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*Empowered Parents: Educated, Engaged, Effective!*

GUIDE TO SERVICES FOR STUDENTS WITH DISABILITIES:

# THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA)

# AMERICANS WITH DISABILITIES ACT (ADA)

# SECTION 504 OF THE VOCATIONAL REHABILITATION ACT

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## INTRODUCTORY COMMENTS

Section 504 of the Vocational Rehabilitation Act (Section 504, passed in 1973) predates both the Individuals with Disabilities Education Act (IDEA) and the Americans with Disabilities Act (ADA, passed in 1990 and amended in 2008). Section 504 is the first federal legislation to prohibit discrimination based on disability. Like ADA, Section 504 has broader coverage than education, prohibiting discrimination in employment and public accommodations (such as child care, before and after-school care, municipal recreation programs, etc.), and protecting adults as well as children.

Prior to 1997, IDEA did not prohibit *discrimination* against students with disabilities, although it required the provision of a “free, appropriate public education.” Some non-discrimination provisions that had previously been only in Section 504 or ADA (participation in extracurricular and nonacademic activities, such as after-school programs, intramural sports, etc.) were specifically included in the 1997 IDEA reauthorization.

The Individuals with Disabilities Education Act, ADA, and Section 504 are federal statutes with accompanying federal regulations that provide additional guidance. For Section 504 in particular, it is critical to be familiar with both the statute and the regulations, because the regulations for Section 504 are more detailed than the statute. If there is any inconsistency between federal statutes or regulations and state law or regulation, the federal law rules. The state may grant MORE rights to families and students than the federal law, but it may not grant FEWER rights.

While IDEA and Section 504 are very similar in their requirements for students with disabilities, IDEA has more specific protections than Section 504 for parents and students. For students who are eligible for both IDEA and Section 504, their needs are generally addressed through the IDEA special education process. There may be some additional non-discrimination provisions from Section 504 that could need to be addressed with a Section 504 plan. In addition, students whose parents revoke consent for special education under the 2008 IDEA Supplemental Regulations are likely eligible for continued services and supports under Section 504; parents of these students should request evaluation and services under Section 504 along with their written revocation of consent of special education services.

In discussing any law, there are five crucial questions that must be answered. First, who must comply with, or obey, the law? Second, who is the law intended to protect? Third, what does the law require? Fourth, what are the procedures for enforcing the law? And fifth, what happens if the law is broken? Each of these questions is addressed in order in this packet.

### Who Must Comply?

**Section 504** prohibits discrimination by recipients of federal dollars. This includes public schools, private schools or charter schools that receive federal financial assistance (textbooks, lunch, transportation) either directly from the federal government or through the state government. It also includes child care centers that receive federal or state subsidies, before and after-school programs, municipal recreation programs, etc. It prohibits discrimination in employment, education, and public accommodations. It also prohibits discrimination by colleges and universities that receive federal financial assistance.

**ADA** prohibits discrimination by all qualifying private employers (Title I); all state and local government programs, including public schools (Title II), and all places of public accommodation, including non-religiously controlled colleges and universities and test agencies (Title III).

**IDEA** applies to state education agencies (SEAs), local education agencies (LEAs), and any entities with which the state or districts contract to fulfill their IDEA obligations. It applies to publicly-funded charter schools, private special education schools and residential placements, and special services school districts, as well as educational services for students with disabilities provided by state agencies such as Departments of Human Services and Juvenile Justice educational services for students with disabilities.

## Who Is Protected?

**Section 504** protects an individual who has, has had, or is perceived as having, **a physical or mental impairment which substantially limits one or more major life activities**, such as caring for oneself, performing manual tasks, walking, seeing, hearing, sleeping, speaking, breathing, standing, lifting, bending, learning, reading, concentrating, thinking, communicating, or working, among others. It protects students whose disability limits their ability to attend, participate in, or receive benefit from, their schooling. Section 504 protects individuals with disabilities from birth to death, but this overview discusses only its coverage for students from kindergarten through high school in public schools. It includes individuals with a full range of disabilities far beyond those covered by IDEA, and it also protects every student who is eligible for IDEA. Examples include students with cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, diabetes, heart disease, HIV/AIDS, dyslexia, dysgraphia, rheumatoid arthritis, ADD/ADHD, cystic fibrosis, severe allergies, and asthma. Some students with these disabilities may be covered by IDEA, but only if they meet the criteria described in the next paragraph.

