impairment that substantially limits a major life activity (and therefore has a disability) must be made on a case by case basis.⁸ In addition, when determining if someone meets the definition of a disability, the definition must be understood to provide broad coverage of individuals.⁹

Physical or mental impairments. Section 504 defines a physical or mental impairment as 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; genito-urinary; hemic and lymphatic; skin; and endocrine.¹⁰

The Section 504 definition of physical and mental impairment also includes any mental or psychological disorder.¹¹ The definition does not include all specific diseases and conditions that may be physical or mental impairments because of the difficulty of ensuring the completeness of such a list.

⁷ 29 U.S.C. § 705(9)(B), (20)(B).

⁸ 34 C.F.R. § 104.35.

⁹ 42 U.S.C. § 12102(4)(A). The Americans with Disabilities Act Amendments Act of 2008 (Amendments Act) amended both the Americans with Disabilities Act (ADA) and the Rehabilitation Act definition of disability for Section 504 to broaden the meaning of disability and the protections under these Federal laws. *See* 42 U.S.C. § 12101 notes; 154 Cong. Rec. S8342, 8346 (daily ed. Sept. 11, 2008) (statement of the Managers to Accompany S. 3406, The Americans with Disabilities Act Amendments Act of 2008). *See also* OCR, *Dear Colleague Letter: Americans with Disabilities Act* (Jan. 19, 2012), www.ed.gov/ocr/letters/colleague-201109.html and accompanying *Questions and Answers on the ADA Amendments Act of 2008 for Students with Disabilities Attending Public Elementary and Secondary Schools* (Jan. 19, 2012), www.ed.gov/ocr/docs/dcl-504faq-201109.pdf.

¹⁰ 34 C.F.R. § 104.3(j)(2)(i).

¹¹ *Id.*; *see also* OCR, *Protecting Students with Disabilities: Frequently Asked Questions About Section 504 and the Education of Children with Disabilities* (FAQ 12) (last modified Oct. 16, 2015), www.ed.gov/ocr/504faq.html.

Major life activities.

To summarize, major life activities include certain acts a person does (such as hearing, speaking, lifting) and a person's bodily functions (such as lung disease that affects a person's respiratory system, or a traumatic brain injury that affects the function of the brain).

The list of major life activities under Section 504 includes, but is not limited to, the activities listed below.¹²

- caring for oneself
- performing manual tasks
- seeing
- hearing
- eating
- sleeping
- walking
- standing
- lifting
- bending
- speaking
- breathing
- learning
- reading
- concentrating
- thinking
- communicating
- working

Major bodily functions are also major life activities under the law, and these major bodily functions include functions of the bowel, bladder, and brain; normal cell growth; and the immune, endocrine (for example, thyroid, pituitary, and pancreas), respiratory, reproductive, circulatory, digestive, and neurological systems.¹³

These lists, however, do not provide every possible major life activity or bodily function; therefore, if an activity or bodily function is not listed in the Amendments Act, it might still be considered a major life activity under Section 504.¹⁴

For example, if a school provides a form with a list of major life activities to consider during an evaluation process, a student may still have a physical or mental impairment that substantially limits a major life activity even if the activity is not listed on the school's form.

¹² 29 U.S.C. § 705(9)(b), (20)(B); 42 U.S.C. § 12102(2)(A).

¹³ 42 U.S.C. § 12102(2)(B).

¹⁴ 42 U.S.C. § 12102(2).

School staff should note, in particular, that a student may have a disability and be eligible for Section 504 services even if his or her disability does not limit the major life activity of learning.

Therefore, rather than considering only how an impairment affects a student's ability to learn, school staff must also consider how the impairment affects *any* major life activity of the student and, if necessary, assess what is needed to ensure that students have an equal opportunity to participate in the school's programs.¹⁵

For example: (1) a student with a visual impairment who cannot read regular print with glasses is substantially limited in the major life activity of seeing; (2) a student with an orthopedic impairment who cannot walk is substantially limited in the major life activity of walking; and (3) a student with diabetes who requires insulin injections is substantially limited in the operation of a major bodily function, the endocrine system. These students would have to be evaluated, as described in the Section 504 regulations, to determine whether they need special education and/or related services.¹⁶

School staff should note that a student may have a disability and be eligible for Section 504 services, including modifications, even if the student earns good grades.

