

Parent Advocacy Brief

Understanding the Americans with Disabilities Act Amendments Act and Section 504 of the Rehabilitation Act

The Impact on Students with LD and AD/HD



The *Americans with Disabilities Act Amendments Act of 2008 (ADAAA)* was passed by Congress in December 2008 and became effective January 1, 2009. This significant piece of legislation corrected what Congress considered to be a departure from the intent of the original ADA (passed in 1990) brought about by several narrow interpretations of the law through Supreme Court rulings. These rulings weakened the law and made it difficult for people with disabilities to receive the protection the law intended.

The ADAAA also has a direct and substantial impact on *Section 504 of the Rehabilitation Act of 1973 (Section 504)* — a federal law designed to protect the rights of individuals with disabilities in programs and activities that receive federal financial assistance from the U.S. Department of Education. Since recipients of this federal financial assistance include public school districts and institutions of higher education as well as other state and local education agencies, Section 504 is an important law that provides protections for school-age children with disabilities.

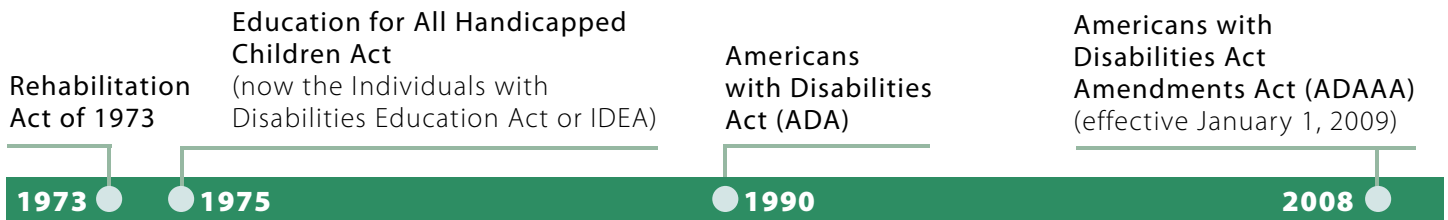
This Parent Advocacy Brief will help you understand the changes brought about by the ADAAA, how they apply to Section 504, and how these changes may impact children with disabilities, including learning disabilities, as well as other conditions such as Attention-Deficit/Hyperactivity Disorder (AD/HD), Aspergers Syndrome, diabetes, asthma, and life-threatening food allergies.



“This bill better defines who Congress intends to meet the definition of disabled.

It clarifies that mitigating measures, such as medication, may not be taken into account. It provides guidance as to what is a major life activity. And, most critically, it lowers the threshold for how limiting a condition must be, and insists that courts interpret the ADA broadly. For all these reasons, this bill returns the focus of the ADA to where it was meant to be — on whether a person with a disability is being discriminated against.”

Senator Tom Harkin (D, IA)
Statement On House Passage
Of The ADA Amendments Act,
September 17, 2008



Overview

Section 504 of the Rehabilitation Act of 1973

Section 504 is a federal law designed to protect the rights of individuals with disabilities in programs and activities that receive federal financial assistance from the U.S. Department of Education. Section 504 states: “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”

Because Section 504 preceded the enactment of the ADA by nearly 20 years, Section 504 has generally been the basis for disabilities protections in the nation’s public schools. The Section 504 federal regulations require a school district to provide a “free appropriate public education” (FAPE) to each qualified student with a disability who is in the school district’s jurisdiction, regardless of the nature or severity of the disability. Under Section 504, FAPE consists of the provision of regular or special education and related aids and services designed to meet the student’s individual educational needs as adequately as the needs of nondisabled students are met.

Persons with a physical or mental impairment that substantially restricts one or more major life activities are eligible for services under Section 504. Some schools use Section 504 to support students with learning disabilities (LD) who need instructional accommodations rather than the specially designed instruction provided under the Individuals with Disabilities Education Act (IDEA) (see box on Page 3). Children and youth with Attention-Deficit/Hyperactivity Disorder (AD/HD) who don’t need or qualify for more comprehensive special education support also are frequently served under this law. All students eligible for special education services under the IDEA are also eligible under Section 504; however, a student eligible under Section 504 is not necessarily eligible under IDEA.

