

Legal Memorandum on Trauma, Schools and Poverty

Understanding Institutional Obligations to Children Experiencing Trauma I: Three Federal Laws on School-Based Responsibilities

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Introduction— This memo is the first in a series of documents prepared as part of the Center on Law, Inequality & Metropolitan Equity's (CLiME) Trauma, Schools, and Poverty project. At this stage in the research, CLiME does not propose that existing special education and antidiscrimination law are the optimal means for providing legal protection to victims of childhood trauma. Rather, we asked whether there currently exists a public duty to provide supportive services to traumatized children. This point of entry led our research to the school system, which holds a central presence in the lives of every child in the United States. CLiME researchers identified three federal statutes that may trigger a duty for schools to identify, evaluate, and provide services or accommodations to trauma victims: The Individuals with Disabilities Education Act (IDEA), Section 504 of the Rehabilitation Act (504), and the Americans with Disabilities Act (ADA). The following memo serves as a survey of all three Acts and addresses the following questions:

For students manifesting signs of traumatic experience, do schools in the United States have a duty to act to identify, intervene, or accommodate their learning needs?

- For what purpose was the current Federal special education and antidiscrimination laws (with applicability in schools) drafted, namely the Individuals with Disabilities Education Act (IDEA)?
- Who qualifies as a “disabled” or “handicapped” child under Federal special education law? To what services/accommodations are these individuals expressly entitled? Are victims of childhood trauma likely to qualify as “disabled” or “handicapped” under State law?
- What are the main charges of the Federal special education law? Specifically, does the school have an affirmative duty to “find” children with disabilities among the student population and what actions are required once a student is identified?
- For what purpose were the current Federal special education and antidiscrimination laws (with applicability in schools) drafted, namely the Individuals with Disabilities Education Act (IDEA, Section 504 of the Rehabilitation Act (504), and the Americans with Disabilities Act (ADA)?
- For what purpose were the current Federal antidiscrimination laws (with applicability in schools) drafted, namely Section 504 of the Rehabilitation Act (504) and the Americans with Disabilities Act (ADA)?

- Who qualifies as a “disabled” or “handicapped” child under the Federal antidiscrimination law? To what services/accommodations are these individuals expressly entitled? Are victims of childhood trauma likely to qualify as “disabled” or “handicapped” under these Federal laws?
- Within the context of disability protection, what is the promise of New Jersey’s antidiscrimination law and whom does it protect?

I. Legislative Purpose, Structure and Coverage

A. WHAT IS THE PURPOSE OF THE FEDERAL SPECIAL EDUCATION LAW, NAMELY THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA)?

Individuals With Disabilities Education Act (IDEA):

Statute: 20 U.S.C. § 1400 et seq.

Delegation of Authority: 20 U.S.C. § 1402 (A Special Education and Rehabilitative Services office within the Department of Education shall carry out the purposes of this chapter).

Regulations: 34 C.F.R. pt. 300 (and cross-references)

Purposes of the Act:

“(1)(A) to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living;

(B) to ensure that the rights of children with disabilities and parents of such children are protected; and (C) to assist States, localities, educational service agencies, and Federal agencies to provide for the education of all children with disabilities;

(2) to assist States in the implementation of a statewide, comprehensive, coordinated, multidisciplinary, interagency system of early intervention services for infants and toddlers with disabilities and their families;

(3) to ensure that educators and parents have the necessary tools to improve educational results for children with disabilities by supporting system improvement activities; coordinated research and personnel preparation; coordinated technical assistance, dissemination, and support; and technology development and media services; and

(4) to assess, and ensure the effectiveness of, efforts to educate children with disabilities.” 20 U.S.C.A. § 1400(d) (West).

B. WHO QUALIFIES FOR SERVICES AS A CHILD WITH A DISABILITY UNDER IDEA?

IDEA’S Definition of Disabled/Handicapped

“The term “child with a disability” means a child--(i) with intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (referred to in this chapter as “emotional disturbance”), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities¹; and (ii) who, by reason thereof, needs special education and related services.” 20 U.S.C.A. § 1401(3)(A)(i) (West).