This is because the student's impairment may substantially limit a major life activity regardless of whether the student performs well academically, and the student may need special education or related aids and services because of this disability.¹⁷

For example, a student who has dyslexia and is substantially limited in reading finds it challenging to read the required class material in a timely manner. Alternatively, a student who has been diagnosed with depression may be substantially limited in her ability to concentrate while completing school assignments. In both of these cases, the student spends far more time preparing for class than other students and earns good grades because of the student's intelligence and extreme efforts. The student would still be substantially limited in the major life activity of reading despite earning good grades and may require a multi-sensory approach to learning, and additional time to complete in-class tests or quizzes, even if that student earns mostly A's.

¹⁵ 34 C.F.R. § 104.35.

¹⁶ *Id.*

¹⁷ 42 U.S.C. § 12102; 154 Cong. Rec. S8342, 8346 (daily ed. Sept. 11, 2008) (statement of the Managers to Accompany S. 3406, The Americans with Disabilities Act Amendments Act of 2008). See also OCR, *Questions and Answers on the ADA Amendments Act of 2008 for Students with Disabilities Attending Public Elementary and Secondary Schools* (FAQ 7 & 9) (Jan. 19, 2012), www.ed.gov/ocr/docs/dcl-504faq-201109.pdf.

Mitigating measures. When determining if a person has a disability, a school cannot consider the ameliorative effects of mitigating measures when determining how the impairment impacts the major life activities under consideration.¹⁸

For example, a student with low vision (unable to read typical size print with ordinary eyeglasses or contacts) who is able to read using a computer program that enlarges the font size of documents is still a person with a disability, even though the computer program permits the student to diminish the impact of his or her low vision and read lessons and other materials for school.

The Amendments Act provides a non-comprehensive list of mitigating measures: medications; prosthetic devices (for example, an artificial arm); assistive devices (for example, computer modifications that increase accessibility, wheelchairs, scooters, walkers, canes, and crutches); learned behavior; and adaptive neurological modifications that an individual may use to eliminate or reduce the effects of an impairment.

Note that the use of ordinary eyeglasses or contacts is the one exception to the mitigating measure rule.¹⁹ In other words, if a person's vision is corrected with ordinary eyeglasses or contacts,²⁰ the school may consider how the eyeglasses or contacts help the student see when making a determination about whether the student has a disability based on seeing.

You can go to page 20 for more discussion about mitigating measures.

Substantial limitation. The determination of substantial limitation must be made on a case-by-case basis with respect to each individual student.²¹ Section 504 requires that, for elementary and secondary school students, a group of knowledgeable persons draw upon information from a variety of sources in making this determination.²²

The group of knowledgeable persons is often called a *Section 504 Team*.

¹⁸ 42 U.S.C. § 12102(4)(E)(i).

¹⁹ 42 U.S.C. § 12102(4)(E)(ii).

²⁰ 42 U.S.C. § 12102(4)(E)(iii)(I).

²¹ 34 C.F.R. § 104.35.

²² 34 C.F.R. § 104.35(c).

The Amendments Act also requires, however, that in making that determination under Section 504, the beneficial effects of mitigating measures (other than ordinary eyeglasses and contact lenses) must not be considered.²³ For example, school districts must determine if a student with asthma has a disability without considering how an inhaler affects the student's major life activities such as breathing and talking.

Episodic impairments. If an impairment only occurs periodically (that is, it is episodic) or is in remission, it is a disability if, when in an active phase, it would substantially limit a major life activity.²⁴ For example, a student with epilepsy is a student with a disability if, during a seizure, the student is substantially limited in a major life activity such as thinking, breathing, or neurological function. Or, a student with bipolar disorder is a person with a disability if, during manic or depressive episodes, the student is substantially limited in a major life activity such as concentrating or brain function.

Record of a disability. To meet the Section 504 definition of an individual with a disability, a student could also *have a record of a disability*.²⁵ Having a *record of a disability* means that a person either has a history of a disability or has been misclassified as having a mental or physical impairment that substantially limits one or more major life activities.²⁶ For example, a person who had heart disease, cancer, or a mental illness, may have a record of a disability, but no longer have the impairment.²⁷ An example of a misclassification is a school district that incorrectly identified a student as having a learning disability, when further testing revealed the student's issues were caused by the need for ordinary eyeglasses and the student does not have a learning disability.

A student who has a record of a disability may or may not need special education or related aids and services. Section 504 does not obligate a school district to provide aids or services that a student does not need. But, even if a student with a disability does not need services, the student is protected from disability-based discrimination under Section 504's general non-discrimination requirements.²⁸

²³ 42 U.S.C. § 12102(4)(E).

