

# Ensuring Access to Speech and Debate for Students with Disabilities: Legal Basics

by Thomas A. Mayes and Perry A. Zirkel



Two important federal laws—the Americans with Disabilities Act of 1990 (“ADA”) and Section 504 of the Rehabilitation Act of 1973 (“Section 504”)—protect students with disabilities from discrimination in education, as well as requiring supports and program modifications when necessary to participate in programs or services offered by covered entities. Although most attention has focused on interscholastic athletics (Sullivan, Lantz, & Zirkel, 2000), their coverage includes co-curricular and extracurricular speech and debate programs. We explain these legal basics and then apply them to situations that speech and debate professionals may confront.

## What Entities Are Covered by the ADA and Section 504?

Title II of the ADA prohibits discrimination against persons with disabilities by state and local governments, such as school districts. Title III prohibits discrimination against persons with disabilities by privately owned places of public accommodation, including schools; however, Title III

does not cover “religious organizations or entities controlled by religious organizations, including places of worship” (42 U.S.C. § 12187). Even though Title III of the ADA does not cover a faith-based private entity, a covered entity may violate the ADA by providing assistance to, or partnering with, that non-covered private entity (Sullivan, Lantz, & Zirkel, 2000).

Section 504 prohibits discrimination against persons with disabilities by entities receiving federal financial assistance. Section 504’s definition of “federal financial assistance” is broader than cash assistance, and includes loans and in-kind assistance, as well as indirect assistance (34 C.F.R. § 104.4(b)), and includes private schools that participate in federal programs such as special education under the IDEA and remedial education under Title I (Zirkel, 2009).

## Which Students Are Covered Under Section 504 and the ADA?

Both Section 504 and the ADA contain the identical definition of disability—(1) a physical or mental impairment that (2) substantially limits the person (3) in a major life activity (Zirkel, 2009). Note

under this standard that a diagnosis, standing alone, does not create 504/ADA coverage. Instead, that impairment must cause a substantial limitation on a major life activity (Holler & Zirkel, 2008). For example, if a child with a dyslexia diagnosis has evidence of only a minor limitation in any major life activity, the child is not 504/ADA covered (Holler & Zirkel, 2008; Zirkel, 2009). The law’s list of major life activities is broad, non-exhaustive, and not limited to academic performance (Holler & Zirkel, 2008). A knowledgeable team, not a single person, such as a debate coach or tournament director, must make the determination of whether a student meets this three-part definition (34 C.F.R. § 104.35(c)(3)).

The ADA amendments of 2008 provided interpretive standards for determining substantial limitation. First, a team determines a child’s eligibility under the ADA and Section 504 without regard to medication or mitigating measures (Zirkel, 2009). For example, for a child who has hearing loss, that child’s team determines eligibility without her hearing aids, not with her hearing aids. Similarly, a team determines eligibility for a child with ADHD without the effect of any



*We explain the legal basics of the Americans with Disabilities Act of 1990 and Section 504 of the Rehabilitation Act of 1973 and then apply them to situations that speech and debate professionals may confront.*

prescription medication a child may be taking. The only exception to this “no mitigating measures” rule is ordinary contacts or eyeglasses.

Second, the ADA and Section 504 cover impairments that are episodic or in remission if the condition is substantially limiting in its active phase (Zirkel, 2009). Third, the law covers temporary impairments if the temporary impairment results in substantial limitations of a major life activity (Office for Civil Rights [OCR], 2015). As a general rule, the length of time for a temporary impairment is six months but the requisite duration will depend on the individual circumstances (OCR, 2015).

The ADA and Section 504 also protect individuals who are *regarded* as having an impairment or who have a *record* of such an impairment (Holler & Zirkel, 2008). People who are covered under the “regarded as” or “record of” prongs do not have a current disability; however, they are protected from discrimination based on disabilities they once had or disabilities people imagine them to have. However, these two alternative prongs protect the individual against exclusion rather than entitling them to services or accommodations.

