



# **Education of Individuals with Disabilities: The Individuals with Disabilities Education Act (IDEA), Section 504 of the Rehabilitation Act, and the Americans with Disabilities Act (ADA)**

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January 5, 2009

Congressional Research Service

7-5700

[www.crs.gov](http://www.crs.gov)

R40123

## Summary

Several federal statutes, notably the Individuals with Disabilities Education Act (IDEA), Section 504 of the Rehabilitation Act, and the Americans with Disabilities Act (ADA), address the rights of individuals with disabilities to education. Although there is overlap, particularly with Section 504 and the ADA, each statute plays a significant part in the education of individuals with disabilities, and is of interest to Congress both in preparing for the reauthorization of IDEA and in oversight of recent amendments to the ADA. IDEA, enacted in 1975, is both a grants statute and civil rights statute and requires programs for children with disabilities that are in addition to those available to children without disabilities. Section 504, enacted in 1973, and the ADA, enacted in 1990, are civil rights statutes that prohibit discrimination against individuals with disabilities. Their coverage is similar and the ADA was modeled on Section 504 and its regulations; however, the major distinction is that Section 504 only applies to entities that receive federal financial assistance, while the ADA has broader coverage, not tied to the receipt of federal funds. This report will examine the similarities and differences in the IDEA, Section 504, and ADA coverage of education including the implications of the ADA Amendments Act of 2008.

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## Introduction

Several federal statutes, notably the Individuals with Disabilities Education Act (IDEA),<sup>1</sup> Section 504 of the Rehabilitation Act,<sup>2</sup> and the Americans with Disabilities Act (ADA),<sup>3</sup> address the rights of individuals with disabilities to education. Although there is overlap, particularly with Section 504 and the ADA, each statute plays a significant part in the education of individuals with disabilities, and is of interest to Congress both in preparing for the reauthorization of IDEA and in oversight of recent amendments to the ADA. IDEA, enacted in 1975, is both a grants statute and civil rights statute and requires programs for children with disabilities that are in addition to those available to children without disabilities. Section 504, enacted in 1973, and the ADA, enacted in 1990, are civil rights statutes that prohibit discrimination against individuals with disabilities. Their coverage is similar and the ADA was modeled on Section 504 and its regulations; however, the major distinction is that Section 504 only applies to entities that receive federal financial assistance, while the ADA has broader coverage, not tied to the receipt of federal funds.

## Overview of the Statutes

### The Individuals with Disabilities Education Act

IDEA provides federal funding for the education of children with disabilities and requires, as a condition for the receipt of such funds, the provision of a free appropriate public education (FAPE). Originally enacted in 1975 by P.L. 94-142, the act responded to increased awareness of the need to educate children with disabilities, and to judicial decisions requiring that states provide an education for children with disabilities if they provided an education for children without disabilities.<sup>4</sup> IDEA has been amended several times, most recently by P.L. 108-446 in 2004.<sup>5</sup> The act both authorizes federal funding for special education and related services<sup>6</sup> and, for states that accept these funds,<sup>7</sup> sets out principles under which special education and related services are to be provided. The requirements are detailed, especially when the regulatory interpretations are considered. The major principles include the following requirements:

- States and school districts make available a free appropriate public education (FAPE)<sup>8</sup> to all children with disabilities, generally between the ages of 3 and 21.<sup>9</sup>

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<sup>1</sup> 20 U.S.C. §1400 et seq.

<sup>2</sup> 29 U.S.C. §794.

<sup>3</sup> 42 U.S.C. §12101 et seq.

<sup>4</sup> For a more detailed discussion of the congressional intent behind the enactment of P.L. 94-142, see CRS Report 95-669, *The Individuals with Disabilities Education Act: Congressional Intent*, by Nancy Lee Jones.

<sup>5</sup> For a more detailed discussion of changes made by P.L. 108-446, see CRS Report RL32716, *Individuals with Disabilities Education Act (IDEA): Analysis of Changes Made by P.L. 108-446*, by Richard N. Apling and Nancy Lee Jones.

<sup>6</sup> Related services (for example, physical therapy) assist children with disabilities to help them benefit from special education (20 U.S.C. §1401(26), P.L. 108-446 §602(26)).

<sup>7</sup> Currently, all states receive IDEA funding.

<sup>8</sup> It should be emphasized that what is required under IDEA is the provision of a free appropriate public education. The Supreme Court, in *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 177 (continued...)

- States and school districts identify, locate, and evaluate all children with disabilities, regardless of the severity of their disability, to determine which children are eligible for special education and related services.
- Each child receiving services has an individual education program (IEP) spelling out the specific special education and related services to be provided to meet his or her needs. The parent must be a partner in planning and overseeing the child's special education and related services as a member of the IEP team.
- "To the maximum extent appropriate," children with disabilities must be educated with children who are not disabled.
- States and school districts must provide procedural safeguards to children with disabilities and their parents, including a right to a due process hearing, the right to appeal to federal district court and, in some cases, the right to receive attorneys' fees.

IDEA has detailed requirements that states receiving funds under the act are required to follow. However, IDEA also allows some flexibility for states. For example, a state may, but does not have to, define a group of children aged three to nine or any subset of that age as children with disabilities if they are experiencing developmental delays.<sup>10</sup> This flexibility allows for more state discretion under IDEA whereas the nondiscrimination mandates of Section 504 and the ADA are more uniform.