²⁴ 42 U.S.C. § 12102(4)(D).

²⁵ 34 C.F.R. § 104.3(j)(2)(iii).

²⁶ *Id.*

²⁷ Department of Justice: *ADA, Title II Technical Assistance Manual*, II-2.5000, www.ada.gov/taman2.html#II-2.5000; 34 C.F.R. pt. 104, App. A.

²⁸ 34 C.F.R. §§ 104.4(b), 104.21-23, 104.37, 104.61 (incorporating 34 C.F.R. § 100.7(e)); *see also* OCR, *Questions and Answers on the ADA Amendments Act of 2008 for Students with Disabilities Attending Public Elementary and Secondary Schools* (FAQ 10 & 11) (Jan. 19, 2012), www.ed.gov/ocr/docs/dcl-504faq-201109.pdf.

Regarded as having a disability. A student could also meet the definition of an individual with a disability by being *regarded as* a person with a disability.²⁹ This could mean, for example, that the student does not have any impairment, but is treated by others as having a disability.

For example, a person who does not have a physical or mental impairment that substantially limits a major life activity but who is not allowed on the soccer team because of the false belief that the student has the human immunodeficiency virus (HIV) would be regarded as having a disability.³⁰ Note, as stated previously, although the student with HIV in this instance is not entitled to receive aids and services, the student is nevertheless protected from disability-based discrimination under Section 504's general non-discrimination requirements.

An individual does not fall within the definition as someone regarded as having a disability if the physical or mental impairment is transitory (that is, having an actual or expected duration of six months or less) and minor.³¹ For example, if a person has a broken leg but is expected to fully recover within six weeks, and the injury is considered minor, that person is *not* regarded as a person with a disability even if others treat the person as if he or she has a disability.³²

Note, while Section 504 does not require a school to take specific action if a student has a physical or mental impairment that is transitory and minor, Section 504 also does not prohibit schools from going beyond what the law requires to assist a student.

The school district could, for example, allow the student to take a bus to school, when the student with the broken leg typically walks to school, or provide a pass to allow the student to use the faculty elevator—which is typically off-limits for students—while the student uses crutches.

²⁹ 34 C.F.R. § 104.3(j)(2)(iv).

³⁰ Department of Justice: *ADA, Title II Technical Assistance Manual*, II-2.6000, www.ada.gov/taman2.html#II-2.6000; 34 C.F.R. pt. 104, App. A.

³¹ Amendments Act § 4(e) (codified as amended at 42 U.S.C. § 12102). A transitory and minor impairment is a minor impairment with an actual or expected duration of 6 months or less. 42 U.S.C. § 12102(3)(B). An episodic impairment, on the other hand, is a disability if it would substantially limit a major life activity when active. *Id.* § 12102(4)(D). Neither the ADA statute nor regulation indicates a time limitation for an episodic impairment, whereas a transitory impairment is 6 months or less.

³² Impairments that are episodic in nature or in remission are different from temporary impairments. Temporary impairments could be a disability or could not be a disability, depending upon the extent of the limitation and the length of time. Impairments that are episodic in nature are in remission or are ongoing, while temporary impairments exist for a limited time span. A temporary impairment caused by an injury (for example, a broken leg) may be a covered disability under the ADA Amendments Act if it is sufficiently severe to substantially limit a major life activity. See *Summers v. Altarum Institute Corp.*, 740 F.3d 325 (4th Cir. 2014); see also OCR, *Protecting Students with Disabilities: Frequently Asked Questions About Section 504 and the Education of Children with Disabilities* (FAQ 34) (last modified Oct. 16, 2015), www.ed.gov/ocr/504faq.html.

Qualified individual with a disability. Finally, in addition to satisfying the definition of an individual with a disability, a student with a disability must also be qualified for the protections of Section 504 in order to be covered under the law. For students with disabilities at the elementary and secondary level, being qualified under Section 504 is based primarily on whether the person is a certain age.

Specifically, a student with a disability is a qualified individual with a disability if the student is of an age at which: (1) students without disabilities are provided elementary and secondary educational services; or (2) it is mandatory under State law to provide elementary and secondary educational services to students with disabilities.³³

A student with a disability is also a qualified individual with a disability if he or she is a student to whom a State is required to provide a free appropriate public education (FAPE) under the IDEA, another Federal education law that addresses the rights of students with disabilities.