### What Is Included in the Duty Not to Discriminate?

Section 504 and the ADA are antidiscrimination laws (Holler & Zirkel, 2008; OCR, 2015). These laws prohibit decision-making based on “generalizations or stereotypes” and must be individualized (OCR, 2013, p. 5). These laws also require covered entities afford children with disabilities an “equal opportunity” to participate in a covered entity’s programs or services (34 C.F.R. § 104.37).

The duty not to discriminate includes the following, according to the United States Department of Education’s OCR (2013, pp. 3-4, quoting and paraphrasing 34 C.F.R. § 104.4(b)(1)(i)-(iv), (vii), (2), (3)):

- “denying a qualified student with a disability the opportunity to participate in or benefit from an aid, benefit, or service;

- affording a qualified student with a disability an opportunity to participate in or benefit from an aid, benefit, or service that is not equal to that afforded others;
- providing a qualified student with a disability with an aid, benefit, or service that is not as effective as that provided to others and does not afford that student with an equal opportunity to obtain the same result, gain the same benefit, or reach the same level of achievement in the most integrated setting appropriate to the student’s needs;
- providing different or separate aid, benefits, or services to students with disabilities or to any class of students with disabilities unless such action is necessary to provide a qualified student with a disability with aid, benefits, or services that are as effective as those provided to others; and
- otherwise limiting a qualified individual with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving an aid, benefit, or service.”

This discrimination prohibition includes the duty not to partner with or provide “significant assistance to any association, organization, club, league, or other third party that discriminates on the basis of disability” (OCR, 2013, p. 5). For that reason, the United States Department of Justice warned that a public school’s debate team competing at a tournament in an inaccessible building at a private religious high school “may not be meeting its obligation of program access” (Letter to Bereuter, 1993). In a related matter, statewide or regional high school activity associations or leagues have uniformly been held to be subject to the ADA and Section 504 (OCR, 2013; Sullivan, Lantz, & Zirkel, 2000).

The obligation to provide an equal opportunity for participation may require extracurricular programs or activities “to make reasonable modifications to ... policies, practices or procedures...” unless it can be

demonstrated “that the requested modification would constitute a fundamental alteration of the nature of the extracurricular ... activity” (OCR, 2013, p. 7). The obligation also may require a covered entity to provide “supplementary aids and services,” unless those would fundamentally alter the program or activity (OCR, 2015; OCR, 2013, p. 6). If those supports are necessary, the child’s team includes them in the child’s plan (Sullivan, Lantz, & Zirkel, 2000).

In determining whether a supplementary aid or service or a modification constitutes a fundamental alteration, the OCR (2013) uses the following framework:

- 1) Is the modification or service necessary for an equal opportunity for participation (OCR, 2013)?
  - 2) If so, does the modification or service “fundamentally alter” the activity? A fundamental alteration occurs under either of these circumstances:
    - It “alters such an essential aspect of the activity or game that it would be unacceptable even if it affected all competitors equally (such as adding an extra base in baseball)” or
    - Even though having “only a peripheral impact on the activity or game itself,” it “might nevertheless give a particular player with a disability an unfair advantage over others and, for that reason, fundamentally alter the nature of the competition.” (OCR, 2013, p. 7).
  - 3) If the modification or service is a fundamental alteration, has the school determined “whether other modifications might be available that would permit the student’s participation” (OCR, 2013, p. 7)?
- The purpose of the law is to level the playing field and account for the limitations because of the child’s disability, not to give the child a competitive advantage over other children (OCR, 2013). For that reason, an entity may require students, with or without supplementary services

or modifications, to attain a certain “level of skill or ability in order for that student to participate in a selective or competitive program or activity, so long as the selection or competition criteria are not discriminatory” (OCR, 2013, p. 3). The law also provides for coaches’ decisions about who will compete and in what event, so long as those coaches’ decisions are not discriminatory and “must be based on the same criteria the coach uses for all other” competitors (OCR, 2013, at 6). The process of determining whether modifications or supports amount to a fundamental alteration requires knowing the fundamental nature of the activity. If there is a dispute about what is an essential element of a speech or debate event, it is difficult to make a principled application of the first subprong of the “fundamental alteration” prong above. If there is no agreement about what is “essential” to the event, then the analysis should continue to whether there is a competitive advantage gained by the modification or support.