## **Section 504 of the Rehabilitation Act**

Unlike IDEA, the statutory language of Section 504 is brief. Essentially, Section 504 prohibits discrimination against an otherwise qualified individual with a disability solely by reason of disability in any program or activity receiving federal financial assistance or under any program or activity conducted by an executive agency or the U.S. Postal Service.<sup>11</sup> This prohibition goes far beyond the provision of education and also includes all levels of education, including colleges and universities which are not covered by IDEA.<sup>12</sup> Generally, although there are some differences which will be discussed subsequently, regarding K-12 schools, the Department of Education (ED) has interpreted the Section 504 compliance standards for schools to be the same as the basic requirements of IDEA.<sup>13</sup> In addition, the tenth circuit court of appeals in a 1982 decision held that

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(1982), held that this requirement is satisfied when the state provides personalized instruction with sufficient support services to permit a child to benefit educationally from that instruction, and that this instruction should be reasonably calculated to enable the child to advance from grade to grade. IDEA does not require that a state maximize the potential of children with disabilities.

<sup>9</sup> Part C of IDEA, 20 U.S.C. §1431 et seq., provides for grants to states and localities to enhance the development of infants and toddlers with disabilities.

<sup>10</sup> 20 U.S.C. §1401(3)(B).

<sup>11</sup> 29 U.S.C. §794. For a more detailed discussion of Section 504 see CRS Report RL34041, *Section 504 of the Rehabilitation Act of 1973: Prohibiting Discrimination Against Individuals with Disabilities in Programs or Activities Receiving Federal Assistance*, by Nancy Lee Jones.

<sup>12</sup> The application of Section 504 and the ADA to colleges and universities is beyond the scope of this report.

<sup>13</sup> These requirements include the provision of a free appropriate public education in the least restrictive setting. See 34 C.F.R. Part 104, Appx. A, Subpart D.

even if the State of New Mexico declined IDEA funds, Section 504 had essentially the same requirements as IDEA with regard to the provision of education.<sup>14</sup>

## **The Americans with Disabilities Act**

The Americans with Disabilities Act is a broad civil rights statute prohibiting discrimination against individuals with disabilities.<sup>15</sup> As stated in the act, its purpose is “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”<sup>16</sup> As with Section 504, the ADA covers far more than K-12 education; it also covers employment, public services, and public accommodations which include educational facilities. Like Section 504, the ADA covers colleges and universities but, unlike Section 504, such schools do not need to be in receipt of federal funds. The ADA was recently amended by the ADA Amendments Act, P.L. 110-325, which rejects certain Supreme Court interpretations of the ADA definition of disability.<sup>17</sup> Generally, the ADA and Section 504 are interpreted in the same manner regarding the coverage of K-12 education. The Department of Education (ED) notes that the Office of Civil Rights (OCR) enforces both Section 504 and title II of the ADA. “The standards adopted by the ADA were designed not to restrict the rights and remedies available under Section 504. The Title II regulations applicable to free and appropriate public education issues do not provide greater protection than applicable Section 504 regulations.”<sup>18</sup>

## **Eligibility**

### **Age Requirements**

IDEA Part B covers the education of school-age children, while Part C of IDEA covers infants and toddlers. IDEA’s Part B requirements apply to children aged three to five and eighteen to twenty-one to the extent that coverage of these children would not be inconsistent with state law or practice.<sup>19</sup> Section 504 and the ADA, in contrast, have no age limitations.

### **Definitions of Child with a Disability and Individual with a Disability**

One of the most significant differences between IDEA, Section 504, and the ADA is in the definition of child or individual with disability. IDEA contains a categorical definition while Section 504 and the ADA have identical functional definitions. The definition for Section 504 and

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<sup>14</sup> *New Mexico Association for Retarded Citizens v. New Mexico*, 678 F.2d 847 (10th Cir. 1982). All states are currently receiving IDEA funds.

<sup>15</sup> For a more detailed discussion of the ADA see CRS Report 98-921, *The Americans with Disabilities Act (ADA): Statutory Language and Recent Issues*, by Nancy Lee Jones.

<sup>16</sup> 42 U.S.C. §12101(b)(1).

<sup>17</sup> For a more detailed discussion of the ADA Amendments Act see CRS Report RL34691, *The ADA Amendments Act: P.L. 110-325*, by Nancy Lee Jones.

<sup>18</sup> <http://www.ed.gov/about/offices/list/ocr/504faq.html>

<sup>19</sup> 20 U.S.C. §1412(a)(1).

the ADA is broader than that in IDEA.<sup>20</sup> IDEA covers children with specifically listed disabilities who are in need of special education, while Section 504 and the ADA are more general and encompass all ages and are not limited to the provision of education. A child who is covered under IDEA would be covered under Section 504 and the ADA, but some students not covered under IDEA would be covered under Section 504 and the ADA. Several of the most common disabilities of students included under Section 504 and the ADA, but not always covered under IDEA are attention deficit hyperactivity disorder (ADHD), diabetes, asthma, and dyslexia.<sup>21</sup> It should also be observed that the number of students covered under IDEA is much larger than those covered solely under Section 504 and the ADA in K-12 schools.<sup>22</sup>

IDEA defines a child with a disability in the following manner.