Americans with Disabilities Act Amendments Act of 2008

The Americans with Disabilities Act (ADA), passed in 1990, was the first comprehensive civil rights law for people with disabilities. As such, it applies to all qualifying private employers (employers with 15 or more employees), all state and local government programs, including the public schools, and all places of public accommodation, including non-religiously controlled colleges and universities and test agencies. However, following its enactment, some of the fundamental provisions of the ADA were narrowed by Supreme Court rulings. The rulings (most notably *Sutton v. United Airlines*, 1999 and *Toyota Motor Manufacturing v. Williams*, 2002) served to limit the scope of opportunities and protections that were originally intended

by the legislators and disability advocates involved in the creation and passage of the law. Congress responded to this constriction by passing the Americans with Disabilities Act Amendments Act of 2008, which included a conforming amendment (a legislative procedure used to make an old law be consistent with the new law) to Section 504. The ADAAA became effective on January 1, 2009.

The ADAAA did not change the basic definition of disability, but rather the manner in which the definition is to be interpreted. The ADAAA continues to define disability as an individual:

1. With a physical or mental impairment that substantially limits one or more major life activities;
2. Who has a record of such an impairment; or
3. Who is regarded as having such impairment.

Significant Changes Made by ADAAA

Expanded list of major life activities

Before ADAAA: The definition of major life activities included but was not limited to: caring for oneself, performing manual tasks, seeing, hearing, speaking, breathing, learning, and working.

Now: The following activities have been added: eating, sleeping, walking, standing, lifting, bending, reading, concentrating, thinking, and communicating. While the list of major life activities has been expanded, it remains “illustrative.” In other words, the list is not intended to be all-inclusive and an activity not listed may be covered.

In addition, the legislation clarified that an impairment substantially limiting one major life activity does not need to limit others to be considered a disability. For example, a student will be considered to have a disability if his or her impairment substantially limits reading even if it does not substantially limit learning.

Of particular interest to students with learning disabilities and their parents is the clarification that “an individual with an impairment that substantially limits a major life activity should not be penalized when seeking protection under the ADA simply because he or she managed their own adaptive strategies or received informal or undocumented accommodations that have the effect of lessening the deleterious impacts of their disability.” (Source: Representative George Miller on the floor of the House; *Congressional Record* 9/17/2008, Page: H8294) For example, a student with learning disabilities who is performing well academically may, nonetheless, be a qualified individual under both the ADAAA and Section 504.

Important Terms to Know

Accommodations

Accommodations are tools and procedures that provide equal access to instruction and assessment for students with disabilities. They are provided to “level the playing field.” Without accommodations, students with disabilities may not be able to access grade-level instruction and participate fully on assessments. Accommodations are not intended to reduce learning expectations.

Specially Designed Instruction

IDEA defines specially designed instruction as “adapting, as appropriate to the child’s needs, the content, methodology, or delivery of instruction to address the unique needs of the child that result from the child’s disability; to ensure access of the child to the general education curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children.”

Substantially limits a major life activity or activities

Before ADAAA: The Supreme Court rulings had resulted in a narrow interpretation of “substantially limits,” both in scope and conditions on which the determination was made.

Now: While the ADAAA did not change the term “substantially limits,” the new law clearly establishes that the term is to be interpreted broadly and inclusively.

The law clarifies that the measurement for impairments that are episodic or in remission must be considered at the time they are active. For example, whether or not a student with a condition such as depression, diabetes, asthma, or anxiety that is in remission is “substantially limited” would need to be determined when the student’s condition is active. Also, Congress clarified that the decision of whether an individual has a disability should not entail an extensive analysis and that it should be expansive.

Removes consideration of mitigating measures

Before ADAAA: Several Supreme Court decisions in 1999 established that the decision of whether an individual has a disability under the ADA must take into account the effects, both positive and negative, of any “mitigating measures” used by that individual.

Now: The ADAAA requires the “substantially limits” decision to be made without regard to any impact or ameliorative effects of mitigating measures. For example, schools can no longer consider the effect of medication on a student with AD/HD, asthma, diabetes, etc.