You can go to page 40 for a discussion of the IDEA.

³³ 34 C.F.R. § 104.3(l)(2). See also footnote 4 (noting that this resource guide addresses students from kindergarten through 12th grade).

An Overview of a Free Appropriate Public Education

Section 504 and the IDEA contain requirements for FAPE for students with disabilities, but there are some differences. Under the IDEA, FAPE is a statutory term.³⁴ It requires a school district to develop an individualized education program (IEP) for each eligible student with a disability that sets out, among other information, the student's program of special education and related services. In this section, however, we discuss the FAPE requirements under Section 504 only.

You can go to page 40 for a discussion of the differences between Section 504 FAPE and IDEA FAPE.

All elementary and secondary school students who are qualified individuals with disabilities, as defined by Section 504, and who need special education and/or related aids and services are entitled to FAPE. Under Section 504, FAPE is the provision of regular or special education and related aids and services that are designed to meet the individual educational needs of students with disabilities as adequately as the needs of non-disabled students are met and are based on adherence to procedures governing educational setting, evaluation and placement, and procedural safeguards.³⁵ Implementation of an IEP developed in accordance with the IDEA is one means of meeting the Section 504 FAPE standard.³⁶

Though not explicitly required by the Department's Section 504 regulations, school districts often document the elements of an individual student's FAPE under Section 504 in a document, typically referred to as a *Section 504 Plan*.

In general, a *Section 504 Plan* describes the regular or special education and related aids and services a student needs and the appropriate setting in which to receive those services.

A written Section 504 Plan is often a useful way to document that the school district engaged in a process to identify and address the needs of a student with a disability and to communicate, to school personnel, the information needed for successful implementation. OCR encourages schools to document a student's Section 504 services in a written plan to help avoid misunderstandings or confusion about what Section 504 services the school offered the student. Note, however, that IDEA-eligible students with disabilities who have an IEP are not required to also have a Section 504 plan even though they are protected under Section 504. For these students, the IEP developed and implemented in accordance with the IDEA is sufficient.

³⁴ 20 U.S.C. § 1401(9) and 34 C.F.R. § 300.17.

³⁵ 34 C.F.R. § 104.33.

³⁶ 34 C.F.R. § 104.33(b)(2).

Under Section 504, FAPE must be provided free of charge to students with disabilities.³⁷ Schools may impose fees on a student with a disability only if the fees are equally imposed on students without disabilities.³⁸ For example, fees to cover the cost of a field trip that apply to all students are fees a school can charge to a student with a disability.

Key features of FAPE under Section 504 include:

- Evaluation and placement procedures that guard against misclassification or inappropriate placement of students;³⁹
- Periodic reevaluation of students who have been provided special education or related services and prior to a significant change in placement;⁴⁰
- Provision of regular or special education and related aids and services that are designed so that the individual educational needs of students with disabilities are met as adequately as the needs of non-disabled students are met;⁴¹
- Education of students with disabilities with non-disabled students—to the maximum extent that this arrangement is appropriate for the needs of students with disabilities;⁴²
- A system of procedural safeguards (that is designed to inform parents of a school district's actions or decisions and to provide parents with a process for challenging those actions or decisions) that include notice; an opportunity for parents to review their child's records; an impartial due process hearing (with an opportunity for participation by the student's parents or guardians and representation by counsel); and a review procedure.⁴³

³⁷ 34 C.F.R. § 104.33(c).

³⁸ *Id.*

³⁹ 34 C.F.R. § 104.35.

⁴⁰ 34 C.F.R. § 104.35(d).

⁴¹ 34 C.F.R. § 104.33(b)(1)(i).

⁴² 34 C.F.R. § 104.34(a).

⁴³ 34 C.F.R. § 104.36.

Student Evaluations and Placement Under Section 504

Under Section 504, school districts must conduct an evaluation in a timely manner of any student who needs or is believed to need special education or related services because of a disability.⁴⁴ When a school is aware of a student's disability, or has reason to suspect a student has a disability, and the student needs or is believed to need special education or related services, it would be a violation of Section 504 if the school delays or denies the evaluation.⁴⁵

In some circumstances, the IDEA evaluation process may provide the school district with the necessary information, required by Section 504, to determine whether a student has a disability, and whether that student needs related aids and services or supplementary aids and services in the regular education environment because of that disability. However, if a State or school district uses a separate process for evaluating the needs of students under Section 504, it must follow the requirements for evaluation specified in the Section 504 regulations.⁴⁶