**ADA** also prohibits discrimination against a person who has, has a record of having, or is regarded as having, a physical or mental impairment that substantially limits one or more major life activities. In the reauthorization of ADA in 2008, Congress clarified that limitation in one major life activity does not need to impact other major life activities in order to trigger the protections of ADA.

The term “major life activity” should be broadly interpreted to protect more people, rather than fewer. Even if a person has a disability or health condition that occurs only periodically (such as ADHD, depression, asthma, allergies, or diabetes), or is in remission (such as cancer), can trigger ADA protections when they are active. The 2008 ADA amendments do not allow the use of “mitigating measures” in determining whether a person has a disability, except for the use of glasses or corrective lenses if they fully correct the vision problem. “Mitigating measures” include interventions such as medication, prosthetics, hearing aids, medical equipment, assistive technology or accommodations. This means that a person can still be protected as having a disability even if they take medication that usually removes most of their symptoms, such as students who take medication for ADHD, asthma, diabetes, or serious allergies. Mitigating measures include, but are not limited to, medication, prosthetics, hearing aids, medical equipment, learned behavioral or adaptive neurological modifications, assistive technology or accommodations.

The 2008 ADA amendments also expanded protection for people who are “regarded” as having a disability. Prior to the 2008 ADA amendments, courts had interpreted this provision to apply (and thus protect a person) only if the employer, school, etc. regarded the person as having a disability that substantially limited a major life activity. The 2008 ADA Amendments clarified that this provision is intended to protect individuals who were subject to discrimination who did not actually have a disability but who were perceived as having a disability, or a person who had a disability but only with minor symptoms.

This expansion of protection under ADA 2008 also expands protection under Section 504 even though the 504 regulations were not changed, as interpretations of the ADA and Section 504 have generally been regarded as applying equally to both laws.

**IDEA** guarantees a free appropriate public education to children and youth from birth to 21 who have a disability that affects their ability to learn (“adversely affects educational performance”) and requires special education and related services to benefit from their education. “Learning” does not mean just academics; it also includes behavior, functional life skills, etc. IDEA covers a specific group of disabilities, and if a child doesn’t have one of those disabilities she is not eligible under IDEA even if the disability affects her ability to learn. The covered disabilities include mental retardation, hearing impairment, speech/language disability, serious emotional disturbance, other health impaired, autism, traumatic brain injury, learning disability, multiple disabilities, deaf, blind, and deaf-blind. (Both ADHD and Tourette Syndrome are included under the “other health impaired” category). In the 2004 amendments to IDEA, the law clarified that a child with disabilities is protected by IDEA even if the child is receiving passing grades, progressing from year to year, or has not been retained from progressing to the next level.

### What is required?

**ADA** requires that schools not discriminate; its regulations regarding students with disabilities are not as specific as Section 504 regarding the affirmative obligation of schools to provide a free, appropriate public education to all students with disabilities.

**Section 504** (through its implementing regulations) and **IDEA** both require the provision of a “free, appropriate public education in the least restrictive environment” to all eligible students (FAPE in LRE). (While the language of the statute of Section 504 and ADA are similar, the Section 504 regulations regarding public schools are more comprehensive than other areas of Section 504 regulations such as those relating to employment or other public accommodations. The Section 504 regulations regarding education do not just prohibit discrimination; they require provision of FAPE in LRE just as IDEA does). FAPE in LRE includes:

a. **Requirement to identify all potentially eligible students/“child-find”**. This means that there must be ways for parents to refer their own children as potentially eligible; teachers must understand their obligations to identify and refer potentially eligible students; and administrators and others who work with children must understand these obligations. A decision must be made for each referred child as to whether or not an evaluation will be conducted. Under Section 504, school districts only have the responsibility to identify all potentially eligible students in their public schools, while under IDEA, school districts must also identify, evaluate, and if eligible, provide services to students with disabilities in private schools located in their district.