(A) In general

The term ‘child with a disability’ means a child —

(i) with mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (referred to in this title as ‘emotional disturbance’), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and

(ii) who, by reason thereof, needs special education and related services.<sup>23</sup>

In contrast, the ADA and Section 504 do not list disabilities and define an individual with a disability in a functional manner. The ADA definition was amended by the ADA Amendments Act of 2008 (ADAAA), P.L. 110-325,<sup>24</sup> and defines the term disability with respect to an individual as “(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment (as described in paragraph (3)).”<sup>25</sup> Although this is essentially the same statutory language as was in the original ADA, P.L. 110-325 contains new rules of construction regarding the definition of disability, which provide that

- the definition of disability shall be construed in favor of broad coverage to the maximum extent permitted by the terms of the act;
- the term “substantially limits” shall be interpreted consistently with the findings and purposes of the ADA Amendments Act;
- an impairment that substantially limits one major life activity need not limit other major life activities to be considered a disability;

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<sup>20</sup> *Muller v. Comm. on Special Education of East Eslip Union Free School District*, 145 F.3d 95, 100, n.2 (2d Cir. 1998).

<sup>21</sup> Rachel A. Holler and Perry A. Zirkel, “Section 504 and Public Schools: A National Survey Concerning ‘Section 504-Only’ Students,” 92 NASSP Bulletin 19, 28 (March 2008). These conditions may be covered under IDEA in some circumstances under the “other health impairment” category. See 34 C.F.R. §300.8(c)(10).

<sup>22</sup> *Id.*

<sup>23</sup> 20 U.S.C. §1401(3).

<sup>24</sup> For a more detailed discussion of the ADA Amendments Act see CRS Report RL34691, *The ADA Amendments Act: P.L. 110-325*, by Nancy Lee Jones.

<sup>25</sup> P.L. 110-325, §4(a), amending 42 U.S.C. §12102.

- an impairment that is episodic or in remission is a disability if it would have substantially limited a major life activity when active; and
- the determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures, except that the ameliorative effects of ordinary eyeglasses or contact lenses shall be considered.<sup>26</sup>

The ADA Amendments Act specifically lists examples of major life activities including caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working. The act also states that a major life activity includes the operation of a major bodily function.

The Rehabilitation Act is amended by the ADA Amendments Act to reference the definition of disability in the ADA. The Senate Statement of Managers noted the importance of maintaining uniform definitions in the two statutes so covered entities “will generally operate under one consistent standard, and the civil rights of individuals with disabilities will be protected in all settings.”<sup>27</sup> The Senate Statement of Managers also observed the following:

We expect that the Secretary of Education will promulgate new regulations related to the definition of disability to be consistent with those issued by the Attorney General under this Act. We believe that other current regulations issued by the Department of Education Office of Civil Rights under Section 504 of the Rehabilitation Act are currently harmonious with Congressional intent under both the ADA and the Rehabilitation Act.<sup>28</sup>

The implications of the changes in the definition of disability under Section 504 and the ADA for the coverage children in K-12 schools is not entirely clear. In Senate hearing testimony, Sue Gamm, a consultant and former special education chief in Chicago, argued that the change in the definition will greatly expand the number of 504/ADA children,<sup>29</sup> while Jo Anne Simon, Assistant Professor at Fordham University School of Law, argued that courts generally had not interpreted the definition of disability in Section 504 and the ADA in a restrictive manner and that “concerns that the ADAAA will compel schools to provide services to students who don’t really need them are misplaced.”<sup>30</sup> Perry Zirkel, a Lehigh University education and law professor, argues that the ADAAA would result in more students in K-12 education being given Section 504 plans, especially students with diabetes, asthma, food allergies, dyslexia, and attention deficit disorder (ADD).<sup>31</sup> Another commentator noted that the addition of “reading” in the list of major life activities may be problematic since “there is no easy way to distinguish children who are unable to read because they have a disability from those who have simply received poor instruction.”<sup>32</sup>

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<sup>26</sup> Low vision devices are not included in the ordinary eyeglasses and contact lens exception.

<sup>27</sup> 153 CONG. REC. S. 8347 (Sept. 11, 2008)(Statement of Managers to Accompany S. 3406, the Americans with Disabilities Act Amendments Act of 2008).

<sup>28</sup> *Id.*

<sup>29</sup> See Mark W. Sherman, “Senate Seems Willing to Revise ADA in Light of Educators’ Views,” 41 EDUCATION DAILY 2 (July 24, 2008).

<sup>30</sup> [http://help.senate.gov/Hearings/2008\\_07\\_15/Simon.pdf](http://help.senate.gov/Hearings/2008_07_15/Simon.pdf).

<sup>31</sup> “ADA Amendments Become Law, New Definitions Expand Protection,” SECTION 504 COMPLIANCE HANDBOOK (Nov. 2008).

<sup>32</sup> “List of ‘Major Life Activities’ in ADA Bill Raises Questions About Reading,” 24 THE SPECIAL EDUCATOR 3 (continued...)