Children suffering emotionally from severe or prolonged exposure to trauma *may* express the behavior that qualifies for an “emotional disturbance” classification. Emotional disturbance is “a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance: . . . [a]n inability to learn that cannot be explained by intellectual, sensory, or health factors[;]. . . [a]n inability to build or maintain satisfactory interpersonal relationships with peers and teachers[;] . . . [i]nappropriate types of behavior or feelings under normal circumstances[;] . . . [a] general pervasive mood of unhappiness or depression[;] . . . [a] tendency to develop physical symptoms or fears associated with personal or school problems. 34 C.F.R. § 300.8(c)(4)(i). Emotional disturbance includes a carve out, which excludes “socially maladjusted” students, however, there is no definition for what the term “socially maladjusted” means. *See* 34 C.F.R. § 300.8(C)(4)(ii).

C. WHAT ARE THE MAIN COMPONENTS OF IDEA WITH RESPECT TO THE INQUIRIES OF THE TRAUMA, SCHOOLS, AND POVERTY PROJECT?²

1. Free Appropriate Public Education (FAPE)

Applicability under IDEA?: Yes, a FAPE is guaranteed; 20 U.S.C.A. § 1415(a) (West).

“The term “free appropriate public education” means special education and related services that--(A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the standards of the State educational agency;(C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and (D) are provided in conformity with the individualized education program required under section 1414(d) of this title.” 20 U.S.C.A. § 1401(9) (West).

2. Identification/Location (Child Find)

¹ “Such term does not include a learning problem that is primarily the result of visual, hearing, or motor disabilities, of intellectual disabilities, of emotional disturbance, or of environmental, cultural, or economic disadvantage.” 20 U.S.C. § 1401(30)(C).

² This section is strictly limited for the purposes of our initial research questions. This section does not purport to address the full breadth of procedural and other requirements under IDEA.

APPLICABILITY UNDER IDEA: Yes, there is a “child find” obligation. 20 U.S.C.A. § 1412(a)(3) (West); 34 C.F.R. § 300.111. The obligation to identify a student needing special education pertains to all children, whether they are in public or nonpublic school settings. *Id.*; *see also* *Moorestown Twp. Bd. of Educ. v. S.D.*, 811 F. Supp. 2d 1057, 1066 (D.N.J. 2011).

“All children with disabilities residing in the State, including children with disabilities who are homeless children or are wards of the State and children with disabilities attending private schools, regardless of the severity of their disabilities, and who are in need of special education and related services, are identified, located, and evaluated and a practical method is developed and implemented to determine which children with disabilities are currently receiving needed special education and related services.” 20 U.S.C.A. § 1412(a)(3)(A) (West).

3. *Evaluation/Placement/Accommodation*

APPLICABILITY UNDER IDEA: Yes, IDEA requires evaluation by a variety of trained personnel through a variety of tools, 20 U.S.C. § 1414(b), and requires development of an individualized education program (IEP) that considers child’s strengths, weaknesses and goals, which need be reevaluated no less than annually. 20 U.S.C. § 1414(d). A special “IEP” team is generated for this reason, including parent, teacher, special education teacher, representative of a local overseeing agency, optional added expert, someone, perhaps already included who can “interpret the instructional implications of evaluation results,” including someone already on the team, and the child, as appropriate. § 1415(d)(1)(B).

Parental consent is required by § 1414 for an IEP; however, if withheld schools *may* follow procedures under § 1415. *See also* 34 C.F.R. §§ 300.301—306. In the absence of consent, the school is no longer under an absolute duty to provide a FAPE. *See* 20 U.S.C. § 1414(a)(1)(D)(ii). Education for disabled students should be in the “least restrictive environment” possible, preferably in general classrooms with alongside nondisabled students. 20 U.S.C.A. § 1412(a)(5).