Under **Section 504**, parents must be provided with annual notification of the protections of Section 504, and how to access them. Parents should be receiving this notice as part of parent guides, direct correspondence, or other means reasonably designed to ensure that parents are aware of Section 504. Schools decide whether or not an evaluation will be conducted and what the evaluation will consist of, as well as who will conduct the evaluation, *but parents must provide informed written prior consent to the initial evaluation.*

Under **IDEA**, each district must have written policies and procedures to ensure that they identify each potentially eligible child, even those children not in school or in private or religious schools. Those policies and procedures must provide for parent referral and for teacher/ administrator referral, as well as referral by other agencies that work with children. If the district wishes to evaluate, they must either obtain informed, written parental consent to conduct an evaluation, or they must go to a hearing to demonstrate sufficient evidence to justify an evaluation.

**b. Assessment and eligibility determination.** Under IDEA and Section 504, once it's determined that there will be an assessment, a decision must be made about what the assessment(s) will consist of; and after the assessment(s), whether or not the child is eligible and on what basis. Assessments must be racially/culturally non-discriminatory, valid for the purposes for which they are used, and provided in the language and form most likely to generate the data needed for decision-making. At least one team member must be knowledgeable **IN** the area of suspected disability.

Under **Section 504**, the U.S. Department of Education Office for Civil Rights interprets the law to require parental consent for evaluation. (A Section 504 evaluation may not be used to circumvent the parent's right to consent or withhold consent for an evaluation for special education eligibility.) The decision whether or not to evaluate is made by the 504 team, which must include people who are knowledgeable about the child and the suspected disability. There are no specific timelines under Section 504, but the U.S. Department of Education's general rule is that the same timelines for special education apply to Section 504 if the district does not have its own specific 504 timelines. If an evaluation is to be conducted, 34 CFR 104.35(b) requires the district to select and administer tests that ensure that test results accurately reflect the student's aptitude, achievement, or other factor being measured. Guidance from the US DOE OCR notes that "Section 504 also requires that tests and other evaluation materials include those tailored to evaluate the specific areas of educational need and not merely those designed to provide a single intelligence quotient. The tests and other evaluation materials must be validated for the specific purpose for which they are used and appropriately administered by trained personnel." Evaluation procedures must incorporate information from more than one test and from a variety of sources.

Under **IDEA**, once it is decided that there will be an evaluation, the decision is made regarding what the evaluation will consist of and who will conduct it. The evaluation must occur within 60 days of consent (or within another timeframe if the state has another timeframe), and evaluation, determination of eligibility, and development and implementation of the IEP must occur within 90 calendar days of written consent. The evaluation must be multi-disciplinary (at least two professionals). Each district must evaluate each student with disabilities who may require special education and related services, including students attending nonpublic schools. The evaluation must identify all areas of suspected disability, including if appropriate health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor ability, and the impact of the disability on all education areas (academic, behavioral, social-emotional, functional, etc.), and consider the child's strengths as well as needs, and the parents' concerns for enhancing the education of their child. The focus must be on enabling the student **to be involved in and progress in the general curriculum**.

#### **Independent Evaluation:**

Under **Section 504**, parents have a right to an independent evaluation *at their own expense*, and to provide relevant information that must be considered by the team.

Under *IDEA*, parents have a right to an independent evaluation at public expense each time the district conducts an evaluation, unless the district requests a hearing “without unnecessary delay” and persuades the hearing officer that their evaluation is comprehensive and appropriate. Parents do not have to give any reason for requesting an independent evaluation, and districts may not place barriers in the way of parents seeking an independent evaluation. The parents select the independent evaluator as long as they meet state and district criteria and charge a reasonable rate. Parents also have the right to provide relevant information that must be considered by the team.

**Re-Evaluation:** Every year, there must be an annual review.

Under *Section 504*, there must be an annual determination of continuing eligibility and an annual review of the services and accommodations plan. Each student with disabilities eligible under Section 504 must be re-evaluated “periodically,” and may not be determined ineligible without a re-evaluation. A student’s Section 504 plan should not be significantly changed or terminated without a re-evaluation.

