

# **SECTION 504 VS. IDEA IN NEW YORK**

**Syracuse, New York**

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**HISCOCK & BARCLAY, LLP**  
**JAMES P. EVANS, ESQ.**  
ONE PARK PLACE  
300 SOUTH STATE STREET  
SYRACUSE, NEW YORK 13202-2078

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## I. INTRODUCTION

Federal law has had a prominent impact upon the education of disabled children in the United States since the enactment of the Education for All Handicapped Children's Act of 1975 -- the precursor of the Individuals with Disabilities Education Act. Over a series of amendments and revisions to this federal statute, it evolved into what is today the Individuals with Disabilities Education Act of 2004 ("IDEA").<sup>1</sup>

Prior to that time, however, another federal law protected disabled children enrolled in schools that received federal funding: Section 504 of the Rehabilitation Act of 1973 ("Section 504").<sup>2</sup> This statute prohibits any program that receives federal funding from discriminating against individuals based on their disability, and it provides disabled individuals with a private cause of action against those entities receiving federal funds which engage in or permit such discrimination. Concerning schools, the statute requires schools receiving federal assistance to provide disabled students with the same benefits and access to educational programs as non-disabled students.<sup>3</sup>

Discerning which of the two statutes applies to a particular student's situation can sometimes present a challenge for educators. Accordingly, this material will delineate the functions of each statute, the obligations they impose upon schools, and will highlight the differences between the two statutes.

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<sup>1</sup> IDEA is codified at 20 U.S.C. §§ 1400, *et seq.*

<sup>2</sup> The Rehabilitation Act is codified at 29 U.S.C. §§ 791, *et seq.*

<sup>3</sup> 34 C.F.R. § 104.33(b).

## II. STATUTORY OVERVIEW

While similar in their overarching goals, Section 504 and IDEA differ in their objectives: IDEA seeks to provide students who are affected by at least one of thirteen separate categories of disabilities with a specific and responsive education program -- while Section 504 seeks to deter discrimination against disabled students and ensure they receive access to the same educational and extracurricular programs their non-disabled classmates enjoy. A review of each statute's legislative history and structure is valuable for appreciating the similarities and differences of the two statutes.

### A. Section 504 of the Rehabilitation Act

Congress's goal in enacting Section 504, as stated by Senator Hubert Humphrey, was "to share with handicapped Americans the opportunities for an education, transportation, housing, health care, and jobs that other Americans take for granted."<sup>4</sup> Congress designed this civil rights statute "to eliminate discrimination on the basis of handicap in any program or activity receiving Federal financial assistance."<sup>5</sup> Accordingly, it prohibits programs and activities receiving federal assistance from excluding an "otherwise qualified individual with a disability" from its program, denying such a person the program's benefits

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<sup>4</sup> *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 277 (1987).

<sup>5</sup> *Protecting Students and Disabilities; Frequently Asked Questions About Section 504 and the Education of Children with Disabilities* (OCR 2005) (<http://www.ed.gov/about/offices/list/ocr/504faq.html>).

and/or from otherwise subjecting such individual to discrimination, based solely on the individual's disability.<sup>6</sup>

The Supreme Court has stated that its "basic purpose" is "to ensure that handicapped individuals are not denied jobs or other benefits because of the prejudiced attitudes or the ignorance of others." It further opined that "the act is carefully structured to replace such reflexive reactions to actual or perceived handicaps with actions based on reasoned and medically sound judgments."<sup>7</sup>

The Rehabilitation Act was enacted in 1973, but Congress almost immediately decided that its definition of a "handicapping condition" was "far too narrow and constricting" to address the broader problems and achieve the broader goals Congress had intended.<sup>8</sup> Therefore, the following year, Congress amended and substantially broadened the definition of "handicapping condition" in the Rehabilitation Act Amendments of 1974. The broadened definition included not only individuals who were currently coping with an existing disability, but also those who previously had been disabled and those who were only thought of by others as being disabled.<sup>9</sup>

In enacting Section 504, Congress did not provide any additional source of federal funding relative to the cost of the statute, but instead conditioned receipt of federal assistance upon compliance with its mandate. Since most federal

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<sup>6</sup> It also prohibits any other discrimination against such an individual that is based solely on his/her disability. 29 U.S.C. § 794(a).

<sup>7</sup> *School Bd. of Nassau County*, 480 U.S. at 284-285.

<sup>8</sup> S. Rep. No. 93-1297 (1974), reprinted in 1974 U.S.C.C.A.N. 6373, 6413.

<sup>9</sup> In essence, Section 504 provides: "No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance[.]" 29 U.S.C. § 794(a).

assistance comes through federal agencies, the statute obligates these agencies to promulgate regulations to ensure compliance with Section 504.<sup>10</sup>

As it concerns schools, Section 504 requires schools to provide students with “regular or special education and related aids and services that . . . are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met . . . .”<sup>11</sup> However, the statute states this obligation only in broad terms, leaving a substantial amount of discretion to schools in determining how they will satisfy this obligation.<sup>12</sup>

## **B. IDEA’s Terms and Purpose**

IDEA, by contrast, is strictly an educational statute designed to address the specific educational needs of each disabled student. It requires public schools to consider each disabled student’s need for accommodations and provide a program -- or “placement” -- that is specifically developed to help each disabled student obtain an educational benefit.

In 1997, Congress noted in IDEA’s legislative findings that, before enactment of the Education for All Handicapped Children Act in 1975, “more than one-half of the children with disabilities in the United States” were not receiving “appropriate educational services that would enable such children to

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<sup>10</sup> *Id.*

<sup>11</sup> 34 C.F.R. § 104.33(b).

<sup>12</sup> Additionally, “[w]hile Section 504 clearly provides for a private cause of action to enforce a claim of discrimination (citation omitted), it does not provide for a [private] cause of action to assert a claim of procedural inadequacy, separate and apart from a claim of discrimination.” *Power ex rel. Power v. School Board of the City of Virginia Beach*, 276 F. Supp. 2d 515 (E.D. Va. 2003).

have full equality of opportunity.”<sup>13</sup> Further, Congress found that, as of 1995, “one million of the children with disabilities in the United States [were] excluded entirely from the public school system and did not go through the educational process with their peers.”<sup>14</sup> It found that while disabled children may attend a public school and participate in its educational programs, a failure to identify and accommodate their disabilities would deprive them of “a successful educational experience.”<sup>15</sup>

Through IDEA, Congress intended to specifically address this disparity in educational opportunity and to provide some of the necessary funding States needed to address the problem. Of course, the offer of funding served the additional purpose of inducing States to adopt statutes and regulations that impose strict substantive and procedural guidelines on their local educational agencies.<sup>16</sup>

### **C. The Difference Between IDEA and Section 504**

Accordingly, the primary distinction between the statutes becomes readily apparent. Unlike Section 504, IDEA is not designed to “level the playing field,” but to *alter* the playing field in order to allow disabled children to obtain an

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<sup>13</sup> 20 U.S.C. § 1400(c)(2)(B).

<sup>14</sup> 20 U.S.C. § 1400(c)(2)(C).

<sup>15</sup> 20 U.S.C. § 1400(c)(2)(D).

<sup>16</sup> The United States Constitution limits the federal government to those matters that are specifically designated as appropriate for federal legislation and control. Education is not one of those areas, and it has traditionally been seen as a matter for local (*i.e.*, State) control. Therefore, Congress essentially bought its way into the area of education by promising substantial federal assistance to those States that would adopt the required statutes and regulations, all of which mirror IDEA’s procedural and substantive mandates. Regrettably, the federal government did not fully fulfill its promises concerning federal assistance, which has been a bone of contention for some time.

“educational benefit.” In order to achieve this role, IDEA provides students with services and support that go well beyond providing disabled students with the same access to educational programs as that enjoyed by non-disabled students -- it provides qualifying students with specifically tailored programs of services and support, including assistive technology, designed to meet each child’s specific needs, in order to ensure disabled children receive an “educational benefit” from their schooling.<sup>17</sup>

How much educational benefit is required in order to meet the standards of a free appropriate public education (“FAPE”) is still an area of debate. The Second Circuit Court of Appeals (for New York State and Connecticut) has held that “for an IEP to be reasonably calculated to enable the child to receive educational benefits, it must be likely to produce progress, not regression.”<sup>18</sup> This progress must be meaningful (*i.e.*, more than mere trivial advancement), but does not have to result in the maximization of a disabled student’s potential.<sup>19</sup> As

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<sup>17</sup> Some federal courts, however, have held that IDEA requires the student received more than a “*de minimis*” educational benefit, and that IDEA requires students to receive a “meaningful education.” *See, e.g., J.L. and M.L. and Their Minor Daughter, K.L. v. Mercer Island School Dist.*, No. Co6-494P, 2006 Westlaw 3628033; U.S. Dist. LEXIS 89492 (W.D. Wash. 2006) (“[D]isability education’ underwent a change about ten years ago. Prior to that time, the statutory scheme was the Education for Handicapped Children Act of 1975 (EHA), the purpose of which was solely to provide access to education for disabled students who had been marginalized in the public school system. Satisfied that the goal of ‘access’ had been reached, in 1997 Congress enacted the IDEA with the express purpose of addressing implementation problems resulting from ‘low expectations, and an insufficient focus on applying replicable research on proven methods of teaching and learning for children with disabilities.’ (Citation omitted.) The statute clearly stated its commitment to ‘our national policy of ensuring equality of opportunity, full participation, **independent living, and economic self-sufficiency** for individuals with disabilities.” (Citation omitted; emphasis in original)), *corrected on other grounds on motion for reconsideration*, 2007 U.S. Dist. LEXIS 10343 (W.D. Wash. 2007).

<sup>18</sup> *Weixel v. Bd. of Educ.*, 287 F.3d 138, 151, (2d Cir. 2002) (quoting *MS v. Bd. of Educ.*, 231 F.3d 96, 103 (2d Cir. 1998)).

<sup>19</sup> *Bd. of Educ. v. Rowley*, 458 U.S. 176, 206, 207 (1982); *Walczak v. Fla. Union Free School Dist.*, 142 F.3d 119, 130 (2d Cir. 1998).

the Second Circuit has stated in the past, IDEA requires school districts to provide disabled students with an “appropriate” education -- “not one that provides everything that might be thought desirable by loving parents.”<sup>20</sup> Accordingly, a school district need only provide a placement “that is ‘likely to produce progress, not regression,’” providing “the student with an opportunity greater than mere ‘trivial advancement.’”<sup>21</sup>

IDEA also provides a detailed evaluation process, placement scheme, and dispute resolution process. Finally, Parts B through D of IDEA delineate federal assistance available to States and their school districts to help defray the cost of complying with IDEA.<sup>22</sup>

### **III. ELIGIBILITY CRITERIA UNDER THE TWO STATUTES**

A fundamental difference between IDEA and Section 504 is each statute’s eligibility criteria. Generally speaking, Section 504 has a relatively broad eligibility criteria, whereas IDEA’s criteria is far more restrictive.

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<sup>20</sup> *Walczak*, 142 F.3d at 132 (quoting *Tucker v. Bayshore Union Free School Dist.*, 873 F.2d 563, 567 (2d Cir. 1989)).

<sup>21</sup> *Cerra v. Pawling Cent. School Dist.*, 427 F.3d 186, 192 (2d Cir. 2005).

<sup>22</sup> IDEA is “spending clause” legislation -- *i.e.*, a State’s obligation to comply with IDEA is conditioned on the State having accepted the federal funding that IDEA provides. In order to induce States to adopt IDEA’s statutes and regulations, Congress promised States it would provide federal funding to offset the cost of compliance. That promise has often been a source of cynicism in the educational community, although the federal government has made significant increases in its funding under IDEA.

Since FY 1995, federal funding under IDEA, Part B, has more than quadrupled, with the funding provided in FY 2005 for the grants-to-states program reaching 18.6% of the total estimated excess cost (*i.e.*, the additional cost) of serving disabled children under IDEA. This level of funding approached one-half of the amount necessary to “fully fund” the program for FY 2005.

Despite that progress, more recent years have realized only marginal funding increases which, when combined with increased costs for special education, have substantially eroded this progress. [Source: Congressional Research Service Report for Congress, *Individuals with Disabilities Education Act (IDEA): Current Funding Trends* (2005).]

## **A. Eligibility Criteria Under Section 504**

Section 504 defines a disabled student as one who:

- (i) has a physical or mental impairment which substantially limits one or more major life activities,
- (ii) has a record of such an impairment, or
- (iii) is regarded as having such an impairment.<sup>23</sup>

This broad formula covers a wide myriad of possible disabilities. By contrast, IDEA lists thirteen possible categories of qualifying disabilities. Thus, proportionally fewer children should qualify under IDEA as compared to Section 504.

