

# COMPLIANCE MANUAL FOR SECTION 504 OF THE REHABILITATION ACT OF 1973

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## **CHAPTER ONE:**

### **INTRODUCTION TO SECTION 504**

This document addresses Section 504 of the Rehabilitation Act of 1973, (Section 504), as it applies to students with disabilities. The purpose of this document is to help school districts (districts) better understand their obligations under Section 504. It is for informational purposes only and is not intended as a substitute for legal advice. Reference to “student with a disability” assumes in most cases that the student is covered under Section 504.

**What Is Section 504?** Section 504 is a federal anti-discrimination law that protects the rights of individuals with disabilities in programs and activities that receive federal financial assistance from the U.S. Department of Education (29 USC §794,701 et seq.). Recipients of this federal financial assistance include public school districts, institutions of higher education, and other state and local education agencies. It requires a school district to provide a “free and appropriate education,” (FAPE) to each qualified student with a disability who is in the recipient’s jurisdiction, regardless of the nature or severity of the student’s disability (34 C.F.R. § 104.33(a)). Under Section 504, FAPE provides regular or special education and related aids and services that are designed to meet the needs of individuals with disabilities as adequately as the needs of individuals without disabilities are met. 34 C.F.R. § 104.33(b)(1)(i).

### **Who Enforces Section 504?**

The U.S. Department of Education, Office for Civil Rights (OCR), enforces Section 504. OCR has 12 enforcement offices and a headquarters office in Washington, DC. The enforcement office for Minnesota is located in Chicago. The contact information is: Office for Civil Rights, U.S. Department of Education, John C. Kluczynski Federal Building, 230 S Dearborn St, 37th Floor, Chicago, IL 60604 - Telephone 312.730.1560; Fax 312.730.1576; TTY 312.730.1609; Email: OCR.Chicago@ed.gov

Complaints of disability discrimination may also be filed with the Minnesota Department of Human Rights. The contact information is: Minnesota Department of Human Rights, 190 E 5th Street, St. Paul, MN 55101- Telephone 800.657.3704; 651.296.5663; TDD 651.296.1283

### **What Happens if a District Does Not Comply with Section 504?**

OCR attempts to bring a district into voluntary compliance through negotiation of a corrective action agreement. If this is unsuccessful, OCR may initiate proceedings for suspension or elimination of federal funds that school districts receive for programs and services (Executive Order 11914, 41 Fed. Reg. 17871(1976)). OCR also may refer the case to the Department of Justice for judicial proceedings.

### **What is the Americans With Disabilities Act and How is Section 504 Different?**

Americans with Disabilities Act (ADA) is a federal anti-discrimination law. Title II of the Act prohibits state and local governments from discriminating on the basis of disability. It provides that "no qualified individual with a disability shall, by reasons of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by such entity" ( 42 U.S.C. § 12132). While neither Title II of the ADA nor its implementing regulations has an explicit FAPE requirement, for all practical purposes districts must provide FAPE and due process in order to comply with the ADA since the obligations and duties under the ADA and Section 504 are generally the same (*Letter to Rahall*, 21 IDELR 575 (OCR 1994)). If a public school is in compliance with Section 504, it is also in compliance with the ADA (NTS Am. Jur. 2d *Americans with Disabilities Act* § 616 (2008)). The two laws should be interpreted simultaneously.

## **What is the Individuals with Disabilities Education Act and How is Section 504 Different?**

The Individuals with Disabilities Education Act (IDEA) is a federal law governing special education (34 C.F.R. § 300). Because it is a grant statute, federal funds are provided for the education of students with disabilities who meet the eligibility criteria for one or more of thirteen categories. It requires a school district to provide a free and appropriate education (34 C.F.R. § 300.17).

While both IDEA and Section 504 mandate the provision of FAPE, IDEA defines FAPE as consisting of special education and related services, implemented on the basis of an Independent Educational Program (IEP). Under Section 504, FAPE may consist of either regular or special education and related aids and services, as implemented by any appropriate means, including, but not limited to, an IEP but is generally in the form of a Section 504 Plan (34 C.F.R. § 104.33). If, however, a student does not qualify for an IEP, he or she may qualify for a Section 504 Plan as determined below. IDEA requires that a child's disability must adversely affect his or her education, requiring special education, whereas, in order to qualify under Section 504, a student must have a physical or mental impairment that substantially limits a major life activity or is regarded as having such impairment.

Additionally, while federal funds are provided for implementation of IDEA, under Section 504, federal funds are not provided, although the obligation to comply remains. Cost considerations do not limit a district's responsibility to provide FAPE under Section 504.

### **What Happens if a Student Qualifies Under Section 504?**

If a student qualifies under Section 504, it has been determined through a variety of sources that the student has a physical or mental impairment that substantially limits a major life activity, determined on a case-by-case basis. Documented sources may include aptitude and achievement tests, teacher recommendations, physical condition, social and cultural background and adaptive behavior by those knowledgeable about the meaning of the evaluation data and placement options. Once eligibility has been determined, a Section 504 Plan is prepared and implemented in accordance with applicable regulations. Periodic reevaluations are required. 34 C.F.R. § 104.35(d).

The Section 504 Plan may consist of education in the regular classrooms, education in regular classes with supplementary services, accommodations and/or special education and related services. The Section 504 Plan is designed to meet individual educational needs of students with disabilities as adequately as the needs of students without disabilities and should adhere to provisions that include identification, evaluation, placement and notice. Implementation of an IEP, developed in accordance with IDEA, is one means of meeting this standard. 34 C.F.R. § 104.33(b)(1)(2).

### **What Happens if a Student Qualifies Under Idea?**

If a student qualifies under IDEA, an IEP is prepared and implemented in accordance with applicable regulations. To qualify for special education and related services under Part B of the IDEA, a student must be between the ages of 3 and 21 and must satisfy both parts of a two-part

test: 1) The student must meet the definition of one or more of the categories of disabilities specified at 34 C.F.R. § 300.8(c)(1- 13), or if a state and school district so elect, the student may qualify by meeting the criteria described in 34 C.F.R. § 300.8(b) for development delays. 2) The student must be shown to be in need of special education and related services because of his disability or disabilities. 34 C.F.R. § 300.22.

### **Can a Student Qualify Under Both Section 504 and Idea?**

If a student qualifies under IDEA, the student also qualifies under Section 504 and, therefore, is covered under its nondiscrimination protections. A student who has been determined to be qualified under Section 504, however, is not necessarily considered disabled under IDEA if the student does not meet one of the thirteen specific criteria (See 34 C.F.R. § 300.8(c)(1-13). If a student does not qualify under IDEA, he or she should be evaluated under Section 504. *Yukon (OK) Public Schools*, 50 IDELR 199 (OCR 2007).

### **How Have the Americans with Disabilities Act Amendments Act of 2008 Affected Section 504 and a District's Responsibilities?**

The Americans with Disabilities Act Amendment Act of 2008 (Amendments Act), which became effective on January 1, 2009, rejected a number of U.S. Supreme Court decisions that were viewed as improperly narrowing ADA coverage in a manner that excluded individuals who were meant to fall within the protections of the Act.

The Amendments Act includes: construing the term "disability" in favor of broader coverage; lowering of the standard for what constitutes a major life activity; interpreting the term "substantially limits" so that the impairment need not limit other major life activities; interpreting an episodic impairment or one that is in remission as covered if it substantially limits a major life activity when active; determining whether an impairment substantially limits a major life activity without regard to the effects of specific measures which lessen the effect of the disability (except for ordinary eyeglasses or contact lenses which fully correct an impairment); providing an expanded list of major life activities; changing the definition of "regarded as" so that an individual may be covered whether or not the perceived impairment would actually result in a substantial limitation of a major life activity so that the individual need only establish that he or she is believed to have such impairment regardless of its significance; interpreting the "regarded as" provision so that it does not apply to transitory or minor impairments; not providing reasonable accommodations to individuals only qualifying under the act under the "regarded as" provision. Pub. L. No. 110-315, 122 Stat. 3553 (2008). *Protecting Students with Disabilities – Frequently Asked Questions about Section 504 and the Education of Children with Disabilities*, U.S. Department of Education, Office for Civil Rights, March 17, 2011. See also, *Dear Colleague Letter: Questions and Answers on the ADA Amendments Act of 2008 for Students with Disabilities Attending Public Elementary and Secondary Schools*, U.S. Department of Education, Office for Civil Rights, January 19, 2012.

## Summary of Requirements Under Section 504

- Designate a Section 504 Coordinator.
- Adopt grievance procedures.
- Provide notice that the district does not discriminate.
- Provide programs and services accessible to persons with disabilities.
- Annually identify and locate every qualified student with a disability.
- Provide a free appropriate public education to each qualified child with a disability regardless of the severity of the disability so that regular or special education and related aids and services are designed to meet individual needs of students with disabilities as adequately as the needs of students without disabilities.
- Educate each qualified student with a disability in the “least restrictive environment.”
- Conduct an evaluation of each child who because of a disability needs or is believed to need special education or related services in accordance with evaluation procedures.
- Draw on a variety of sources in making placement decisions.
- Establish and implement procedures for periodic reevaluations.
- Establish and implement procedural safeguards.
- Afford equal opportunity for participation by students with disabilities in nonacademic and extracurricular activities.

Find the full compilation of Section 504 regulations in Chapter Two.

### **Red Flags for Identification of Students Under Section 504**

- When a parent, teacher or child frequently expresses a concern about the child's performance.
- When suspension or expulsion is being considered for a student.
- When retention of a student is being considered.
- When a student demonstrates a pattern of not benefiting from teacher instruction, including failing grades or inability to progress through grade level curriculum.
- When a student returns to school after a serious illness or injury and/or has a chronic health condition or learning disability.
- When a student is evaluated and is found to not qualify for special education services under IDEA.
- When a student has been identified as having an attention deficit disorder (ADD) or attention deficit hyperactive disorder (ADHD), Autism Spectrum Disorder (ASD) or any other chronic mental, emotional, behavioral, medical or physical condition that substantially limits a major life activity.
- When a student is identified as "at risk" for whatever reason or exhibits the potential for dropping out of school (e.g., inconsistent attendance, behavioral issues, substance or child abuse in the family; substance abuse by student).
- When a child is suspected of having or known to have a disability of any kind.



**Best Practices for Section 504 Plans**

- Write clear Section 504 Plans. For example, rather than providing an accommodation “as needed,” indicate who will determine that the accommodation is needed.
- Include all appropriate staff and parent(s)/guardians in Section 504 team meetings. Many districts incorporate this process into already existing teams, such as child study teams (e.g., if it is determined that a child does not qualify for an IEP, the child is then evaluated by the team for a Section 504 Plan).
- Consider a staff in-service on Section 504 Plans and review of current Section 504 plans.
- Put a Section 504 Plan in writing; if it is not written down, OCR assumes it did not happen.
- Provide all of the student’s teachers with a copy of the Section 504 Plan at the beginning of the school year and have them sign off on having received it. Include staff in charge of the student’s extracurricular activities in cases where it is determined that it would be appropriate.
- Periodically review each Section 504 Plan. An annual review is strongly recommended.
- Prepare a one-page Section 504 overview for staff and parents and publish it in a district newsletter. The overview should inform the reader how eligibility is determined and what parties make up the eligibility team.