If a child with a disability is unable to participate in an activity even with modifications and supports, the law does not require that covered entities create a parallel or separate activity (Letter to Negrón, 2013). However, the United States Department of Education encourages schools to consider doing so (Letter to Negrón, 2013; OCR, 2013). If a school district created an alternate activity for children with disabilities who could not access the standard activity, it would be disability-based discrimination to require children with disabilities to participate in the alternate activity (OCR, 2013).

Two more topics deserve attention: (1) bullying and harassment and (2) discipline of students with disabilities. If a child with a disability experiences harassment because of his disability or a denial of a free appropriate public education because of bullying and harassment, the school “must take prompt and effective steps reasonably calculated to end the bullying, eliminate the hostile environment, prevent it from

recurring, and, as appropriate, remedy its effects” (OCR, 2014).

As to discipline, as a general rule, a covered entity is not to remove a child with a disability, from the child’s current educational placement because of behavior that is a manifestation of her disability (S-1 v. Turlington, 1981). Although the law covers only disciplinary removals that constitute changes in placement (e.g., suspensions or expulsions of more than 10 days in length), it may be prudent to consider whether the child’s disability caused the misconduct before removing or suspending him from the team or competition. That being said, if the disability-caused misconduct is incompatible with the activity, the child is excludable under the “fundamental alteration” prong of Section 504 and the ADA.

*“Following the principles set forth in this article will help schools comply with Section 504 and the ADA. More importantly, however, schools will follow a key portion of the NSDA’s Code of Honor ... Respect.”*

Children who are covered under the “regarded as” or “record of” prongs are protected from discrimination but are not entitled to modifications or supports (Holler & Zirkel, 2008). This is because they have no present and actual need for different treatment. Finally, parents who disagree with identification decisions, evaluation decisions, or educational placement decisions have procedural safeguards (Weber, 2012). This includes the right to an impartial hearing (34 C.F.R. § 104.37) and the right to use the covered entity’s required grievance procedure (34 C.F.R. § 104.7(b)).

## Hypotheticals: What Do You Do in the Following Situations?

Using this information, consider the following ten hypothetical situations (assume, unless otherwise stated, that you are the team’s coach). We provide our proposed responses in light of the authorities discussed above.

### ► Hypothetical One:

You are a tournament director and have received a request for accommodations from an Extemporaneous Speaking competitor’s coach. The competitor is 504-covered because of PTSD: the child’s traumatic event occurred in the Sudanese civil war. The coach asks that any Extemp question relating to war crimes or current armed conflict in Africa be removed when the child draws her questions.

*The request does not appear to be a change in the essential nature of Extemporaneous Speaking. The competitor will still draw three questions and answer one; the competitor has no competitive advantage over other speakers, who also draw three and answer one.*

### ► Hypothetical Two:

A Humorous Interpretation competitor wants to attend an overnight trip. The competitor’s plan calls for paraeducator assistance because of physical health needs. You usually arrange team travel, which is paid for by the team’s parent booster club. The booster club tells the student’s parents that a parent must travel with the child because the booster club cannot pay for the paraeducator to travel to the overnight tournament.

*This demand is prohibited discrimination. The booster club is an agent of the school. The school cannot partner with the booster club to impermissibly shift costs for the school’s obligations under Section 504 and the ADA to the parents.*

► **Hypothetical Three:**

You are a state tournament director. A child with a fine motor impairment is entered in Lincoln-Douglas Debate. Her parent contacted you and demanded that you order any debater facing her child to “slow down” and not spread so she can “keep up” while flowing. She also states that spreading should not be allowed anyway because that is not “real LD.”