The regulations of the Department of Education (the “Department”) under Section 504 (the “504 Regulations”) define “major life activity” as activities similar to the following: “caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.”<sup>24</sup> They define a physical or mental impairment as:

- (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, genito-urinary; hemic and lymphatic; skin; and endocrine; or
- (B) any mental or psychological disorder, such as mental retardation, organic brain syndrome,

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<sup>23</sup> 34 C.F.R. § 104.3(j)(1). Regrettably, this statute and its regulations use the term “handicapped persons” to refer to disabled individuals. Congress abandoned this antiquated term in 1990 when it passed the Americans with Disabilities Act, which refers to “disabled” individuals.

<sup>24</sup> 34 C.F.R. § 104.3(l)(2)(ii).

emotional or mental illness, and specific learning disabilities.<sup>25</sup>

**1. Eligibility Considerations Under Section 504**

Section 504's first criteria for eligibility (*i.e.*, meeting the definition of "handicapped persons") is straight-forward, focusing on an individual's actual and existing disabilities. Relative to schools, Section 504 prohibits schools from engaging in or permitting discrimination against their disabled students, based solely upon their disabilities, and it requires schools to provide their disabled students with those accommodations necessary to permit them to receive a "free appropriate public education" -- or a "FAPE."<sup>26</sup>

The second and third criteria, however, are more amorphous, covering not only individuals who have had a disability in the past (*i.e.*, has a "record" of having had "such an impairment"), but those considered to be disabled although they are not. In other words, these criteria protect individuals who are not actually disabled, but have either been disabled in the past or are merely thought to be disabled. Concerning the obligations of schools, however, Section 504 requires them to provide a FAPE, using such accommodations as are necessary to "meet the individual educational needs" of disabled students. It would be difficult -- to say the least -- for schools to devise accommodations to address a non-existent disability. Thus, while the second and third sets of criteria will protect a student from disability discrimination in schools, they do not trigger a

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<sup>25</sup> 34 C.F.R. § 104.3(l)(2)(i).

<sup>26</sup> 34 C.F.R. §§ 104.33(a)-(c).

school district's obligation to provide accommodations in order to facilitate a child's FAPE.

The logic behind this conclusion self-evident, but was well stated by the Department's Office of Civil Rights ("OCR") in a 1992 field memorandum to senior staff:

Logically, since the student [qualifying under prong two or three] is not, in fact, mentally or physically handicapped, there can be no need for special education and related aids and services. . . . Those two prongs of the definition are legal fictions. They are meant to reach situations where individuals either never were or are not currently handicapped, but are treated by others as if they were.<sup>27</sup>

Consequently, covered schools are not obligated to refer, evaluate, or accommodate students meeting only the second or third eligibility criteria of Section 504. Their obligation to these students is to avoid discriminating against them or permitting others to do so as a matter of practice or policy.

## **2. *Conditions Excluded From Section 504's Definition of "Disabled"***

Although Section 504 encompasses a broad swath of potential disabilities, some are plainly excluded. In particular, the 504 Regulations repeatedly caution that covered schools must ensure their students who fail to adequately progress in their education because of factors unrelated to a disability -- *e.g.*, lack of English proficiency, lack of educational opportunity, cultural factors, etc. -- are not classified as disabled students under Section 504.

Likewise, Section 504's definition of a "handicapping condition," according to its plain terms, excludes any condition that is not a physical or

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<sup>27</sup> OCR Senior Staff Memo, 19 IDELR 894 (OCR 1992).

mental impairment. Therefore, environmental issues, language barriers, cultural factors, and economic and other disadvantages are not disabilities under Section 504 -- nor are age, pregnancy, physical characteristics, personality traits, sexual orientation, or “normal deviations in height, weight, or strength.”<sup>28</sup>

### **3. *Defining a Physical or Mental Condition That Substantially Limits a Major Life Activity***

While a student may have to contend with “a physical or mental impairment,” that student will still not qualify under Section 504 unless the impairment “substantially limits” one or more of the student’s “major life activities.”<sup>29</sup> Federal courts have significantly refined the definitions of these terms in a series of cases, considering Section 504 and its protégé, the Americans with Disabilities Act (“ADA”).<sup>30</sup> For example, in *Toyota Motor Mfg., Kentucky v. Williams*,<sup>31</sup> the United States Supreme Court held that a person qualified under Section 504 only if he/she could demonstrate the existence of a physical or mental impairment that limited “a major life activity.”<sup>32</sup> Citing to the regulations of the Department of Health, Education and Welfare, the Court noted that major life activities were defined to include things such as “walking, seeing, hearing,’ and, as relevant here, ‘performing manual tasks,” as well as “tend[ing] to

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<sup>28</sup> *Executive Summary: Compliance Manual Section 902, Definition of the Term “Disability”* (EEOC 2000).

<sup>29</sup> 34 C.F.R. § 104.3.

<sup>30</sup> *See, e.g., Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 534 U.S. 184, 193-199 (2002). The Court in *Toyota* considered a case brought under the ADA, but the Court’s holdings about the meaning of an “impairment that ‘substantially limits one or more major life activities’” is equally applicable to Section 504.

<sup>31</sup> *Id.* at 194-195.

<sup>32</sup> *Id.* at 194 (citing 42 U.S.C. § 12102(2)(A) and 29 C.F.R. §1630.2(j)).

[his/her] personal hygiene [and carrying] out personal or household chores . . . bathing, and brushing one’s teeth[.]”<sup>33</sup>

The Court noted that Section 504 also requires a claimant to prove that his/her impairment limited at least one major life activity and that the limitation was “substantial.” It concluded that “to be substantially limited in performing manual tasks, an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people’s daily lives. The impairment’s impact must also be permanent or long-term.”<sup>34</sup> The Court concluded that it is “insufficient for individuals attempting to prove disability status under this test to merely submit evidence of a medical diagnosis of an impairment. Instead, the ADA requires those ‘claiming the Act’s protection . . . to prove a disability by offering evidence that the extent of the limitation [caused by their impairment] in terms of their own experience . . . is substantial.”<sup>35</sup>

The Department also defines “major life activities” as “functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working,” although it notes that this list is not exhaustive.<sup>36</sup> However, it has not expressly adopted the Supreme Court’s

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<sup>33</sup> *Id.* at 195 and 201.

<sup>34</sup> *Id.* at 198 (citing 29 C.F.R. §§ 1630.2(j)(2)(ii)-(iii)).

<sup>35</sup> *Id.* at 198 (citing *Albertson’s, Inc. v. Kirkingburg*, 527 U.S. 555, 567 (1999)).

<sup>36</sup> *Protecting Students with Disabilities: Frequently Asked Questions about Section 504 and the Education of Children with Disabilities*, No. 12 (OCR 2005), <http://www.ed.gov/about/offices/list/ocr/transitionguide.html>.

definition of what constitutes a substantial limitation of a major life activity, simply noting that such a determination must be made on an individual basis.<sup>37</sup>

#### **4. *Consideration of Mitigating Measures in Evaluating Potentially Disabled Students***

The 504 Regulations require a covered school to consider a student’s use of “mitigating measures” in determining whether the student qualifies for services under Section 504. The 504 Regulations define “mitigating measures” as “devices or practices” a person uses to eliminate or reduce the effects of his/her mental or physical impairment (*e.g.*, eyeglasses, medications, inhalers, etc.).<sup>38</sup> According to the OCR, “[a] person who experiences no substantial limitation in any major life activity when using a mitigating measure does not meet the definition of a person with a disability and would not be entitled to FAPE under Section 504.”<sup>39</sup>

#### **B. Eligibility Criteria under IDEA**

By contrast, IDEA defines a “child with a disability” more narrowly. It lists thirteen conditions within its definition of “a child with a disability.” These conditions are defined with some specificity in the Department’s 2007 regulations, which implement IDEA (“IDEA Regulations”). These listed conditions and their definitions guide public schools in deciding whether a

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<sup>37</sup> *Id.*

<sup>38</sup> *Id.*, No. 21.

<sup>39</sup> *Id.*

student is eligible for a FAPE under the auspices of IDEA. These conditions and the essential portion of their definitions are stated below:<sup>40</sup>

**(1) *Autism***

... a developmental disability significantly affecting verbal and nonverbal communication and social interaction ... that adversely affects educational performance.

**(2) *Deaf-blindness***

... concomitant hearing and visual impairments, the combination of which causes such severe communication and other developmental and educational needs that they cannot be accommodated in special education programs solely for children with deafness or children with blindness.

**(3) *Deafness***

... a hearing impairment that is so severe that a child is impaired in processing linguistic information through hearing, with or without amplification, which adversely affects a child's educational performance.

**(4) *Emotional disturbance***

... 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.

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<sup>40</sup> 20 U.S.C. §§ 1401(3) and 30; 34 C.F.R. § 300.8.

- (E) A tendency to develop physical symptoms or fears associated with personal or school problems.

**(5) *Hearing impairment***

... an impairment in hearing, whether permanent or fluctuating, that adversely affects a child's educational performance but is not included under the definition of deafness . . . .

**(6) *Mental retardation***

... significantly sub-average general intellectual functioning, existing concurrently with deficits in adaptive behavior and manifested during the developmental period, that adversely affects a child's educational performance.

**(7) *Multiple disabilities***

... concomitant impairments (such as mental retardation-blindness, mental retardation-orthopedic impairment), the combination of which causes such severe educational needs that they cannot be accommodated in special education programs solely for one of the impairments.

**(8) *Orthopedic impairment***

... a severe orthopedic impairment that adversely affects a child's educational performance.

**9. *Other health impairment***

... having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that --

(i) Is due to chronic or acute health problems such as asthma, attention deficit disorder or attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, sickle cell anemia, and Tourette syndrome; and

(ii) Adversely affects a child's educational performance.

**10. *Specific learning disability***

... a disorder in one or more of the basic psychological processes involved in understanding or

in using language, spoken or written, that may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations . . . .

**11. *Speech or language impairment***

. . . a communication disorder such as stuttering, impaired articulation, a language impairment, or a voice impairment that adversely affects a child's educational performance.

**12. *Traumatic brain injury***

. . . an acquired injury to the brain caused by an external physical force, resulting in total or partial functional disability or psychosocial impairment, or both, that adversely affects a child's educational performance.

**13. *Visual impairment including blindness***

. . . an impairment in vision that, even with correction, adversely affects a child's educational performance. The term includes both partial sight and blindness.

Comparing IDEA's relatively specific criteria with the broad all-encompassing criteria of Section 504 readily demonstrates one significant difference between these statutes: IDEA covers a much narrower class of students who generally tend to suffer from more profound disabilities than do those covered under Section 504.

Congress's 2004 reauthorization of IDEA only accentuates this difference, establishing a requirement that States draft and implement policies and procedures "designed to prevent the inappropriate overidentification or disproportionate representation by race and ethnicity of children as children with disabilities, including children with disabilities with a particular impairment described in section 1401 of this title."<sup>41</sup> (IDEA's 2004 reauthorization also

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<sup>41</sup> 20 U.S.C. § 1412(a)(24).

included a prohibition against school districts requiring students to take prescription medication as a condition to attending school, although school personnel are permitted to discuss that option with parents.<sup>42)</sup>

#### **IV. IDENTIFYING, EVALUATING, AND PLACING DISABLED STUDENTS**

Each of these statutes have specific provisions relative to a school's obligation to identify, evaluate, classify, and place disabled children.

##### **A. Child-Find, Evaluation, Classification, and Placement Under Section 504**

###### **1. *Child-Find Obligations***

Section 504 places an affirmative duty upon public school districts to conduct a "child-find" at least annually, during which school districts must undertake efforts to notify disabled students and their parents of the district's obligations to provide a FAPE.<sup>43</sup>

This obligation extends not only to those disabled students attending one of a public school district's schools, but also to its residential students who have been parentally-placed in a private school and those being homeschooled.<sup>44</sup> However, this obligation to identify disabled children who have been parentally-placed in private schools ***does not equate an obligation to serve the students***. Rather, once a school district has offered the child a FAPE, it has

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<sup>42</sup> 20 U.S.C. § 1412(a)(25).

<sup>43</sup> 34 C.F.R. § 104.32.