II. Antidiscrimination

A. WHAT IS THE PURPOSE OF THE FEDERAL SPECIAL EDUCATION LAW, NAMELY SECTION 504 OF THE REHABILITATION ACT (504) AND THE AMERICANS WITH DISABILITIES ACT (ADA)?

The Rehabilitation Act (Section 504):

Statute: 29 U.S.C. § 701 et seq.

Authority: 29 U.S.C. 702 (delegating authority to the Rehabilitation Services Administration to be housed within the Department of Education to carry out the purposes of the Act). *See also* 29 U.S.C.A. § 794 (West).

Regulations: 34 C.F.R. pt. 104

Purpose of the Act: “. . . to ensure, to the greatest extent possible, that youth with disabilities and students with disabilities who are transitioning from receipt of special education services under the Individuals with Disabilities Education Act (20 U.S.C. 1400 et seq.) and receipt of services under section 794 of this title have opportunities for postsecondary success.” 29 U.S.C.A. § 701(b)(5). (citing only the educational purpose, among other charges).

COMMENTARY—DEP’T OF ED. COMMENT (WEBSITE):

“The Americans with Disabilities Act Amendments Act of 2008 (Amendments Act), effective January 1, 2009, amends the Americans with Disabilities Act of 1990 (ADA) and includes a conforming amendment to the Rehabilitation Act of 1973 (Rehabilitation Act) that affects the meaning of the term disability in Section 504 of the Rehabilitation Act (Section 504). The Amendments Act retains the definition of disability under Section 504 and the ADA but emphasizes that the definition should be interpreted broadly. Among other things, the Amendments Act directs that the ameliorating effects of mitigating measures (other than ordinary eyeglasses or contact lenses) not be considered in determining whether an individual has a disability; expands the scope of "major life activities" by providing a non-exhaustive list of general activities and a non-exhaustive list of major bodily functions; clarifies that an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active; and clarifies the meaning of "regarded as" having a disability, including that individuals "regarded as" having a disability are not entitled to reasonable accommodations or reasonable modifications.” <http://www2.ed.gov/policy/rights/guid/ocr/disability.html>.

Americans With Disabilities Act (ADA):

Statute: 42 U.S.C. § 12101 et seq. (Title II Part A – Public Services (public schools); Title III Public Accommodations (in private schools))

Enforcement: 42 U.S.C.A. § 12133 (West) (“The remedies, procedures, and rights set forth in section 794a of Title 29 shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of section 12132 of this title.”).

Regulations: 28 C.F.R. pt. 35³; 28 C.F.R. pt. 36 + applies regulations from 28 C.F.R. pt. 39 and 34 C.F.R. pt. 104.

³ This “extends the prohibition of discrimination” in federally assisted programs established by section 504 of the Rehabilitation Act of 1973 to all activities of State and local governments, including those that do not receive Federal financial assistance, and incorporates specific prohibitions of discrimination on the basis of disability from titles I, III, and V of the Americans with Disabilities Act. 28 C.F.R. pt. 35, App. B.

Findings/Purpose of the Act:

- “[D]iscrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services; 42 U.S.C.A. § 12101(a)(3) (West).
- “It is the purpose of this chapter-- (1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities; (2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities; (3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and

(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.” 42 U.S.C.A. § 12101(b) (West).

A. WHO QUALIFIES FOR SERVICES AS “DISABLED” OR “HANDICAPPED” UNDER 504 AND THE ADA?

DEFINITION UNDER 504: For purposes of the Rehabilitation Act, “individual with a disability” is defined as it is in the Americans with Disabilities Act of 1990 (“ADA”)⁴. *See* 29 U.S.C. § 794(a); *see also* 42 U.S.C. § 12101 et seq.