*This parent (query why the coach did not initiate this conversation) is seeking a competitive advantage for her daughter, not an accommodation. Asking a fast speaker to speak slower is akin to asking a fast runner to run slower. She demands that other competitors forego using a skill. As to whether spreading in LD should be permitted, this is a question for competition and rules committees.*

► **Hypothetical Four:**

A child with an ADHD diagnosis who wishes to do Public Forum Debate asks if he can have extra prep time because of his ADHD. You have not noticed that the child had any problems with concentration during class or in practice and did not know that the child had ADHD.

*There are two issues. The child's eligibility should be determined by a team of professionals, not you as the coach (If the child is already eligible, query your school did not inform you.). As to the request for extra prep time, this request would appear to be a variance from the one fixed rule in Public Forum: the timing of speeches and prep time, an impermissible alteration of the rules of the activity.*

► **Hypothetical Five:**

You are observing one of your teams in a novice round. One of the opposing school's competitors has a physical disability and uses a note-taker to flow the round (he uses a note-taker during his coursework

during the school day). It appears that the note-taker, a recent high school graduate who excelled in Policy Debate, is flowing in potential substantive responses for the competitor and pulling up potential blocks for the competitor to read.

*The competitor's note-taker is not providing a permissible support; rather, he is providing an unfair competitive advantage, even if it is with the best of intentions.*

► **Hypothetical Six:**

You are running the tab room for Congressional Debate at the state tournament. A competitor with a disability that causes impulse control problems received very low ranks in Congressional Debate because he routinely interrupted other speakers. He and his coach argued that his interruptions of other speakers should not be “penalized” because they are the effects of his disability.

*Even if the routine interruptions were related to the speaker's disability, these interruptions disrupt and fundamentally alter the nature of Congressional Debate.*

► **Hypothetical Seven:**

You are a head coach of a public school debate team. One of your Oratory competitors uses a wheelchair. The upcoming tournament is at a faith-based nonpublic school, which is not fully accessible to students who use wheelchairs. You ask the tournament host to move Oratory to the first floor, which is accessible. The school says no, because the first floor is required for Policy Debate rounds, the tab room, and the judges' lounge. You ask if the competitor can use the staff elevator to go and from her rounds. Again, the school says no because, by school policy, students are not permitted in the elevator.

*Your attendance at this tournament would violate Section 504 and the ADA, because it is inaccessible to your competitor,*

*even if the faith-based private school is not subject to the ADA. Furthermore, if the private school is governed by Section 504, it has a duty to not discriminate, which would include making these very minor changes.*

► **Hypothetical Eight:**

A parent of a child with a learning disability approaches you and demands that you name her child as one of the four Lincoln-Douglas debaters the school is sending to a “national circuit” tournament. The child ranked seventh best on the team according to tournament results and had received all modifications and supports called for in his plan. The parent demands that her child be given a spot because debate is essential to his self-esteem.

*The assignment to the four slots for this tournament is a coaching decision. Section 504 and the ADA do not override results of competition or guarantee a spot in a selective activity.*

► **Hypothetical Nine:**

One of your Prose/Poetry competitors has a physical disability and uses a wheelchair and other assistive devices. She complains to you that she does not feel like a “real” member of the team. She rides in a separate van to tournaments, stays in a hotel room alone, routinely sits separately from the team in the “accessible seating” section at awards assemblies, and did not receive recognition of her recent final round appearance on the team's social media feeds.