## Resources:

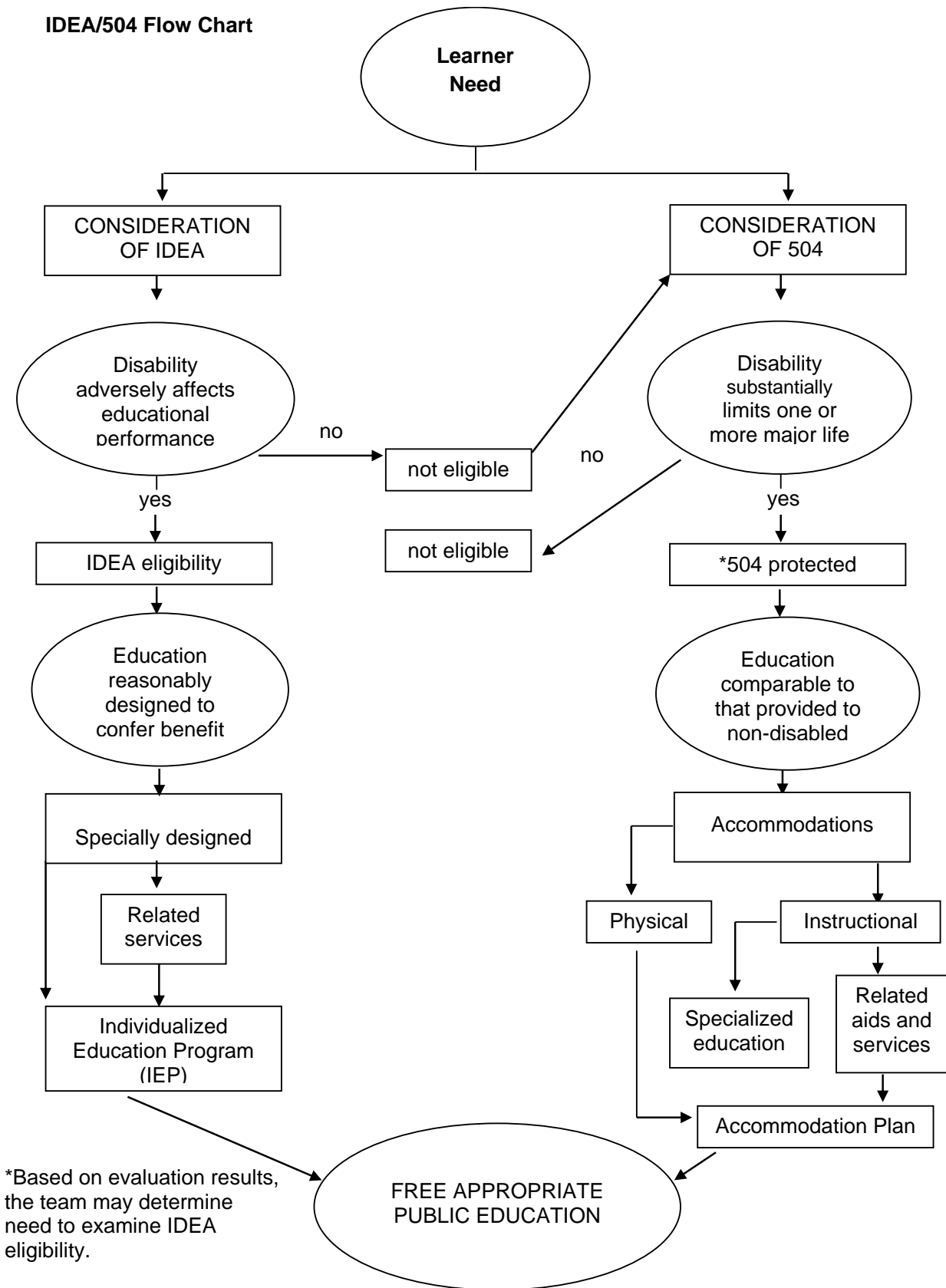
*Minnesota Manual of Accommodations for Students with Disabilities in Instruction and Assessment, A Guide to Selecting, Administering, and Evaluating the Use of Accommodations, 2008-2009 and Training Guide. National Center on Educational Outcomes, 2008.*<sup>1</sup>

*Protecting Students with Disabilities - Frequently Asked Questions About Section 504 and the Education of Children with Disabilities. Office for Civil Rights, U. S. Department of Education, March 17, 2011.*<sup>2</sup>

### **Sample Section 504 Coordinator Duties**

- Manage and monitor Section 504 Plans as acting member of each Section 504 team.
- Ensure that all 504 Plans are reviewed periodically and that reevaluations are conducted every three years.
- Provide ongoing training and support to staff regarding the implementation of Section 504 regulations.
- Collect and maintain all Section 504 data (Section 504 Plans, list of eligible students, evaluations medical reports, discipline records, etc.).
- Continually monitor and address architectural barriers to accessibility for persons with qualifying disabilities in accordance with Section 504/ADA.
- Facilitate provision of reasonable accommodations for district employees with qualifying disabilities.
- Keep the school board and staff informed of Section 504/ADA compliance issues and legal requirements.
- Coordinate Section 504 grievances.
- Serve as the liaison between the district, parents, and outside agencies, including the Office for Civil Rights at the U.S. Department of Education with respect to inquiries, complaint resolution, corrective actions, etc.

**IDEA/504 Flow Chart**



## **CHAPTER TWO:**

### **LEGAL REQUIREMENTS AND GUIDANCE FOR DISTRICTS UNDER SECTION 504 OF THE REHABILITATION ACT – REGULATIONS, GUIDANCE AND OCR DECISIONS**

The case summaries in this chapter do not reflect every point of law but highlight a particular point for purposes of illustration. A complete compilation of the Section 504 regulations is included at the end this chapter.

## DESIGNATE A SECTION 504 COORDINATOR

### Federal Regulation

Section 104.7 (a) Designation of responsible employee. A recipient that employs fifteen or more persons shall designate at least one person to coordinate its efforts to comply with this part.

### OCR Decision Guidance

- **Designate a Section 504 Coordinator for the district.**
- **Publish the Coordinator's name, office address, phone number and indicate that the Coordinator is responsible for all Section 504 matters pertaining to identification, evaluation and placement as well as disability discrimination.**
- **Publish the information in a number of places so that it is easily accessible.**
- **If the required designation for the current school year has not been published, use an insert and agree to publish the information in the next publication of the student handbook.**

### OCR Decisions

- In Florida, OCR held that the Section 504 regulations do not require the designation of a Section 504 Coordinator at each school building within a school district; designation of at least one responsible person for the entire district is sufficient. *Dade County (FL) Sch. Dist.*, 23 IDELR 838 (OCR 1995). Docket No. 04-95-1271.
- In New York, OCR determined that it is not enough to publish just contact information for the Section 504 Coordinator on school calendars. Published information should also include clarification that the Section 504 Coordinator's duties include addressing complaints of disability discrimination in addition to Section 504 matters pertaining to identification, evaluation and placement. *Central Islip (NY) Public Schools*, 51 IDELR 112, (OCR 2008). Docket No. 02-07-5001.
- In Massachusetts, OCR noted compliance concerns regarding the district's designation of a person to coordinate its efforts under Section 504 because it was not easily accessible. *Framingham (MA) Public Schools*, 108 LRP 21725 (OCR 2007). Docket No. 01-07-1143, 01-07-1169.
- In Tennessee, acknowledging that the regulations do not specify the particular information that must be provided to constitute identification, OCR ruled that a district violated Section 504 because it failed to disclose the name, address and telephone number of the Section 504 Coordinator. Districts are required to identify the individual(s) who serves as the Section 504 Coordinator in the nondiscrimination notice. OCR will check for compliance in the course of investigating other parental complaints as well during a civil rights audit. *Harriman City (TN) School District*, EHLR 311:78 (OCR 1986).

## ADOPT GRIEVANCE PROCEDURES

### Federal Regulation

Section 104.7 (b) Adoption of grievance procedures. A recipient that employs fifteen or more persons shall adopt grievance procedures that incorporate appropriate due process standards and that provide for the prompt and equitable resolution of complaints alleging any action prohibited by this part. Such procedures need not be established with respect to complaints from applicants for employment or from applicants for admission to postsecondary educational institutions.

### OCR Technical Assistance

- **Establish a two-step review process for appeal.**

### OCR Decision Guidance

- **Provide a clear process including who can use the grievance procedures (e.g., students, employees, parents and third parties), and a process for filing a complaint.**
- **Disseminate or publish the grievance procedures.**
- **Indicate that the complaint is not required to be filed in writing so as not to discriminate against a qualified person with a disability related to writing.**
- **Indicate at what stage an investigation is triggered.**
- **Provide for an adequate, reliable, and impartial investigation of complaints, including the opportunity to present witnesses and other evidence.**
- **Designate reasonably prompt time frames for major stages of the complaint process;**
- **Provide notice of the outcome of the complaint to all parties.**
- **Designate an alternative Section 504 Coordinator in the event the complaint alleges that the Coordinator or other school official with responsibilities regarding the grievance procedure process is a part of the alleged discrimination.**
- **Include an adoption date on grievance procedures.**
- **Indicate in the grievance procedures that they can be used for discrimination complaints.**

### OCR Technical Assistance Resource

- OCR guidance recommends “an alternative procedure if the complaint alleges that the ADA Coordinator or other school officials with responsibilities regarding the grievance procedures process are a part of the alleged discrimination” as well as “a two-step review process that allows for appeal.” *ADA Self-Evaluation and Transition Planning for Public Schools, U.S. Department of Education, Office for Civil Rights, p. 36.*

**OCR Decisions**

- In Massachusetts, OCR found that a district did not promptly and adequately respond to a Section 504 complaint of discrimination because of inadequate grievance procedures. *Barnstable (MA) Public Schools*, 108 LRP 63069, (OCR 2008). Docket No. 01-07-1188.
- In New York, OCR determined that a district was not in compliance with Section 504 because of absence of an adoption date for grievance procedures as well as an indication that they were available for use by employees, applicants or other beneficiaries. *Central Islip (NY) Public Schools*, 51 IDELR 112, (OCR 2008). Docket No. 02-07-5001.
- In Oklahoma, OCR determined that although Section 504 does not specifically require a district to include the address or phone number of the person designated to coordinate Section 504, not providing this contact information constitutes ineffective notice. *Broken Arrow (OK) Public Schs.*, 50 IDELR 22 (OCR 2007). Docket No. 07-071152.
- In Alabama, OCR determined that the student grievance procedures published in a school board policy manual failed to provide that the procedures could be used for discrimination complaints. *Jacksonville (AL) City Schs.*, 46 IDELR 139 (OCR 2006). Docket No. 04-06-1083.

## PROVIDE NOTICE THAT THE DISTRICT DOES NOT DISCRIMINATE

### Federal Regulation

#### Section 104.8 Notice

(a) A recipient that employs fifteen or more persons shall take appropriate initial and continuing steps to notify participants, beneficiaries, applicants, and employees, including those with impaired vision or hearing, and unions or professional organizations holding collective bargaining or professional agreements with the recipient that it does not discriminate on the basis of handicap in violation of Section 504 and this part. The notification shall state, where appropriate, that the recipient does not discriminate in admission or access to, or treatment or employment in, its program or activity. The notification shall also include an identification of the responsible employee designated pursuant to 104.7(a). A recipient shall make the initial notification required by this paragraph within 90 days of the effective date of this part. Methods of initial and continuing notification may include the posting of notices, publication in newspapers and magazines, placement of notices in recipients' publication, and distribution of memoranda or other written communications.

(b) If a recipient publishes or uses recruitment materials or publications containing general information that it makes available to participants, beneficiaries, applicants, or employees, it shall include in those materials or publications a statement of the policy described in paragraph (a) of this section. A recipient may meet the requirement of this paragraph either by including appropriate inserts in existing materials and publications or by revising and reprinting the materials and publications.

### OCR Decision Guidance

- **Include a notice that the district does not discriminate in all materials available to students, participants, beneficiaries, applicants and employees based on disability and identify the person responsible for coordinating Section 504. This can be accomplished by including an appropriate insert in existing materials and publications, revising and reprinting materials and publications.**
- **Indicate on the notice that a district does not discriminate based on all categories of disabilities (e.g., “The district does not discriminate based on physical disability” but rather “The district does not discriminate based on disability.”)**

#### *OCR Decisions*

- In Alabama, OCR found that although the student handbook stated that a district did not discriminate based on disability, it failed to identify the person responsible for coordinating compliance with the district’s nondiscrimination policy either by name or title. If the handbooks do not contain the contact person, parents will not know whom to contact when help is needed. A district may comply with Section 504 by including inserts in existing materials or revising and reprinting them. *Jacksonville (AL) City Schs*, 46 IDELR 139 (OCR 2006). Docket No. 04-06-1083.
- In Missouri, in a case involving the district’s failure to evaluate a student with ADHD, OCR found the district failed to incorporate a nondiscrimination notice based on disability



or sex in the student handbook. *Camdenton (MO) R-III Sch. Dist.*, 20 IDELR 197 (OCR 1993). Docket No. 07-93-1031.

- In New Jersey, OCR found that a district's nondiscrimination notice failed to contain a reference to persons with disabilities; the handbooks did not provide the name of the Section 504 Coordinator and the general grievance procedure did not reference Section 504 grievances. *Garfield (NJ) Sch. Dist.*, 18 IDELR 545 (OCR 1991). Docket No. 02-91-1080.
- In Pennsylvania, OCR found that the district's student handbook and application for admission form did not contain proper notice of nondiscrimination because it only extended to people with physical disabilities. The case involved failure of the district to properly evaluate a seventeen-year-old student diagnosed with a mild form of cerebral palsy with seizure disorder and dysphasia and the other special education students to determine their individual needs for a vocational education program. *School Dist. of Philadelphia (PA)*, 19 IDELR 529 (OCR 1992). Docket No. 03-92-1093.

## MAKE PROGRAMS AND SERVICES ACCESSIBLE TO PERSONS WITH DISABILITIES

### Federal Regulation

Subpart C-Accessibility. Section 104.21 Discrimination prohibited. No qualified handicapped person shall, because a recipient's facilities are inaccessible to or unusable by handicapped persons, be denied the benefits of, be excluded from participation in, or otherwise be subjected to discrimination under any program or activity to which this part applies.