DEFINITION UNDER THE ADA: He or she must have a “physical or mental impairment that substantially limits one or more major life activities . . . [has] a record of such impairment . . . or [is] being regarded as having such an impairment” 42 U.S.C. § 12102(1). The term “disability” shall be interpreted broadly, in favor of coverage where possible. 42 U.S.C. § 12102(4)(A). *See also* 42 U.S.C.A. § 12131 (West) (defines qualified person in public schools)⁵. ADA protection extends to individuals “subjected to an action prohibited under this chapter because of an actual or perceived physical or mental

⁴ “Subject to subparagraphs (C), (D), (E), and (F), the term “individual with a disability” means, for purposes of sections 701, 711, and 712 of this title and subchapters II, IV, V, and VII of this chapter [29 U.S.C.A. §§ 760 et seq., 780 et seq., 790 et seq., and 796 et seq.], any person who has a disability as defined in section 12102 of Title 42.” 29 U.S.C.A. § 705(20)(B) (West).

⁵ “[A]n individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.” 42 U.S.C.A. § 12131(2) (West).

impairment whether or not the impairment limits or is perceived to limit a major life activity.” 42 U.S.C.A. § 12102(3)(A) (West).

“[M]ajor life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.” 42 U.S.C.A. § 12102(2)(A) (West).

B. WHAT ARE THE MAIN COMPONENTS OF 504 AND THE ADA WITH RESPECT TO THE INQUIRIES OF THE TRAUMA, SCHOOLS, AND POVERTY PROJECT?⁶

1. Free Appropriate Public Education (FAPE)

APPLICABILITY UNDER 504: A FAPE is guaranteed. 29 U.S.C. § 794(a); 34 C.F.R. § 104.33 (regulatory support):

“[An] appropriate education is the provision of regular or special education and related aids and services that

- (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and
- (ii) are based upon adherence to procedures that satisfy the requirements of §§ 104.34, 104.35, and 104.36.. 34 C.F.R. § 104.33(b)(1).

Implementing an Individualized Education Plan, as would be required under the Individuals with Disabilities Education Act (IDEA) will satisfy the aforementioned requirement of meeting the needs of handicapped persons as adequately as those of nonhandicapped students. 34 C.F.R. § 104.33(b)(2). A disabled child or his or her family shall incur no additional costs if additional services or alternate placement is required in the provision of an “appropriate education” for the child.

APPLICABILITY UNDER THE ADA: No, there is no direct FAPE requirement. This is not an oversight, as FAPE is mentioned in regulations: “Does not require a private school to provide a free appropriate education or develop an individualized education program in accordance with regulations of the Department of Education implementing section 504 of the Rehabilitation Act of 1973, as amended (34 CFR part 104), and regulations implementing the Individuals with Disabilities Education Act (34 CFR pt 300).” 28 C.F.R. pt. 36, App. C.

2. Identification/Location (Child Find)

⁶ This section is strictly limited for the purposes of our initial research questions. This section does not purport to address the full breadth of procedural and other requirements within 504 and the ADA.

APPLICABILITY UNDER 504: Yes, identification of students and notification to parent/guardians (of duties under this Part) are guaranteed. *See* 29 U.S.C.A. § 794(a); *see also* 34 C.F.R. § 104.32, 104.36:

“A recipient that operates a public elementary or secondary education program or activity shall annually: (a) Undertake to identify and locate every qualified handicapped person residing in the recipient's jurisdiction who is not receiving a public education; and (b) Take appropriate steps to notify handicapped persons and their parents or guardians of the recipient's duty under this subpart. “ 34 C.F.R. § 104.32

APPLICABILITY UNDER ADA: No, identification of disabled students is not an affirmative duty, because there is no FAPE requirement.

3. Evaluation/Placement/Accommodations

APPLICABILITY UNDER 504: Yes, evaluation is required. 34 C.F.R. § 104.35(b). Placement determined by a “group of persons,” § 104.35(c), often including members of a Child Study Team.⁷ Periodic reevaluation is required. § 104.35(d). Placement shall be based upon a variety of sources including, “aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior[.]” *See* 34 C.F.R. § 104.35. The educational setting should be alongside non-handicapped students, whenever possible. 34 C.F.R. 104.34(a). Section 504 is concerned with outcomes, therefore, handicapped students shall not be “counseled toward more restrictive career objectives than . . . nonhandicapped students with similar interests and abilities.” 34 C.F.R. § 104.47(b).