Under *IDEA*, there must be an annual review to develop the IEP for the next year. The IEP must be in place before the start of the next school year, and before services begin. *IDEA* provides that a re-evaluation should be conducted whenever necessary to confirm continuing eligibility or identify new needs, or upon parent or teacher request. A triennial re-evaluation is required to determine continuing eligibility, unless the parent and district agree that no new assessments are required to document continuing eligibility. Even if the district does not believe that a full re-evaluation is needed at the three year mark, the parent has the right to request – and receive – a full re-evaluation if they believe it is necessary. Parental consent is required for each re-evaluation, unless the district can document that it sought parental consent and the parents did not respond (not that they denied consent). If parental consent is denied, the district must request and prevail at an impartial hearing in order to conduct the re-evaluation.

### c. Development of a Plan for Services

**Section 504:** Once eligibility has been determined, the Section 504 team (which must include someone knowledgeable in the area of disability as well as knowledgeable about the child) develops a **Section 504 Services and Accommodations Plan**. There is no requirement that the parent be part of the team that develops the Section 504 plan, but it is best practice to include the parent as a decision-making member of the Section 504 team. The district may use an IEP as the format for this plan, as long as it contains all necessary services and accommodations. The district may also use IDEA procedures as a means of developing Section 504 plans, but it does not require them to do so. This plan may include specialized instruction, related services, and/or accommodations within the general education classroom as well as any other services available under IDEA. These services may include:

**Accommodations** such as physical barrier removal, seating placement, extended time for testing, testing modifications, adjustment of class schedules, rest periods, use of aides (tape recorders, calculators, audio-visual equipment, computers, modified textbooks, etc.)

**Push-in (in-class) or Pull-out services** such as class or homework note-taking assistance, oral catheterization, administration of medication such as epi-pens, oral medicine, and inhalers and monitoring of blood levels and physical or mental status, positive behavioral supports, consultation, service coordination, tutoring, counseling, and all the related services specifically addressed in IDEA. Districts may not require parents to sign a waiver of liability in order to have medication administered, except that the

district may require that the parent sign a waiver of liability as long as the medication is administered pursuant to the directions given by the parent and/or healthcare provider.

***Services or accommodations required for non-discrimination, meaningful program access, and “as adequate an education” as children without disabilities***, such as access to magnet schools, charter schools or choice programs, before and after-school programs, clubs, graduation ceremonies, and extracurricular activities. Section 504 does not contain specific requirements regarding services or courses of study related to ensuring an effective transition from school to adult life, but it does require that schools make job training and other services available to other students available to students with disabilities.

Under ***IDEA***, an ***Individualized Education Program*** must be developed by the IEP team within 30 days of when a student is determined eligible for IDEA services. The IEP team must include the child's general education teacher, if the child is or may be participating in general education; the parent(s); an individual qualified to provide or supervise special education; a professional team member to interpret evaluations; and a district representative authorized to make commitments on behalf of the district. The general educator must participate in all decisions affecting general education or the student's participation in the general education classroom. The district may proceed with the IEP meeting without all required participants if they secure parental consent and the team member to be excused provides information in advance of the meeting if their area is going to be discussed at the meeting.

The IEP must contain a description of the present levels of educational performance, including how the child's disability affects involvement and progress in the general curriculum; measurable annual goals (and short term objectives or benchmarks, if the child is taking alternate assessments related to alternate standards) related to meeting the child's needs and to enable the child to be involved in and progress in the general curriculum; specific special education and related services and supplementary aids and supports that will be provided to or on behalf of the student to help the student attain the goals and be involved in and progress in the general curriculum and participate in extracurricular and nonacademic activities with non-disabled peers; projected date for beginning of services and frequency, duration and location of services; extent of participation in state and district-wide assessments, and any modifications or accommodations for that participation, participation in extracurricular and nonacademic activities with non-disabled peers; methods to determine if the goals are being achieved; methods to inform parents of progress towards the goals; and placement. Districts must periodically report to special education parents (through quarterly reports or reports concurrent with report cards) of their children's progress toward reaching the annual goals. IDEA defines “special education” as specially designed instruction, including where needed, adaptation of the content, method and mode of delivery. Under IDEA 2004, the services in the IEP should be based on peer-reviewed research to the extent practicable. IDEA also requires that students aged 16 and older, or younger if appropriate, have an IEP that contains a transition plan that addresses the student's interests, aptitudes, and their future plans regarding post-secondary education, career, housing, independent living, and community involvement. IEPs must also contain transition services and courses of study that are needed to help the student reach those goals.