### **Section 104.22 Existing facilities**

(a) **Accessibility.** A recipient shall operate its program or activity so that when each part is viewed in its entirety, it is readily accessible to handicapped persons. This paragraph does not require a recipient to make each of its existing facilities or every part of a facility accessible to and usable by handicapped persons.

(b) **Methods.** A recipient may comply with the requirements of paragraph (a) of this section through such means as redesign of equipment, reassignment of classes or other services to accessible buildings, assignment of aides to beneficiaries, home visits, delivery of health, welfare, or other social services at alternate accessible sites, alteration of existing facilities and construction of new facilities in conformance with the requirements of Section 104.23, or any other methods that result in making its program or activity accessible to handicapped persons. A recipient is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with paragraph (a) of this section. In choosing among available methods for meeting the requirement of paragraph (a) of this section, a recipient shall give priority to those methods that serve handicapped persons in the most integrated setting appropriate.

(c) **Small health, welfare, or other social service providers.** If a recipient with fewer than fifteen employees that provides health, welfare, or other social services finds, after consultation with a handicapped person seeking its services, that there is no method of complying with paragraph (a) of this section other than making a significant alteration in its existing facilities, the recipient may, as an alternative, refer the handicapped person to other providers of those services that are accessible.

(d) **Time period.** A recipient shall comply with the requirement of paragraph (a) of this section within sixty days of the effective date of this part except that where structural changes in facilities are necessary, such changes shall be made within three years of the effective date of this part, but in any event as expeditiously as possible.

(e) **Transition plan.** In the event that structural changes to facilities are necessary to meet the requirement of paragraph (a) of this section, a recipient shall develop, within six months of the effective date of this part, a transition plan setting forth the steps necessary to complete such changes. The plan shall be developed with the assistance of interested persons, including handicapped persons or organizations representing handicapped persons. A copy of the transition plan shall be made available for public inspection. The plan shall, at a minimum: (1) Identify physical obstacles in the recipient's facilities that limit the accessibility of its program or activity to handicapped persons; (2) Describe in detail the methods that will be used to make the

facilities accessible; (3) Specify the schedule for taking the steps necessary to achieve full accessibility in order to comply with paragraph (a) of this section and, if the time period of the transition plan is longer than one year, identify the steps of that will be taken during each year of the transition period; and (4) Indicate the person responsible for implementation of the plan.

(f) **Notice.** The recipient shall adopt and implement procedures to ensure that interested persons, including persons with impaired vision or hearing, can obtain information as to the existence and location of services, activities, and facilities that are accessible to and useable by handicapped persons.

### **Section 104.23 New construction**

(a) **Design and construction.** Each facility or part of a facility constructed by, on behalf of, or for the use of a recipient shall be designed and constructed in such manner that the facility or part of the facility is readily accessible to and usable by handicapped persons, if the construction was commenced after the effective date of this part.

(b) **Alteration.** Each facility or part of a facility which is altered by, on behalf of, or for the use of a recipient after the effective date of this part in a manner that affects or could affect the usability of the facility or part of the facility shall, to the maximum extent feasible, be altered in such manner that the altered portion of the facility is readily accessible to and usable by handicapped persons.

(c) **Conformance with Uniform Federal Accessibility Standards.** (1) Effective as of January 18, 1991, design, construction, or alteration of buildings in conformance with sections 3 8 of the Uniform Federal Accessibility Standards (UFAS) (Appendix A to 41 C.F.R. subpart 101 19.6) shall be deemed to comply with the requirements of this section with respect to those buildings. Departures from particular technical and scoping requirements of UFAS by the use of other methods are permitted where substantially equivalent or greater access to and usability of the building is provided. (2) For purposes of this section, section 4.1.6(1)(g) of UFAS shall be interpreted to exempt from the requirements of UFAS only mechanical rooms and other spaces that, because of their intended use, will not require accessibility to the public or beneficiaries or result in the employment or residence therein of persons with physical handicaps. (3) This section does not require recipients to make building alterations that have little likelihood of being accomplished without removing or altering a load bearing structural member.

### **ADA Technical Assistance**

- **When program accessibility in existing facilities can be achieved only through structural alterations, carrying a student with a disability may serve as a temporary expedient until construction is completed. Carrying is permitted in manifestly exceptional cases if the carriers are formally instructed on the safest and least humiliating means of carrying and if provided in a reliable manner.**

### **OCR Decision Guidance**

- **Determine on a case-by-case basis how accessible a program or activity is “when viewed in its entirety” by conducting an extensive analysis of the barriers to accessibility and their impact on students with disabilities.**

- **Continue to use “existing facilities” if the program access requirement is met. Modifying or ceasing to use all non-accessible facilities constructed or put into operation before June 3, 1977, is not required; the program access requirement may be met by using workable alternatives to making structural changes such as redesign of equipment, relocation of classes, assignment of aides, home visits, etc.**
- **The following situations are examples of disability discrimination: the absence of hot water for changing diapers of students with disabilities; the absence of an inside route to the accessible bathroom, thereby subjecting students to weather conditions, when the only accessible route to the accessible bathroom is through another classroom causing unfavorable attention to students with disabilities; failure to equip bathroom facilities with bathroom stalls, toilet paper dispensers and covered pipes in accordance with regulations at the time of construction.**
- **Apply the broad coverage of program accessibility so that it includes not only school buildings, but also ancillary facilities such as a district's administration building as well as support facilities (parking spaces, entrances, signage, restrooms, drinking fountains, alarm systems, doors, etc.).**
- **Use of a path by students when walking to school is not a program or activity for accessibility purposes if it is neither situated on land owned by the district nor maintained by the district. If a route, passageway or roadway is on school property or is school-maintained, however, it may be subject to Section 504 accessibility requirements.**
- **Provide a firm, stable, slip-resilient accessible route, an asphalt courtyard, accessible playground equipment and wheelchair play-formed swing sets as some of the ways of making a playground accessible in the absence of federal regulations pertaining to playgrounds.**
- **Provide a high degree of accessibility in buildings in which a student with a disability may spend extended time as opposed to those in which a student with a disability spends relatively short periods of time.**
- **Publish notice of procedures for relocating or reassigning programs or activities when they are inaccessible due to physical barriers.**
- **Publish a district's procedures for providing program access in existing buildings, such as relocating programs or activities, in a manner that ensures that interested persons are made aware of the district's procedures (e.g. written notice on school bulletin boards may not reach all interested parties).**
- **Carrying students with a mobility-impairment as a means of providing accessible transportation, even for a brief period, except in extraordinary or rare and exigent circumstances (e.g. fragile medical condition of small child) is not permitted. Even the use of carrying wheelchairs or a Stair-Tracs is prohibited as a means of providing accessible transportation.**

- **Using a main entrance to a school is not required to comply with the program accessibility requirements of Section 504. However, the alternative entrance for individuals with disabilities must be comparable to the entrance doors used for students without disabilities (e.g. hours unlocked, lighting, accessible pathways to and from doors).**

### ADA Technical Assistance

- “Carrying persons with mobility impairments to provide program accessibility is permitted in two cases: when program accessibility in existing facilities can be achieved only through structural alterations (that is, physical changes to the facilities), carrying may serve as a temporary expedient until construction is completed. Second, carrying is permitted in manifestly exceptional cases if (a) carriers are formally instructed on the safest and least humiliating means of carrying and (b) the service is provided in a reliable manner. Carrying is contrary to the goal of providing accessible programs, which is to foster independence.” *The ADA Title II Technical Assistance Manual*, 28 C.F.R. 35.102-35.104, 5-2000.

### OCR Decisions

- In California, OCR determined that absence of hot water denied staff and students with physical disabilities necessary and basic sanitary conditions for changing diapers and that the outside route to accessible toilets prevented the toilet from being accessible at all times due to weather. Also, they found that the inside route to accessible toilets through a classroom of students denied the students with disabilities their right to privacy. *San Diego (CA) City United Sch. Dist.*, 36 IDELR 13 (OCR 2001). Docket No. 09-01-1118.
- In New Jersey, OCR found that a district denied persons with disabilities the benefits of, or excluded them from, participation in the programs and activities of the “existing” administration building, built in 1915. Several offices were reachable only by stairs and certain interior elements such as stalls, toilet paper dispensers and exposed pipes were not accessible despite the fact that the bathrooms had been altered in 1983 under ANSI. *Vineland (NJ) City Sch. Dist.*, 16 IDELR 748 (OCR 1990). Docket No. 02-89-1158. Also, in Missouri, OCR determined that when viewing all programs and activities in their entirety, identified parking, entrances, signage, restrooms, drinking fountains, alarm systems and interior doors as support facilities must be in compliance with accessibility rules. *Pleasant Hill (MO) R-III Sch. Dist.*, 32 IDELR 12 (OCR 1991). Docket No. 07-98-1240.
- In California, OCR concluded that a district was not in violation of Section 504 when it failed to formally maintain an unpaved path used by students. Because the paths were considered existing facilities, Section 504 does not require that the district make each of its existing facilities or every part of a facility built before June 3, 1977, accessible to and usable by persons with disabilities. The primary purpose of the path, which ran across the high school campus and accessed a trail maintained by a regional park, was to serve as an entrance to the school grounds. OCR determined that there were other accessible entrances and that the trail was not a program or activity of the district. *San Ramon Valley (CA) Unified Sch. Dist.*, 22 IDELR (OCR 1995). Docket No. 09-95-1090.
- In Mississippi, OCR found that a district discriminated against students by failing to provide a playground area that was accessible to students with disabilities when viewed in its entirety. The playground, which was constructed in the 1960s and contains equipment approximately twenty to twenty-five years old, had an unstable surface of

grass, dirt and pea gravel. The district agreed to install wheelchair play-formed swing sets on the asphalted courtyard. *Marshall County (MS) School District*, 44 IDELR 140 (OCR 2005). Docket No. 06-051004.

- In California, OCR expressed concern that although there are no current federal guidelines specific to playground equipment, the city playground contained an uneven surface area, an inaccessible route to the playground equipment and a raised barrier to the playground making it inaccessible. The district agreed not to use the playground. *West Contra Costa (CA) Unified Sch. Dist.*, 34 IDELR 128 (OCR 2000). Docket No. 09-99-1201.
- In Texas, OCR found a number of accessibility issues in which usage of the buildings was an important factor in determining if there was a limitation of access to programs. It was determined that buildings in which a student may spend extended periods of time (e.g. libraries, student activity centers) must meet a higher degree of accessibility than those in which a student spends relatively short periods of time. *Cayuga (TX) Indep. Sch. Dist.*, 43 IDELR 203 (OCR 2004). Docket No. 06-04-1216.
- In Oregon, OCR found that a district had not followed notice procedures for providing program access in existing buildings, such as relocating programs or activities upon request if a person with a disability is unable to otherwise access the program or activity due to physical barriers. The notice, which was published on school bulletin boards, was not published in a manner that ensures that interested persons, other than students, are made aware of the district's procedures. *Sweet Home (OR) Sch. Dist. No. 55*, 22 IDELR 1053 (OCR 1995). Docket No. 10-95-1035.
- Also, in Idaho, OCR found that a district was not in compliance with Section 504 as it did not have procedures for relocating and reassigning programs or activities when they were inaccessible because of physical barriers. *Grangeville (ID) Joint Dist. No. 241*, 21 IDELR 1139 (OCR 1994). Docket No. 10-94-1074.
- And see an OCR Staff Memorandum in which OCR provides guidelines for investigations of program accessibility for individuals with disabilities with respect to existing buildings, such as relocating classes, use of aides, providing services and activities to accessible ground-level floors within a building or reassigning classes to other buildings that are accessible. OCR states that an institution must develop an effective procedure so that classes will be relocated when the need arises. *OCR Staff Memorandum*, 17 IDELR 613 (OCR 1991).
- In the District of Columbia, it was determined that a district violated Section 504 by carrying a nine-year-old mobility-impaired student with cerebral palsy during a brief period during which the wheelchair lift was out of service and awaiting repair. *Ramirez v. District of Columbia*, 32 IDELR 87 (D.D.C. 2000). Docket No. 99-803.
- In Idaho, OCR determined that a district inappropriately carried a student with juvenile arthritis to the second floor while the wheelchair-accessible lift was out of service. *Grangeville (ID) Joint Dist. No. 241*, 21 IDELR 1139 (OCR 1994). Docket No. 10-94-1074.
- In Ohio, in a case involving a student with cerebral palsy and hydrocephalus in a school with existing buildings many of which contain only stairs to the upper floors, OCR determined that "Carrying an individual with a disability is, except under rare and exigent circumstances, an unacceptable means of providing access to district programs." Mt.

Gilead (OH) Exempted Village Sch. Dist. 42 IDELR 126 (OCR 2004). Docket No. 15-04-1068.