In addition, the ADAAA provides an expansive list of mitigating measures. Such measures include but are not limited to: medication, medical supplies, equipment or appliances, low-vision devices (except eyeglasses or contact lenses), hearing aids, cochlear implants, assistive technology, learned behavioral or adaptive neurological modifications, and reasonable accommodations.

What We Know

A 2005 survey of school districts produced or reported on the following:

- The national average of students on Section 504 plans is approximately 1.2% of the K-12 school population.
- Middle and high school students make up a greater percentage of those served by Section 504 than elementary students.
- The percentage of 504-only students did not significantly differ among rural, suburban, and urban settings.
- There was no significant difference in the percentage of 504-only students with respect to school wealth.
- AD/HD was the most common basis for a Section 504 plan, followed by diabetes.
- Only 14 states had established 504 policies and procedures in 2004.
- No state collected data on 504-eligible students.

Source: *Section 504 and Public Schools: A National Survey Concerning “Section 504-Only” Students*, Rachel A. Holler and Perry A. Zirkel, *NASSP Bulletin*, Vol. 92, No. 1, March 2008, 19-43.

Impact of Significant Changes

Elementary and Secondary Schools

The significant changes to Section 504 brought about by the ADAAA are likely to have substantial impact on the policies and procedures used by elementary and secondary schools. While the U.S. Department of Education (U.S. Ed) does not currently expect to issue changes to the federal regulations governing Section 504 (as of August 2009), the Office for Civil Rights at the U.S. Ed quickly updated guidance documents that reflect these changes. Section 504 experts are urging school and district administrators to quickly review and update existing policies and procedures regarding Section 504 implementation so as not to run afoul of the ADAAA, as has already happened in some districts (see Case in Point: North Royalton City School District, Page 6).

Without question, the expanded list of major life activities — now including reading, concentrating, and thinking, in addition to learning — provides a basis for more students to be considered for eligibility under Section 504. Additionally, the clear and concise language regarding mitigating measures and the expansive list of measures included in the ADAAA provides a different framework for eligibility decisions. Since most Section 504 plans are currently being provided for students with AD/HD, many more students may be eligible when the effects of medication are not part of the consideration of “substantially limits.” The same is true for the change clarifying that the impact of an impairment is to be measured at the time the impairment is active.

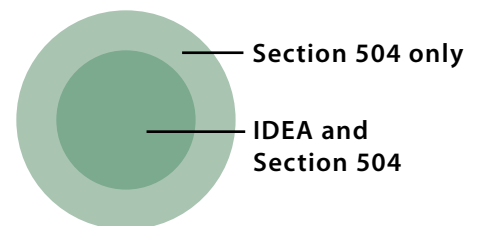
Relationship between Section 504 and the IDEA

The Individuals with Disabilities Education Act (IDEA) was enacted in 1975 (as the Education for All Handicapped Children Act) — just two years after enactment of the Rehabilitation Act. Representing an expansive new responsibility for public schools, implementation of IDEA quickly became the focus of public schools across the nation. The IDEA also came with a promise of federal funds to help local districts pay for the excess costs of providing education to children with disabilities, whereas Section 504 — an anti-discrimination law — provides no additional funding to schools.

All students eligible for special education services under the IDEA are also covered by Section 504. However, not all students eligible under Section 504 are eligible under IDEA (see graphic at right).

There are several situations where eligibility for Section 504 should now be considered. Among them are:

- When a student has been evaluated for eligibility under IDEA and found to be ineligible;
- When a student previously eligible for and receiving services under IDEA is determined to no longer need special education services;
- When a student is found eligible for services under IDEA but the parents refuse to consent to the provision of special education;
- When parents decide to revoke consent for the provision of special education services for their child after initial consent and delivery of services.



There are many important differences between Section 504 and the IDEA. For additional information, see the Comparison Chart on Pages 9-10.