A school district must evaluate a student if it has reason to believe the student has a disability and the student needs special education or related services as a result of that disability, even if the student only exhibits behavioral (and not academic) challenges.⁴⁷

For example, those students who have a high-number of discipline referrals for inappropriate verbal outbursts in class, as compared to their peers, could be students with disabilities in need of services. Some students, due to an unaddressed disability, may engage in behaviors that do not conform to school codes of conduct because the students are not receiving needed special education or related aids and services, including needed services to address behavior. These and other indications that a student's behavior is out of the expected range of behaviors for students of similar age may trigger a school district's obligation to evaluate under Section 504 to determine whether the student has a disability and needs special education or related services as a result of that disability.

⁴⁴ 34 C.F.R. § 104.35(a). English Learner (EL) students who may have a disability, like all other students who may have a disability and may require special education or related aids and services under Section 504, because of that disability, must be located, identified and evaluated in a timely manner. 34 C.F.R. §§ 104.32 and 104.35(a)-(b). To avoid inappropriately identifying EL students as students with disabilities because of their limited English proficiency, an EL student must be evaluated in an appropriate language based on the student's needs and language skills. For additional information, see OCR and DOJ, *Dear Colleague Letter: English Learner Students and Limited English Proficient Parents* (Jan. 7, 2015), www.ed.gov/ocr/letters/colleague-el-201501.pdf.

⁴⁵ 34 C.F.R. § 104.35.

⁴⁶ *Id.*

⁴⁷ 34 C.F.R. § 104.33.

A school district must, at no cost to parents, evaluate students who are suspected of having a disability, or more than one disability, in all related or all specific areas of educational need.⁴⁸ For example, a student who is easily distracted and unfocused may be manifesting attention-deficit/hyperactivity disorder (ADHD), depression, or a specific learning disability.⁴⁹ There is a range of physical or mental impairments that could cause a student to have a disability under Section 504 and to need special education or related services because of that disability, but this determination cannot be made without first evaluating the student.

If a school district determines, based on the facts and circumstances of the individual case, that a medical assessment is necessary to conduct a Section 504 individual evaluation in order to determine whether a child has a disability under Section 504 and needs special education or related services because of a disability,⁵⁰ the school district must ensure that the student receives this assessment at no cost to the student's parents.⁵¹ When determining if the student has a disability and needs special education or related aids and services, school districts are also required to have procedures to ensure that evaluation information is documented and carefully considered.⁵²

⁴⁸ *Id.*; 34 C.F.R. § 104.35

⁴⁹ Research estimates that approximately one-quarter to one-third of all children with ADHD also have a learning disability, and that they have coexisting psychiatric disorders at a much higher rate than students without ADHD. See U.S. Department of Education, *Teaching Children with Attention Deficit Hyperactivity Disorder: Instructional Strategies and Practices* (2004), www.ed.gov/teachers/needs/speced/adhd/adhd-resource-pt2.doc.

⁵⁰ A specific diagnosis is not actually necessary if the school determines a student is substantially limited in a major life activity and that limitation is caused by a mental or physical impairment. 34 C.F.R. §§ 104.3(j), 104.35; see also OCR, *Dear Colleague Letter and Resource Guide on Students with ADHD*, 23 n.70 (July 26, 2016), www.ed.gov/ocr/letters/colleague-201607-504-adhd.pdf.

⁵¹ 34 C.F.R. §§ 104.33, 104.35, and 34 C.F.R. pt. 104, App. A (discussing Subpart D, ¶ 23) ("Recipients must also pay for psychological services and those medical services necessary for diagnostic and evaluative purposes."); See also OCR, *Dear Colleague Letter and Resource Guide on Students with ADHD*, 23 n.71 (July 26, 2016), www.ed.gov/ocr/letters/colleague-201607-504-adhd.pdf; U.S. Department of Education, Office of Special Education and Rehabilitative Services, Office of Special Education Programs, *Identifying and Treating Attention Deficit Hyperactivity Disorder: A Resource for School and Home* (last modified Feb. 13, 2009), www.ed.gov/rschstat/research/pubs/adhd/adhd-identifying.html. If a school district does not have the appropriate personnel on staff to conduct a medical assessment for diagnostic and evaluative purposes, the district must make arrangements for the medical assessment at no cost to the parent.

⁵² 34 C.F.R. § 104.35(c)(2).