- In Indiana, OCR found that while carrying or lifting persons with mobility impairments is generally unacceptable as a means of providing transportation, the medical condition of the preschooler, who was fragile and weighed less than thirty pounds could be considered an extraordinary circumstance which permitted lifting her from the school van under Section 504. *South Montgomery (IN) Community Sch. Corp.* 1 ECLPR 263 (OCR 1992). Docket No. 15-92-1144.
- In New Jersey, OCR determined in a school with numerous inaccessible facilities that use of Stair-Trac was an unacceptable means of achieving accessibility. This mechanical device must be operated by another individual who both loads and unloads the wheelchair into the device and therefore, is analogous to carrying a student with a disability. *Lyndhurst Township (NJ) School District*, ECLPR 367 (OCR 1993). Docket No. 02-93-1012.
- In New York, the New York State Educational Agency determined that carrying wheelchairs and use of devices such as Stair-Tracs, which assists persons assigned to carry a wheelchair up and down stairways, is prohibited since the goal of providing accessible programs is to foster independence and avoid humiliation. *Hindsdale Central Sch. Dist.* 401 IDELR 349 (SEA NY 1989). Docket No. 12213.
- In Massachusetts, OCR determined that an alternative entrance to the school for a student with an unspecified disability was acceptable. Doors other than those designated as the main entrance may be used to satisfy the program accessibility requirements of Section 504 provided the arrangements are comparable to those for students without disabilities (e.g. hours unlocked, lighting, accessible pathways to and from doors). *Newton (MA) Public Schools*, 27 IDELR 233 (OCR 1997). Docket No. 01-96-1183.

## **IDENTIFY AND LOCATE EVERY QUALIFIED CHILD WITH A DISABILITY – “CHILD FIND”**

### **Federal Regulation**

Subpart D -- Preschool, Elementary, and Secondary Education.

Section 104.31 Application of this subpart. Subpart D applies to preschool, elementary, secondary, and adult education programs or activities that receive federal financial assistance and to recipients that operate, or that receive federal financial assistance for the operation of, such programs or activities.

Section 104.32 Location and notification. 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.

### **OCR Decision Guidance**

- **Provide public awareness to inform citizens of educational opportunities available to individuals with disabilities and maintain documentation of such activities.**
- **Maintain a list or "dissemination network," including community agencies and facilities, individuals and locations, that received child find information.**
- **Distribute information regarding availability of services.**
- **Track individuals with disabilities within the age range whether or not currently enrolled in an infant, early childhood, public or private educational setting, to ensure the delivery of services.**
- **Determine those individuals who receive special education and those individuals who do not receive needed services.**
- **Post Child Find notices annually in locations around the district and within the community.**
- **Publish biennial news releases concerning child and procedural safeguards and provide copies of procedural safeguards to parents and students.**

#### ***OCR Decision***

- In Texas, OCR determined that although districts have discretion regarding Child Find procedures, this case illustrates what constitutes an acceptable practice. *Celina (TX) Indep. Sch. Dist.*, 34 IDELR 41 (OCR 2000). Docket No. 06-99-1395.



**PROVIDE A FREE APPROPRIATE PUBLIC EDUCATION – “FAPE”****Federal Regulation**

Section 104.33 Free appropriate public education.

(a) **General.** A recipient that operates a public elementary or secondary education program or activity shall provide a free appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction, regardless of the nature or severity of the person's handicap.

(b) **Appropriate education.** (1) For the purpose of this subpart, the provision of 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 Section 104.34, Section 104.35, and Section 104.36. (2) Implementation of an Individualized Education Program developed in accordance with the Education of the Handicapped Act is one means of meeting the standard established in paragraph (b)(1)(i) of this section. (3) A recipient may place a handicapped person or refer such a person for aid, benefits, or services other than those that it operates or provides as its means of carrying out the requirements of this subpart. If so, the recipient remains responsible for ensuring that the requirements of this subpart are met with respect to any handicapped person so placed or referred.

(c) **Free education** -- (1) General. For the purpose of this section, the provision of a free education is the provision of educational and related services without cost to the handicapped person or to his or her parents or guardian, except for those fees that are imposed on non-handicapped persons or their parents or guardian. It may consist either of the provision of free services or, if a recipient places a handicapped person or refers such person for aid, benefits, or services not operated or provided by the recipient as its means of carrying out the requirements of this subpart, of payment for the costs of the aid, benefits, or services. Funds available from any public or private agency may be used to meet the requirements of this subpart. Nothing in this section shall be construed to relieve an insurer or similar third party from an otherwise valid obligation to provide or pay for services provided to a handicapped person.

(2) **Transportation.** If a recipient places a handicapped person or refers such person for aid, benefits, or services not operated or provided by the recipient as its means of carrying out the requirements of this subpart, the recipient shall ensure that adequate transportation to and from the aid, benefits, or services is provided at no greater cost than would be incurred by the person or his or her parents or guardian if the person were placed in the aid, benefits, or services operated by the recipient.

(3) **Residential placement.** If a public or private residential placement is necessary to provide a free appropriate public education to a handicapped person because of his or her handicap, the placement, including non medical care and room and board, shall be provided at no cost to the person or his or her parents or guardian.

(4) **Placement of handicapped persons by parents.** If a recipient has made available, in conformance with the requirements of this section and 104.34, a free appropriate public

education to a handicapped person and the person's parents or guardian choose to place the person in a private school, the recipient is not required to pay for the person's education in the private school. Disagreements between a parent or guardian and a recipient regarding whether the recipient has made a free appropriate public education available or otherwise regarding the question of financial responsibility are subject to the due process procedures of Section 104.36.

(d) **Compliance.** A recipient may not exclude any qualified handicapped person from a public elementary or secondary education after the effective date of this part. A recipient that is not, on the effective date of this regulation, in full compliance with the other requirements of the preceding paragraphs of this section shall meet such requirements at the earliest practicable time and in no event later than September 1, 1978.

### OCR Decision Guidance

The following are examples of denial of FAPE if the needs of students with disabilities are not provided for as adequately as the needs of students without disabilities:

- **Excessive class sizes/caseloads.**
- **Lack of certified personnel.**
- **Inadequate evaluation procedures for special education.**
- **Disparity in transportation, facilities/classrooms for students with disabilities as compared to students without disabilities.**
- **Failure to provide a student with a disability with an aide due to inadequate funding.**
- **Early release of students with disabilities from class due to safety concerns resulting in loss of valuable class time.**
- **A series of unqualified substitute teachers for an extended period of time in the special classes for students with learning disabilities.**
- **Inadequate range of equipment and materials for students with disabilities.**
- **Policies that have the effect of discriminating against students with disabilities by not providing equal opportunity (e.g. lack of access to particular classes, grading).**

### OCR Decisions

- In Utah, OCR held that a district was in violation of FAPE in failing to meet the needs of students with disabilities as adequately as it provided for the education of students without disabilities. Inadequate funding contributed to excessive class sizes and caseloads, lack of certified personnel, inadequate evaluation procedures for students believed to need special education or related services, disparity in transportation arrangements and facilities/classrooms available to students with disabilities as compared to non-disabled students. *Granite (UT) Sch. Dist.* 16 IDELR 1217 (OCR 1990). Docket No. 08-90-1027.

- Also, in Washington state, OCR held that lack of funding was not a sufficient basis for failure to provide a deaf student in a residential program with the necessary related services, a one-on-one dormitory assistant, and violated the student's rights under Section 504 and Title II of the ADA. Also, in *Washington State School for the Deaf*, 22 IDELR 987 (OCR 1995). Docket No. 10-94-1084.
- In California, OCR held that a district was in violation of FAPE because of the following: using a series of unqualified substitute teachers for an extended period of time in the special classes for learning disabled students, not providing an adequate range of equipment and materials as well as discriminatory policies pertaining to participation, enrollment and grading in exploratory classes that failed to provide equal opportunity for participation by students with disabilities. *Montebello (CA) Unified Sch. Dist.*, 20 IDELR 388 (OCR 1991). Docket No. 09-93-1003-1.
- In Florida, OCR determined that a district's release of students with disabilities earlier than other students in the school because of safety concerns constituted differential treatment and was in violation of Section 504 and Title II. This practice resulted in a shortened day for these students as well as loss of valuable class time. *Miami-Dade County (FL) Publ. Schs.*, 35 IDELR 101(OCR 2000). Docket No. 04-99-1425. In another Florida case, OCR found that sending students using a wheelchair home early, resulting in a shortened day, was determined to be in violation of FAPE. *Hardeman County (TN) School District*, 108 LRP 53549 (OCR 2008). Docket No. 04-08-1019.
- In Pennsylvania, a hearing officer held that a holistic Section 504 plan for a student with severe asthma, gross motor difficulties and extreme sensitivity to sensory stimulation, which provided numerous accommodations, was commensurate with a free and appropriate education. Therefore, the parents were not entitled to reimbursement for private school. The accommodations included use of nonverbal signals to make the student aware of inappropriate sensory simulation, availability of a one-on-one aide, flexible recess accommodations, special seating in lunchroom, transportation in a school bus with an aide, warning student of impending loud noises, and permission to opt out of activities. *Molly J. by B.L. and M.L. v. Lower Merion Sch. Dist.* 36 IDELR 182 (E.D. Pa 2002). Docket No. 01-602.

## EDUCATE EACH QUALIFIED CHILD WITH A DISABILITY IN THE “LEAST RESTRICTIVE ENVIRONMENT” - LRE

### Federal Regulation

#### Section 104.34 Educational setting

(a) **Academic setting.** A recipient to which this subpart applies shall educate, or shall provide for the education of, each qualified handicapped person in its jurisdiction with persons who are not handicapped to the maximum extent appropriate to the needs of the handicapped person. A recipient shall place a handicapped person in the regular educational environment operated by the recipient unless it is demonstrated by the recipient that the education of the person in the regular environment with the use of supplementary aids and services cannot be achieved satisfactorily. Whenever a recipient places a person in a setting other than the regular educational environment pursuant to this paragraph, it shall take into account the proximity of the alternate setting to the person's home.

(b) **Nonacademic settings.** In providing or arranging for the provision of nonacademic and extracurricular services and activities, including meals, recess periods, and the services and activities set forth in 104.37(a)(2), a recipient shall ensure that handicapped persons participate with nonhandicapped persons in such activities and services to the maximum extent appropriate to the needs of the handicapped person in question.

(c) **Comparable facilities.** If a recipient, in compliance with paragraph (a) of this section, operates a facility that is identifiable as being for handicapped persons, the recipient shall ensure that the facility and the services and activities provided therein are comparable to the other facilities, services, and activities of the recipient.

### OCR Technical Assistance

- **It may be necessary to educate students with disabilities in the least restrictive environment by placing them in a structured, supportive environment; students who are blind or visually impaired might be better served directly among their own disability population in specialized institutions designed to serve this population, given their unique communication needs.**

### OCR Decision Guidance

- **Section 504 contains a least restrictive environment requirement substantially similar to IDEA although Section 504 does not use this language. It has the same effect: creating a presumption in favor of inclusion.**
- **Inclusion of students with disabilities in nonacademic and extracurricular activities may be limited in the interest of safety.**
- **Section 504 is consistent with IDEA regarding behavioral issues; districts are not required to mainstream a student with a disability who engages in significantly disruptive behavior, interferes with the education of classmates or threatens the safety of other students or poses a danger.**

- **While Section 504 does not contain an express requirement for continuum of special education services as found under IDEA, the same concepts have been applied under Section 504.**
- **The obligation to educate students with disabilities in the least restrictive environment encompasses all aspects of the child’s program, including nonacademic and extracurricular activities such as music and physical education.**
- **An open enrollment policy may have the effect of not providing the same choice of schools to students with disabilities since special education is not available at all school sites. Districts are permitted to determine the educational setting of a student with disabilities including the actual physical location. Special education for high-incidence disabilities is available in all schools, however, special education for students with low-incidence disabilities is not available in all schools.**
- **Placement of a student that will cause him or her to miss any educational opportunities enjoyed by their non-disabled peers (e.g. activities involving a food to which a student is allergic) may not be acceptable.**
- **The term “comparable facilities, services and activities” includes restrooms, gymnasiums and locker rooms, classrooms with respect to location, instructional appropriateness, accessibility, size, lighting and ventilation.**
- **Consideration of a district’s efforts in developing and implementing a plan to ensure comparable facilities for students with disabilities will be made when assessing facilities for comparability.**

### **OCR Technical Assistance**

- In Policy Guidance from the U.S. Department of Education, it is formally recognized that students who are blind or visually impaired might be better served directly among their own disability population in specialized institutions designed to serve this population, given their unique communication needs. For students who are blind or visually impaired, the least restrictive environment requirements can be met both in and out of regular education, depending on a student’s individual needs; a full range of placement options should be explored. *Policy Guidance on Educating Blind/Visually Impaired Students*, 23 IDELR 377 (OSEP 1995).