<sup>44</sup> *Id.*

no duty to provide “educational services to students not enrolled in the public school program based on the personal choice of the parent or guardian.”<sup>45</sup>

As discussed below, this limitation in the public school district’s duty is a substantial difference from IDEA, which requires public school districts to not only identify qualifying students who have been parentally-placed in private schools, but to provide those students with special education services and support, including assistive technology. By contrast, IDEA requires public school districts to provide such services to privately-placed student-residents, providing such services on an equitable basis, as compared to the services provided to students attending district schools. It also requires public school districts to spend federal funds made available under IDEA on privately-placed students in the same proportion it spends those funds on students attending district schools.

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## **2. *Student Referral Under Section 504 of the Rehabilitation Act***

School districts are required to refer potentially disabled students to a committee of individuals who are knowledgeable about the child, the child’s disability, and the evaluation tools utilized. This committee is often referred to as the 504 Committee.

### **(a) *The 504 Committee***

The “504 Committee” is responsible for conducting student evaluations and deciding the placement of eligible students under Section 504. Unlike IDEA,

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<sup>45</sup> *Letter to Veir*, 20 IDELR 864 (OCR 1993); *Hinds Co. School Bd.*, 20 IDELR 1175 (OCR 1993).

<sup>46</sup> 20 U.S.C. § 1412(a)(10).

however, Section 504 does not specify the Committee's membership. The 504 Regulations require public school districts to place individuals on the Committee who are knowledgeable about the child, the meaning of the evaluation data concerning the child, and the available placement options.<sup>47</sup> Accordingly, while the statute and regulations do not specify specific members, the guidance provided by the Regulations essentially dictates the Committee's membership, depending upon the child, the issue, and his/her disability.

Similarly, Section 504 does not specify how many members a 504 Committee may have, and the statute and the 504 Regulations are silent about the level of expertise or knowledge members should possess. Therefore, school district officials have some discretion in this regard, but are well advised to ensure that the members of a 504 Committee are competent in their field and are adequately credentialed.

Given Section 504's more generalized guidance, the composition of 504 Committees often vary according to a child's specific disability, its manifestation, and the child's needs. Interestingly -- unlike IDEA -- Section 504 does not require school districts to include parents on their 504 Committees. However, refusing to do so will likely be viewed as a hostile act by parents and is likely to cause a significant breach in the district's relationship with parents -- potentially creating an unnecessary adversarial relationship. Therefore, "best practices" dictate that school districts include a disabled student's parents on the

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<sup>47</sup> 34 C.F.R. § 104.35(c).

504 Committee and provide the parents with those notices mandated by Section 504's procedural protection provisions.

(b) *Permissible Pre-Referral Strategies and Techniques*

Before referring a child to its 504 Committee, the school district may first attempt to resolve the student's difficulties through the use of screening committees, student assistance teams, or intervention teams. These teams are intended for students who may be able to achieve adequate educational progress without being classified as disabled under Section 504. OCR described this latitude as follows:

[Before referring a student for evaluation,] the district must have reason to believe that the student is having academic, social, or behavioral problems that substantially affect the student's overall performance at school. A district, however, has the option of attempting to address these types of problems through documented school-based intervention and/or modifications, prior to conducting an evaluation. Furthermore, if such interventions and/or modifications are successful, a district is not obligated to evaluate a student for special education or related services.<sup>48</sup>

(c) *Student Evaluation by the 504 Committee*

Once a school district suspects that a student is suffering from a disability and may need services, it must take affirmative steps to timely evaluate the student. The district's 504 Committee should conduct that evaluation, but only after requesting and obtaining parental consent to do so. OCR has conclusively held that Section 504 requires parental consent prior to a student's evaluation under Section 504. This position was aptly stated by the OCR's Texas Office:

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<sup>48</sup> *Karnes City (TX) ISD*, 31 IDELR 64 (OCR 1999).

OCR has determined, through policy clarification, that the Section 504 regulation . . . requires parental consent prior to the conduct of initial student evaluation procedures . . . . Parental discretion in matters involving student assessment/evaluation is an inherent part of the regulation and parental discretion is an appropriate and necessary policy component at the initial evaluation stage.<sup>49</sup>

Although the regulation is silent on the issue, OCR has generally stated that parental consent must be obtained before a school district can evaluate a child. If the parents refuse to consent to an evaluation, the district *may* use due process hearing procedures required by the 504 Regulations to override the parents' refusal of consent.<sup>50</sup>

Public school districts are required by the 504 Regulations to establish standards and procedures for initial evaluations and periodic re-evaluations of students who need or are believed to need special education and related services because of a disability. Pursuant to 34 C.F.R. § 104.35(b), those procedures must provide for the individual evaluation of a student prior to his/her classification and/or the provision of services.

Neither Section 504 nor the 504 Regulations specify particular tests or modalities to be used in such evaluations. However, school districts are required to select tests that will best ensure the test results will accurately reflect a student's aptitude or achievement -- or other factors being measured -- rather

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<sup>49</sup> *Letter to Durham*, 27 IDELR 380 (OCR 1997) (Dallas Office).

<sup>50</sup> OCR, *504 Frequently Asked Questions*, <http://www.ed.gov/about/offices/list/ocr/504faq.html> ("Section 504 requires informed parental permission for initial evaluations. If a parent refuses consent for an initial evaluation and a recipient school district suspects a student has a disability, the IDEA and Section 504 provide that school districts may use due process hearing procedures to override the parents' denial of consent.")

than reflect the student's disability (except where the disability is the factor being measured).

Under Section 504, the term "evaluation" does not necessarily mean "test." Rather, this statute uses the term "evaluation" to refer to a gathering of data or information from a variety of sources so as to permit the 504 Committee to make the required determination.<sup>51</sup> Thus, formal testing is not always required under Section 504 in order to determine eligibility.<sup>52</sup>

In any event, school districts must use test and evaluation materials that are specifically tailored to evaluate the student's areas of educational need -- not merely those designed to provide a single intelligence quotient.<sup>53</sup> "Tests and other evaluation materials must have been validated for the specific purpose for which they are used" and must be appropriately administered by trained personnel.<sup>54</sup>

After gathering the requisite data, if a 504 Committee determines a child qualifies for accommodations or services under the statute, it must draft an accommodation plan for the child, which will describe the child's disability, needs, and placement.<sup>55</sup> (These procedures are discussed in greater detail below.)

Under Section 504, school districts must periodically perform comprehensive re-evaluations of students who are receiving special education

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<sup>51</sup> 34 C.F.R. § 104.35(c)(1).

<sup>52</sup> School districts commonly utilize the following sources of data for a Section 504 evaluation: the student's grades, disciplinary referrals, health information, language surveys, parent information, standardized test scores, teacher comments, etc. 34 C.F.R. 104.35.

<sup>53</sup> 34 C.F.R. § 104.35(b)(2).

<sup>54</sup> 34 C.F.R. § 104.35(b)(1).

<sup>55</sup> 34 C.F.R. § 104.35(c).

and related services.<sup>56</sup> OCR considers school districts to be in compliance with this obligation if they conduct a complete re-evaluation at least every three years (similar to IDEA triennial re-evaluations). As a practical matter, and to ensure continuity of the child's program, school districts should consider annually reviewing a child classified under Section 504 in order to determine whether changes are required because of changes in the child's disability or program.

### **3. *Student Placement Under Section 504***

In the context of Section 504, the term "placement" simply means the child's regular education classroom with certain individually-planned accommodations or modifications. It usually does not mean removing the child from the regular education classroom, as might be the case under IDEA. For example, a child with ADD who is receiving services under Section 504 may have a "placement" that includes accommodations such as an assignment notebook, a seat close to the teacher, a requirement that the teacher refocus the student periodically, a behavior modification plan, or shortened assignments.

Whatever modifications to the regular education classroom setting are provided, a school district must ensure it provides the modifications in a manner consistent with Section 504's non-segregation mandate -- or in the least restrictive environment.<sup>57</sup> Additionally, if a school "operates a facility that is identifiable as [a school] for handicapped persons," it must "ensure that the

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<sup>56</sup> 34 C.F.R. § 104.35(d).

<sup>57</sup> 34 C.F.R. § 104.34(a).

facility and the services and activities provided therein are comparable to the other facilities, services, and activities”<sup>58</sup> it provides.

The requirement to provide students with special education and related services in the least restrictive environment also extends to extracurricular activities. The 504 Regulations mandate that covered schools ensure disabled students can participate “to the maximum extent appropriate” in extracurricular and non-academic services and activities, including meals, recess periods, counseling services, athletics, transportation, recreational activities, special interest groups, and/or clubs sponsored by the schools.<sup>59</sup> Therefore, school are required to consider the extent to which a disabled student, classified under Section 504, can participate in extracurricular athletic programs, etc., and make reasonable accommodations to facilitate such participation, if appropriate.

## **B. Child-Find, Evaluation, Classification, and Placement Under IDEA**

IDEA contains more detailed requirements for identification and placement of disabled students.

### **1. Child-Find Obligations**

IDEA requires the State Education Agency to establish policies for identifying, locating, and evaluating children with disabilities, including children who are parentally-placed in private schools.<sup>60</sup> These policies must require local education agencies -- *i.e.*, school districts -- to identify, locate, and evaluate all

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<sup>58</sup> 34 C.F.R. § 104.34(c).

<sup>59</sup> 34 C.F.R. §§ 104.34(b) and 104.37(a)(2).

<sup>60</sup> 20 U.S.C. § 1412(a)(3).

children with disabilities, regardless of the severity of those disabilities and regardless of the child's placement.<sup>61</sup>

In New York, school districts are obligated to identify all disabled children of pre-school and school ages residing within the district or attending private school within the district.<sup>62</sup> This requirement applies to all children, including those who attend private schools, are highly mobile, migrant children, homeless children, and wards of the State.<sup>63</sup> The child-find obligation includes children who are only suspected of having a disability, including children who receive passing grades, "advancing from grade to grade."<sup>64</sup>

To ensure school districts utilize a meaningful process to identify disabled children attending private schools, IDEA requires them to utilize a child-find process designed to ensure the equitable participation of such children and an accurate count of disabled children, including privately-placed students. School districts must ensure that their child-find process for privately-placed students permits completion of that process within the same time period in which students attending public schools are identified.<sup>65</sup>

### **C. Referral and Evaluation of Students Under IDEA**

Like Section 504, IDEA requires school districts to refer children suspected of a disability for evaluation. Referral under IDEA is made to the

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<sup>61</sup> 20 U.S.C. § 1412(a)(3).

<sup>62</sup> 20 U.S.C. §§ 1412(a)(3) and (10); 34 C.F.R. § 300.13(c); 8 N.Y.C.R.R. § 200.2(a).

<sup>63</sup> 20 U.S.C. §§ 1401(3) and 1412(a)(3).

<sup>64</sup> 34 C.F.R. § 300.111(c).

<sup>65</sup> 20 U.S.C. §§ 1412(a)(10)(A)(ii) and (iii).

Committee on Special Education. The request for such an evaluation may come from the child's parents, the school district, or the State Education Agency.<sup>66</sup>

**1. *Time Limits for a Student's Initial Evaluation***

Once a school district receives a request that a child be evaluated under IDEA, it has sixty days to complete that evaluation and determine an eligible child's placement. IDEA's 2004 reauthorization has made it clear that this time period refers to calendar days -- not business or school days. The sixty-day time limit does not apply if a child has transferred to a school district while a request for an evaluation was pending in his/her prior school district.<sup>67</sup> However, this exception from the sixty-day time limit only applies if the subsequent school district is making sufficient progress to ensure prompt completion of the evaluation and has agreed with the parents on a specific timeframe in which the evaluation will be completed.<sup>68</sup>

**2. *The Response to Intervention Process***

IDEA's 2004 reauthorization included language that suggested public school districts can defer a student's evaluation under IDEA while it attempts to improve the student's performance with alternative strategies. This provision was born out of concern that an excessive number of children were being classified as having a "specific learning disability," as defined under IDEA, although many of these children could have achieved acceptable progress with lesser interventions. To meet this concern of over-classification, Congress

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<sup>66</sup> 20 U.S.C. §§ 1414(a)(1)(A) and (B); 8 N.Y.C.R.R. § 200.4(a).

<sup>67</sup> 20 U.S.C. § 1414(a)(1)(C).

<sup>68</sup> 20 U.S.C. § 1414(a)(1)(C)(I) and (II).

changed the definition of “specific learning disability” in IDEA’s 2004 reauthorization -- changing this definition for the first time in thirty years. This change occurred in Section 1414, subsection (b)(6),<sup>69</sup> which now reads:

**(6) Specific Learning Disabilities.**

**(A) In general**

... [W]hen determining whether a child has a specific learning disability as defined in Section 1401 of this title, a local educational agency shall not be required to take into consideration whether a child has a severe discrepancy between achievement and intellectual ability in oral expression, listening comprehension, written expression, basic reading skill, reading comprehension, mathematical calculation, or mathematical reasoning.