Case in Point: North Royalton City School District

In a March 30, 2009 decision regarding a Section 504 complaint filed against the North Royalton (OH) City School District involving a nine-year-old with an anxiety disorder and a life-threatening nut allergy, the Office for Civil Rights (OCR) (Midwestern Division, Cleveland, Ohio) found several areas in which the district's policies and procedures failed to comport with the requirements of Section 504. Among them were:

- **The district's written policies provided that a student whose impairment does not limit his learning is not entitled to a Section 504 plan.** OCR ruled that learning is only one of a number of major life activities that districts should consider. OCR noted that the ADAAA expanded the list to include major bodily functions, concentrating, communicating and thinking, and clarified that life activities are not limited to those identified in the law.
- **The district considered the services contained in the student's individual health plan as mitigating measures.** OCR noted that, under the ADAAA, the district must not take into account mitigating measures, such as the use of medicine or the provision of related aids and services, such as those provided in individual health plans or emergency allergy plans, when determining a student's disability status.
- **The district's written policy was inconsistent with Section 504 and the ADAAA in that it provided that students with disabilities who do not require special education are entitled only to "reasonable, but more than standard" accommodations and modifications to the general curriculum.** OCR's ruling noted that, under Section 504 and the ADAAA, reasonableness is not the standard for the provision of services. Rather, a school district must provide, at no cost to the parents or guardians, those services determined to be necessary to provide a qualified student with a disability with a FAPE, at the elementary and secondary level. Reasonableness is a standard that only applies under Section 504 and the ADAAA in the employment context.

The OCR resolution agreement with North Royalton includes several system-wide activities, including:

- The district will revise its procedures to meet current Section 504 requirements.
- The district will notify students, parents, faculty, and staff of the revised procedures, including how to obtain accessible hard copies and/or accessible electronic copies. OCR will also provide training to district staff.
- The district will issue a letter to the parents or guardians of all students in the district currently receiving services under emergency allergy plans, informing them of the revised Section 504 procedures and of their right to request an evaluation under Section 504, at no cost to themselves, if they believe that their child's medical impairment substantially limits one or more major life activity.



Colleges and universities

Colleges and universities (institutions of higher education or IHEs) that receive federal funds must also adhere to Section 504. However, their obligations are significantly different than elementary and secondary schools. IHEs are required to provide qualified students with appropriate academic adjustments and auxiliary aids and services that are necessary to afford the individual an equal opportunity to participate in a school's program. However, such institutions are not required to make adjustments or provide aids or services that would result in a fundamental alteration of the program or impose an undue burden on the institution.



For example, a university would not be expected to eliminate academic requirements essential to the instruction being pursued by a student, although the school may be required to make modifications in order to enable students with disabilities to meet those academic requirements. Current regulations provide that "Modifications may include changes in the length of time permitted for the completion of degree requirements, substitution of specific courses required for the completion of degree requirements, and adaptation of the manner in which specific courses are conducted."

Source: Statement of the Managers to Accompany S. 3406,
The Americans with Disabilities Act Amendments Act of 2008

Unlike elementary or secondary schools, IHEs have no obligation to locate, evaluate or serve eligible persons. Therefore, seeking academic adjustments, aids and services are the responsibility of the individual. Providing the necessary supporting documentation is also the individual's, and not the school's responsibility. IHEs should have clear and concise documentation policies that can be accessed by students interested in the institution. Documentation from elementary and secondary school years may not necessarily fulfill the requirements of an IHE. Once a request has been made and supported by the student's documentation and presented to program or faculty members, IHEs must have a process in place to determine if accommodations are reasonable (i.e., and therefore acceptable) or a fundamental alteration of the program (i.e., and therefore unacceptable).

As with elementary and secondary schools, the significant changes to Section 504 brought about by the ADAAA are likely to expand the numbers of individuals in IHEs who could be determined qualified under Section 504 and therefore would be eligible to receive supports and services necessary to provide equal opportunity to participate in and benefit from the programs.

Questions for Parents to Consider

Q: Will more students be eligible for Section 504 because of the ADAAA?

A: It depends. School districts that have fully implemented Section 504 in an expansive manner may not experience increases in eligible students. Those that have taken a more limiting approach will most likely experience an increase once the significant changes in the ADAAA are implemented.

Q: My child is receiving informal accommodations that the teacher or other school personnel (e.g., counselor, nurse) are providing. Should I request to formalize these accommodations through a 504 plan?