### **OCR Decision Guidance**

- A letter from the Office of Special Education Programs (OSEP) states that a student with ADD may be eligible under Section 504 if the impairment constitutes a substantial limitation of one or more major life activities. Such determination must be reached on a case-by-case basis. The letter also clarifies that Section 504 contains a least restrictive environment requirement substantially similar to IDEA although Section 504 does not use this language. Nonetheless, it has the same effect of creating a presumption in favor of inclusion. *Letter to Williams*, 21 IDELR 73 (OSEP 1994).
- In Alabama, the state educational agency found that a district did not violate FAPE in its attempt to minimize the risk of collision by placing a gifted student with a visual impairment in the flute section rather than with the other saxophone players. While it was

not an optimal placement and not in the least restrictive environment, it was done to ensure the safety of the student as well as that of other students. In *Conecuh County Bd. of Educ.*, 23 IDELR 572 (SEA MA 1994).

- In Virginia, a circuit court overruled a district court's decision that held that a district failed to accommodate a nonverbal autistic student in a regular education class despite the fact that it provided extensive accommodations including deliberate adjustment of the regular education class, curriculum modifications, a one-to-one aide, extensive training for teachers and an autism consultant to assist with the student's regular education placement. The court noted that the lower court failed to consider the disruptive effect of the student's repetitive behaviors: (whining, screeching, biting and tantrums) in the decision not to place the student in a self-contained autism classroom with mainstreaming for art, music library, physical education and recess. *Hartmann by Hartmann v. Loudon County Bd. of Edu.*, 41 F. 3d 1223 (1994). Docket No. 96-2809.
- Also, in Missouri, OCR found that behavior is a permissible factor in determining the least restrictive environment for a student with multiple mental disabilities who demonstrated violent behaviors such as biting, kicking, poking, throwing and turning over furniture. In this case, the student was "substantially likely to result in injury to himself or others." *Light v. Parkway C-2 Sch. Dist.*, 21 IDELR 933 (8th Cir. 1994). 41 F. 3d 1223 (1994). Docket No. 94-2333.
- In Massachusetts in a case involving a student with ADHD, OCR concluded that the district committed a number of Section 504 violations, among them, failing to provide supplementary aids and services and a continuum of special education services such as classroom consultants, counseling and smaller classes taught by qualified instructors and failing to provide the student with a full day of instruction. *Boston (MA) Renaissance Charter Sch.* 26 IDELR 889 (OCR 1997). Docket No. 97-1096.
- In West Virginia, OCR held that a district violated Section 504 for excluding a student with cerebral palsy from music and physical education and isolating him during lunch, thereby failing to educate him to the maximum extent possible with non-disabled students. *Logan County (WV) Sch. Dist.* 353 IDELR 286 (OCR 1989). Docket No. 03-89-1057.
- In Louisiana, the District Court concluded that a district did not violate Section 504 or IDEA for transferring a profoundly deaf student from his neighborhood school to a school attended by deaf students who used the same method for communication. *Veasey v. Ascension Parish Sch. Bd.*, 104 LRP 5452 (U.S. District Ct. LA 2004). Docket No. 93-377-C.
- In Tennessee, OCR found that a district was not in violation of Section 504 because of its open enrollment policy in which parents with disabilities were not given the same choice of schools as parents of students without disabilities. OCR relied on Section 504 which permits districts to determine the educational setting of a student with a disability, including the actual physical location. While special education is available in all schools for students with high-incidence disabilities (self-contained learning disability, mental retardation, multiple disabled without severe medical needs and speech-language disorders), special education is not available at all school sites for students with low-incidence disabilities (autism, emotional disturbed, multiple-disabled with severe medical needs). In this case the autistic student was reassigned but eventually placed in a private school at district expense. *Memphis City (TN) Sch. Dist.*, 29 IDELR 490 (OCR 1998). Docket No. 04-98-1061.

- In Massachusetts, in a case of a student involving a life-threatening peanut allergy, the state educational agency held that the district was in violation of Section 504 for failure to accommodate by not requiring a ban on all peanut/tree products. The decision also recognized that students' placements should not cause them to miss any educational opportunities enjoyed by their non-disabled peers such as "equal access to a pool of other students during snacks and lunchtime so that the student may learn appropriate social pragmatics in a natural environment, simultaneously with the rest of the age like peers in his class." *Mystic Valley Regional Charter Sch.*, 40 IDELR, 275 (MA 2004). Docket No. 03-3629.
- In Georgia, OCR found that a district was in compliance with Section 504 by educating students with severe behavior disorders and severe emotional disturbances in a psycho-educational center as the least restrictive environment because the students needed to receive educational services in a structured, supportive environment. However, the district did not provide facilities and programs at the psycho-educational center comparable to the programs and facilities provided to other students in the district; the center for students with disabilities did not contain a gymnasium, locker rooms or age-appropriate restrooms. *DeKalb County (GA) Sch. Dist.*, 18 IDELR 921 (OCR 1991). Docket No. 04-84-1176.
- In Virginia, OCR determined that a district was in violation of Section 504 for failing to provide classrooms for students who were learning disabled, educable mentally retarded or trainable mentally retarded that were comparable to those for non-disabled students; the classrooms were located in lofts with three walls and a noisy area as opposed to the classrooms for non-disabled students that had four walls. Additionally, the district was in violation of Section 504 for failing to ensure that students with disabilities participated with non-disabled students during lunch to the maximum extent possible; special education teachers were individually permitted to decide if their students would eat lunch with non-disabled students and the decision was not necessarily based on the needs of the students. Section 104.34(b) *Stafford County (VA) Publ. Sch.* 16 IDELR 896 (OCR 1990). Docket No. 03-89-1118.

## CONDUCT AN EVALUATION IN ACCORDANCE WITH PROCEDURES

### Federal Regulation

#### Section 104.35 Evaluation and placement

(a) **Pre-placement evaluation.** A recipient that operates a public elementary or secondary education program or activity shall conduct an evaluation in accordance with the requirements of paragraph (b) of this section of any person who, because of handicap, needs or is believed to need special education or related services before taking any action with respect to the initial placement of the person in regular or special education and any subsequent significant change in placement.

(b) **Evaluation procedures.** A recipient to which this subpart applies shall establish standards and procedures for the evaluation and placement of persons who, because of handicap, need or are believed to need special education or related services which ensure that: (1) Tests and other evaluation materials have been validated for the specific purpose for which they are used and are administered by trained personnel in conformance with the instructions provided by their producer; (2) Tests and other evaluation materials include those tailored to assess specific areas of educational need and not merely those which are designed to provide a single general intelligence quotient; and (3) Tests are selected and administered so as best to ensure that, when a test is administered to a student with impaired sensory, manual, or speaking skills, the test results accurately reflect the student's aptitude or achievement level or whatever other factor the test purports to measure, rather than reflecting the student's impaired sensory, manual, or speaking skills (except where those skills are the factors that the test purports to measure).

### OCR Decision Guidance

- **If the district chooses to utilize a “pre-screening process,” it must establish standards and procedures which ensure that valid criteria and evaluation instruments are used, that valid and consistent standards are applied by a qualified group of individuals knowledgeable about the child in question, and that the information upon which decisions are based is well documented.**
- **A student should not be placed on a Section 504 plan without determining if the student has a qualifying disability by conducting an appropriate evaluation.**
- **A district should not rely on the unilateral assessment of a principal that because of passing grades, a student is not in need of a Section 504 evaluation.**
- **Did the evaluation consider all significant factors related to the learning process for the student, including adaptive behavior and cultural and language background? This may include, but is not limited to, classroom and playground observation, performance-based testing, academic assessment information, social, emotional and psychological evaluations, and data offered by the student’s teachers, medical providers, school nurse, and parent/guardian.**



- **The evaluation must be sufficient for the Section 504 team to completely and accurately describe: a) the nature and extent of the Student's disabilities; b) the student's individual needs; and c) the regular or special education and/or related aids and services necessary to ensure that the student receives a free appropriate public education.**
- **A district must have a process in its procedures for evaluating a student under Section 504 if they do not qualify for IDEA.**
- **Academic struggles, excessive absences, tardiness and repeated parental requests for an evaluation are factors that should cause a district to consider evaluating a student.**
- **A district is obligated to comply with a request from parents to conduct an evaluation of their child if the district has reason to suspect that the student has a disability.**
- **A district is obligated to conduct an evaluation of a student, including a medical assessment, if necessary, at no cost to the parents if the district suspects that the student has a disability that would result in Section 504 eligibility.**
- **It is implicit in the various steps in the placement process that evaluations must be completed in a reasonable period of time. Unreasonable delay is discrimination against a student with disabilities because it has the effect of denying students with disabilities meaningful access to educational services provided to non-disabled students.**
- **Section 504 regulations do not provide timeframes for completing evaluation of students. OCR uses state guidelines to determine if evaluations have been done in a timely manner which is typically 30 to 45 days after referral.**
- **Districts may use the same process initially to evaluate the needs of students under Section 504 as they use to evaluate the needs of students under IDEA.**
- **If districts choose to adopt a separate process for evaluating the needs of students under Section 504, they must follow the requirements for evaluation specified in the Section 504 regulation at 34 C.F.R. 104.35.**

### ***OCR Decisions***

- **In California, OCR held that a district did not have sufficient procedures to ensure compliance with the evaluation requirements of Section 504. A coalition contended that a group of students with identified learning disabilities, who, because of their high intelligence levels, passable levels in school and high test scores, did not receive full evaluations. OCR concluded that while Section 504 neither requires a district to comply with parental requests for a complete evaluation nor prohibits or requires a pre-screening process, if such a process is used, the district must provide procedural safeguards and "must establish standards and procedures for the pre-screening process which ensure that valid criteria and evaluation instruments are used, that valid and consistent standards are applied by a qualified group of individuals knowledgeable about the child in question, and that the information upon which decisions are based is well**

documented.” *San Diego (CA) Sch. Dist.*, 353 IDELR 236 (OCR 1989). Docket No. 09-88-1063.

- In Colorado, in a case involving a student with a hearing impairment and learning disabilities, OCR found that a district failed to complete an evaluation of the student to determine if he needed special education or related services under Section 504. OCR determined that a district did not have policies and procedures for the evaluation and placement of students with disabilities or procedural safeguards that met the requirements of the Section 504 regulations. *Fowler (CO) School District*, 108 LRP 17816 (OCR 2007). Docket No. 09-06-1021.
- In Wyoming, OCR found that a district’s 504 plan for a student who missed most of the school year because of illness fell short of Section 504 standards. Among the findings by OCR were that the district demonstrated a general lack of knowledge and confusion regarding its responsibilities, failed to follow appropriate evaluation and placement procedures, failed to conduct a disability-related evaluation of the student and failed to determine if he was a student with a disability even though the student was placed on a Section 504 plan. *Laramie County (WY) School Dist.*, 108 LRP 64322 (OCR 2008). Docket No. 08-08-1119-D.
- In California, OCR found that the district failed to appropriately evaluate the student, which inhibited its ability to create an appropriate 504 plan, which resulted in a failure to provide FAPE. The District did not implement evaluation procedures that were sufficient to fully and accurately assess the nature and extent of the Student’s disabilities, and developed a plan without conducting a comprehensive evaluation. *San Dieguito (CA) Union School District*, 53 IDELR 243 (OCR 2009). Docket No. 09-08-1259
- In Oklahoma, OCR determined that the district violated Section 504 because its procedures did not contain a process for determining eligibility under section 504 for students who are not qualified under IDEA and that the district failed to make an eligibility determination for the student under Section 504 after he failed to qualify under IDEA. *Yukon (OK) Public Schools*, 50 IDELR 199 (OCR 2007). Docket No. 07-07-1127.
- In Louisiana, OCR determined that a district should have evaluated a student with ADHD to determine the need for a Section 504 plan; the student demonstrated academic struggles, excessive absences and tardiness, and the parents had made repeated requests for an evaluation. A principal’s unilateral decision that the student was not entitled to services because he had passing grades was improper. *New Orleans (LA) Public Schools*, 50 IDELR 260 (OCR 2008). Docket No. 06-07-1409.
- In Georgia, OCR determined that a district did not violate Section 504 by not evaluating a student with a mild case of attention deficit hyperactivity disorder since multiple classroom observations by a psychologist determined that the student was capable of grade-level work but frequently failed to do it; the disability did not substantially affect the student’s ability to learn. *See also Columbia County (GA) Sch. Dist.*, 37 IDELR 73 (OCR 2002). Docket No. 04-02-1019.
- In an OCR Memorandum, OCR clarifies a former statement in a September 16, 1991 Memorandum concerning “Clarification of Policy to Address the Needs of Children with Attention Deficit Disorders within General and/or Special Education.” The Memorandum provides that if parents believe their child has a disability, whether by ADD or any other impairment, and the LEA has reason to believe the child will need special education or related services, the school must evaluate the child. If the district refuses to evaluate it

must provide parents with notice of their right to challenge the refusal under Section 504. OCR Memorandum 19 IDELR 876 (OCR 1993).