**(B) Additional Authority**

In determining whether a child has a specific learning disability, a local educational agency ***may use a process that determines if the child responds to scientific, research-based intervention as a part of the evaluation procedures described in paragraphs (2) and (3).*** (Emphasis added.)<sup>70</sup>

Combined with this revision, the 2004 reauthorization also expressly prohibits a child’s classification if its determinant factor is a:

- (A) lack of appropriate instruction in reading, including the essential components of reading instruction ... (as defined in section 6368 (3) of this title);
- (B) lack of instruction in math; or

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<sup>69</sup> 20 U.S.C. § 1414(b)(6).

<sup>70</sup> The Department’s Regulations were also revised to comport for this change in definition and to prohibit a child’s classification as having a specific learning disability if the child’s underachievement may be the result of a lack of appropriate instruction in reading or math. 34 C.F.R. § 300.309(b). The Regulations require an IEP Team to consider “as part of evaluation ... data that demonstrate[s] that prior to, or as part of, the referral process, the child was provided appropriate instruction in regular education settings, delivered by qualified personnel[.]” 34 C.F.R. § 300.309(b).

(C) limited English proficiency.<sup>71</sup>

Once it is clear that a child suspected of having a specific learning disability has not made adequate progress after an appropriate period of time, when provided appropriate instruction, the school district must “promptly request parental consent to evaluate” the child.<sup>72</sup>

These changes opened doors toward the development and use of techniques such as Response to Intervention -- or “RtI.” RtI, and techniques like it, are designed to provide progressively intensive interventions in the hope that a child’s educational needs can be satisfied and sufficient progress realized without classification under IDEA. It is limited to children who are struggling and *may* have a specific learning disability, as defined in Section 1401(3). It is not intended to be an adequate remedy for children who are documented to have a specific learning disability.

RtI refers to a process that emphasizes how well students respond to changes in instruction. Its essential elements are:

The provision of scientific, research-based instruction and interventions in general education;

Monitoring and measurement of student progress in response to the instruction and interventions; and

Use of these measures of student progress to shape instruction and make educational decisions.

A number of leading national organizations and coalition groups, including the National Research Center on Learning Disabilities and the fourteen

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<sup>71</sup> 20 U.S.C. § 1414(b)(5).

<sup>72</sup> 34 C.F.R. § 300.309(c).

organizations forming the 2004 Learning Disabilities (LD) Roundtable coalition, have outlined the core features of an RtI process as follows:

- High quality, research-based instruction and behavioral support in general education.
- Universal (school-wide or district-wide) screening of academics and behavior in order to determine which students need closer monitoring or additional interventions.
- Multiple tiers of increasingly intense scientific, research-based interventions that are matched to student need.
- Use of a collaborative approach by school staff for development, implementation, and monitoring of the intervention process.
- Continuous monitoring of student progress during the interventions, using objective information to determine if students are meeting goals.
- Follow-up measures providing information that the intervention was implemented as intended and with appropriate consistency.
- Documentation of parent involvement throughout the process.
- Documentation that the special education evaluation timelines specified in IDEA 2004 and in the state regulations are followed unless both the parents and the school team agree to an extension.<sup>73</sup>

After IDEA's 2004 reauthorization, many school districts began relying upon processes such as RtI as a screening measure prior to evaluation under the auspices of IDEA. These efforts, however, cannot extend the time in which the

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<sup>73</sup> Source: *Response to Intervention (RtI): A Primer for Parents*, Mary Beth Klotz, PhD, NCSP, and Andrea Canter, PhD, NCSP National Assoc. of School Psychologists (2006) (<http://www.nasponline.org/resources/factsheets/rtiprimer.aspx>).

school district completes a parentally-requested evaluation unless the parents agree to an extension. Without such an agreement, the school district must complete a child's evaluation and determine eligibility for services within sixty days after receiving parental consent -- irrespective of any alternative intervention process.<sup>74</sup> However, if the parents agree to extend the timeline for the intervention while alternate intervention strategies are tested, the school district may then utilize these strategies before having a child evaluated.

In any event, the Regulations require school districts to document the instructional strategies used and the student-centered data collected. The Regulations also require school districts to document the provision of notice to the child's parents concerning the general education services being provided to the child, the strategies being implemented to increase the child's rate of learning, as well as advising the parents of their right to request an evaluation.<sup>75</sup>

This permitted use of alternative strategies has a number of potential benefits: (1) it allows school districts to get assistance to students who may not be eligible for special education or related services under IDEA's criteria, but who plainly need assistance; (2) it potentially reduces the number of children classified under IDEA; and (3) it provides school districts with a progressive process that allows them to more fully and accurately evaluate a child and more closely tailor any special education or related services ultimately provided under IDEA.

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<sup>74</sup> 34 C.F.R. § 300.309(c).

<sup>75</sup> 34 C.F.R. § 300.311(a)(7).

Use of such techniques, however, has caused some unnecessary delays in the completion of initial evaluations, and school districts must be careful not to miss the sixty-day deadline for initial evaluations absent parental agreement to extend the deadline. Obviously, such agreement should be in writing and kept on file.

### **3. *Parental Consent for Evaluation Under IDEA***

Like Section 504, IDEA requires parental consent prior to a child's evaluation.<sup>76</sup> This statute and the Regulations require school districts to first notify parents that the district proposes to evaluate the child, describing the evaluation tests and modalities to be used. School districts must obtain "informed consent" from a child's parents before conducting an evaluation under IDEA, and they must document their efforts to obtain such consent.<sup>77</sup>

The school district must make reasonable efforts to obtain informed consent from the parents for an initial evaluation.<sup>78</sup> If the parents refuse to consent to an initial evaluation, the school district *may*, but is not required to, pursue the evaluation through an impartial hearing, as described below. However, the school district is not obligated to do so, and its decision not to do so will not violate the school district's obligation to provide a FAPE and may preclude the parents from asserting potential disability as a basis to avoid disciplinary action.<sup>79</sup>

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<sup>76</sup> 20 U.S.C. § 1414(a)(1)(D)(I); 34 C.F.R. § 300.300.

<sup>77</sup> 34 C.F.R. § 300.300(d)(5).

<sup>78</sup> 34 C.F.R. § 300.300(a)(1)(iii).

<sup>79</sup> 34 C.F.R. § 300.300(a)(3)(ii).

Some courts have held that school districts cannot pursue an initial evaluation through the impartial hearing process if the child has been parentally-placed in a private school and his/her parents have made it plain that they will refuse services even if the child is classified as disabled under IDEA.<sup>80</sup> The rationale behind this ruling is that if parents ultimately refuse services (as IDEA allows them to do), and they have already indicated that fact and have placed their child in a private school, the evaluation serves no practical purpose and, therefore, constitutes an undue invasion into the parents' constitutional rights and authority.

The New York State Review Officer considered this issue a year later and specifically rejected the holding of *Fitzgerald*, apparently reasoning that the welfare of a child could require an evaluation in spite of parental objection. Accordingly, the State Review Officer held that school districts could pursue initial evaluations through the impartial hearing process -- even when the child is parentally-placed in a private school and the parents have stated they will refuse to accept services.<sup>81</sup>

This dichotomy was ultimately resolved by the Department's 2006 IDEA Regulations, which amended Section 300.300(d)(4), to provide that if a parent of a child who was homeschooled or parentally-placed in a private school at the parent's expense does not consent to an initial evaluation or re-evaluation, or the

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<sup>80</sup> See, e.g., *Fitzgerald v. Camdenton R-III School Dist.*, Appeal No. 04-3102 (8th Cir. 2006) ("Where a home-schooled child's parents refuse consent, privately educate the child, and expressly waive all benefits under the IDEA, an evaluation would have no purpose"); *California State Educational Agency*, 41 IDELR, ¶141 (Cal. 2004); but see *Andress v. Cleveland Independent School District*, 64 F.3d 176, 178-179 (5th Cir. 1995).

<sup>81</sup> *Application of a Child Suspected of Having a Disability*, SRO Dec. No. 05-071 (2006).

parent fails to respond to the request to provide consent, the school district “(A) may not use the consent override procedures . . . and (B) is not required to consider the child eligible for services under the requirements relating to parentally-placed private school children with disabilities . . . .”

#### **4. Evaluation Modalities Under IDEA**

IDEA mandates that school districts use --

**(A)** a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent, that may exist in determining

**(i)** whether the child is a child with a disability; and

**(ii)** the content of the child’s individualized education program, including information related to enabling the child to be involved in and progress in the general education curriculum[.]<sup>82</sup>

School districts may not utilize “any single measure or assessment as the sole criterion for determining whether a child is a child with a disability or determining an appropriate educational program for the child . . . .” Additionally, the statute requires that school districts “use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.”<sup>83</sup>

Finally, IDEA, as reauthorized, requires schools to ensure that assessment and evaluation materials are selected and administered so as to avoid discrimination based upon race or culture, and are administered in the “language

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<sup>82</sup> 20 U.S.C. § 1414(b)(2)(A).

<sup>83</sup> 20 U.S.C. §§ 1414(b)(2)(B) and (C).

and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally, unless it is not feasible to so provide or administer.”<sup>84</sup>

#### **D. Placement of the Disabled Child Under IDEA**

A child’s placement under the provisions of IDEA is much more highly regulated than under Section 504.

##### **1. Development of the IEP**

IDEA requires that school districts develop an “individualized education program” (“IEP”) -- or a written statement for each child with a disability that is developed, reviewed, and revised” as mandated by the statute. An IEP must include the following --

A statement of the child’s present level of academic achievement and functional performance, including:

- How the child’s disability affects the child’s involvement and progress in the general education curriculum;
- A statement of measurable annual goals, including academic and functional goals, designed to meet each child’s needs that result from his/her disability, enabling the child to be involved in and make progress in the general education program;
- For disabled children taking alternate assessments, a description of the benchmarks or short-term objectives; and

How the placement will meet each of the child’s other educational needs that result from the child’s disability;

A description of how the child’s progress toward meeting the annual goals will be measured and how that progress will be

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<sup>84</sup> 20 U.S.C. § 1414(b)(3).

reported (such as through the use of quarterly or other periodic reports, concurrent issuance of report cards);

A statement of the special education and related services and supplementary aids and services to be provided to the child, and a statement of the program modifications or supports for school personnel that will be provided for the child to --

- Advance appropriately toward attaining the annual goals;<sup>85</sup>
- Be involved in and make progress in the general education curriculum ... and participate in extracurricular and other non-academic activities; and
- To be educated and participate with other children with disabilities and disabled children in the activities described in section 1414.

An explanation of the extent, if any, to which child will not participate with non-disabled children in regular class and in the activities; and

A statement of any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the child on state and district-wide assessments;

If the IEP provides for a child to take an alternate assessment by a particular state or district-wide assessment of student achievement, why that alternative is necessary and why the alternative assessment tool is appropriate for this child, among other things.<sup>86</sup>

The school district must also include information about transitional services in the IEP, if appropriate. *See* 20 U.S.C. § 1414(d).

IDEA's reauthorization included provisions that an IEP need only contain what is specifically required by the statute and that the "IEP Team" need not

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<sup>85</sup> The statute requires these services and aids to be "based on peer-reviewed research to the extent practicable." 20 U.S.C. § 1414(d)(1)(A)(i)(IV).

<sup>86</sup> 20 U.S.C. § 1414(d)(1)(A)(i).

include information in one component of an IEP that is already stated in another component.

## **2. *Composition of the IEP Team***

The IEP Team -- or the committee that will determine the appropriate placement for a child -- should include the following individuals:

the child's parents;

at least one regular education teacher of the child (assuming the child is participating in the regular education environment);

at least one special education teacher or, where appropriate, not less than one special education provider of the child;

a representative of the school district who --

- is educated and trained concerning children with disabilities.
- is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities;
- is knowledgeable about the general education curriculum; and
- is knowledgeable about the school district's available resources;

an individual who can interpret the instructional implications of evaluation results, who may be a member of the team described above;

at the parents' election, an individual with knowledge or special expertise regarding the child, including related services personnel; and

when appropriate, the disabled child.<sup>87</sup>

In an effort to provide school districts and parents with additional flexibility, IDEA's reauthorization allows IEP Team members to be excused from

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<sup>87</sup> 20 U.S.C. § 1414(d)(1)(B).

attending an IEP meeting where their particular area of curriculum or related services will not be discussed or modified, provided the parents and school district agreed to the member's absence in writing. In fact, the parents and school district can even agree to excuse an IEP Team member whose area of curriculum or related services *will* be discussed or modified at the IEP meeting, provided the member submits written input concerning his/her area of the curriculum and/or related services.<sup>88</sup> The statute and best practices require such agreements to be in writing and kept in the school district's file concerning the student.