Possible services include administration of medication, aides, assistive technology, audiology, counseling, in-class supports, medical services (for diagnosis), nursing services, modified instruction, modified texts, parent counseling, peer supports, peer training, professional development for the teacher or aide, physical or occupational therapy, psychological services, recreation, social work services, speech pathology services, transition services, transportation, and other services as needed to enable the student to benefit from their education.

## Special Circumstances:

Under *IDEA*, there are special circumstances that must also be discussed at each IEP meeting, and if needs are identified in the following areas, services must be put into the IEP to address them:

- Behavior needs (functional behavior assessment and positive behavior support plan)
- Need for students who are blind to learn Braille
- Need for communication with peers and teachers, whether or not the student has a hearing disability, and need for students with hearing disabilities to be able to communicate in their mode of communication with teachers and peers
- Need for assistive technology
- Need for extended school year services (ESY)

## Teacher Responsibilities:

Once the service plans have been completed, they must be implemented as soon as possible, so common sense requires that anyone who has implementation responsibilities must be aware of those responsibilities. *IDEA* specifically requires that teachers be provided with a copy of the IEP, and be made aware of their obligations under the IEP; and US DOE OCR guidance on **Section 504** indicates that “regular education teachers must implement the provisions of Section 504 plans when those plans govern the teachers’ treatment of students for whom they are responsible. If the teachers fail to implement the plans,” the district may be in non-compliance.

### **d. Services in the least restrictive appropriate environment:**

**Section 504 and IDEA** both require that the child be placed in the class and school the child would attend if s/he were not disabled, and that the child not be removed from the regular class unless the child’s needs can’t be met there even with the use of supplementary aids and services. Even if the child is removed from the general education classroom, opportunities must be provided to interact with non-disabled peers. The child may not be segregated based on administrative convenience. The district may consider the benefits to the child and to other children, both academically and socially.

Under *IDEA*, services to support the inclusion of a child with a disability may include services to a general education teacher (training, technical assistance, consultation) or even to other students in the class (sensitivity training, peer buddy training, circle of friends, etc.). Exclusion of the student from general education must be justified in writing on the IEP. Teachers and administrators must be made aware of their “least restrictive environment” responsibilities, and provided with training and technical assistance to help them meet those obligations.

Under **Section 504**, if the child cannot be educated in the regular class even with the use of supplementary aids and services, comparable facilities must be provided. In other words, students with disabilities can’t be segregated in the basement or the trailer, or sent out of district to solve an overcrowding problem, if children without disabilities don’t share in the suffering. Section 504 also requires meaningful program accessibility to specialized programs or any programs offered by the school or district. This is an important consideration in districts with magnet schools.

Under *IDEA*, the district must offer a continuum of placements, from full-time in the regular class to part-time regular class/part-time resource room, to part-time regular class/part-time self-contained class, to self-contained class with some interaction with non-disabled peers (such as in gym, lunch, and/or "specials" like art or music), to full-time self-contained class, to the most restrictive settings such as public and private separate schools, residential placement, and home and hospital instruction. But the decision-making process must walk through each setting, from least restrictive to more and then most restrictive, considering each setting as a possible placement not only as it currently exists but as it may be modified with supports, services, aids and accommodations.