## Identification and Evaluation of Children with Disabilities

IDEA requires that all children with disabilities, including those enrolled by their parents in private, including religious, elementary and secondary schools, be located, identified, and evaluated.<sup>33</sup> The Section 504 regulations also contain a requirement that children with disabilities be identified, located<sup>34</sup> and evaluated.<sup>35</sup> ED's discussion of these 504 regulations observes that these are basic requirements of both IDEA and Section 504.<sup>36</sup> The ADA statutory and regulatory requirements do not contain specific provisions detailing requirements for educational facilities. However, the ADA does state that "[e]xcept as otherwise provided in this Act, nothing in this Act shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 (29 U.S.C. 790 et seq.) or the regulations issued by Federal agencies pursuant to that title."<sup>37</sup> Thus, all three statutes appear to have requirements regarding the identification of children with disabilities, although IDEA contains the most detailed requirements.<sup>38</sup>

## Educational Rights of Children with Disabilities

### General

IDEA is more detailed in its statutory and regulatory requirements concerning the education of children with disabilities than Section 504 or the ADA. Litigation regarding educational rights is more frequent under IDEA. In addition, the fact that IDEA is a grants statute as well as a civil rights statute means that it is the subject of periodic reauthorization and monitoring which reinforce institutional attention and compliance. Generally, the basic substantive requirements of IDEA are similar to those in the Section 504 regulations.<sup>39</sup> In its discussion of the Section 504 regulations, ED states that these basic requirements include the provision of a free appropriate public education, and education with children without disabilities "to the maximum extent

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(October 10, 2008).

<sup>33</sup> 20 U.S.C. §1412(a)(3).

<sup>34</sup> 34 C.F.R. §104.32.

<sup>35</sup> 34 C.F.R. §104.35.

<sup>36</sup> 34 C.F.R. Part 104, Appx. A.

<sup>37</sup> 42 U.S.C. §12201. *See also*, 28 C.F.R. §35.103(a); OCR Senior Staff Memorandum, 19 IDELR 859 (Nov. 19, 1992), which states that "[u]nlike the Department of Education's Section 504 regulation for federally assisted programs, the Title II regulation does not provide separate coverage for preschool, elementary, secondary and postsecondary education programs. However, the Department of Justice (DOJ) has confirmed that the nondiscriminatory provisions under Title II are to be construed to cover discriminatory conduct that is specifically prohibited under Subparts D, E and F of Section 504."

<sup>38</sup> 20 U.S.C. §1414; 34 C.F.R. §300.300 et seq.

<sup>39</sup> *W.B. v. Matula*, 67 F.3d 484, 492-493 (3d Cir. 1995) "There appear to be few differences, if any, between IDEA's affirmative duty and §504's negative prohibition."; *Brendan K. v. Easton Area School District*, 2007 U.S. Dist. LEXIS 27846 (E.D. Pa. April 16, 2007) "The substantive requirements of the Rehabilitation Act in the education context are equivalent to the requirements set forth in the IDEA."

appropriate to their needs.<sup>40</sup> The ADA, as noted previously, provides that “nothing in this Act shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act ...”<sup>41</sup>

## Free Appropriate Public Education

The core requirement under IDEA is the provision of FAPE.<sup>42</sup> Each child receiving services under IDEA must have an individual education program (IEP) spelling out the specific special education and related services to be provided to meet his or her needs.<sup>43</sup> Although a detailed analysis of the interpretation of FAPE is beyond the scope of this report, it should be noted that the Supreme Court in *Board of Education of the Hendrick Hudson Central School District v. Rowley*<sup>44</sup> observed that “(i)mplicit in the congressional purpose of providing access to a ‘free appropriate public education’ is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child.”<sup>45</sup> The Court concluded that “the ‘basic floor of opportunity’ provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.”<sup>46</sup> However, the states are not required to “maximize” each child’s potential.<sup>47</sup> If the child is progressing from grade to grade making measurable and adequate gains, the FAPE requirement is met.

Section 504 and ADA also require the provision of a free appropriate public education<sup>48</sup> although the IDEA regulatory requirements are more detailed.<sup>49</sup> One court has noted that the provision of FAPE under Section 504 is conceptually different from the provision of FAPE under IDEA. “While both the Individuals with Disabilities Education Act, ... and section 504 mandate that local education agencies provide a FAPE to children with disabilities, the scope of protection afforded under each of these statutes is somewhat different.... Section 504 provides relief from discrimination, whereas the IDEA provides relief from inappropriate educational placement decisions, regardless of discrimination.”<sup>50</sup> Some courts have found that, in order to establish a Section 504 violation, a plaintiff must demonstrate bad faith or gross misjudgment in addition to the denial of a FAPE.<sup>51</sup>

An “appropriate education” under Section 504 is defined as the provision of regular or special education and related aids and services designed to meet individual educational needs of children

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<sup>40</sup> 34 C.F.R. Part 104, Appx. A

<sup>41</sup> 42 U.S.C. §12201.

<sup>42</sup> 20 U.S.C. §1412(a)(1).

<sup>43</sup> 20 U.S.C. §1412(a)(4); 20 U.S.C. §1414(d).

<sup>44</sup> 458 U.S. 176 (1982).

