



Disability Law in Public Schools

Stephen Rawson
Tharrington Smith LLP
January 24, 2018

Disclaimers

- ▶ Not speaking for my clients
- ▶ Not providing legal advice
- ▶ *Really* high level overview
- ▶ And about that reading...



Topics / Goals

- ▶ ADA and school employment
- ▶ Section 504 and student access
- ▶ IDEA and special education services



Title I of the ADA

- ▶ “No covered entity shall **discriminate** against a **qualified individual** on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.”

42 U.S.C. § 12112(a)

Definition of Disability

- ▶ A physical or mental impairment that
 - ▶ **Substantially limits**
 - ▶ One or more **major life activities**;
- ▶ A **record** of such an impairment; or
- ▶ Being **regarded as** having such an impairment.

42 U.S.C. § 12102(1)



Who is Covered by the ADA?

- ▶ A “qualified individual” means a person who, with or without **reasonable accommodation**, can perform the **essential functions** of the employment position that such individual holds or desires.

42 U.S.C. § 12111(8)

Essential Functions

- ▶ The term “essential functions” means the **fundamental job duties** of the employment position the individual with a disability holds or desires. Essential functions do not include the **marginal functions** of the position.

29 CFR § 1630.2(n)(1)

What Makes a Job Function Essential?

- ▶ The **employer's judgment** as to which functions are essential;
- ▶ **Written job descriptions** prepared before advertising or interviewing applicants for the job;
- ▶ The **amount of time** spent on the job performing the function;
- ▶ The **consequences** of not requiring the employee to perform the function; and/or
- ▶ The **work experience** of past and current employees in the same or similar jobs.

29 CFR § 1630.2(n)(3)

Can a Qualification Standard Exclude Individuals with Disabilities?


- ▶ A defense to a charge of discrimination based on the use of a **qualification standard**, test or other selection criteria may be shown if:
 - ▶ The qualification standard is **job-related** and **consistent with business necessity**, and
 - ▶ Performance cannot be accomplished by reasonable accommodation.

42 U.S.C. § 12113(a)

What is a Reasonable Accommodation?

- ▶ The term “reasonable accommodation” means **modifications or adjustments**
 - ▶ To a **job application process** that enable a qualified applicant with a disability to be considered for the position; or
 - ▶ To the **work environment**, or to the manner or circumstances under which the position is customarily performed, that enable an individual with a disability who is qualified to perform the essential functions of that position; or
 - ▶ That enable an employee with a disability to enjoy **equal benefits and privileges** of employment as are enjoyed by other similarly situated employees without disabilities.

29 CFR § 1630.2(o)(1)

- 
- ▶ Reasonable accommodation does not have to be provided if it would cause the employer **undue hardship**.
 - ▶ Undue hardship means **significant difficulty or expense** incurred by an employer, when considered in light of factors such as:
 - ▶ Nature and **net cost** of the accommodation needed;
 - ▶ **Overall financial resources** of the employer; and
 - ▶ **Impact** of the accommodation upon the employer's operation.

29 CFR § 1630.2(o), (p)

Section 504 in the School Setting

- ▶ Disabled students must be given the opportunity to participate in public education to the same extent as non-disabled students.
- ▶ Extends to nonacademic and extracurricular services/activities, such as meals, recreational activities, transportation, health services, etc.
- ▶ May require provision of accommodations to enable the student to participate in the educational program.