**e. Rights to confidentiality of records, and parent access to records (Family Educational Rights and Privacy Act, or FERPA, also known as the Buckley Amendment.)**

*Section 504 and IDEA* both incorporate FERPA, which provides parents with a right to access records upon request, without unnecessary delay and before any IEP meeting (within a reasonable amount of time). FERPA also gives students the right to confidentiality of their records, so that records may not be viewed or released without prior written consent of the parents, unless particular staff need to know (the child's teacher, related services provider, etc.) A log must be kept of anyone who views the records, including the date, person viewing, records viewed, and reason. The parents have a right to see this information. Parents also have a right to a copy of the records if necessary for access, and to a free copy if charging would restrict their access.

Parents also have the right to request deletions or revisions to information in the records they believe is misleading, inaccurate, or irrelevant. They have the right to a hearing to request deletions or revisions. Even if they do not prevail, they have the right to attach comments to any portion of the record with which they do not agree which must be maintained in the student record and disseminated whenever the records are disseminated.

Anyone who has responsibility for student records must be informed of student and parent rights and their responsibility for ensuring that those rights are protected.

**f. Procedural Safeguards**

*Section 504's* procedural safeguards include the right to notice of Section 504's protection; notice to parents explaining any evaluation and placement decisions affecting their child(ren) and explaining the parents' right to review records and appeal any decision regarding evaluation and placement through an impartial hearing; an opportunity for parents to review relevant records; the right to an impartial hearing (but not necessarily using the state's IDEA due process hearing mechanism) if the parent disagrees with the school's decision (a) not to evaluate their child, (b) to determine their child ineligible for 504 services, and/or (c) to provide services with which the parent disagrees, with the right to counsel at the parent(s)' expense; and a review procedure. If a student is receiving Section 504 services that the district believes are necessary to provide the student with an appropriate education, and the parent(s) no longer want their child to receive those services and seeks to withdraw their student from Section 504 services, the district may initiate a Section 504 due process hearing to resolve the dispute.

Students receiving Section 504 services also have procedural safeguards with regard to suspension and expulsion. Neither Section 504 nor its regulations contain a "stay put" placement provision ("stay put" provisions under IDEA require districts to maintain all current services and placement for a student once a

parent requests a due process hearing to challenge a proposed school action, except in certain limited situations involving particular behaviors that subject the student to unilateral discipline by the district). However, Section 504 does require an evaluation before any change in placement, which includes a suspension or expulsion in excess of 10 school days. A long-term suspension (longer than 10 school days) or expulsion of a student protected by Section 504 may only occur if the behavior is not related to the student's disability, so a Manifestation Determination must be made and a Manifestation Review meeting must be convened to determine whether or not the behavior is a manifestation of the student's disability. Section 504 teams may use IDEA's manifestation determination provisions to guide their Section 504 manifestation determination decision-making.

**IDEA** contains specific requirements, known as "procedural safeguards," that protect the rights of parents and children eligible for special education services, including:

*Prior written notice* must include the action to be taken, the reasons why, other options considered and rejected, any tests, procedures, records, reports or factors used by the district to determine whether to propose or deny an action, parental rights to contest the decision, and sources to contact to get help in understanding their rights. The notice must be in the parent's language, and in a format readily understandable by the general public. A full procedural safeguards notice must be provided upon referral for initial evaluation, each notification of an IEP meeting, upon re-evaluation, and when a request for hearing is submitted to the State.

*Parental revocation of consent:* Under IDEA Supplemental Regulations issued in 2008, parents may unilaterally revoke consent for special education services and the district may not request a hearing to override that consent. Once the district receives a written request from a parent revoking consent, the district must provide prior written notice of the implications of that decision (i.e., the child is no longer eligible for special education services or protections) but may not unduly delay complying with the request. *A child whose parent has withdrawn IDEA consent may still be eligible for Section 504.* Parents who wish their child to receive Section 504 services after revocation of consent for special education services should request a Section 504 evaluation with their submission of the revocation of consent for special education services. Even if their child had been determined eligible for special education services under IDEA, the district may still require the child to undergo a Section 504 evaluation in order to be determined eligible for Section 504 services.

*Parent participation in meetings:* IDEA requires that parents be invited to any meetings where decisions will be made about referral, evaluation, eligibility, services, and placement. Meetings must be scheduled at mutually convenient times and places, and parents must be provided notice sufficiently in advance so that they will have an opportunity to attend. If parents can't attend, their participation must be facilitated through the use of electronic conference equipment or other means, and districts must document all attempts to involve the parents. Meetings must be conducted in the language used for communication by the parent, and foreign or sign language interpreters or translators must be provided by the district at no cost to the parent.