<sup>45</sup> *Id.* at 200.

<sup>46</sup> *Id.* at 201.

<sup>47</sup> *Id.* at 198.

<sup>48</sup> 34 C.F.R. §104.33(a). *See also* U.S. Department of Education, Office for Civil Rights, “Free Appropriate Public Education for Students with Disabilities: Requirements Under Section 504 of the Rehabilitation Act of 1973,” <http://www.ed.gov/about/offices/list/ocr/docs/edlite-FAPE504.html>; 28 C.F.R. §35.103(a).

<sup>49</sup> 34 C.F.R. §300.101 et seq.

<sup>50</sup> *A.W. v. Marlborough County*, 25 F.Supp.2d 27, 31-32 (D. Conn. 1988).

<sup>51</sup> *See e.g., Monahan v. State of Nebraska*, 687 F.2d 1164, 1170 (8th Cir. 1982).

with disabilities as adequately as the needs of children without disabilities are met and that comply with procedural requirements.<sup>52</sup> Note that IDEA requires the provision of special education and related services, while Section 504 requires the provision of **regular** or special education and related aids and services. Thus, a child with a Section 504 plan could be receiving a “regular” education with related aids and services, while a child with an IEP under IDEA must be in receipt of special education. Courts have applied the *Rowley* standard to Section 504 and found that an appropriate education is one that is reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.<sup>53</sup>

Section 504, like IDEA, also requires that a child with a disability be placed in the regular educational environment to the maximum extent appropriate to the needs of the student with a disability.<sup>54</sup> Section 504, unlike IDEA, does not require the implementation of an IEP; however, an IEP developed in accordance with IDEA is one means of meeting the Section 504 requirements.<sup>55</sup> The plan developed under Section 504 is often referred to as a “504 plan.”<sup>56</sup> Unlike IDEA, Section 504 regulations do not provide detailed requirements about how a 504 plan is created. For example, IDEA specifies that the IEP team include the child’s parents,<sup>57</sup> while there is no similar requirement in Section 504 or its regulations.

Section 504 and the ADA contain the requirement of “reasonable accommodation” for purposes of determining if there has been discrimination in employment.<sup>58</sup> There is no reasonable accommodation requirement in IDEA. ED has not read the “reasonable accommodation” limitation into the Section 504 or ADA Title II regulations on education and has stated,

A reasonable accommodation limitation on the responsibilities of recipients is contained in Subpart B of the regulation, which covers employment. See 34 C.F.R. §104.12. Subpart E, which covers postsecondary and vocational education, contains a similar limitation on the recipient’s obligation to modify its academic requirements to ensure that they do not discriminate or have the effect of discrimination on the basis of disability. If a recipient can demonstrate that an academic requirement is essential to the program or instruction being pursued by the student with a disability or to a directly related licensing requirement, failure to modify the requirement will not be regarded as discriminatory. See 34 C.F.R. §104.44. Such limitations are not contained in Subpart D, covering elementary and secondary education. We conclude therefore that the regulation writers intended to create a different standard for elementary and secondary students than for employees or postsecondary/vocational students.<sup>59</sup>

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<sup>52</sup> 34 C.F.R. §104.33(b)(1).

<sup>53</sup> See *e.g.*, *Molly L. v. Lower Merion School District*, 194 F.Supp.2d 422, 428 (E.D. Pa. 2002).

<sup>54</sup> 34 C.F.R. §104.34 (Section 504); 20 U.S.C. §1412(a)(5) (IDEA).

<sup>55</sup> 34 C.F.R. §104.33(b)(2). See also *Corey H. Ex rel. B.H. v. Cape Henlopen School District*, 286 F.Supp.2d 380 (D.Del. 2003), which held that if the district had provided the student with FAPE under IDEA, it has not violated Section 504.

<sup>56</sup> See U.S. Department of Education, Office for Civil Rights, “Frequently Asked Questions About Section 504 and the Education of Children with Disabilities” <http://www.ed.gov/about/offices/list/ocr/504faq.html>.

<sup>57</sup> 34 C.F.R. §1414(d)(1)(B).

<sup>58</sup> 42 U.S.C. §12111(9) (ADA); 28 C.F.R. §41.53 (Section 504).

<sup>59</sup> Letter to Zirkel, U.S. Department of Education, Office for Civil Rights, 20 IDELR 134 (August 23, 1993). Reprinted at <http://www.dueprocessillinois.org/zirkel.html>.

The Department of Education has also examined the issue of whether students with disabilities can be denied access to accelerated programs such as Advanced Placement and International Baccalaureate classes. ED found such a denial violates Section 504, the ADA, and IDEA. Although schools may have eligibility requirements for such courses, ED stated: “[i]t is unlawful to deny a student with a disability admission to an accelerated class or program solely because of that student’s need for special education or related aids and services.”<sup>60</sup>