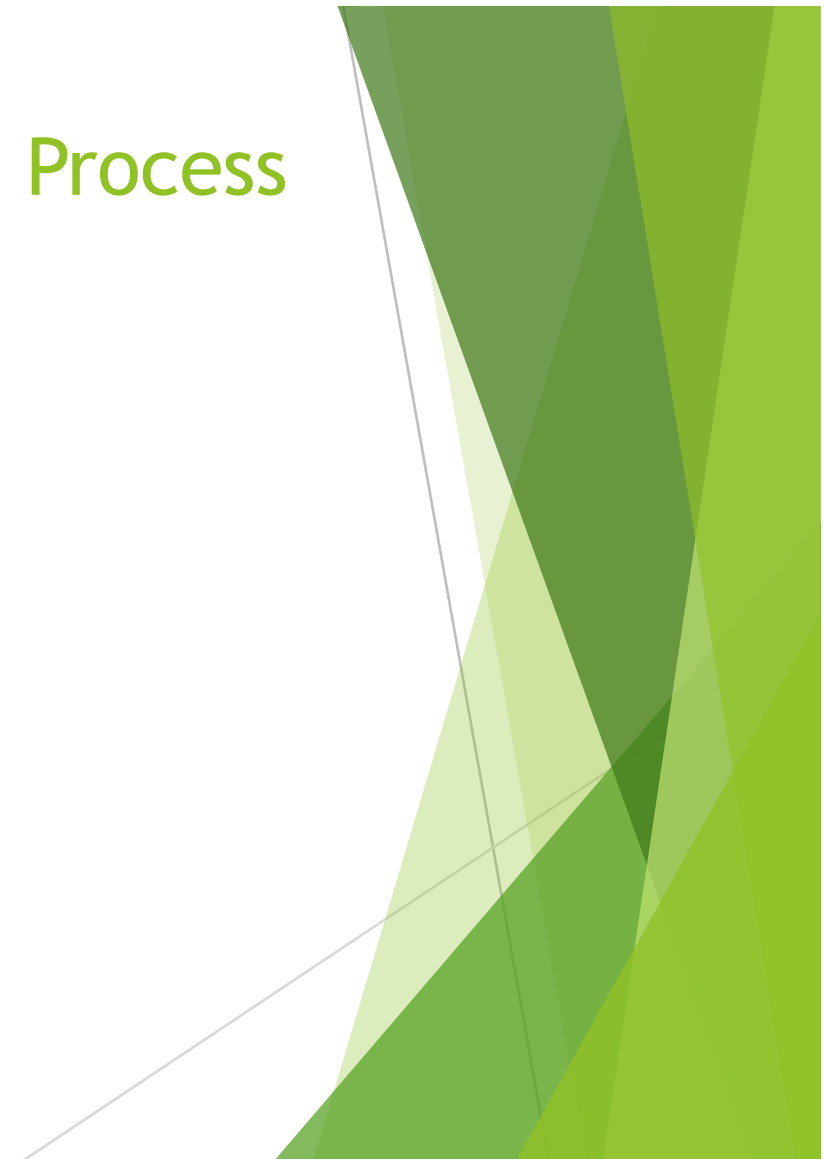
Overview of the 504 Evaluation Process

Does the student have a disability?

- ▶ A physical or mental impairment . . .
- ▶ That substantially limits . . .
- ▶ A major life activity

If the team concludes the student has a disability, then:

- ▶ Is the student entitled to services or accommodations?



What about mitigating measures?

- ▶ What about if the student takes medication?
- ▶ What if the student has a health plan that addresses emergency precautions?
- ▶ What if the student has selectively scheduled classes so that core classes are always in the morning when the student is more focused?

DO NOT CONSIDER for eligibility

DO CONSIDER for accommodation needs

Guiding Questions for 504 Planning

- ▶ What can we do to accommodate based on the disabling condition to give the student a fair opportunity to participate?
- ▶ The issue is not maximizing the student's potential but comparing the student against an average peer.