*Pendency placement* (students' current placement and services may not be changed without prior written notice, and if the parents request mediation or due process, changes may not be made until the conclusion of those proceedings, unless the parent and district agree otherwise; the only exception to this is in the area of discipline)

*Surrogate parents* for any child whose parents are unknown, unavailable, or who is a ward of the state. The surrogate parent may NOT be an employee of the State or local child welfare agency or any agency involved in the care or education of the child.

### **What are the due process/accountability mechanisms?**

#### **Accountability:**

Under **Section 504**, each district must submit data to the U.S. Department of Education, Office for Civil Rights, about placement, performance, tracking, and discipline. OCR reviews this information, and district offices may instigate investigations based on data that demonstrates potential discrimination. However, these OCR-initiated investigations are not common. OCR is currently prioritizing systemic, not individual, complaint.

Under **IDEA**, each state must set standards or goals for the performance of children with disabilities consistent with standards set for children without disabilities, and performance indicators to assess the progress of children with disabilities in academic achievement, drop-out rates, and graduation rates. Students with disabilities must participate in State and district-wide assessments, with appropriate accommodations and modifications. States must conduct alternate assessments for students who cannot participate in the general assessments. Each state and its districts must make available and report to the public on the assessment results of students with disabilities, with the same frequency and the same detail, and at the same time, as reported for non-disabled students. Each state must report to the public on progress made towards reaching the goals, using disaggregated data and comparing performance of classified students with non-classified students. (This is part of the state's State Performance Plan and Annual Performance Report).

#### **Monitoring:**

No monitoring is conducted under **Section 504**, unless the U.S. Department of Education receives a complaint, in which case it will conduct an investigation. There are no time limits for this investigation, and they often take a long time because the Office for Civil Rights of the U.S. Department of Education, which is responsible for enforcing Section 504, has insufficient staff to timely respond to all complaints. The State generally does not monitor for Section 504 compliance although the state and each district must agree to comply with Section 504 in order to receive federal financial assistance.

Under **IDEA**, the U.S. Department of Education's Office of Special Education Programs (OSEP) identifies states for monitoring pursuant to its review of each state's State Performance Plan/Annual Performance Report. If the Department finds continuing noncompliance, they may withhold part or all of the IDEA funds, or refer the State to the Attorney General for law enforcement proceedings. Under IDEA 2008 Supplemental regulations, correction of noncompliance must occur as soon as possible but no later than a year from identification.

States are required to monitor the districts in their state to ensure compliance and identify progress toward achieving the State performance plan indicators. If continuing noncompliance by a district is identified through the State's monitoring process, the State may withhold special education dollars, direct a particular action plan to be implemented, or take other needed action to ensure compliance.

## Resolution of Complaints:

**Section 504:** Each district must have a Section 504 coordinator or Grievance officer and parents may file complaints with this coordinator or grievance officer. A parent who is dissatisfied with the results of a complaint to the Section 504 coordinator or grievance officer may file a complaint with the U.S. Department of Education, Office for Civil Rights, or go immediately to federal court under a Section 1983 action. Complaints filed in federal court under a Section 1983 action may be filed on behalf of an individual student or a group of students if there are systemic issues that affect more than one student with disabilities in that school, district, or state. State Departments of Education do not have formal responsibility for district compliance with Section 504 issues. "Exhaustion of administrative remedies" is not required. Attorneys' fees are generally not available for hearings under Section 504, but they are available for court cases under Section 1983 if the parent prevails (wins). Mediation is not required, but US DOE OCR may offer to facilitate mediation, or "early complaint resolution," to resolve a filed complaint if both parties are willing to use this approach. However, any agreement that is reached through this process is not monitored by OCR.