## Disciplinary Procedures

The law concerning when a child with a disability may be subject to disciplinary procedures for a violation of a code of student conduct is complex and complicated. Generally, under IDEA a child with a disability is not immune from disciplinary procedures; however, these procedures are not identical to those for children without disabilities.<sup>61</sup> If a child with a disability commits an action that would be subject to discipline, school personnel have several options. A child with a disability who violates a code of student conduct may be removed from her current placement to another setting or suspension for up to 10 school days; the child may be placed in an interim alternative education setting for up to 45 school days for situations involving weapons, drugs, or if the student has inflicted serious bodily injury upon another person while at school; and a hearing officer may be asked to order a child be placed in an interim alternative educational setting for up to 45 school days if the hearing officer determines that maintaining the current placement of the child is substantially likely to result in injury to the child or others.<sup>62</sup> If the local educational agency (LEA) seeks to change the placement of a child with a disability because of a violation of a code of student conduct either on an interim basis or on a long-term basis (except for a 10-day suspension), a manifestation determination review must be conducted to determine whether the conduct in question was caused by, or had a direct and substantial relationship to, the child’s disability or was the direct result of the LEA’s failure to implement the IEP. If the child’s behavior is not a manifestation of a disability, long-term disciplinary action such as expulsion may occur, except that educational services may not cease.<sup>63</sup>

The issue of whether these detailed IDEA requirements are also required by Section 504 and the ADA is not clear. The Section 504 regulations require a system of procedural safeguards and note that compliance with the procedural safeguards of IDEA as described above is one means of meeting the Section 504 requirement.<sup>64</sup> However, this does not mean that all the IDEA requirements are therefore required under Section 504. In *Cennntenial School District v. Phil L. and Lori L. ex. rel Matthew L.*,<sup>65</sup> the court held that “[a]lthough students qualifying under the

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<sup>60</sup> Dear Colleague Letter: Access by Students with Disabilities to Accelerated Programs, Office for Civil Rights, Department of Education (Dec. 26, 2007) <http://www.ed.gov/about/offices/list/ocr/letters/colleague-20071226.html>.

<sup>61</sup> For a more detailed discussion of discipline issues including the Supreme Court’s decision in *Honig v. Doe*, 484 U.S. 305 (1988), see CRS Report RL32753, *Individuals with Disabilities Education Act (IDEA): Discipline Provisions in P.L. 108-446*, by Nancy Lee Jones.

<sup>62</sup> 20 U.S.C. §1415(k).

<sup>63</sup> *Id.*

<sup>64</sup> 34 C.F.R. §104.36.

<sup>65</sup> 559 F.Supp.2d 634 (E.D.Pa. 2008).

Rehabilitation Act are afforded some procedural protections—namely a Section 504 hearing—they are not afforded the specific protection of a ‘manifestation determination’ under the IDEA.”<sup>66</sup>

Although neither the statutory language nor the regulations under Section 504 or the ADA discuss disciplinary issues, the Department of Education has discussed disciplinary issues under these statutes. The Department has stated:

As under the IDEA, Section 504 and Title II of the ADA provide that students whose misconduct is not related to their disabilities cannot be expelled or suspended for more than 10 days. However, the Department has taken the view that districts can cease providing educational services to students under those laws, if nondisabled students would also be refused educational services under similar circumstances.<sup>67</sup>

## Parental Rights

The involvement of parents in the education of their children is a key policy in IDEA, Section 504, and the ADA; however, IDEA contains the most detailed provisions relating to parental rights. IDEA specifically states that one of its purposes is to ensure that the rights of children with disabilities and parents of such children are protected.”<sup>68</sup> The Supreme Court in *Winkelman v. Parma City School District*<sup>69</sup> found that the establishment of procedural rights was required “to ensure that the rights of children with disabilities and parents of such children are protected.” These provisions were found to support the finding that the parents of a child with a disability have “a particular and personal interest” in the goals of IDEA and that “IDEA includes provisions conveying rights to parents as well as to children.”

More specifically, some of the parental rights under IDEA include the right to request an initial evaluation of consent to the evaluation if requested by the LEA,<sup>70</sup> the right to “informed consent” before IDEA services are initiated,<sup>71</sup> the right to be part of the IEP team,<sup>72</sup> the right to review their child’s records,<sup>73</sup> and rights to notification.<sup>74</sup> The Section 504 requirements regarding parental rights are less detailed and specifically include notification,<sup>75</sup> and the right to examine relevant records.<sup>76</sup> However, the Section 504 regulations do not specifically include the parents as part of

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<sup>66</sup> *Id.* at 646. See also *Tylicki v. Stephen St. Onge*, 2008 U.S. App. LEXIS 23342 (2d Cir. October 28, 2008).

<sup>67</sup> OSEP Memorandum 95-16, 22 IDELR 531 (April 26, 1995). Although this Memorandum discusses IDEA disciplinary procedures prior to the 1997 (P.L. 105-17) and 2004 (P.L. 108-446) reauthorizations and does not reflect the extensive amendments Congress made to these sections, it would appear that the interpretation of Section 504 and the ADA has not changed in this area.

<sup>68</sup> 20 U.S.C. §1400(d)(2).

<sup>69</sup> 550 U.S. 516 (2007).

<sup>70</sup> 20 U.S.C. §1414(a)(1)(D).

<sup>71</sup> 20 U.S.C. §1414(a)(1)(D)(II).

<sup>72</sup> 20 U.S.C. §1414(d)(1)(B).

<sup>73</sup> 20 U.S.C. §1415(b)(1).