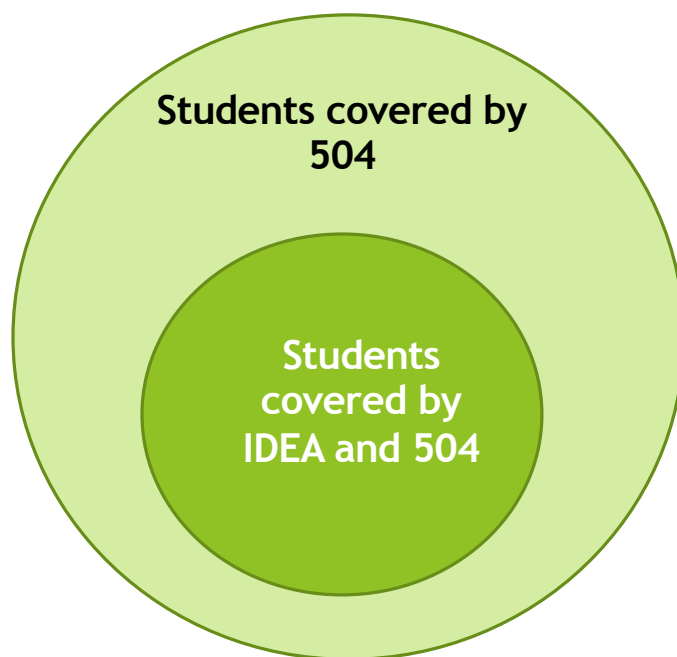
Accommodations/Modifications

- ▶ Modifying the physical structure, rules, requirements, or other aspect of the educational program to enable access by a disabled student, but without changing the content, methodology, or delivery of instruction
- ▶ Examples:
 - ▶ Extra time, audio books, sign language translation
 - ▶ Preferential seating
 - ▶ Rule changes, such as exception to attendance requirements for student with medical absences

Section 504 vs. IDEA

- ▶ Anti-discrimination v. funding statute
- ▶ IDEA regulations are far more comprehensive than those of Section 504 in providing procedural protections and substantive guidelines
- ▶ Section 504 eligibility requirements are more broad and less restrictive than those of IDEA.
- ▶ Modifications and related services may be available under 504 even if student does not need special education

Which Students are Covered by 504/IDEA?



Eligibility: IDEA v. 504

IDEA

- ▶ Must meet the definition of one or more of the categories of disabilities; AND
- ▶ Must be in need of special education and related services as a result of his disability or disabilities

504

- ▶ Must have a physical or mental impairment that
- ▶ Substantially limits a major life activity



Who is Eligible under the IDEA?

- ▶ In order to be eligible for an IEP, the student must have a disability that:
 - ▶ Adversely affects educational performance; and
 - ▶ Requires specialized instruction
- ▶ Which disabilities qualify is defined by the state?
 - ▶ In NC, there are 14 areas of eligibility that can lead to identification

The Process

- ▶ Evaluation
- ▶ Eligibility
- ▶ IEP Development
- ▶ Progress Monitoring
- ▶ Annual Review
- ▶ Reevaluation



IEP team members

- ▶ The parents;
- ▶ 1+ regular education teacher
- ▶ 1+ special education teacher
- ▶ An LEA representative
- ▶ Someone who can interpret the instructional implications of evaluation results;
- ▶ Anyone with knowledge or special expertise regarding the child (ie., related services providers)
- ▶ The child, as appropriate
- ▶ An attorney or advocate for the parent

The IEP

- ▶ Present Levels of Performance
- ▶ Annual Goals
- ▶ Supplementary Aids and Services
- ▶ Service Delivery
 - ▶ Amount of services
 - ▶ Location of services
- ▶ Related Services



Least Restrictive Environment (LRE)

A removal from the regular education environment is only permissible if...the nature or severity of the disability is such that education in regular classes **with the use of supplementary aids and services** cannot be achieved satisfactorily.

34 CFR 300.114(a)(2)(ii)

Service Delivery and LRE

Deciding LRE

DeVries / Hartmann test:

[Removal to a more restrictive environment is justified if...]

- 1) No benefit from mainstreaming
- 2) Marginal benefit from mainstreaming significantly outweighed by benefits of separate setting; OR
- 3) Disruptive impact on mainstream environment



Rights of Parents/Procedural Safeguards:

- ▶ The opportunity to examine records
- ▶ Right to an Independent Educational Evaluation at Public Expense
- ▶ Prior Written Notice and Procedural Safeguards Notice
- ▶ Notices in the parent's native language
- ▶ The ability to seek due process
- ▶ **Meaningful participation in IEP meetings**
- ▶ **Meaningful participation in all decisions regarding placement**

Manifestation Determination Review

- ▶ Purpose: To evaluate the child's misconduct and determine whether the conduct is a manifestation of the child's disability.
- ▶ The MDR must occur within 10 days of the suspension recommendation.
- ▶ The MDR must include the LEA, the parent, and "relevant members of the IEP team" (as determined by the parent and LEA).