**IDEA:** Parents unhappy with district policies, practices or procedures have several remedies. If they are complaining about a policy, practice or procedure that violates the law, they may file a request for complaint investigation with the State Department of Education, Office of Special Education Services. This is not the place to address judgment calls, such as how many sessions of related services are appropriate for a particular child. It is a way to address a complaint that the IEP is not being implemented, or that the IEP for a student aged 16 or older does not have any transition plan or transition services. This is also a way to address more systemic issues such as a district policy to request parents to pay for related services, or never to place children with emotional disabilities in general education classrooms, or other policies, practices or procedures that would affect more than one child. The state must complete its investigation and provide written findings within 60 calendar days of receipt of the written request for complaint investigation, requiring a corrective action plan whenever noncompliance is identified. The state may extend the 60 calendar day timeline if there are extraordinary circumstances with regard to a particular complaint, or if the parent and district agree to extend the timeline in order to participate in mediation or some other alternative dispute resolution process available in the state. The state may not extend the timeline due to systems issues such as inadequate staffing in the complaint investigation office or receipt of an unusually high number of complaints. It may be appropriate for the state to extend the timeline if they receive a complaint that reveals systemic issues of a magnitude requiring an unusually comprehensive investigation in order to fully and fairly resolve all issues, or if there is an unexpected unavailability of a party indispensable to the investigation (such as a serious illness of the complainant who has information needed in order to fully investigate the complaint).

Once the state receives the request for complaint investigation, it must first determine whether or not the complaint alleges something that would be a violation of the law even if it were true. Once it makes that determination, the state has 60 calendar days to carry out an independent on-site investigation if it feels one is necessary; give the complainant the opportunity to submit additional information about the complaint; provide the district with the opportunity to respond to the complaint; review all relevant information and make an independent determination; and issue a written decision.

If parents want to challenge issues particularly relevant to their child (what is the appropriate placement? Is their child eligible? How much service should their child receive?), they must either request mediation by the State or an impartial hearing under the state's due process system on the state's form. If the parent wants to request an impartial hearing, they must first give the district another chance to resolve the

disagreement by participating in a “resolution session” held by the district by filing a complaint with the school district, with a copy to the state. The district must convene a meeting with the parent(s) and relevant members of the IEP team within 15 days of receipt of the parent’s due process complaint, unless the district and parent agree that a resolution session would not be productive, or the school and parent agree to go to mediation. If the parent does not bring an attorney to the resolution session, the district may not bring an attorney, either. The school district has 30 days from the time the complaint is filed to resolve the complaint to the satisfaction of the parents, after which a due process hearing can occur. If the resolution session is unsuccessful, or the district and parent agree it is not necessary, then there is a 45-day timeline for a due process hearing and a decision to be issued by the hearing officer.

Exhaustion of administrative remedies *is* required under **IDEA**, unless going through due process would be futile. If the parent disagrees with the hearing officer’s decision, s/he may appeal to state or federal court within 90 days of receipt of the hearing officer’s decision. If the parent prevails, s/he may be entitled to attorneys’ fees from the district.

**ADA:** The ADA is enforced by the U.S. Department of Justice. Complaints about violations of Title II by units of State and local government or violations of Title III by public accommodations and commercial facilities (private businesses and non - profit service providers) are filed with the U.S. Department of Justice within 180 days of the alleged violation. In a public school situation, the U.S. Department of Justice must first try to resolve the complaint or issue to the complainant and the school/district a Letter of Findings containing findings of fact and conclusions of law and a description of a remedy for each violation found. The Department of Justice must try to resolve complaints, but it does not require complainants to exhaust administrative remedies, so parents who feel that their child’s school is violating the ADA may proceed with a private law suit at any time during the process.

## **Conclusion**

While the processes for special education under IDEA and Section 504 may be different, students with disabilities under both IDEA and Section 504 are entitled to a “free, appropriate public education in the least restrictive environment.” It is critical that parents and advocates understand the similarities, differences, and intersections of these laws to ensure that the rights of students with disabilities and the rights of their parents to be partners in decision-making are protected. It is also important for parents and advocates to understand the non-discrimination provisions of IDEA, Section 504, and the ADA to ensure that students with disabilities have access to as meaningful an education as students without disabilities, including meaningful access to all district and school programs, services, and supports.