A: Yes. By documenting that the child has a disability which substantially limits a major life activity (e.g., learning, concentrating, other), you are ensuring the legal protections provided by federal law — something Congress intended when it passed the ADAAA. You are also providing documentation in the case of transition to a new school or setting, teacher changes or other life event.

Q: My child was previously found ineligible for services under IDEA and a Section 504 plan was not discussed at that time. Since ADAAA has broadened eligibility requirements, should we request a reevaluation?

A: Yes, if you believe your child could benefit from a Section 504 plan. Because of the similarities between the IDEA and Section 504 “Child Find” requirement, schools should begin to pay particular attention to students found ineligible for services under IDEA and be willing to discuss whether a Section 504 plan is appropriate for the child.

Q: My child was previously found ineligible for a Section 504 plan. Should we request another evaluation?

A: Yes, especially if you believe the denial was directly related to the “old” interpretation of the law (e.g., finding that there was no substantial limitation of a major life activity or denial due to consideration of a mitigating measure such as medication).

Q: My child has been eligible for services under IDEA and now the school proposes to end that eligibility. Should there be a discussion about a Section 504 plan?

A: Yes. There are a substantial number of children (approx. 3%) who are declassified each year. It is very likely that many of these children need accommodations for both classroom instruction and testing in order to be successful in general education.

Q: How does the ADAAA affect adults who need testing accommodations on graduate-level or other exams?

A: Congress intends for any qualified individual to have access to testing accommodations. Upon passing the ADAAA, Congress also stated: “...testing entities may establish appropriate and reasonable documentation requirements related to the determination of disability, as is true under current law.”

IDEA and 504 Comparison Chart

Component	IDEA	Section 504
Purpose	A federal statute whose purpose is to ensure a free and appropriate education (FAPE) for children with disabilities who fall within one of the specific disability categories as defined by the law.	A broad civil rights law which protects the rights of individuals with disabilities in any agency, school or institution receiving federal funds to provide persons with disabilities, to the greatest extent possible, an opportunity to fully participate with their peers.
Who is Protected?	Covers eligible students ages 3-21 whose disability adversely affects their educational performance and/or ability to benefit from general education.	Covers all persons with a disability from discrimination in educational settings based solely on their disability.
Services	Provides individual supplemental educational services and supports, in addition to what is provided to students in the general curriculum, to ensure that the child has access to and benefits from the general curriculum. Provided free of charge to the parent.	Requires schools to eliminate barriers that would prevent the student from participating fully in the programs and services offered in the general curriculum.
Requirements for Delivering Services	<p>Requires a written Individualized Education Program (IEP) with specific content addressing the disability directly and specifying educational services to be delivered, mandating transition planning for students 16 and over, as well as a Behavior Intervention Plan (BIP) for any child with a disability that has a behavioral issue.</p> <p>Defines "Appropriate Education" as a program reasonably calculated to provide "educational benefit" to the student. Related services (e.g., counseling, speech, transportation, occupational and physical therapy, etc.) are provided as required for the student to benefit from the educational process and are aligned with specially designed instruction.</p>	<p>Does not require a written IEP but does require a documented plan. Requires that reasonable accommodations be made for the child with a disability. Requires the school to provide reasonable accommodations, supports and auxiliary aides to allow the child to participate in the general curriculum.</p> <p>Defines "Appropriate Education" as comparable to the one provided to general education students.</p>
Funding	Provides additional funding to states and local school districts to help cover the excess cost of providing special education to eligible students.	<p>Does not provide any additional funding to states or local school districts.</p> <p>Additionally, IDEA funds may not be used to serve children found eligible only under Section 504.</p>
Evaluation Procedures	<p>A full evaluation is required, using a variety of assessment tools and strategies to gather relevant functional and developmental information, including information provided by the parent that may assist the team in determining whether the child has a disability and how it affects the child's educational program.</p> <p>Multiple assessment tools must be used to assess the child in all areas of the suspected disability.</p> <p>Written consent is necessary by parent or guardian before an initial evaluation is conducted.</p> <p>Requires a reevaluation every three years by the IEP team to determine if services are still needed to address the student's disability, unless the parent and other members of the IEP team agree it is not necessary.</p>	<p>Evaluation draws on information from a variety of sources in the area of concern. A group decision is made with persons knowledgeable about the student, evaluation data, and available educational placement options. Written consent is not necessary before completing an evaluation; however, notice must be provided to the parent or guardian.</p> <p>Requires yearly reevaluations or periodic review.</p>