In OCR's investigative experience, school districts sometimes rely on a student's average, or better-than-average, classroom grades or grade point average (GPA) and, as a result, make inappropriate decisions. For example, a school district might wrongly assume that a student with an above-average GPA does not have a disability and therefore fail to conduct a Section 504 evaluation of that student, even if the school suspects that the student has ADHD or the school is aware that the student has been diagnosed with ADHD outside of school.

However, a student with a disability may achieve a high level of academic success but may nevertheless be substantially limited in a major life activity due to the student's impairment because of the additional time or effort the student must spend to read, write, or learn compared to others.⁵³

Scenario 1 – Suspected Disability & Evaluation

Rosita is a fourth grade student at her local public elementary school. Her teacher notices that Rosita has trouble concentrating during class lessons and that it takes Rosita significantly longer than most students to complete in-class assignments. While the teacher acknowledges that it is very difficult for Rosita to stay seated and on-task, she does not think Rosita needs special education services because she is earning B's and C's. What should the teacher do?

In this situation, Rosita's teacher needs to inform the proper individuals in the school system that Rosita needs to be evaluated. It is only through an evaluation process that a school district can properly determine if a student has a disability and needs Section 504 services. Note that grades alone, whether good or bad, do not necessarily indicate whether a student has or does not have a disability. Even if Rosita does not require special education, she could still receive other Section 504 services if she meets the Section 504 definition of disability and is in need of related aids or services or supplemental services. For example, Rosita may have ADHD and may, because of her ADHD, need extra time to complete assignments and assistance from a classroom aide to stay on task during class. However, even if Rosita does not require either special education or related aids and services, as long as she is a student with a disability under Section 504, she is still protected under that law from other forms of discrimination (for example, bullying and harassment - see the discussion on page 32). The teacher's referral of Rosita for evaluation is central to complying with Section 504 here.

⁵³ 28 C.F.R. § 35.108(d)(3)(iii). See also 29 C.F.R. pt. 1630, App. (Equal Employment Opportunity Commission Interpretive Guidance on Title I of the Americans with Disabilities Act) (discussing Section 1630.2(j)(4)) (Mar. 25, 2011), www.gpo.gov/fdsys/pkg/CFR-2013-title29-vol4/pdf/CFR-2013-title29-vol4-part1630-app-id986.pdf.

Scenario 2 – Suspected Disability & Involvement of Knowledgeable People

Robert's seventh grade teachers report that he often falls asleep, without warning, during class and misses instruction. His parents insist that he gets a good night sleep but note that their pediatrician told them Robert might have narcolepsy, a chronic brain disorder that involves poor control of sleep and wake patterns. What should the teachers do?

Staff should seek an evaluation to determine whether Robert has a physical or mental impairment that is interfering with his ability to stay awake. The group who meets to review this evaluation and make a decision about services must consist of knowledgeable people (for example, school nurses, teachers, counselors, psychologists, school administrators, social workers, doctors, etc.) who, in interpreting evaluation data and determining the needed services, carefully review and analyze information collected from a variety of sources (for example, the pediatrician's report; aptitude and psychological test results; the student's grade reports; teacher observations; the student's social and cultural background; the student's family).

If the evaluation, which must be conducted at no cost to the parents or student, shows that the student has a disability, then the knowledgeable group (that is, people who are knowledgeable about the student, the meaning of the evaluation data and about the placement options), must together determine placement, including the special education or related aids and services the student needs under Section 504.

Scenario 3 – Disabilities in Remission

Doctors diagnosed Omar with cancer at the beginning of the summer break, between fourth grade and fifth grade. When initially diagnosed, Omar was weak and tired all the time, and, at times, unable to even get out of bed or dress or feed himself. He received chemotherapy in July and August and returned to school, without any symptoms of his disease, at the beginning of the school year. At that time his parents informed the school of Omar's cancer diagnosis. It is now November and doctors have informed Omar's parents that his disease appears to be in remission. Omar's mom notes that he runs and plays like all the other children and his grades are great. How would a group of knowledgeable persons determine if Omar has a disability?

A student who has an impairment that is episodic (for example, epilepsy or post-traumatic stress disorder) or in remission is considered to be a person with a disability if, when active (that is, when symptoms are evident or reoccur), the impairment substantially limits a major life activity. When active, Omar's illness left him weak and unable to get out of bed. In other words, when active, cancer substantially limits his ability to care for himself which, under Federal law, is a major life activity. Moreover, the cancer substantially limits the major bodily function of normal cell growth, which is also a major life activity under Federal law. For this reason, the group of knowledgeable persons would determine that Omar is a student with a disability.