- In Texas, OCR held that a district is obligated to conduct an evaluation of a student, including a medical assessment, if necessary, at no cost to the parents if the district suspects that the student has a disability that would result in Section 504 eligibility. *Letter to Vier*, 20 IDELR 864 (OCR 1993). Also, *Sacramento City (CA) Unified Sch. Dist.*, 23 IDELR 112 (OCR 1995). Docket No. 95812-2271.
- In a Missouri case, where a district took 173 days to complete an evaluation of an emotionally disturbed student, OCR determined “it is implicit that the various steps in the placement process, which includes evaluation, must be completed in a reasonable period of time.” Unreasonable delay constitutes discrimination against a student with disabilities because it has the effect of denying him or her them meaningful access to educational services provided to non-disabled students. *Lumberton (MS) Pub. Sch. Dist.*, 18 IDELR 33 (OCR 1991). Docket No. 04-91-1133.

The following information regarding evaluations under Section 504 is from *Protecting Students with Disabilities: Frequently Asked Questions About Section 504 and the Education of Children with Disabilities*, U.S. Department of Education, Office for Civil Rights, March 17, 2011.

## **EVALUATIONS**

### **What is an appropriate evaluation under Section 504?**

Recipient school districts must establish standards and procedures for initial evaluations and periodic re-evaluations of students who need or are believed to need special education and/or related services because of disability. The Section 504 regulatory provision at 34 C.F.R. 104.35(b) requires school districts to individually evaluate a student before classifying the student as having a disability or providing the student with special education.

Tests used for this purpose must be selected and administered so as best to ensure that the test results accurately reflect the student's aptitude or achievement or other factor being measured rather than reflect the student's disability, except where those are the factors being measured. Section 504 also requires that tests and other evaluation materials include those tailored to evaluate the specific areas of educational need and not merely those designed to provide a single intelligence quotient. The tests and other evaluation materials must be validated for the specific purpose for which they are used and appropriately administered by trained personnel. (FAQ 18)

### **How much is enough information to document that a student has a disability?**

At the elementary and secondary education level, the amount of information required is determined by the multi-disciplinary committee gathered to evaluate the student. The committee should include persons knowledgeable about the student, the meaning of the evaluation data, and the placement options. The committee members must determine if they have enough information to make a knowledgeable decision as to whether or not the student has a disability. The Section 504 regulatory provision at 34 C.F.R. 104.35(c) requires that school districts draw from a variety of sources in the evaluation process so that the possibility of error is minimized. The information obtained from all such sources must be documented and all significant factors related to the student's learning process must be considered. These sources and factors may include aptitude and achievement tests, teacher recommendations, physical condition, social and cultural background, and adaptive behavior. In evaluating a student suspected of having a disability, it is unacceptable to rely on presumptions and stereotypes regarding persons with disabilities or classes of such persons. Compliance with the IDEA regarding the group of persons present when an evaluation or placement decision is made is satisfactory under Section 504. (FAQ 19)

### **What process should a school district use to identify students eligible for services under Section 504? Is it the same process as that employed in identifying students eligible for services under the IDEA?**

School districts may use the same process to evaluate the needs of students under Section 504 as they use to evaluate the needs of students under the IDEA. If school districts choose to adopt a separate process for evaluating the needs of students under Section 504, they must follow the requirements for evaluation specified in the Section 504 regulatory provision at 34 C.F.R. 104.35. (FAQ 20)

**May school districts consider "mitigating measures" used by a student in determining whether the student has a disability under Section 504?**

No. As of January 1, 2009, school districts, in determining whether a student has a physical or mental impairment that substantially limits that student in a major life activity, must not consider the ameliorating effects of any mitigating measures that student is using. This is a change from prior law. Before January 1, 2009, school districts had to consider a student's use of mitigating measures in determining whether that student had a physical or mental impairment that substantially limited that student in a major life activity. In the Amendments Act (see FAQ 1), however, Congress specified that the ameliorative effects of mitigating measures must not be considered in determining if a person is an individual with a disability.

Congress did not define the term "mitigating measures" but rather provided a non-exhaustive list of "mitigating measures." The mitigating measures are as follows: medication; medical supplies, equipment or appliances; low-vision devices (which do not include ordinary eyeglasses or contact lenses); prosthetics (including limbs and devices); hearing aids and cochlear implants or other implantable hearing devices; mobility devices; oxygen therapy equipment and supplies; use of assistive technology; reasonable accommodations or auxiliary aids or services; and learned behavioral or adaptive neurological modifications.

Congress created one exception to the mitigating measures analysis. The ameliorative effects of the mitigating measures of ordinary eyeglasses or contact lenses shall be considered in determining if an impairment substantially limits a major life activity. "Ordinary eyeglasses or contact lenses" are lenses that are intended to fully correct visual acuity or eliminate refractive error, whereas "low-vision devices" (listed above) are devices that magnify, enhance, or otherwise augment a visual image. (FAQ 21)

**Does OCR endorse a single formula or scale that measures substantial limitation?**

No. The determination of substantial limitation must be made on a case-by-case basis with respect to each individual student. The Section 504 regulatory provision at 34 C.F.R. 104.35(c) requires that a group of knowledgeable persons draw upon information from a variety of sources in making this determination. (FAQ 22)

**Are there any impairments which automatically mean that a student has a disability under Section 504?**

No. An impairment in and of itself is not a disability. The impairment must substantially limit one or more major life activities in order to be considered a disability under Section 504. (FAQ 23)

**Can a medical diagnosis suffice as an evaluation for the purpose of providing FAPE?**

No. A physician's medical diagnosis may be considered among other sources in evaluating a student with an impairment or believed to have an impairment which substantially limits a major life activity. Other sources to be considered, along with the medical diagnosis, include aptitude and achievement tests, teacher recommendations, physical condition, social and cultural background, and adaptive behavior. As noted in FAQ 22, the Section 504 regulations require school districts to draw upon a variety of sources in interpreting evaluation data and making placement decisions. (FAQ 24)

**Does a medical diagnosis of an illness automatically mean a student can receive services under Section 504?**

No. A medical diagnosis of an illness does not automatically mean a student can receive services under Section 504. The illness must cause a substantial limitation on the student's ability to learn or another major life activity. For example, a student who has a physical or mental impairment would not be considered a student in need of services under Section 504 if the impairment does not in any way limit the student's ability to learn or other major life activity, or only results in some minor limitation in that regard. (FAQ 25)

**How should a recipient school district handle an outside independent evaluation? Do all data brought to a multi-disciplinary committee need to be considered and given equal weight?**

The results of an outside independent evaluation may be one of many sources to consider. Multi-disciplinary committees must draw from a variety of sources in the evaluation process so that the possibility of error is minimized. All significant factors related to the subject student's learning process must be considered. These sources and factors include aptitude and achievement tests, teacher recommendations, physical condition, social and cultural background, and adaptive behavior, among others. Information from all sources must be documented and considered by knowledgeable committee members. The weight of the information is determined by the committee given the student's individual circumstances. (FAQ 26)

**What should a recipient school district do if a parent refuses to consent to an initial evaluation under the Individuals with Disabilities Education Act (IDEA), but demands a Section 504 plan for a student without further evaluation?**

A school district must evaluate a student prior to providing services under Section 504. Section 504 requires informed parental permission for initial evaluations. If a parent refuses consent for an initial evaluation and a recipient school district suspects a student has a disability, the IDEA and Section 504 provide that school districts may use due process hearing procedures to seek to override the parents' denial of consent. (FAQ 27)

**Who in the evaluation process makes the ultimate decision regarding a student's eligibility for services under Section 504?**

The Section 504 regulatory provision at 34 C.F.R. 104.35(c)(3) requires that school districts ensure that the determination that a student is eligible for special education and/or related aids and services be made by a group of persons, including persons knowledgeable about the meaning of the evaluation data and knowledgeable about the placement options. If a parent disagrees with the determination, he or she may request a due process hearing. (FAQ 28)

**Once a student is identified as eligible for services under Section 504, is there an annual or triennial review requirement? If so, what is the appropriate process to be used? Or is it appropriate to keep the same Section 504 plan in place indefinitely after a student has been identified?**

Periodic re-evaluation is required. This may be conducted in accordance with the IDEA regulations, which require re-evaluation at three-year intervals (unless the parent and public agency agree that re-evaluation is unnecessary) or more frequently if conditions warrant, or if the child's parent or teacher requests a re-evaluation, but not more than once a year (unless the parent and public agency agree otherwise). (FAQ 29)

**Is a Section 504 re-evaluation similar to an IDEA re-evaluation? How often should it be done?**

Yes. Section 504 specifies that re-evaluations in accordance with the IDEA is one means of compliance with Section 504. The Section 504 regulations require that re-evaluations be conducted periodically. Section 504 also requires a school district to conduct a re-evaluation prior to a significant change of placement. OCR considers an exclusion from the educational program of more than 10 school days a significant change of placement. OCR would also consider transferring a student from one type of program to another or terminating or significantly reducing a related service a significant change in placement. (FAQ 30)

**What is reasonable justification for referring a student for evaluation for services under Section 504?**

School districts may always use regular education intervention strategies to assist students with difficulties in school. Section 504 requires recipient school districts to refer a student for an evaluation for possible special education or related aids and services or modification to regular education if the student, because of disability, needs or is believed to need such services. (FAQ 31)

## **DRAW ON A VARIETY OF SOURCES IN MAKING PLACEMENT DECISIONS**

### **Federal Regulation**

Section 104.35 Evaluation and placement

c) **Placement procedures.** In interpreting evaluation data and in making placement decisions, a recipient shall (1) draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior, (2) establish procedures to ensure that information obtained from all such sources is documented and carefully considered, (3) ensure that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options, and (4) ensure that the placement decision is made in conformity with Section 104.34.

### **OCR Technical Assistance**

- **Conditioning placement of a student with a disability in an advanced class or program on the forfeiture of needed special education or related aids and services is inconsistent with Section 504.**

### **OCR Decision Guidance**

- **In establishing a student's educational plan, the basis for decisions should be well documented and include the names of the group of persons knowledgeable about the child, the meaning of the evaluation data, and the placement options.**
- **Revising a Section 504 Plan for a student with ADHD and OCD so that accommodations would not apply to honors classes is not consistent with Section 504 as FAPE is based on the student's educational need as determined through specific procedures in accordance with 34 C.F.R. Section 104.35.**
- **In moving a student from elementary to middle school consider that some aspects of a student's Section 504 Plan will not be appropriate given that there will be multiple subject-specific teachers in middle school instead of a primary teacher.**

### **OCR Technical Assistance Resource**

- "If a qualified student with a disability requires related aids and services to participate in a regular education class or program, then a school cannot deny that student the needed related aids and services in an accelerated class or program." *Dear Colleague Letter: Access by Students with Disabilities to Accelerated Programs, Office of the Secretary, United States Department of Education, December 26, 2007.*

### **OCR Decisions**

- In Pennsylvania, OCR determined that a district failed to develop an educational plan for a gifted student with Attention Deficit Hyperactivity Disorder (ADHD) with a group of persons knowledgeable about the student, which would have included the student's regular education teachers.
- While the district claims that the teachers were involved, there was no documentation to support the district's claim. The parents wanted the student's education to be conducted



in the regular classroom with modifications rather than removing the student for special education. *Girard (PA) Sch. Dist.* 18 IDELR 1048 (OCR 1992). Docket No. 03-91-1170.

- In Tennessee, in a case involving a student with attention deficit hyperactivity disorder (ADHD) and obsessive compulsive disorder (OCD), OCR concluded that a district's decision to revise the student's Section 504 Plan so that accommodations (extra time on class work, homework and routine classroom tests) did not apply to honors classes, is generally inconsistent with Section 504.
- Conditioning enrollment in an advanced class or program on the forfeiture of needed special education or related aids and services is inconsistent with the principle of individualized determinations, which is a key procedural aspect of Section 504. As noted above, under Section 504, the provision of FAPE is based on the student's individualized education needs as determined through an evaluation and placement process in accordance with Section 504. *Wilson County (TN) School District*, 50 IDELR 230 (OCR 2008). Docket No. 04-07-1251.

## CONDUCT A REEVALUATION PRIOR TO A SIGNIFICANT CHANGE IN PLACEMENT AND ESTABLISH PROCEDURES FOR PERIODIC REEVALUATION

### Federal Regulation

Section 104.35 Evaluation and placement

(a) **Pre-placement evaluation.** A recipient that operates a public elementary or secondary education program or activity shall conduct an evaluation in accordance with the requirements of paragraph (b) of this section of any person who, because of handicap, needs or is believed to need special education or related services before taking any action with respect to the initial placement of the person in regular or special education and any subsequent significant change in placement.

d) **Reevaluation.** A recipient to which this section applies shall establish procedures, in accordance with paragraph (b) of this section, for periodic reevaluation of students who have been provided special education and related services. A reevaluation procedure consistent with the Education for the Handicapped Act is one means of meeting this requirement.