**3. *IDEA's Criteria for Development of an IEP***

IDEA mandates that the IEP Team consider the following criteria --

the strengths of the child;

the concerns of the parents for enhancing the education of their child;

the results of the initial evaluation or most recent evaluation of the child; and

the academic, developmental, and functional needs of the child.

The IEP Team must also take into account the extent to which a child's behavior impedes his/her learning or the learning of his/her classmates, including the use of behavioral interventions and supports, as well as other strategies to address behavior. IEP Teams must consider the extent to which a lack of English proficiency affects a student's needs and, in the case of the blind or visually impaired, provide for instruction in Braille, if appropriate. IEP Teams

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<sup>88</sup> 20 U.S.C. § 1414(d)(1)(C).

must consider the extent to which a child has communication needs (e.g., is hearing impaired), and consider whether the child needs assistive technology devices and services.<sup>89</sup>

The IEP should incorporate the current evaluations concerning the child's functional ability and needs, annual goals and, if appropriate, short-term instructional objectives related to those goals, and the child's placement, including the special education and related services to be provided.<sup>90</sup>

The IEP does not have to provide a child with the best education possible - - nor must it negate the effects of the child's disability. Rather, an appropriate IEP "accurately reflects the results of evaluations to identify the student's needs, establishes annual goals and short-term instructional objectives related to those needs [as appropriate under the 2004 Reauthorization of IDEA], and provides for the use of appropriate special education services."<sup>91</sup> As noted earlier, an IEP is appropriate if it provides a meaningful education -- *i.e.*, more than trivial advancement. It is not necessary that an IEP allow a student to reach his or her maximum potential.<sup>92</sup>

School districts are obligated to ensure that each child with a disability has an IEP in place at the beginning of each school year. Failure to do so could constitute a deprivation of a FAPE. Parents and school districts may collaboratively amend a child's recently developed IEP without the necessity of another IEP meeting.

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<sup>89</sup> 20 U.S.C. §1414(d)(3).

<sup>90</sup> 34 C.F.R. §§ 300.320-300.324.

<sup>91</sup> *Application of a Child with a Disability*, NY SRO Dec. No. 05-131 (2005).

<sup>92</sup> *Rowley*, 458 U.S. at 207; *Walczak*, 142 F.3d at 130.

IDEA provides for parents and school districts to agree to end or to modify a child's IEP in a written document. This is a useful and flexible tool where relatively minor "tweaks" and slight revisions to an IEP are desired. Parents can request a copy of the amended IEP, but best practices suggest that the school district should routinely give the parents a copy of any amended IEP. Doing so will avoid an argument that the amendment is not accurate or that the parents did not agree to it.<sup>93</sup>

#### **4. IDEA's Criteria for Reading Re-evaluations**

The IEP Team must periodically re-evaluate each disabled child in order to ensure he or she is making adequate progress toward his or her annual goals. Such re-evaluation should occur when requested by a child's parents or teachers, and may not occur more often than once a year unless the school district and the parents agree otherwise. However, re-evaluation must occur at least once every three years.<sup>94</sup> When a parent refuses to consent to a re-evaluation, the school district *may* pursue the re-evaluation or using the consent override procedures set forth in 34 C.F.R. § 300.300(a)(3).<sup>95</sup>

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<sup>93</sup> 20 U.S.C. § 1414(d)(1); 8 N.Y.C.R.R. §§ 200.4(f) and (g).

<sup>94</sup> 20 U.S.C. § 1414(d)(4); 34 C.F.R. § 300.324(b); 8 N.Y.C.R.R. § 200.4(b)(4).

<sup>95</sup> 34 C.F.R. § 300.300(c)(1).

## **E. The Mandate for Mainstreaming in Regular Education**

Both Section 504 and IDEA require a disabled child to be placed in the least restrictive environment possible.<sup>96</sup> In other words, a disabled child must be educated in a typical regular education classroom to the greatest extent possible. IDEA prohibits school districts from ostracizing disabled children from the school community and from devolving into a sort of separate but equal paradigm.

### **1. Least Restrictive Environment Under Section 504**

Like IDEA, Section 504 presumes a disabled child can be educated in the regular classroom. In this regard, it requires procedures to ensure that, “to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.”<sup>97</sup> A school district may not place a disabled child in a placement more restrictive than the regular education environment unless it can demonstrate that the child cannot succeed in that environment even with additional services, including behavior improvement plans, classroom modifications, assistive devices, counseling, etc. Similarly, a school district cannot segregate disabled students during class or non-academic times (*e.g.*,

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<sup>96</sup> 20 U.S.C. § 1412(a)(5).

<sup>97</sup> 20 U.S.C. §1412(a)(5)(B).

lunch, recess, field trips, etc.) unless it can demonstrate that such segregation was necessary for the disabled child to receive a meaningful education. OCR and the Office of Special Education and Rehabilitative Services (“OSERS”) will always presume a disabled child should be educated in a regular education environment, and a school district doing otherwise will have to rebut that presumption if challenged.<sup>98</sup>

A disabled child sometimes must be educated in a setting other than the regular classroom because the child is a disruptive force who prevents other children in the class from receiving an education. However, such a placement is unlikely to pass muster if the school district has not first attempted an adequate behavior modification plan or other appropriate modifications prior to using a more restrictive setting. While both IDEA and Section 504 presume that a regular education classroom is a disabled child’s appropriate placement, this presumption is particularly strong under Section 504 because the disabilities considered under this statute are typically less severe and because the overarching goal of this statute is to provide a level playing field and equal access to a covered school’s educational programs.

Accordingly, in this regard, Section 504 and IDEA strive to achieve the same result (*i.e.*, educating a disabled child in the least restrictive environment), but you should expect OCR and the courts to consider this obligation to be more poignant under Section 504 for the reasons stated above.

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<sup>98</sup> 34 C.F.R. § 104.34.

## **V. PROCEDURAL SAFEGUARDS/DISPUTE RESOLUTION**

Regrettably, school districts and parents many times cannot agree on the best or most appropriate classification or placement for a child. In such circumstances, a dispute resolution system is necessary, and both Section 504 and IDEA provide a dispute resolution procedure.

### **A. Procedural Safeguards Under Section 504**

The procedure provided by Section 504 is much less detailed, and school districts are afforded significantly more discretion in this regard than under IDEA. The Regulations require that each district “establish and implement, with respect to actions regarding the identification, evaluation, or educational placement of persons who, because of handicap, need or are believed to need special instruction or related services . . . .”<sup>99</sup> The Regulations mandate that public school districts provide procedural safeguards that will include adequate notice to parents/guardians, an opportunity for parents/guardians to examine relevant records, an impartial hearing with the opportunity for participation by the student’s parents/guardians, who may be represented by counsel at the hearing, and a review procedure.<sup>100</sup> Utilizing IDEA’s procedural safeguards is one way a school district can comply with the mandate of Section 504.

Perhaps by default, or perhaps in a effort to simplify things, many school districts simply apply IDEA’s procedural safeguard process to Section 504 cases. While this may simplify things for the Assistant Superintendent for Special Education, it also saddles a school district with burdens and strict timelines with

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<sup>99</sup> 34 C.F.R. § 104.36.

<sup>100</sup> *Id.*

which a school district need not necessarily encumber itself. Accordingly, school districts should think carefully about whether they wish to simply adopt IDEA's provisions for due process or whether they wish to work to carefully refine a process for Section 504.

## **B. Procedural Safeguards Under IDEA**

IDEA has much more stringent mandates concerning procedural safeguards and due process afforded to parents, which require States and their school districts to provide parents with the opportunity to participate in meetings concerning their child's identification, evaluation, educational placement, the right to obtain an independent educational evaluation of their child, and the provision of a FAPE.<sup>101</sup> Since these provisions were substantially modified after IDEA's 2004 reauthorization, they are worth reviewing here.

### **1. *Prior Written Notice Required by IDEA***

Under IDEA, school districts must provide parents with prior notice of any proposed change in placement or the refusal to initiate or change a child's identification, evaluation, or placement, or the provision of a FAPE to the child.

Such notices must contain the following information:

a description of the action the district is proposing or refusing to take;

an explanation as to why the district proposes or refuses to take the action and a description of each evaluation procedure, assessment, record, or report it has used as a basis for its position;

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<sup>101</sup> 20 U.S.C. § 1415(b)(1). IDEA 2004 now includes specific provisions requiring States to have processes in place which permit surrogate parents to participate for children who are wards of the state, homeless, or otherwise need such representation. 20 U.S.C. §§ 1415(b)(2).

a statement that a disabled child's parents have protection under the procedural safeguards of IDEA and, if the notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained;

sources that parents may contact for assistance in understanding this portion of IDEA;

a description of other options the IEP Team considered and why the Team rejected those options; and

a description of the factors that are relevant to the school district's proposal or refusal.<sup>102</sup>

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<sup>102</sup> 20 U.S.C. § 1415(c)(1).

The notice must be in the parents' native language, unless it is unfeasible to do so.<sup>103</sup>

## **2. Notice re Procedural Safeguards**

Once a year, school districts are required to provide parents with a copy of the procedural safeguards afforded to them by IDEA (an obligation school districts can satisfy by posting the Notice on their websites), as well as on the following additional occasions: (i) upon a student's initial referral or parental request for an evaluation; (ii) when the first Due Process Complaint Notice is filed (*see infra*); or (iii) when the parent requests such information. This Notice must contain "a full explanation of the procedural safeguards, written in the native language of the parents (unless it clearly is not feasible to do so) and written in an easily understandable manner"<sup>104</sup> relating to the following:

- an independent evaluation;
- prior written notice;
- parental consent;
- the parents' right to access his/her child's educational records;
- the opportunity to present and resolve complaints, including --
  - the time period in which to make a complaint;
  - the opportunity for the school district to resolve the complaint; and
  - the availability of mediation;

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<sup>103</sup> 20 U.S.C. § 1415(b)(4).

<sup>104</sup> 20 U.S.C. § 1415(d)(2).

the child's placement during pendency of due process proceedings;

procedures for students who are subject to placement in an interim alternative educational setting;

requirements for unilateral placement by parents of children in private schools at public expense

due process hearings, including requirements for disclosure of evaluation results and recommendations;

State-level appeals (if applicable in the State);

civil actions, including the time periods in which they must be filed; and

provisions relating to recovery of attorneys' fees.<sup>105</sup>

### **3. *IDEA's Mandate Concerning Mediation***

IDEA requires States receiving assistance under its provisions to ensure that school districts have procedures in place which allow parties' disputes involving any matter, including those arising before the filing of a complaint, to resolve the disputes through a mediation process. These procedures must ensure that the mediation process is:

voluntary on the part of the parties;

not used to deny a parent's right to a due process hearing or any other rights provided by IDEA; and

conducted by a qualified and impartial mediator who is trained in effective mediation techniques.<sup>106</sup>

Additionally, school districts or the State Education Agency can establish procedures that offer parents and schools that choose to use a mediation process

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<sup>105</sup> *Id.*

<sup>106</sup> 20 U.S.C. § 1415(e)(1)-(2).

the opportunity to meet, at a time and location convenient to the parents, with a disinterested party who meets certain criteria.

The State must maintain a list of individuals who are qualified mediators and knowledgeable in laws and regulations concerning special education and related services, and it must bear the cost of the mediation process, including the cost of meetings with a disinterested individual as described above. All discussions that occur during the mediation process are designated as confidential by IDEA and may not be used as evidence in a subsequent due process hearing or civil proceeding.<sup>107</sup>

In the event the mediation results in an agreement, the parties must execute a legally binding agreement that sets forth their resolution of the dispute and that --

states that all discussions that occurred during the mediation process are confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding;

is signed by both the parent[s] and a representative of the school district who has the authority to bind the school district to the agreement; and

is enforceable in any State court of competent jurisdiction or any district court of the United States.<sup>108</sup>

#### **4. *The Due Process Complaint Notice***

IDEA requires a party serving a Due Process Complaint Notice (*i.e.*, the complaint which commences an impartial hearing) to include certain information as follows:

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<sup>107</sup> 20 U.S.C. § 1415(e)(2).