However, he may or may not require special education or related aids and services that are designed to meet his individual educational needs as adequately as the needs of non-disabled students are met. Even if Omar does not need special education or related aids and services, he would still be protected under Section 504, for example, from bullying and harassment based on his disability.

School districts must have standards and procedures to evaluate students who may have a disability and need special education or related services.⁵⁴ The evaluation of a student, however, must be individualized. Although Section 504 does not require a specific process, the standards and procedures must meet certain requirements. Specifically, the evaluation standards and procedures must ensure that:

- Evaluations consist of more than IQ tests;⁵⁵
- Evaluations measure specific areas of educational need. These could include speech processing, inability to concentrate, and behavioral concerns;⁵⁶
- Tests are selected and administered to the student in a manner that best ensures that the test results accurately reflect the student's aptitude or achievement or other factor being measured, rather than reflect the student's disability, except where those are the factors being measured;⁵⁷
- Tests and other evaluation materials are validated for the specific purpose for which they are used;⁵⁸ and
- Tests are appropriately administered by trained personnel.⁵⁹

⁵⁴ 34 C.F.R. § 104.35(b).

⁵⁵ 34 C.F.R. § 104.35(b)(2).

⁵⁶ *Id.*

⁵⁷ 34 C.F.R. § 104.35(b)(3).

⁵⁸ 34 C.F.R. § 104.35(b)(1).

⁵⁹ *Id.*

Scenario 4 – Appropriate Testing

Juan is a student in the third grade. His teacher tests reading comprehension with written in-class quizzes. Juan has trouble finishing the quizzes on time, and his answers are short and incomplete. Because of the poor responses on the quizzes, Juan's teacher believes he may have a disability related to his ability to understand what he reads (reading comprehension skills). The school conducts an evaluation that requires Juan to read a passage and to write responses to a series of questions about the passage. Was this testing appropriate to evaluate Juan's suspected disability?

This test would not be appropriate for determining whether Juan has a disability related to reading comprehension if he has a disability related to writing. Specifically, if Juan struggles with writing, such as trouble staying in the margins, organizing words left to right and getting words on paper, Juan may have a disability related to his ability to write manually and may not score well on the test because he cannot finish answering questions in the time given, not because he does not understand the reading passage. In this example, Juan may have excellent reading comprehension skills, but his inability to write well quickly may result in a low test score.

Scenario 5 – Timeframes for Evaluation

Mr. Williams is very concerned. In September, two weeks after the new school year began, his 16 year-old son told him that he was having a hard time hearing his teacher and, as a result, he is unable to take detailed notes during class lectures. The school promised to evaluate the student, and Mr. Williams consented to the evaluation before the end of September. However, it is now December and, to date, his son has not been evaluated. Should the school have completed the evaluation before December?

Most likely, yes. Section 504 does not provide a specific amount of time for school districts to complete an evaluation. However, under the IDEA (another Federal law that protects students with disabilities and of which schools should be aware), an initial evaluation must be conducted within 60 days of receiving parental consent for the evaluation or if the State has established a different timeframe for conducting the evaluation, within that timeframe. OCR generally looks to the IDEA timeline, or if applicable, to State requirements or local district policy to assess the reasonableness of the time it takes the school to evaluate the student once parental consent has been obtained.

In determining a student's needs, sources to consider include aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior.⁶⁵

Other information that the school district must also consider is a medical diagnosis or the results of a medical assessment obtained by the school district. If a district believes a medical assessment is necessary and the parent volunteers to pay for a private assessment, the district must make it clear that the parent has a choice and can choose to accept a school-furnished assessment at no cost to the parent.⁶⁶

OCR interprets Section 504 to require informed parental consent for the initial evaluation. If a parent refuses consent for an initial evaluation and a recipient school district suspects a student has a disability, OCR interprets Section 504 to allow school districts to use due process hearing procedures to seek to override the parents' denial of consent.⁶⁷ OCR also urges schools to allow for parental participation when considering any change in the student's Section 504 provision of FAPE, including location of services.⁶⁸

Section 504 is silent on the form of parental consent required. OCR has accepted written consent as compliance.⁶⁹ Making a request in writing can help avoid misunderstandings between parents and school districts, and could help to prove or disprove a related allegation in the event a parent decides to file a formal civil rights complaint against a school district in the future.