### OCR Technical Assistance

- **Student must be reevaluated prior to a significant change in placement which includes exclusion from the educational program of more than 10 school days, transfer to another program or termination or significantly reducing a related service.**

### OCR Decision Guidance

- **Reevaluations are considered just as important as the pre-placement evaluation in the overall scheme of the evaluation process. The student's special education needs may change frequently throughout the course of his or her educational career and the reevaluation requirement exists to assess evolving needs.**
- **Students must be reevaluated prior to a change in placement which include an exclusion from the educational program of more than 10 school days, transferring a student from one type of program to another or terminating or significantly reducing a related service to be significant changes in placement.**
- **Change often triggers reevaluations (e.g. information about the possibility of a suspected disability, significant behavior problems, depression, transfer to a new school, dramatic change in grades).**
- **A reevaluation procedure that is consistent with the requirements of the IDEA (every three years) is one way of meeting the requirement for a reevaluation under Section 504; it is not clear whether and to what extent less frequent reevaluations are permitted under Section 504.**

- **While it is not prohibited to use an IEP from a former district attended by a student, it must be determined if the IEP is appropriate in the new district and a reevaluation conducted if necessary.**
- **Whether or not a pattern of exclusions constitutes a significant change in placement requiring a reevaluation, must be made on a case-by-case basis.**

### OCR Technical Assistance Resource

- OCR guidance provides that students must be reevaluated prior to a significant change in placement. OCR considers an exclusion from the educational program of more than 10 school days, transferring a student from one type of program to another or terminating or significantly reducing a related service to be significant changes in placement. *Protecting Students With Disabilities - Frequently Asked Questions About Section 504 and the Education of Children With Disabilities, Office for Civil Rights, U.S. Department of Education, March 27, 2009, Question 30.*

### OCR Decisions

- In California, OCR concluded that a district failed to comply with Section 504 when it failed to reevaluate a student suspended seventeen times. The suspensions created a pattern of exclusion and caused a significant change in the student's placement for which a reevaluation should have been conducted. Reliance on a two-year-old functional analysis assessment and observation of this student with emotional disturbance, dysthymia and post-traumatic stress disorders, were not sufficient to meet the requirements of Section 504 Section (a) 104.35, which requires a district to conduct an evaluation of a student with a disability before the district determines the student's initial placement and before any subsequent significant changes in placement. *West Contra Costa (CA) Unified Sch. Dist.*, 42 IDELR 121 (OCR 2004). Docket No. 09-04-1041.
- In California, OCR determined that a district was in violation of Section 504 for failing to initiate the reevaluation process or reconvene a Section 504 meeting to determine if a student's Section 504 Plan should be adjusted because the student faced significant problems at school related to depression. *San Bernardino City (CA) Unified School District*, 108 LRP 53202 (OCR 2008). Docket No. 09-07-1378.
- In Florida, in a case of a student with schizophrenia and Tourette's disorder who was placed in a separate facility for severely emotionally disturbed children, OCR held while Section 504 does not prohibit the use of an IEP from a former district attended by the student, it must be determined if the IEP is appropriate in the current district and conduct a reevaluation if necessary. *Flagler County (FL) Sch. Dist.* 34 IDELR 182 (OCR 2000). Docket No. 04-00-1246.
- In Tennessee, OCR determined that a district's in-school suspension program (ISS) was comparable in nature and quality to the educational services regularly provided to special education students. Therefore, the ISS program did not create a pattern of exclusions that resulted in a "significant change in placement," triggering a reevaluation. OCR reiterated its policy that each situation must be made on a case-by-case basis. *Chester County (TN) Sch. Dist.*, 17 IDELR 301 (OCR 1990). Docket No. 04-90-1240.

## PARENTAL CONSENT FOR EVALUATIONS AND REEVALUATIONS

### OCR Technical Assistance

- A district must obtain informed parental consent before conducting a child's initial evaluation.

### OCR Decision Guidance

- Affirmative parental consent is not required for reevaluations of students on Section 504 Plans.

### OCR Technical Assistance Resource

- OCR guidance provides that informed parental consent for initial evaluations is required. *Protecting Students With Disabilities - Frequently Asked Questions About Section 504 and the Education of Children With Disabilities, Office for Civil Rights, U.S. Department of Education, March 17, 2011, Question 27.*

### *OCR Decisions*

- In Texas, OCR's policy clarification states that parental consent should be obtained prior to conducting a student's initial evaluation and placement. "Parental discretion in matters involving student assessment/evaluation is an inherent part of the regulation and parental consent is an appropriate and necessary policy component in the initial evaluation phase." Parental consent, however, is not required for subsequent evaluations. *Letter to Durham, 27 IDELR 380 (OCR 1997).*

## **ESTABLISH AND IMPLEMENT PROCEDURAL SAFEGUARDS**

### **Federal Regulation**

Section 104.36 Procedural safeguards. A recipient that operates a public elementary or secondary education program or activity shall establish and implement, with respect to actions regarding the identification, evaluation, or educational placement of persons who, because of handicap, need or are believed to need special instruction or related services, a system of procedural safeguards that includes notice, an opportunity for the parents or guardian of the person to examine relevant records, an impartial hearing with opportunity for participation by the person's parents or guardian and representation by counsel, and a review procedure. Compliance with the procedural safeguards of section 615 of the Education of the Handicapped Act is one means of meeting this requirement.

### **OCR Decision Guidance**

- **Distribute procedural safeguards that provide notice, an opportunity for parents/guardians to examine records, an impartial hearing with opportunity for participation by parents/guardians and representation by counsel and a review procedure.**
- **Do not ask parents if they understand their rights without providing written procedural safeguards; that is not appropriate.**
- **Provide parents/guardians with a copy of procedural safeguards.**
- **Save documents and information that pertain to a student's eligibility for services (e.g. committee meeting minutes, interview notes) as parents have a right to review records under Section 504.**
- **Establish a "review procedure" for appeal of impartial due process hearing decisions in accordance with Section 504.**
- **Establish grievance procedures that provide an impartial hearing process (e.g. not using district employees, employees that are contractors who provide special education services or school board members in proceedings conducted to resolve disputes between children with disabilities and officials of their school system).**
- **Use procedural safeguards required under IDEA as one way of complying with Section 504's procedural safeguard requirement; note that Section 504 is much less elaborate.**
- **Recognize that an evaluation is not required whenever it is requested if the district does not suspect a child has a disability; however, parents have a right to challenge the decision of the district not to evaluate their child.**

- **Comply with Section 504 procedural safeguards when conducting informal screenings and interventions (e.g. by a “site consultation team”) that are used to possibly identify students with a disability.**
- **Provide procedural safeguards that explain the action the district proposes to take or not take and the reasons in sufficient detail so that parents can meaningfully evaluate the proposed action or inaction.**

### ***OCR Decisions***

- In West Virginia, OCR determined in the absence of written procedural safeguards, notice was not provided when a principal asked a parent if she understood her rights. *Marion County (WV) Schs.*, 45 IDELR 289 (OCR 2005). Docket No. 03-05-1110.
- In New York, OCR found it is not enough for a district to maintain procedural safeguards in accordance with Section 504. It also requires that the district actually distribute the information to parents regarding these rights. *Schenectady (NY) City Sch. Dist.*, 50 IDELR 110 (OCR 2007). Docket No. 02-07-1237.
- In New York, OCR determined that a district violated Section 504 when it destroyed documents and information from the investigation of a Section 504 complaint including committee meeting minutes and interview notes regarding a student’s eligibility for services under Section 504. Parents had requested these documents pursuant to 34 C.F.R. 104.35 which permits parents to examine records. *Frederick County (MD) Public Schools*, 46 IDELR 230 (OCR 2006). Docket No. 03-06-1153.
- In Florida, where a district’s internal grievance procedures permitted the board of education to determine if a Section 504 violation had occurred, OCR determined that the district did not have an impartial hearing process in accordance with Section 504 and, therefore, did not offer sufficient protections to parents. *Leon County (FL) Sch. Dist.*, 50 IDELR 172 (OCR 2007). Docket No. 04-07-1346.
- In Indiana, challenging the impartiality of a hearing officer, OCR found that the parents failed to provide evidence sufficient to support their challenge but nonetheless defined an impartial hearing officer by applying judicially recognized principles of fairness. OCR states that school districts may not use their own employees as hearing officers or employees that are contractors for providing special education services, and that school board members may not serve in proceedings conducted to resolve disputes between children with disabilities and officials of their school system. *Griffith (IN) Public Schools*, 40 IDELR 105 (OCR 2003). Docket No. 05 03-1156.

### ***Procedural Safeguards and Evaluations***

- In a Missouri case, where parents filed a complaint alleging a district failed to evaluate their son to determine proper placement, OCR determined that the district violated Section 504 by failing to provide parents with adequate notice of their procedural safeguards when the district decided not to evaluate their son for attention deficit disorder. *Camdenton (MO) R-III Sch. Dist.* 20 IDELR 197 (OCR 1993). Docket No. 07-93-1031.
- In a Hawaii class action suit, the U.S. Court of Appeals rejected the parents’ contention that the district must perform an evaluation whenever one is requested but noted that parents may challenge the decision not to evaluate their child. It also held that the state department of education was required to provide procedural safeguards as well as

notice of the type of evaluation; the procedure for deciding which type of evaluation that would be conducted effectively gave the agency the ability to decide when parents would receive the notice. *Pasatiempo v. Aizawa*, 25 IDELR 64 (9th Cir. 1996). Docket No. 94-17092. 103 F. 3d 796 U.S. Court of Appeals.

- In California, OCR determined that informal screenings and interventions by a “site consultation team” that are used to possibly identify students with a disability must comply with the Section 504 procedural safeguards. While Section 504 does not prohibit a district from utilizing a pre-screening process for purposes of identifying students who may be in need of special education or related services, such a process constitutes an evaluation process. Since the pre-screening process is an evaluation system, parents must be provided with full procedural safeguards. *San Diego (CA) Sch. Dist.*, 353 IDELR 236 (OCR 1989). Docket No. 09-88-1063.
- In Wisconsin, OCR noted in a case of termination of homebound services absent a proper assessment and proper notice to parents, while Section 504 104.36 does not specify the level of detail of notice that recipients must provide to parents with respect to the evaluation process. Nonetheless, OCR ruled that the notice must be of sufficient detail to allow parents to decide in a meaningful way whether to consent to the evaluation or to request a due process hearing to challenge the proposed evaluation. *Middleton-Cross Plains (WI) Area Sch. Dist.*, 16 IDELR 763 (OCR 1990). Docket No. 05-90-1003.
- In Texas, OCR determined that while a district is not obligated to conduct an evaluation if it does not suspect that the student has a disability that would result in Section 504 eligibility, it is obligated to inform the parents of their due process rights to challenge the decision not to evaluate. *Letter to Vier*, 20 IDELR 864 (OCR 1993).

## AFFORD EQUAL OPPORTUNITY FOR PARTICIPATION IN NONACADEMIC AND EXTRACURRICULAR SERVICES AND ACTIVITIES

### Federal Regulation

#### Section 104.37 Nonacademic services

(a) **General.** (1) A recipient to which this subpart applies shall provide nonacademic and extracurricular services and activities in such manner as is necessary to afford handicapped students an equal opportunity for participation in such services and activities. (2) Nonacademic and extracurricular services and activities may include counseling services, physical recreational athletics, transportation, health services, recreational activities, special interest groups or clubs sponsored by the recipients, referrals to agencies which provide assistance to handicapped persons, and employment of students, including both employment by the recipient and assistance in making available outside employment.

(b) **Counseling services.** A recipient to which this subpart applies that provides personal, academic, or vocational counseling, guidance, or placement services to its students shall provide these services without discrimination on the basis of handicap. The recipient shall ensure that qualified handicapped students are not counseled toward more restrictive career objectives than are nonhandicapped students with similar interests and abilities.

(c) **Physical education and athletics.** (1) In providing physical education courses and athletics and similar aid, benefits, or services to any of its students, a recipient to which this subpart applies may not discriminate on the basis of handicap. A recipient that offers physical education courses or that operates or sponsors interscholastic, club, or intramural athletics shall provide to qualified handicapped students an equal opportunity for participation. (2) A recipient may offer to handicapped students physical education and athletic activities that are separate or different from those offered to nonhandicapped students only if separation or differentiation is consistent with the requirements of 104.34 and only if no qualified handicapped student is denied the opportunity to compete for teams or to participate in courses that are not separate or different.