<sup>74</sup> 20 U.S.C. §1415(b)(3).

<sup>75</sup> 34 C.F.R. §104.32.

<sup>76</sup> 34 C.F.R. §104.36.

the team determining placement decisions.<sup>77</sup> The due process procedures also contain parental rights, but are discussed in the subsequent section.

## Remedies

IDEA's remedy provisions are much more detailed than those in Section 504 or the ADA. IDEA contains detailed provisions that explain the remedies that are available for children with disabilities and their parents. Complaints may be filed with the local education agency (LEA), the state education agency (SEA), or both.<sup>78</sup>

Complaints filed with the LEA must be presented within two years of the date the parent or LEA knew or should have known about the incident that is the subject of the complaint or within a state's timeline if that is explicit.<sup>79</sup> These complaints can be resolved through a resolution session,<sup>80</sup> mediation,<sup>81</sup> an impartial due process hearing,<sup>82</sup> or litigation.<sup>83</sup> The parties must first try to resolve the dispute through a resolution session unless they agree in writing to waive the session or agree to mediation.<sup>84</sup> If the complaint is not resolved, then the parties may have an impartial due process hearing.<sup>85</sup> The parties have the right to appeal the hearing officer's decision to federal district court, but all of the available administrative remedies must be exhausted prior to filing suit.<sup>86</sup> This action must be brought within 90 days of the hearing officer's decision or within a state's timeline if that is explicit.<sup>87</sup> As part of its decision, the court may award reasonable attorneys' fees.<sup>88</sup> Notice of these remedies must be given to the parents at least once a year.<sup>89</sup>

Complaints filed with the SEA must be presented within one year of the date of the incident that is the subject of the complaint.<sup>90</sup> A copy of the complaint must be forwarded to the LEA.<sup>91</sup> Within 60 days of the filing of the complaint, the SEA must carry out its own investigation, give the complainant opportunity to provide additional information about the complaint, provide the LEA with opportunities to respond to the complaint (including voluntary mediation), and review all information and issue a written decision.<sup>92</sup> This deadline may be extended under exceptional

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<sup>77</sup> See 34 C.F.R. §104.35.

<sup>78</sup> IDEA also contains detailed provisions for federal and state monitoring. See 20 U.S.C. §1416.

<sup>79</sup> 20 U.S.C. §1415(b)(6)(B); 34 C.F.R. §300.507(a)(2). Detailed requirements for the contents of the complaint are listed in the statute and the regulations. See 20 U.S.C. §1415(b)(6)-(7); 34 C.F.R. §300.508(b).

<sup>80</sup> 20 U.S.C. §1415(f)(1)(B); 34 C.F.R. §300.510.

<sup>81</sup> 20 U.S.C. §1415(e); 34 C.F.R. §300.506.

<sup>82</sup> 20 U.S.C. §1415(f); 34 C.F.R. §§300.511-.516.

<sup>83</sup> 20 U.S.C. §1415(i)(2); 34 C.F.R. §§300.516-517.

<sup>84</sup> 20 U.S.C. §1415(f)(1)(B)(i); 34 C.F.R. §300.510(a); 34 C.F.R. §300.510(c).

<sup>85</sup> 20 U.S.C. §1415(f)(1)(B)(ii); 34 C.F.R. §300.510(b)(1).

<sup>86</sup> 20 U.S.C. §1415(i)(2)(A); 34 C.F.R. §300.516.

<sup>87</sup> 20 U.S.C. §1415(i)(2)(B); 34 C.F.R. §300.516(b).

<sup>88</sup> 20 U.S.C. §1415(i)(3); 34 C.F.R. §300.517. These provisions do not affect the District of Columbia Appropriations Act, 2005, which has its own provision for awarding attorneys' fees under IDEA. 20 U.S.C. §1415(i)(3)(B)(ii).

<sup>89</sup> 20 U.S.C. §1415(d)(1); 34 C.F.R. §300.504.

<sup>90</sup> 34 C.F.R. §300.153(c). The regulations list detailed requirements for the contents of the complaint. 34 C.F.R. §300.153.

<sup>91</sup> 34 C.F.R. §300.153(d).

<sup>92</sup> 34 C.F.R. §300.152.

circumstances or by agreement between the parents and the LEA.<sup>93</sup> If a complaint raises an issue that is already subject to a due process hearing with the LEA, the SEA must set aside that issue until the conclusion of the hearing.<sup>94</sup> If an issue has already been decided in a due process hearing, the SEA is bound by that decision.<sup>95</sup>