APPLICABILITY UNDER ADA: Evaluation and Placement not directly required, “The receipt of Federal assistance by a private school, however, would trigger application of the Department of Education's regulations to the extent mandated by the particular type of assistance received.” 28 C.F.R. pt. 36, App. C; *see also* 28 C.F.R. § 35.103(a); *see also* *J.T. v. Dumont Pub. Sch.*, 103 A.3d 269, 280 (App. Div. 2014) (“ADA regulations generally conform to the regulations promulgated under Section 504 of the RA”).

Conclusion— Children exposed to trauma may qualify for services, accommodations, or placements under both special education law. The exclusion of “socially maladjusted” children may be problematic; however, such inquiry is reserved for future research, as no express definition of the term exists under Federal law. Students may similarly qualify for services, accommodations, or placement under antidiscrimination law, but educational

⁷ “OCR [(Office of Civil Rights)] has interpreted Section 504 to require districts to obtain parental permission for initial evaluations. If a district suspects a student needs or is believed to need special instruction or related services and parental consent is withheld, the IDEA and Section 504 provide that districts may use due process hearing procedures to seek to override the parents' denial of consent for an initial evaluation.” <http://www2.ed.gov/about/offices/list/ocr/504faq.html#evaluation>.

entities have a less exacting, or perhaps simply *lesser* overall duty, than under the special education law.