IDEA and 504 Comparison Chart (continued)

Component	IDEA	Section 504
Independent Evaluation	Allows parents to request an Independent Educational Evaluation (IEE) at the school district's expense if the parent or guardian disagrees with the evaluation obtained by the school district. The independent evaluator must meet the same criteria the district requires for their employees and must be approved by all parties.	Does not allow independent evaluations at the district's expense or the ability to request an independent educational evaluation.
Procedural Safeguards	<p>Requires written notice to the parent or guardian prior to identification, evaluation and/or placement of the child.</p> <p>Changes of services or placement must have written notice before any change can take place. Requires due process rights to be followed at all times and a manifestation determination hearing for discipline procedures.</p> <p>For any child with behavioral concerns, a Functional Behavior Assessment (FBA) must be completed and a Behavior Intervention Plan (BIP) written to assist the student in learning appropriate behaviors and providing supports to enable the student to be successful in their learning community.</p>	<p>Does not require written notice to the parent or guardian.</p> <p>Requires notice before a "significant change" in placement. Requires due process rights if the child is referred for formal evaluation under IDEA, and the team determines not to evaluate.</p>
Placement Decisions	<p>Requires the district and schools to use information from a variety of sources, consider all documented information, and use a team approach to make eligibility decisions. Team members are identified under IDEA and must be knowledgeable about the child, evaluation data, the continuum of placements and services available.</p> <p>Requires that the student receive a free and appropriate education with his or her non-disabled peers in the least restricted environment (LRE).</p> <p>Requires an IEP meeting before any change in placement or services is made. Students are eligible for a full continuum of placement options, including regular education with related services, as needed.</p>	<p>Requires the district and schools to use information from a variety of sources and to consider all documented information. Uses a team approach to make eligibility decisions, with team members being knowledgeable about the child, evaluation data, and the and continuum of placements and services available.</p> <p>The student must receive a free and appropriate education with his or her non-disabled peers.</p> <p>A meeting is not required for a change of placement. Students are served in general education with or without modification.</p>
Due Process	Requires districts to provide resolution sessions and due process hearings for parents or guardians who disagree with the identification, evaluation, implementation of IEP, or the student's LRE placement.	<p>Requires districts to provide a grievance procedure for parents and students who disagree with the identification, evaluation, implementation of plan, or LRE placement. A grievance procedure to follow must be provided to parents and employees and a 504 coordinator identified in the district to assist individuals as needed.</p> <p>Does not require a due process hearing before Office for Civil Rights (OCR) involvement or court action, unless the student is also covered by IDEA.</p> <p>Compensatory damages are possible.</p>

Resources

National Center for Learning Disabilities, Webinar Presentation: The Americans with Disabilities Act Amendments Act: Its Impact on Students with LD and AD/HD
<https://cc.readytalk.com/cc/playback/Playback.do?id=0ggjuljg>

National Center for Learning Disabilities, Section 504 in 2009: Broader Eligibility, More Accommodations
www.nclld.org/on-capitol-hill/federal-laws-aamp-ld/adaaa-a-section-504/section-504-in-2009

U.S. Department of Education, Office for Civil Rights, Protecting Students With Disabilities: Frequently Asked Questions About Section 504 and the Education of Children with Disabilities
www.ed.gov/about/offices/list/ocr/504faq.html



The National Center for Learning Disabilities (NCLD) works to ensure that the nation's 15 million children, adolescents and adults with learning disabilities have every opportunity to succeed in school, work and life. NCLD provides essential information to parents, professionals and individuals with learning disabilities, promotes research and programs to foster effective learning and advocates for policies to protect and strengthen educational rights and opportunities.

For more information, please visit us on the Web at www.LD.org.

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- *A Parent's Guide to Universal Design for Learning (UDL)*