⁶⁵ *Id.*

⁶⁶ 34 C.F.R. §§ 104.33, 104.35 and 34 C.F.R. pt. 104, App. A (discussing Subpart D, ¶ 23) ("Recipients must also pay for psychological services and those medical services necessary for diagnostic and evaluative purposes."). See also OCR, *Dear Colleague Letter and Resource Guide on Students with ADHD* (July 26, 2016), www.ed.gov/ocr/letters/colleague-201607-504-adhd.pdf; and U.S. Department of Education, Office of Special Education and Rehabilitative Services, Office of Special Education Programs, *Identifying and Treating Attention Deficit Hyperactivity Disorder: A Resource for School and Home*, at 9 (last modified Feb. 13, 2009), www2.ed.gov/rschstat/research/pubs/adhd/adhd-identifying.html. If a school district does not have the appropriate personnel on staff to conduct a medical assessment for diagnostic and evaluative purposes, the district must make arrangements for the medical assessment at no cost to the parent.

⁶⁷ See OCR, *Protecting Students with Disabilities: Frequently Asked Questions About Section 504 and the Education of Children with Disabilities* (FAQ 27) (last modified Oct. 16, 2015), www.ed.gov/ocr/504faq.html.

⁶⁸ 34 C.F.R. § 104.35(a) and 34 C.F.R. pt. 104, App. A (discussion of Subpart D) (enable parents or guardians to influence decisions regarding the evaluation and placement of their children); see also OCR, *Protecting Students with Disabilities: Frequently Asked Questions About Section 504 and the Education of Children with Disabilities* (FAQ 41) (last modified Oct. 16, 2015), www.ed.gov/ocr/504faq.html.

⁶⁹ IDEA, as well as many state laws, also require written consent prior to initiating an evaluation. See OCR, *Protecting Students with Disabilities: Frequently Asked Questions About Section 504 and the Education of Children with Disabilities* (FAQ 42) (last modified Oct. 16, 2015), www.ed.gov/ocr/504faq.html.

If a parent believes his or her child has a disability, the parent may ask, for example, a principal, counselor, social worker, or teacher to arrange for an evaluation of the student. Through the Section 504-compliant evaluation process, a knowledgeable group of people will determine if the student has a disability and, if so, what services the student needs.⁶⁰

Although a parent does not have an absolute right to a Section 504 evaluation upon request, a school must evaluate a student if the school has reason to believe the student is in need of special education or related services because of a disability.⁶¹

School districts violate Section 504 when they deny or delay conducting an evaluation of a student when it would have been reasonable for a staff member to have suspected that a student has a disability and needs special education or related services because of that disability.

If the school does not agree to evaluate the student, the school must inform the parent of his or her right to challenge the school's decision. If a parent disagrees with any decisions regarding the identification, evaluation, or educational placement of his or her child, the parent may seek an impartial hearing (often called a *due process hearing*) that provides the parent with an opportunity to participate and permits representation by an attorney and a review procedure.⁶²

You can go to page 35 for a discussion of procedural safeguards, including due process.

A parent may have a specialist or other educational professional, who is independent of the school, test his or her child.⁶³ School districts are required to consider information from a variety of sources in interpreting evaluation data and in making placement decisions, and the independent evaluation is another source that makes up the universe of information about the student.⁶⁴

⁶⁰ The school's evaluation process may be the same under Section 504 and the IDEA. An evaluation could reveal that the student is eligible for services under the IDEA and Section 504, Section 504 only, or that the student is not a student with a disability under Section 504, or is a student with a disability under Section 504 who does not need special education or related aids and services.

⁶¹ 34 C.F.R. § 104.35(a). If a school wants to evaluate a student for the first time (initial or preplacement evaluation) and the parent refuses, the school cannot proceed with the evaluation. Instead, the school may, but is not required to, seek a decision from a hearing officer to permit the evaluation. See OCR, *Protecting Students with Disabilities: Frequently Asked Questions About Section 504 and the Education of Children with Disabilities* (FAQ 27) (last modified Oct. 16, 2015), www.ed.gov/ocr/504faq.html.

⁶² 34 C.F.R. § 104.36.

⁶³ Note that Section 504 does not specifically address whether a school district must reimburse a parent if the parent has the student evaluated by professionals who are not affiliated with the school district.

⁶⁴ 34 C.F.R. § 104.35(c)(1).