The remedy provisions in Section 504 and the ADA do not offer as many options for resolving complaints as found in IDEA. Section 504 regulations do require several procedural safeguards that are similar to IDEA provisions, including notice, an opportunity to examine relevant records, an impartial hearing that includes the opportunity to be represented by counsel, and a review procedure,<sup>96</sup> but the ADA does not have any similar provisions. Both Section 504 and the ADA allow parties to file complaints with the respective agencies that oversee the statute's enforcement, but neither statute creates a state complaint system similar to the system found in IDEA. The parties generally have much less time in which to file their complaints than they have under IDEA: under both statutes, the parties must file a complaint within 180 days of the alleged discrimination, unless the deadline is extended for good cause.<sup>97</sup> Section 504 and ADA also create an administrative remedies process that, similar to IDEA, involves attempts at resolution throughout the process. For a Section 504 complaint, if OCR concludes that a school district is out of compliance, it first will attempt negotiation with the school district to bring it into compliance.<sup>98</sup> If negotiation is not successful, OCR may terminate the school district's federal funding or refer the case to DOJ for judicial proceedings.<sup>99</sup> If the party is not satisfied with OCR's initial determination, it may appeal to the Deputy Assistant Secretary for Enforcement.<sup>100</sup> For a complaint filed under the ADA, the Department of Education shall attempt informal resolution of the complaint, and, if the resolution attempt is unsuccessful, the agency shall issue a Letter of Findings.<sup>101</sup> If noncompliance is found, the agency shall resolve the matter by either securing voluntary compliance through a written agreement<sup>102</sup> or, if voluntary compliance is unsuccessful, referring the matter to the Attorney General with its recommendations.<sup>103</sup> However, unlike IDEA, neither Section 504 nor the ADA requires mediation or other alternative means of dispute resolution.<sup>104</sup>

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<sup>93</sup> 34 C.F.R. §300.152(b)(1).

<sup>94</sup> 34 C.F.R. §300.152(c)(1).

<sup>95</sup> 34 C.F.R. §300.152(c)(2).

<sup>96</sup> 34 C.F.R. §104.36.

<sup>97</sup> Section 504 complaints are filed with OCR, usually through the school district's Section 504 officer. See *How to File a Discrimination Claim with the Office for Civil Rights*, <http://www.ed.gov/about/offices/list/ocr/docs/howto.html>. ADA complaints related to discrimination in education are filed generally with the Department of Education, but the regulations do not mention a specific department or office where they should be filed. 28 C.F.R. §35.170; 28 C.F.R. §35.190(b)(2).

<sup>98</sup> See *Frequently Asked Questions About Section 504 and the Education of Children with Disabilities*, <http://www.ed.gov/about/offices/list/ocr/504faq.html>.

<sup>99</sup> *Id.*

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

<sup>101</sup> 28 C.F.R. §35.172.

<sup>102</sup> 28 C.F.R. §35.173.

<sup>103</sup> 28 C.F.R. §35.174.

<sup>104</sup> OCR may "facilitate" mediation. See *Frequently Asked Questions About Section 504 and the Education of Children with Disabilities*, <http://www.ed.gov/about/offices/list/ocr/504faq.html>. The ADA encourages the use of alternative means of dispute resolution. 28 C.F.R. §35.176.

Although the remedy provisions in Section 504 and the ADA do not contain as many options for resolving complaints as IDEA, Section 504 and the ADA do allow parties to file a private right of action far earlier in the resolution process than is allowed under IDEA. Under both Section 504 and the ADA, a party may file a private right of action at any time without exhausting administrative remedies.<sup>105</sup> Additionally, the statutes permit the court to award reasonable attorneys' fees to the prevailing party.<sup>106</sup> However, despite these provisions, multiple appellate courts have held that parties must exhaust all administrative remedies for claims brought under Section 504 or the ADA when those claims could have been brought under IDEA.<sup>107</sup> The courts have all cited to IDEA's statutory language in 20 U.S.C. §1415(l),<sup>108</sup> noting that the law requires parties "seeking relief that is also available" under IDEA to exhaust their remedies under IDEA prior to bringing suit under Section 504 or the ADA. This exhaustion is limited to claims that would seek relief that is available under IDEA; however, the court in *Charlie F. v. Board of Education of Skokie School District 68* noted that this "available relief" may be "relief for the events, condition, or consequences of which the person complains, not necessarily relief of the kind the person prefers."<sup>109</sup> In other words, a party cannot bring a claim under Section 504 or the ADA that also would fall under IDEA solely because the party can receive relief under Section 504 or the ADA that is not available under IDEA (such as compensatory damages).

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<sup>105</sup> 29 U.S.C. §794a(a)(2); 42 U.S.C. 12133 (referring to 29 U.S.C. §794a(a)(2)).

<sup>106</sup> 29 U.S.C. §794a(b); 42 U.S.C. 12133 (referring to 29 U.S.C. §794a(b)); 28 C.F.R. §35.175.

<sup>107</sup> See, i.e., *J.P. v. Cherokee County Board of Education*, 218 Fed. Appx. 911 (11th Cir. 2007); *Weber v. Cranston School Committee*, 212 F.3d 41 (1st Cir. 2000); *Charlie F. v. Board of Education of Skokie School District 68*, 98 F.3d 989 (7th Cir. 1996); *Hope v. Cortines*, 69 F.3d 687 (2d Cir. 1995).

<sup>108</sup> Prior to the 1997 amendments to IDEA, this language was found in 20 U.S.C. §1415(f). At that time the statute referenced the Constitution, the Rehabilitation Act, and other statutes protecting children and youth with disabilities, but it did not specifically mention the Americans with Disabilities Act. The 1997 amendments changed the law to include the Americans with Disabilities Act and relocated the provision to subsection (l). See P.L. 105-17. This section was not amended by the 2004 reauthorization of IDEA, P.L. 108-446.

<sup>109</sup> 98 F.3d at 992.