<sup>108</sup> 20 U.S.C. § 1415(e)(2)(F).

the name of the child, the address of his/her residence, and the school the child is attending;

in the case of a homeless child (as defined at 42 U.S.C. § 11434a(2)), available contact information for the child and the name of the school the child is attending;

a description of the nature of the child's problem concerning the proposed initiation or change, including facts relating to such problem; and

a proposed resolution of the problem, to the extent it is known to the complaining party.<sup>109</sup>

IDEA's 2004 reauthorization included a provision allowing a party receiving a Due Process Complaint Notice to pursue a motion with the hearing officer to dismiss that Complaint Notice if the receiving party believes it fails to comply with the specificity required by 20 U.S.C. § 1415(b)(7)(A). This change was intended to address, among other things, situations where parents had served a school district with a very broad complaint (*e.g.*, the district failed to provide a FAPE) and then repeatedly shifted the basis for their complaint as the hearing ensued, leaving the school district to defend against a claim that had become a veritable moving target.

In an effort to avoid this circumstance, IDEA now requires the complaining party to set forth with the requisite level of specificity the basis for the complaint, and the party receiving the Complaint Notice can file a motion with the hearing officer to dismiss the Notice if the receiving party believes it fails to contain the requisite specificity. However, unless the receiving party provides written notice to the hearing officer and the opposing party within fifteen days of

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<sup>109</sup> 20 U.S.C. § 1415(b)(7).

receiving the Complaint Notice believes that the Complaint Notice is insufficient, the Complaint Notice shall be deemed adequate.<sup>110</sup>

A hearing officer receiving such an objection from a receiving party must decide the objection within five days of receipt of the objection, either overruling it or sustaining it. In instances where a hearing officer sustains such an objection, the hearing officer can afford the complaining party leave to amend its Complaint Notice so as to comply with the statute.<sup>111</sup>

### **5. IDEA's Stay-Put Provisions**

IDEA mandates that during the pendency of any administrative or judicial proceeding regarding a Complaint Notice requesting a due process hearing under Section 300.507, unless the State or local agency and the parents of the child agree otherwise, the child must remain in his or her current educational placement.<sup>112</sup> Courts have held that this language refers to “the operative placement actually functioning at the time the dispute first arises.”<sup>113</sup>

The “stay-put” provision has the effect of an automatic injunction, which is imposed without regard to such factors as irreparable harm, likelihood of success on the merits, and a balancing of the hardships.<sup>114</sup> This provision is intended to provide stability in a disabled child’s education during the pendency of a dispute

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<sup>110</sup> 20 U.S.C. §§ 1415(c)(2)(A) and (C).

<sup>111</sup> 20 U.S.C. §§ 1415(c)(2)(E).

<sup>112</sup> 20 U.S.C. § 1415(j); 34 C.F.R. § 300.518(a); N.Y. Educ. Law § 4404(4).

<sup>113</sup> *Thompson v. Cincinnati Bd. of Educ.*, 918 F.2d 618, 625-626 (6th Cir. 1990); *Mackey v. Bd. of Educ. of Arlington Cent. School Dist.*, 386 F.3d 158, 163 (2d Cir. 2004).

<sup>114</sup> *Drinker v. Colonial School Dist.*, 78 F.3d 859 (3d Cir. 1996); *Zvi D. v. Ambach*, 694 F.2d 904 (2d Cir. 1982).

over placement, but it does not mean that the student must remain in a particular site or in a specific grade.<sup>115</sup>

The issue relative to this provision is identifying the student's "then-current educational placement." IDEA does not define this phrase. It has been held to constitute "the last agreed upon placement at the moment when the due process proceeding is commenced."<sup>116</sup>

Typically, hearing officers and courts will hold that a stay-put placement must be a program that the student has actually participated in -- not a proposed program that is new to the student.<sup>117</sup> However, the placement for a student applying for initial admission to a public school is, assuming parental consent, the public school program.<sup>118</sup> Similarly, a child who has not been identified as qualified under IDEA and is not receiving special education or related services will remain in his/her existing placement during due process proceedings that challenge the child's evaluation and/or placement.<sup>119</sup>

"The U.S. Department of Education has opined that a child's then current placement would 'generally be taken to mean current special education and related services provided in accordance with a child's most recent [IEP].'"<sup>120</sup>

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<sup>115</sup> *Concerned Parents and Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ.*, 629 F.2d 751 (2d Cir. 1980); *Application of the Bd. of Educ.*, NY SRO Dec. No. 99-90 (1999); *Application of a Child with a Disability*, NY SRO, Dec. No. 95-16 (1995).

<sup>116</sup> *Application of a Child with a Disability*, NY SRO Dec. No. 07-095 (2007) (referencing *Murphy v. Bd. of Educ.*, 86 F. Supp. 2d 354, 359 (S.D.N.Y. 2000), *aff'd*, 297 F.3d 195 (2002)); *Application of a Child with a Disability*, NY SRO Dec. No. 01-013 (2001); *Application of the Bd. of Educ.*, NY SRO Dec. No. 00-073 (2003).

<sup>117</sup> *See, e.g., Bd. of Educ. of the City of Buffalo*, NY SRO Dec. No. 05-006 (2005).

<sup>118</sup> 20 U.S.C. § 1415(j); 34 C.F.R. § 300.518(b); N.Y. Educ. Law. § 4404(4); 8 N.Y.C.R.R. § 200.5.

<sup>119</sup> 34 C.F.R. § 518(c); 8 N.Y.C.R.R. § 200.5.

<sup>120</sup> *Application of a Child with a Disability*, NY SRO Dec. No. 07-095 (2007) (citing *Letter to Baugh*, 211 IDELR 481 (OSEP 1987); *see also Susquenita Sch. Dist. v. Raelle*, 96 F.3d 78, 83 (3d

However, a disabled child's parents and the school district can agree on the appropriate placement during an impartial hearing, and that proceeding does not have to be reduced to an IEP and can even supersede the prior unchallenged IEP as the "then current placement."<sup>121</sup>

Clearly, the "then current placement" can be vitally important to the school district and/or the student's parents. Disputes in this regard are not infrequent, and are resolved by the hearing officer on motion by one of the parties to the matter.

IDEA's "stay-put" provision does not apply to changes in placement resulting from an "interim alternative placement" -- or one that arises from disciplinary action that arises from student misconduct that is not a manifestation of the child's disability or one that is imposed because the child has engaged in conduct that involves the possession and/or use of a weapon, possession and/or use of narcotics, and/or the infliction of serious bodily injury on a person at school, on school premises, or at a school function.<sup>122</sup>

(a) *Mandated Resolution Meeting*

After its reauthorization in 2004, the statute was revised to provide an informal process prior to the commencement of a hearing, but after the filing of a Complaint Notice -- in hopes that the parties to the dispute can resolve it before

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Cir. 1996)); *Thomas v. Cincinnati Bd. of Educ.*, 918 F.2d 618, 625 (6th Cir. 1990); *Drinker*, 78 F.3d at 867 (last functioning IEP); *Gregory K. v. Longview Sch. Dist.*, 811 F.2d 1307 (9th Cir. 1987).

<sup>121</sup> NY SRO Dec. No. 04-064 (2004) (referencing *Evans v. Bd. of Educ.*, 921 F. Supp. 1184, at 1189 n.3 (S.D.N.Y. 1996)).

<sup>122</sup> 34 C.F.R. § 300.533.

embarking on the expensive and time-consuming endeavor of an impartial hearing.

Accordingly, IDEA mandates that within fifteen days after receiving the parents' Complaint Notice, the school district must meet with the parents in a last-ditch effort to settle the dispute.<sup>123</sup> The school district cannot have counsel at this meeting unless the parents first opt to bring counsel. The school district must be represented by an individual who has decision-making authority to bind the school district to any agreement that might be reached during this meeting, and any resolution shall be reduced to a written settlement agreement, signed by both parties, which can be enforced in any State court of competent jurisdiction or the federal district court.<sup>124</sup> Any resulting agreement can be voided by either party within three business days after its execution -- providing a sort of cooling-off provision.<sup>125</sup>

If the school district has not resolved the complaint to the parent's satisfaction within thirty days of its receipt of the complaint, a due process hearing may occur, and all of the applicable timelines for a due process hearing set forth under Section 1415 of IDEA shall then begin.

(b) *Disclosure of Evaluations and  
Recommendations*

Within five business days before the hearing begins, each party must disclose to all other parties all evaluations that have been completed to date which such party intends to rely upon, together with a statement of those

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<sup>123</sup> 20 U.S.C. § 1415(f)(1)(B).

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

recommendations the party bases on such evaluations. Failure to comply with this provision can result in evaluations or other documents being precluded. Accordingly, it is imperative that school districts and parents pay close attention to this provision.<sup>126</sup>

(c) *Requirements Concerning Hearing Officers, Creative Limitation, and Appeals*

IDEA has specific requirements concerning the qualifications of hearing officers. Individuals employed by the State Education Agency or the school district involved in the hearing are automatically precluded from serving as a hearing officer, as are individuals having a personal or professional interest in the matter. Hearing officers must possess knowledge of and the ability to understand IDEA, the legal interpretations of it, and the regulations promulgated pursuant to it. They must also have the knowledge and ability to conduct hearings in accordance with “appropriate, standard legal practice,” and have the requisite knowledge and ability to render and write a decision “in accordance with appropriate, standard legal practice.”<sup>127</sup>

The hearing officer may only consider those issues that were raised in the Complaint Notice unless the other party agrees otherwise. Similarly, the hearing officer cannot consider any issue that accrued or arose more than two years before service of the Complaint Notice, provided the parents or the district knew or should have known about the alleged action that forms the basis of the complaint. This timeline shall not apply to a parent, provided the parents can

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<sup>126</sup> 20 U.S.C. § 1415(f)(2).

<sup>127</sup> 20 U.S.C. § 1415(f)(3).

demonstrate that the school district made specific misrepresentations that it had resolved the problem that comprised the basis of the complaint, or the school district withheld information from the parents which IDEA required the district to provide to the parents.<sup>128</sup>

Any decision reached by the hearing officer must be made on substantive grounds based on a determination of whether the child received a FAPE. The hearing officer can conclude that the child did not receive a FAPE based upon a procedural violation only if the procedural inadequacies:

impeded the child's right to a FAPE;

significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE; or

caused the deprivation of educational benefits.<sup>129</sup>

IDEA provides for an appeal of the findings and decision of the hearing officer to the State Education Agency. Hence, in New York, these appeals are heard by the State Review Officer -- who is within the State Education Department.<sup>130</sup>

(d) *Award of Attorneys' Fees*

IDEA permits parents to recover attorneys' fees from the school district in any impartial hearing in which the parents are the prevailing party. The fees awarded shall be determined based upon rates prevailing in the community in

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<sup>128</sup> 20 U.S.C. § 1415(f)(3)(C)-(D).

<sup>129</sup> 20 U.S.C. § 1415(f)(3)(E). This provision further states that nothing contained in it shall be deemed to preclude a hearing officer from ordering a school district to comply with IDEA's provisions.

<sup>130</sup> 8 N.Y.C.R.R. Part 275.

which the action or proceeding arose for the kind and quality of services provided.<sup>131</sup> IDEA also provides for prevailing school districts to recover attorneys' fees from parents if the court determines --

the cause of action was frivolous, unreasonable, or without foundation, or against the attorney of the parent who continued to litigate after the litigation clearly became frivolous, unreasonable, or without foundation; or

against the attorney of a parent or the parent if the parent's complaint or subsequent cause of action was presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation.<sup>132</sup>

A school district may avoid the risk of attorneys' fees by making an offer of settlement to a parent, provided --

the offer is made within the time set forth in Federal Rule of Civil Procedure 68 in the case of a court proceeding -- or any time within ten days before an impartial hearing begins or an appeal is decided in the case of an administrative hearing;

the offer is not accepted within ten days; and

the court or the hearing officer finds that the relief finally obtained by the party is not more favorable to the parents than the offer of settlement.<sup>133</sup>

IDEA is clear that attorneys' fees may not be awarded to parents as a result of the outcome of an IEP meeting, a dispute resolution meeting, or mediation.

### **C. Summary**

Clearly, IDEA contains much more detailed and regimented provisions regarding the resolution of disputes arising under its provisions. Section 504 leaves a fair amount of discretion to school districts regarding the process they

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<sup>131</sup> 20 U.S.C. § 1415(i)(3)(B).

<sup>132</sup> 20 U.S.C. § 1415(i)(3)(B)-(G).