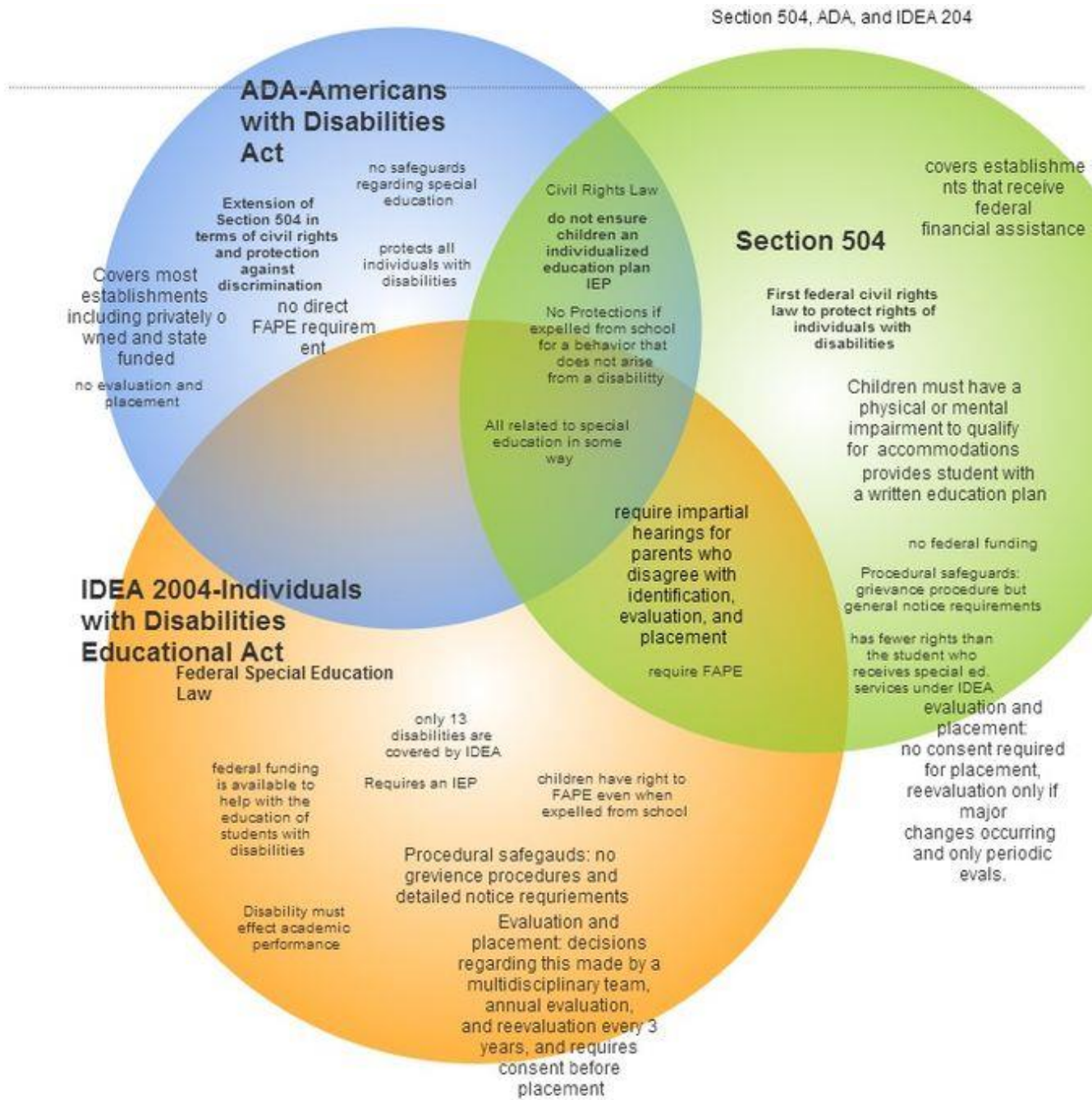


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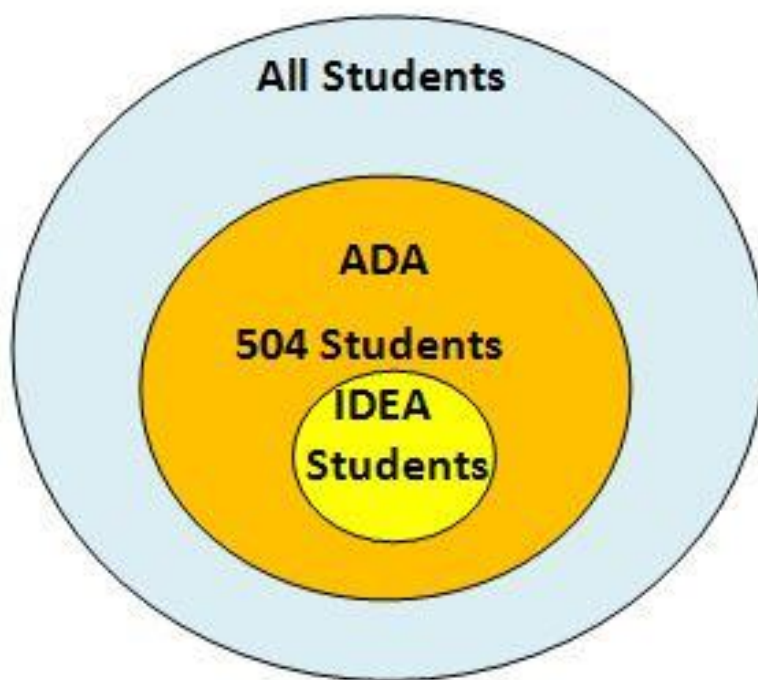


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Table 3. Differences in Responsibility to Provide Free Appropriate Public Education (FAPE)	
IDEA	Section 504
Requires an individualized education program (IEP)	Does not require an IEP, but does require a plan
Appropriate education means a program designed to provide "educational benefit" for a person with disabilities	"Appropriate" means an education comparable to the education provided to those students who are not disabled
Placement may be any combination of special education and general education classrooms	Placement usually in general education classroom
Related services, if required	Related services, if needed
<i>Note: IDEA = Individuals with Disabilities Education Act (amended 1997); Section 504 = Section 504 of the Rehabilitation Act of 1973.</i>	

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