*This competitor is literally and figuratively isolated from her team. This isolation is discrimination, as she is not enjoying the equal benefits of debate team membership (Knott County School District, 2010).*

► **Hypothetical Ten:**

On the last night of the final overnight trip of the year, to the state tournament, a Congress competitor with autism confides in you that he is being


“picked on.” When you ask for more details, he tells you that his underwear has been thrown in the toilet, he was pushed out of bed and made to sleep on the floor, a senior took his snacks and ate them in his presence, and all of his roommates were calling him the r-word. He now brings spare underwear to tournaments and hides them in his briefcase. This has been going on all year, and the competitor says he repeatedly asked his teammates to stop. You had no idea this abuse was happening. You confront the senior, who laughed and accused the competitor with disabilities of being unable to take a joke. The senior is currently 4-0 with top speaker points in LD and has been nominated for the state association’s Senior of the Year award.

*You must take prompt and effective steps to investigate and remedy bullying and harassment. The senior, by his statements, conceded*

*the truth of the allegations of disability-based harassment, which is never a “joke.” You are required to take action to address the harms incurred by the target, as well as providing effective consequences to the perpetrator. In our view, at a very minimum, the senior has forfeited his right to continue competing at the state tournament and his candidacy for Senior of the Year.*

### Conclusion

Following the principles set forth in this article will help schools comply with Section 504 and the ADA, as well as other laws with a non-discrimination requirement, such as the Individuals with Disabilities Education Act (OCR, 2013). Additionally, schools will follow a key portion of the National Speech & Debate Association’s Code of Honor. That code provides the following:

“Respect: A member respects individual differences and fosters diversity. They promote tolerance, inclusion, and empowerment for people from a variety of backgrounds including race, religion, gender, sexual orientation, and ability” (National Speech & Debate Association, 2018, p. 18). 



**Thomas A. Mayes** is an attorney for the Iowa Department of Education. He earned his law degree from The University of Iowa College of Law and a master’s degree in education leadership from Lehigh University. An NSDA member in high school, he frequently judges at debate tournaments in Iowa.



**Perry A. Zirkel** is University Professor Emeritus of Education and Law at Lehigh University. He is the author of Section 504, the ADA, and the Schools. He earned his J.D. and Ph.D. from the University of Connecticut and his LL.M. from Yale University.

### References

- Americans with Disabilities Act, 42 U.S.C. §§ 12101 *et seq.* (2014).
- Bereuter, Letter to, 5 NDLR ¶ 84 (U.S. Department of Justice 1993).
- Holler, R.A., & Zirkel, P.A. (2008). Section 504 and public schools: A national survey concerning “Section 504-only” students. *NASSP Bulletin*, 19-43.
- Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 *et seq.* (2014).
- Knott County Sch. Dist., 110 LRP 67417 (OCR 2010).
- National Speech & Debate Association (2018). *High School Unified Manual 2017-2018*, available at <https://www.speechanddebate.org/high-school-unified-manual>.
- Negrón, Letter to, 62 IDELR 185 (OCR 2013).
- Office for Civil Rights, Protecting Students with Disabilities: Frequently Asked Questions About Section 504 and the Education of Children with Disabilities, 67 IDELR 189 (2015), available at <https://www2.ed.gov/about/offices/list/ocr/504faq.html>.
- Office for Civil Rights, Responding to Bullying of Students with Disabilities, 64 IDELR 115 (2014), available at <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-bullying-201410.pdf>.
- Office for Civil Rights, Dear Colleague Letter of January 25, 2013, 60 IDELR 167 (2013), available at <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201301-504.pdf>.
- S-1 v. Turlington, 635 F.2d 342 (5th Cir. Unit B 1981).
- Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (2014).
- Section 504 Regulations, 34 C.F.R. pt. 104 (2014).
- Sullivan, K.A., Lantz, P.J., & Zirkel, P.A. (2000). Leveling the playing field or leveling the players? Section 504, the Americans with Disabilities Act, and interscholastic sports. *Journal of Special Education*, 33, 258-267.
- Weber, M.C. (2012). Procedures and remedies under Section 504 and the ADA for public school children with disabilities. *Journal of the National Association of Administrative Law Judiciary*, 32, 611-647.
- Zirkel, P.A. (2009). The ADAA and its effect on Section 504 students. *Journal of Special Education Leadership*, 22, 1-8.