<sup>133</sup> 20 U.S.C. § 1415(i)(3)(D)(III).

ultimately choose to provide; IDEA leaves school districts with no such discretion and mandates several specific obligations upon school districts. Similarly, Section 504 does not provide for a mediation process, a dispute resolution meeting, attorneys' fees, settlement offers, or any other similar provisions.

## **VI. STUDENT DISCIPLINE UNDER IDEA AND SECTION 504**

Both Section 504 and IDEA protect disabled students relative to disciplinary action where that discipline is related to conduct that is a manifestation of the student's disability. In such cases, the two statutes mandate a similar process, although IDEA proves to be the more flexible statute on this issue.

### **A. Manifestation Reviews Under Section 504**

Section 504 prohibits a change in a disabled student's placement for more than ten days in any school year unless the appropriate 504 Committee has first determined that the behavior out of which the disciplinary matter arises is not linked to the student's disability or to an inappropriate placement.<sup>134</sup> Because of this, obviously, punishing a student because of a manifestation of his/her disability, or because the school district has failed to provide an appropriate placement, equates to punishing a student for being disabled -- which Section 504 prohibits.

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<sup>134</sup> See, e.g., *Guilford County Schools*, OCR Case No. 11-07 1183, 2007 NDLR (LRP) LEXIS 560, 37 NDLR 79 (OCR S. Div. N.C. 2007); *San Jose Unified School Dist.*, 2006 NDLR (LRP) LEXIS 562, 34 NDLR 76 (OCR W.D. Texas 2006); *Aztec Municipal Schools.*, 2006 NDLR (LRP) LEXIS 568, 34 NDLR 102 (OCR W.D. N.M. 2006); *Long-term Suspension or Expulsion of Handicapped Students*, OCR (Oct. 28, 1998); *Suspension of Handicapped Students -- Deciding Whether Misbehavior Is Caused By a Child's Handicapping Condition*, OCR (Nov. 13, 1989).

A manifestation hearing is essentially the process set forth at 34 C.F.R. § 104.36.<sup>135</sup> As noted above, this provision leaves a fair amount of discretion to school districts and does not contain the type of specific and detailed provisions that IDEA contains. In any event, the hearing process, as spelled out in the school district's policy, must be followed in order to determine whether the student's misconduct was a manifestation of the student's disability or an inadequate placement.

As noted above, while the condition of drug addiction or alcoholism may be protected under Section 504, assuming there is no active substance abuse, even disabled students may be punished for engaging in the illegal use of drugs or alcohol to the same extent that non-handicapped students are punished.<sup>136</sup> Moreover, Section 504 holds that the procedural safeguards set forth at 34 C.F.R. § 104.36 do not apply to such disciplinary action.

## **B. Manifestation Reviews Under IDEA**

IDEA has a very specific and detailed process regarding the discipline of students who are classified under its provisions. These provisions are set forth at 20 U.S.C. § 1415(k) and 34 C.F.R. § 300.530.

### **1. *An Overview of the Manifestation Review***

In essence, IDEA authorizes school district officials to remove a disabled child from his/her current placement and provide him/her with an interim alternative placement for up to ten consecutive school days. It also permits

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<sup>135</sup> *Id.*; see also *Response to Veir*, OCR (1993).

<sup>136</sup> See 29 U.S.C. § 706(8)(C)(iv).

school districts to impose additional removals of not more than ten consecutive school days in the same school year.<sup>137</sup>

However, any suspension from school or other change in placement that exceeds ten consecutive days cannot be imposed unless the disabled student's conduct and disability are first evaluated by the student's IEP Team. In order to determine if the alleged misconduct was a manifestation of the child's disability. This review may also be required for suspensions that are less than ten days in length, where the suspension would create "a series of suspensions or removals that constitute a pattern" because they lead to a total of more than ten days of suspension during the school year, considering such other factors as the length of each suspension or removal, the total amount of time the student is removed from his/her placement, and the proximity of the suspensions or removals to one another.<sup>138</sup>

When required, the child's IEP Team must complete a manifestation review and make a determination regarding the conduct nexus to the student's disability within ten school days of any decision to change the placement of a child with a disability because of a violation of the code of student conduct.<sup>139</sup> (As explained below, the Regulations of New York's Commissioner of Education (the "Commissioner") avoid any issue regarding this deadline because they do not permit a school district to make a disciplinary decision to suspend the student for

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<sup>137</sup> 34 C.F.R. § 530(c); 8 N.Y.C.R.R. § 201.4(a).

<sup>138</sup> *Id.*; see, e.g., *Application of the Bd. of Educ. of the West Seneca Cent. School Dist.*, NY SRO Dec. No. 04-006 (2006).

<sup>139</sup> 34 C.F.R. § 300.530(e); 8 N.Y.C.R.R. § 201.4.

more than ten consecutive school days until such time as the IEP Team has completed a manifestation review.)

The manifestation review must include a review of all relevant information in the student's file, including his/her IEP, teacher observations, and other relevant information. Based on this information, the student's IEP Team must determine if the child's conduct "was caused by, or [has] a direct and substantial relationship to, the child's disability," or "was the direct result of the [school district's] failure to implement the child's IEP."<sup>140</sup> As explained in more detail below, where the IEP Team concludes that the misconduct was a manifestation of the child's disability, the child will be returned to his/her placement and certain other evaluations will be completed.

## **2. *New York Student Discipline and the IDEA Manifestation Review***

New York State provides for two different categories of student suspensions: (1) a suspension for five days or less, which can be implemented on the building principal's authority, after having given the parents an opportunity for an informal conference with the principal and a chance to question witnesses to the alleged misconduct; and (2) a suspension for more than five days, which can only be imposed after a Superintendent's Hearing, at which the parents have a right to be represented by counsel, to present evidence, and to cross-examine witnesses, among other things.<sup>141</sup>

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<sup>140</sup> *Id.*

<sup>141</sup> N.Y. Educ. Law § 3214.

The Commission's Regulations regarding manifestation reviews for disabled children provide that suspensions for five days or less may be imposed without a manifestation review (assuming, of course, that a pattern of suspensions where removals from placement will not be created by the suspension), although parents are required to be provided the opportunity for the informal conference referenced in Education Law Section 3214.

The Commissioner's Regulations require that disciplinary hearings concerning a disabled student that may result in a suspension of more than five days be bifurcated into a "guilt phase" and a "penalty phase."<sup>142</sup> During the guilt phase, the Superintendent or appointed hearing officer must make a determination as to whether the misconduct occurred and whether it would justify imposition of a penalty that could result in a suspension in excess of ten consecutive school days or would otherwise constitute a change in the student's placement.<sup>143</sup> If the Superintendent or the designated hearing officer determines that a change in placement could result from the appropriate penalty to be imposed, the student disciplinary hearing must be adjourned and the manifestation review described below must be implemented.<sup>144</sup> If the manifestation review determination is that there is no nexus between the student's misconduct and his/her disability, the school district may discipline the student as it would any non-disabled student.<sup>145</sup> If the IEP Team determines that the student's misconduct was a manifestation of the student's disability, the

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<sup>142</sup> 8 N.Y.C.R.R. § 201.9(c).

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> 8 N.Y.C.R.R. § 201.9.

Superintendent must dismiss the disciplinary charges and discontinue the disciplinary process. In lieu of that process, the IEP Team will conduct additional evaluations and may adjust the student's placement or behavioral improvement plan, as appropriate.<sup>146</sup> (See discussion below.)

Although a number of New York school districts utilize variations of this process, the Regulations are very clear that the student disciplinary process must first be commenced, and only if the hearing officer comes to the conclusion that the student is guilty of the misconduct alleged should the manifestation review occur. While this process may seem somewhat unwieldy and counterproductive, its rationale is likely to avoid any suggestion that the student's guilt was pre-determined, as might be raised by a manifestation review that preceded any finding of guilt.

### **3. *The Manifestation Review Obligation***

#### **(a) *Triggering the Manifestation Review Obligation***

Pursuant to IDEA's Regulations and the Commissioner's Regulations, the following circumstances trigger the obligation to conduct a manifestation review:

A review of the relationship between the student's disability and the behavior subject to disciplinary action to determine if the conduct is a manifestation of the disability must be made immediately, if possible, but in no case later than 10 school days after:

(1) a decision is made by a superintendent of schools to change the placement of a student to an interim alternative educational setting pursuant to subdivision (e) of section 201.7 of this Part;

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<sup>146</sup> 34 C.F.R. §§ 300.530(f), (g), 300.531.

(2) a decision is made by an impartial hearing officer to place a student in an interim alternative educational setting pursuant to section 201.8 of this Part; or

(3) a decision is made by a board of education, district superintendent of schools, building principal or superintendent pursuant to subdivision (a) or (b) of section 201.7 of this Part to impose a suspension that constitutes a disciplinary change in placement.<sup>147</sup>

(b) *The IEP Team Members and Notice to Parents*

The Commissioner's Regulations provide that the manifestation review must be conducted by an IEP Team composed of the following individuals:

- a representative of the school district knowledgeable about the student and the interpretation of information about child behavior;
- the parent; and
- relevant Members of the CSE as determined by the parent and the school district.<sup>148</sup>

The parent must receive written notification prior to any manifestation team meeting to ensure that the parent has an opportunity to attend. The notification shall inform the parent of the purpose of the meeting, the names of the individuals expected to attend, and shall inform the parent of his or her right to have relevant members of the CSE participate at the parent's request.<sup>149</sup>

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<sup>147</sup> 8 N.Y.C.R.R. § 201.4(a).

<sup>148</sup> 8 N.Y.C.R.R. § 201.4(b).

<sup>149</sup> 34 C.F.R. § 300.530(e)(1).

(c) *The Process When a Nexus Is Found to Exist*

If the disabled student's IEP Team and parents conclude that the misconduct was a manifestation of the student's disability, the IEP Team must either:

- Conduct a functional behavioral assessment, unless the school district had conducted such an evaluation before the behavior that resulted in a change in placement and had implemented a behavioral intervention plan for the child based upon that evaluation.
- If the behavioral intervention plan had already been implemented at the time of the misconduct, the IEP Team must review it to ensure it is adequate, and modify it as necessary to address the behavior.
- The IEP Team must then return the child to the placement from which he/she was removed, unless the parent and IEP Team agree to a change in placement as part of a modification of the student's behavioral intervention plan.<sup>150</sup>

If the conduct is determined not to have a substantial nexus to the student's disability, then the discipline may be imposed as it would be to non-disabled student who had violated the same provisions of the school districts court of conduct.<sup>151</sup>

**4. *Exigent Circumstances Justifying Immediate Removals***

In special circumstances, school district personnel may remove a disabled student from his/her placement to an interim alternative educational setting for

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<sup>150</sup> 34 C.F.R. § 300.530(f).

<sup>151</sup> 34 C.F.R. § 300.530; 8 N.Y.C.R.R. § 201.9(c).

not more than forty-five days -- without regard to whether the behavior is a manifestation of the child's disability -- provided:<sup>152</sup>

- the child has carried a weapon to or possesses a weapon at school, on school premises, or at a school function, which is under the school district's jurisdiction;
- knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance,<sup>153</sup> while at school, on school premises, or at a school function under the school district's jurisdiction;
- has inflicted serious bodily injury on another person, which is defined as: "a bodily injury which involves a substantial risk of death, extreme physical pain, protracted and obvious disfigurement or protracted loss or impairment of the function of a bodily member, organ or mental faculty;"<sup>154</sup>
- there are "unique circumstances" determined "on a case-by-case basis" indicating a change in placement is appropriate for a disabled student who has violated a school district's code of conduct.<sup>155</sup>

Under the Commission's Regulations, such a removal cannot exceed the amount of time that a non-disabled student would have been suspended for the misconduct at issue under the school district's discipline policy.

##### **5. *Students Entitled to a Manifestation Review Under IDEA***

In order to be eligible for a manifestation review, a student must be classified under IDEA at the time of the disciplinary infraction or the school

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<sup>152</sup> 20 U.S.C. § 1415(k)(1)(G), (7); 34 C.F.R. § 300.530(g)-(i); 8 N.Y.C.R.R. § 201.9(e).

<sup>153</sup> An "illegal drug" is defined by the Commissioner's Regulations as "a controlled substance, but does not include a controlled substance legally possessed or used under the supervision of a licensed health-care professional or a substance that is otherwise legally possessed or used under the authority of the Controlled Substances Act or under any other provision of Federal law." 8 N.Y.C.R.R. § 201.2(i). The Commission's Regulations define a "controlled substance" as "a drug or other substance identified under schedule I, II, III, IV, or V in section 202(c) of the Controlled Substances Act (21 U.S.C. section 812 [c])." 8 N.Y.C.R.R. § 201.2(c).

<sup>154</sup> 8 N.Y.C.R.R. § 200.2(i); *see also* 34 C.F.R. § 300.530(g)(3).

<sup>155</sup> 8 N.Y.C.R.R. § 201.7(f).

district must have some notice of a student’s potential eligibility. A student is “presumed to have a disability for discipline purposes” if the school district had knowledge the child was disabled under IDEA before the student engaged in the misconduct at issue.<sup>156</sup> A school district is deemed to have such knowledge, prior to the time of the misconduct if:

- the parent of such student expressed concern in writing to supervisory or administrative personnel of the appropriate school district or to a teacher of the student if the student is in need of special education; or
- the parent of such student orally expressed concern that the student is in need of special education, provided the parent does not know how to write or has a disability that prevents the parent from making this statement to that effect; or
- the parent of the student has requested an evaluation of the student under IDEA; or
- a teacher of the student, or other personnel of the school district, has expressed specific concerns about a pattern of behavior demonstrated by the student, **directly** to the director of special education of the school district or to other **supervisory** personnel of the school district.

In any event, a child will not be considered entitled to a manifestation review if any of the following circumstances exist:

- the parent of the student has not allowed the school district to evaluate the student under IDEA; or
- the parent of the student has refused services under IDEA; or
- it has been determined that the student is not eligible for special education or related services under IDEA.<sup>157</sup>

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<sup>156</sup> 34 C.F.R. § 300.354(a); 8 N.Y.C.R.R. § 201.5.

<sup>157</sup> 34 C.F.R. § 300.534; 8 N.Y.C.R.R. § 201.5(c).

## **6. *Provision of the Expedited Hearing Process***

IDEA provides an expedited review process for parents who are challenging a change in placement resulting from disciplinary action. This process is also available when a school district believes that a disabled child's current placement is "substantially likely" to result in injury to the child or to others.<sup>158</sup>

In the latter instance, a school district can request an expedited hearing, seeking a decision from the hearing officer that places the child in an IAES, because the child poses a danger to himself/herself or others in their current placement. Such a hearing is initiated by utilizing the complaint process set forth in 34 C.F.R. §§ 300.507 and 300.508. At the conclusion of such a hearing, the hearing officer must make one of the following determinations:

- Return the disabled child to the placement from which he/she was removed, assuming the hearing officer determines the removal violated IDEA or the behavior was a manifestation of the child's disability.
- Order a change of placement and appropriate IAES's for not more than forty-five school days, provided the hearing officer determines that the child's current placement is "substantially likely to result in injury to the child or others."

A school district may repeat this process if it believes that returning a disabled child to his/her original placement is substantially likely to result in injury to the child or others.<sup>159</sup>

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<sup>158</sup> 34 C.F.R. § 300.532(a); 8 N.Y.C.R.R. §§ 201.8 and 201.11.

<sup>159</sup> 20 U.S.C. § 1415(k)(3); 34 C.F.R. § 300.532; 8 N.Y.C.R.R. § 201.11(a).

Any such hearing must be provided on an “expedited” basis. The expedited hearing provisions prohibit a hearing officer from accepting an appointment to preside over such a hearing unless he/she is available to hold the hearing and render a decision within ten days.<sup>160</sup> An expedited hearing must meet the following guidelines:

- The school district’s board of education must immediately, upon receipt of filing of a due process complaint seeking an expedited hearing, arrange for the appointment of an impartial hearing officer using the Commissioner’s published rotational selection process;
- A resolution meeting shall occur within seven days of receiving the notice of due process complaint;
- The expedited due process hearing may proceed unless the matter has been resolved to the satisfaction of both parties within fifteen days of receipt of the due process complaint;<sup>161</sup>
- The expedited due process hearing occur within twenty days of the date the complaint requesting the hearing is filed;
- The impartial hearing officer must make a determination regarding the matter within ten school days after the completion of the hearing.<sup>162</sup>

Under the Commissioner’s Regulations, hearing officers conducting an expedited hearing may not grant extensions of the stated timelines. During the expedited hearing process, the disabled child remains in the IAES, pending the hearing officer’s determination, unless the school district and parents agree otherwise.<sup>163</sup>

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<sup>160</sup> 34 C.F.R. § 300.532(c)(3); 8 N.Y.C.R.R. § 201.11(b).

<sup>161</sup> Presumably, the permissive language used in this regulatory provision connotes the ability of the parent and school district agree to continue the resolution process for more than fifteen days. However, in the absence of such an agreement, the expedited hearing should commence within fifteen days of receipt of the due process complaint notice. 8 N.Y.C.R.R. § 201.11(b).

<sup>162</sup> 34 C.F.R. §§ 300.532(c)(2)-(4); 8 N.Y.C.R.R. § 201.11(b).

<sup>163</sup> 34 C.F.R. § 300.532; 8 N.Y.C.R.R. § 201.11(c).

## VII. APPLICATION OF IDEA AND SECTION 504 TO PRIVATE SCHOOLS

IDEA only applies to public school districts, and it has no application to private schools, except that it requires public school districts to ensure that they spend money on parentally-placed students in private schools on the same pro-rata basis that the money is spent on students attending the public school district's schools. Similarly, they must ensure that their child-find process is effective for parentally-placed children in private schools and that they conduct meaningful consultations with private schools regarding these issues.

By contrast, Section 504 does apply to private schools to the extent that they receive federal funds. Whether a religious or other private school receives sufficient and the right kind of federal funding is an area of some debate. Some courts have held that a private school is only subject to Section 504 in those programs in which it actually receives federal funding -- not throughout all of its programs.<sup>164</sup> By contrast, other courts have held that the receipt of any federal assistance -- even if provided indirectly through a school district or BOCES -- is sufficient to subject the entire school and all of its programs to Section 504.<sup>165</sup> It is, therefore, advisable for private schools receiving any federal assistance, directly or indirectly, to assume they are obligated to adhere to Section 504's provisions.

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<sup>164</sup> See, e.g., *Marshall v. Sisters of the Holy Family of Nazareth*, 399 F. Supp. 2d 597, 602 (E.D. Pa. 2005).

<sup>165</sup> See, e.g., *Dupree v. Roman Catholic Church*, 1999 US Dist. LEXIS 13799, \*15 (E.D. La. 1999) (provision of Title I assistance, even though indirectly received through the public school district, was sufficient to subject the private school to Section 504's mandates); *Hunt v. St. Peter School*, 963 F. Supp. 843, 849 (W.D. Mo. 1997) (provision of federal assistance from the U.S. Department of Agriculture's National School Lunch and Breakfast Programs and from the U.S. Department of Education's Title I program or sufficient to subject the private school to Section 504).

Even if Section 504 applies to a private school, however, the Department's 504 Regulations limit that school's obligations. It prohibits such a school from excluding a disabled student from elementary or secondary school programs, but only if the school can provide the student with an appropriate educational placement "with minor adjustments" to its programs.<sup>166</sup> Section 504 also prohibits private schools from charging more for the provision of an appropriate education for disabled students than they would charge non-disabled students, except to the extent any charge is justified by substantial increase in cost to the private school.

## **VIII. SUMMARY AND CONCLUDING THOUGHTS**

### **A. Summary of Distinctions Between IDEA and Section 504**

In summary, Section 504 of the Rehabilitation Act is a much broader civil rights statute that is designed to, in essence, provide students with a level playing field. It defines a disability in much broader terms than IDEA and it contains much less detail and specification than IDEA. Section 504 applies to any program or facility that receives federal funds -- including public and private schools.

By contrast, IDEA is an education act designed to ensure that public school districts provide disabled students residing within their territory with a "meaningful" education. It does not seek to level the playing field so much as it seeks to provide disabled students who qualify under its provisions with the

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<sup>166</sup> 34 C.F.R. §§ 104.39(a) and 104.33(b).

special education and related services necessary for the student to receive some level of educational benefit. Unlike Section 504, IDEA is very specific in almost all regards. It details timelines, processes, rights, and categories of disabilities.

**B. Public School District Considerations Under Section 504 and IDEA**

Which statute is applicable to a child depends upon whether the child has a disability that falls within one of the thirteen categories delineated by IDEA. Assuming that the child has such a disability, it seems axiomatic that the child should be classified under IDEA -- not Section 504. However, given the plethora of potential disabilities outside the scope of IDEA's categories, Section 504 may well require a school to provide accommodations to the child.

By way of practical advice, it is probably to the benefit of public school districts to classify children under Section 504 whenever it is permissible to do so. Section 504 permits school districts to develop their own policies and procedures in many regards (*e.g.*, procedural safeguards), and these processes can often be less stringent and complicated than those existing under IDEA. While it is permissible to adopt processes that apply to IDEA for application to Section 504, doing so without careful thought and deliberation can result in a school district saddling itself with obligations and requirements that it need not incur.

It is often most useful for public school districts to have the relevant members of their IEP Teams also serve on their 504 Committees. Additionally, in an effort to streamline the process and ensure full compliance, it is advisable

for school districts to manage their obligations under both statutes through their Assistant Superintendent for Special Education -- or their Director of Special Education. Doing so helps ensure uniform policies and practices, an appropriate sensitivity to the needs of disabled students and their families, and a seamless manifestation review process for disabled students facing disciplinary action.

In summary, public school districts are well advised to have the same office and the same administrator manage both their obligations under IDEA and Section 504. However, that does not equate to using the very detailed and demanding processes and obligations of IDEA for every obligation under Section 504. To the extent that school districts have latitude and discretion under Section 504, they should use it to lessen their administrative burden.

### **C. Considerations for Private Schools Under Section 504 and IDEA**

Private schools are well advised to assume they are subject to Section 504's provisions if they receive any federal assistance. Such schools should, therefore, have procedures in place relative to manifestation reviews, the provision of accommodations in the student's regular education placement, and access to extracurricular activities. Many private schools will simply accept a public school district's 504 Plan, intending to implement it. Such schools are well advised, however, to carefully consider whether the evaluation material actually does suggest that the student is disabled and whether they can actually provide any accommodations detailed in the 504 Plan.

It is advisable to private schools to come to a specific agreement with parents as to what accommodations they can reasonably provide and what they

will look like. That agreement should be reduced to writing and appended to the enrollment contract so that there is no dispute at a later time as to whether there was a contractual obligation to accommodate a disabled student beyond the private school's ability.

While private schools have no obligation under IDEA, *per se*, they should be cognizant of their right to be meaningfully consulted concerning important matters relative to child-find provisions, expenditure of federal funds provided under Part B of IDEA, provision of services, and other important issues, including transportation, etc. If such meaningful consultation does not occur, private schools should try to work with their appropriate public school district to remedy that situation. However, in the absence of any cooperation, private schools should consider utilizing complaint processes provided under IDEA's Regulations and the Commissioner's Regulations.

Additionally, private schools may have a role in advising their parents concerning a public school district's obligation to provide an evaluation under IDEA. It is advisable that their teachers and/or guidance counselors have some familiarity with these provisions. It is important to note that if a private school should request that the public school district conduct an evaluation of a student who is suspected to have a disability under IDEA, that private school may have the right to require the use of certain scientifically-based intervention techniques and evaluate the student's responses to those academic interventions (*e.g.*, RtI) before deciding whether an evaluation under IDEA is necessary.

By contrast, when a parent requests the evaluation, barring some agreement to the contrary, the public school district has sixty days to complete its

evaluation, make a determination as to eligibility, and construct an IEP, if appropriate. This is an important factor for parents with children placed in private schools to remember. If an evaluation is thought to be needed in short order, it is to the parents' advantage to request the evaluation through the appropriate school district, thereby triggering the sixty-day timeline.

#### **D. Final Thoughts**

Both Section 504 and IDEA are intended to obtain a laudable goal of ensuring that disabled students receive those accommodations and/or special assistance necessary to allow them to be included in the educational process in their local public and/or private schools. While the statutes cannot provide such students with every educational opportunity, they both have come a long way from the dire situation disabled students faced in the early 1970s when large sections of disabled students were denied any participation in the educational process.

These statutes work best when the professionals who are charged with ensuring compliance with them bear in mind the purpose for which they were created: the disabled students. Unquestionably, life for some disabled students is more difficult than many of us can imagine. These statutes are designed to at least give the students the opportunity to obtain a meaningful education and progress as happy and productive adults in our society. Of course, that only works if the educators and parents who are obligated to implement the statutes actually see it through and implement them under the letter and spirit of the law. When we do that, we provide our disabled students with great hope, great

opportunity, and significant potential. This is the final goal that must be kept in mind at all points in the process provided by both statutes.