### OCR Decision Guidance

- **Participation in extracurricular activities and nonacademic services is an issue of accessibility and equal opportunity. "Equal opportunity" is not always the same as "equal treatment." A district's obligations under "equal opportunity" must be made on an individual, case-by-case basis.**
- **Provide any accommodations or services that may be needed in extracurricular activities as designated in the Section 504 Plan.**
- **Providing written policies regarding participation of students with disabilities in extracurricular activities is not required; however, it may be prudent to have them.**
- **Providing a separate program for students with disabilities who are unable, with accommodations, to participate in an extracurricular activity is not required under Section 504.**



- **Uniformly applying academic eligibility requirements will generally comply with Section 504.**
- **Limiting participation in athletics by grade or age can have an adverse impact on students who have repeated grades due to learning disabilities; courts may vary on this issue.**

### **OCR/OSERS/OSEP Guidance**

- **The U.S. Department of Education provides guidance regarding the participation of students with disabilities in extracurricular athletics. The Dear Colleague letter provides an overview of the obligations of public elementary and secondary schools under Section 504 of the Rehabilitation Act (Section 504), and the Department’s Section 504 regulations; cautions schools against making decisions based on presumptions and stereotypes; details the specific Section 504 regulations that require students with disabilities to have an equal opportunity for participation in nonacademic and extracurricular services and activities; and discusses the provision of separate or different athletic opportunities. *Dear Colleague Letter: Students with Disabilities in Extracurricular Athletics*, U.S. Department of Education, Office for Civil Rights, January 25, 2013.**
- **OCR, the Office of Special Education and Rehabilitative Service (OSERS), and the Office of Special Education Programs (OSEP) provide suggestions and resources to increase opportunities for students with disabilities in physical education and athletic extracurricular activities. Suggestions address accessibility, equipment, personnel preparation, teaching style, management of behavior and program options, curriculum assessment, progress, achievement, and grading. *Creating Equal Opportunities for Children and Youth with Disabilities to Participate in Physical Education and Extracurricular Athletics*, OCR, and the Office of Special Education and Rehabilitative Services, Office of Special Education Programs, Washington, DC, 2011.**

### **OCR Decisions**

- **In Vermont, OCR determined that a district did not discriminate against a student with Asperger syndrome and a nonverbal learning disability when the IEP did not provide for accommodations in an after-school skiing program and Student Council. OCR, however, challenged the district’s letter to the student’s parents that in accordance with IDEA, “extracurricular activities are not part of the child’s educational program. Participation in after-school programs is subject to the same rules as other children” and the district was not responsible for providing the student with one-on-one adult support in his after-school program. It is noteworthy that although OCR did not find a violation due to lack of evidence, they provided technical assistance to the district regarding 34 C.F.R. 104 Section 104.37(a)(1) providing assistance to students with disabilities so they may effectively participate in extracurricular activities. *Letter to Winooski (VT) Sch. Dist.*, 46 IDELR 172 (OCR 2006). Docket No. 01-06-1021.**
- **In Georgia, in a case involving a student with muscular dystrophy, OCR did not interpret the Section 504 regulations as requiring a school district to maintain a formal written policy governing participation by students with disabilities in extracurricular activities.**

From a practical point of view, however, having such a policy seems prudent. *Rockdale County (GA) Sch. Dist.*, 22 IDELR 1047 (OCR 1995). Docket No. 04-94-1683.

- In Washington state, OCR determined that a district did not violate Section 504 because qualified students with disabilities were provided an equal opportunity to participate in the district's primary swimming program through accommodations. Where a person with disabilities is unable, with accommodations, to participate in the extracurricular activity, Section 504 does not require that a separate program be developed. *Snohomish (WA) School District No. 201*, 23 IDELR 97 (OCR 1995). Docket No. 10-94-1112.
- In Washington state, OCR held that a district did not discriminate or retaliate against a student with multiple disabilities by not permitting him to participate in an after-school recreational program. After participating on a trial basis in the program, which consisted of several sport activities, it was determined that the student did not meet eligibility requirements which provided that the student be able to meaningfully participate and that the student not have a medically determined health condition that would preclude his or her participation. *Shoreline (WA) School District No. 412*, 24 IDELR 774 (OCR 1996). Docket No. 10-95-1107.
- In Pennsylvania, OCR determined that a district was in compliance with Section 504 when it denied the student with a learning disability the opportunity to participate in the interscholastic football program. The student's grade point average had fallen below the acceptable standard and the student had been absent the allotted number of days. *Susquehanna Township (PA) Sch. Dist.*, 20 IDELR 35 (OCR 1993). Docket No. 03-93-1013.
- In South Carolina, OCR held that a district did not violate Section 504 when it failed to provide accommodations in marching band for a student with attention deficit hyperactivity disorder who was unable to read sheet music. The parent had not established the existence of a qualifying disability nor was the district aware of it. OCR noted that 34 C.F.R. Section 104.37 does not explicitly require the district to identify and evaluate students to determine if they have disabilities. *Greenwood (SC) School District 52*, 49 IDELR 233 (OCR 2007). Docket No. 11-07-1124.
- In Missouri, OCR held that an interscholastic athletic association's rule pertaining to age was an essential eligibility requirement. Therefore, a district was not in violation of Section 504 for refusing to allow a nineteen-year-old student, who had repeated grades due to his learning disability, from playing sports when he passed the maximum age permitted by association rules. OCR determined that waiving the age limit would constitute a fundamental alteration in the nature of the baseball program. *Pottgen v. Missouri State High Sch. Activities*, 21 IDELR 929 (8th Cir. 1994). Docket No. 94-2324. See also *Sandison v. Michigan High Sch. Athletic Ass'n.*, 23 IDELR 222 (6th Cir. 1995). Docket No. 94-2106.
- In Texas, OCR did not require an athletic league to provide a waiver so that a nineteen-year-old student on a Section 504 Plan, who had already played for four years, could continue to participate. The league had already granted an exemption to the student and OCR policy did not require them to provide a waiver to the student beyond the four-year athletic participation limit. *University (TX) Interscholastic League*, 28 IDELR 206 (OCR 1997). Docket No. 06-97-1502.

## EXAMPLES OF PHYSICAL OR MENTAL IMPAIRMENTS THAT MAY REQUIRE A SECTION 504 PLAN

### Examples

Physical or mental impairments such as allergies, arthritis, asthma, attention deficit disorder or attention deficit hyperactivity disorder (ADD/ADHD), cancer, emotional disturbance, environmental sensitivities, special health care needs, temporary disabilities, special health care needs, and serious medical conditions are some examples of physical or mental impairments may require a Section 504 plan if the individual affected has a record of or is regarded as having such impairment and it substantially limits one or more major life activities.

For example:

**Arthritis** may substantially limit the major life activity of moving, for which accommodations in the physical education program may be needed.

**Asthma** may substantially limit the major life activity of breathing, for which accommodations in the physical education program, transportation, or the classroom may be needed.

**Cancer** may substantially limit the major life activity of learning, for which any number of accommodations may be needed, such as a class schedule that allows for rest and recuperation following chemotherapy, attendance at medical appointments and additional time to complete assignments.

**Emotional Disturbance** may substantially limit the major life activity of learning, for which an adjusted class schedule may be needed to allow time for regular counseling or therapy and/or for the administration of medication.

**Temporary Disability** requiring hospitalization for a period of time, for which a homebound program may substantially limit the major life activity of learning for as long as the disability substantially limits the major life activity.

**Special Health Care Needs** such as intermittent catheterization to prevent urinary tract infection and bed wetting may substantially limit the major life activity of learning for which trained personnel may be needed to perform the procedure.

**Student Formerly Receiving Special Education Services** who is a qualified individual under Section 504, who has exited from a special education program and no longer has an IEP, may qualify for academic accommodations or services under Section 504 of the Rehabilitation Act, provided the disability substantially limits a major life activity.

Below are cases involving allergies, asthma, and environmental sensitivities. They serve as illustrations of the complex issues that may arise and provide examples of possible accommodations.

## Allergies

Allergies may substantially limit the major life activity of breathing. Examples of food allergies that may require accommodations in the school setting: gluten, popcorn, peanut and nut products, eggs and dairy.

## OCR Decision Guidance

- **Include persons knowledgeable about the student's disability in decisions about a student's Section 504 Plan.**
- **Make reasonable efforts to provide a student with a food-related allergy disability, with a food or snack that is comparable to that provided to students without a disability.**
- **Consider the following when drafting a Section 504 Plan for a student with a food-related disability: a lunch menu with gluten-free choices, a gluten-free cooking curriculum for a cooking class, a letter to the parents of students in the class of the student with a disability advising them of the student's food allergy and providing a list of acceptable snacks.**
- **Consider taking the following measures pertaining to food-related disabilities: district policies, procedures and protocols to protect the student with a food-related disability in settings other than the student's classroom, the cafeteria and field trips; procedures concerning the proper handling and administration of epinephrine, the staff responsible for emergency responses; the specifics of the training program (content, who, when, how often); and the details of any sanctions against individuals who harass a student with peanut allergies because of those allergies.**
- **Refer to the district's disability-related policies in the student's Section 504 Plan.**
- **Ban the offending product rather than isolating the allergic student. To put him or her at a separate, allergen-free table, for example, could have the effect of stigmatizing the student and isolating him or her from appropriate social interaction. Several school districts in the United States and Canada ban the food product in classrooms if the allergy is life-threatening.**
- **Provide peanut-free tables in the cafeteria or a peanut-free cafeteria and instruction for food service personnel to prevent cross-contamination.**
- **Consider the student's ability to monitor his or her food intake in drafting the Section 504 Plan.**
- **Compile a list of activities for which alternative snacks might be needed during the school year. If a student has a gluten allergy, the student may need to work with an alternative food for the project. If a class or school club is conducting a bake sale, the school may wish to ask the parents providing the baked goods to include an ingredient list and/or to provide allergen-free alternatives to affected students.**

- **Send a letter home to parents before an event, reminding them about the students' food allergies, a list of allergens as well as an invitation to send allergen-free snacks.**
- **Include bus drivers in allergy awareness staff training and emergency response information about students with life-threatening food allergies on their route.**
- **Keep an emergency supply of epinephrine on the bus and instituting a “no food” policy on all buses.**
- **Consider that one student may have a mild allergy to peanuts, while another could have a severe, life-threatening allergy to them. Instead of a blanket policy on food allergies, consider that it is important to create individualized Section 504 Plans for all qualifying students.**
- **Engage students by using an awareness program to bring the issue of allergies to life: “If you had a food allergy, how would you want others to treat you? What can you do to help a student who has food allergies?”**
- **Involve parents in your planning and awareness efforts about the effects of the food allergy as they can often provide effective ideas for communicating about their child’s allergies such as through games.**

### **OCR Decisions**

- In New York, OCR found that a district violated Section 504 by denying a student with food allergies (dairy, nut/peanut, egg, kiwi and crab), enrollment in a culinary course. The district failed to identify the student as a qualified individual with a disability and the student’s Emergency Health Plan did not provide for exclusion from any classes. Staff believed approval by the student’s allergist to take the course under certain conditions did not sufficiently address the possible risks of exposure to airborne allergens, accidental ingestion, food fights, etc. However, minimal attempts were made to obtain additional medical information before denying enrollment to the student and the decision to obtain additional information from the allergist was not made by a group of knowledgeable persons in accordance with Section 504. *Bethlehem (NY) Cent. Sch. Dist.*, 109 LRP 30964 (OCR 2009). Docket No. 02-08-1305.
- In Illinois, OCR held that the district did not discriminate against a student with a popcorn allergy when she was provided two pieces of hard candy as an alternative snack during a school movie in accordance with her Section 504 plan as well as an individualized health plan while her classmates each received a bag of popcorn. The parents’ claimed that their daughter’s snack was not a comparable amount and type of snack to that of her classmates. OCR found that the district did not violate Section 504, as the snack was appropriate and comparable. There were no provisions in the written plans regarding these factors. *Porta (IL) Community Unit School District*, 50 IDELR 170, (OCR 2007). Docket No. 05-07-1224.
- In Connecticut, OCR determined that the district did not discriminate against a student by failing to make sure gluten-free foods were available at extracurricular activities; the district made consistent efforts to ensure the student could obtain gluten-free snacks at all events she attended although the student did not see them on one occasion. The Section 504 Plan included a lunch menu with gluten-free choices, a gluten-free curriculum for cooking class. It also provided that a letter would be sent to the class parents advising them of the student’s allergy and that the student’s parents would prepare a list of safe snacks. The district had established procedures for activities held in

and out of the district where the parents could notify groups that their child planned to attend a particular event and where the district would ensure that the group hosts made gluten-free food. (*Tolland (CT) Sch. Dist.*, 46 IDELR 171 (OCR 2006). Docket No. 01-06-1017.

- In South Carolina, OCR found that a district failed to develop an appropriate Section 504 Plan for a sixth- grader with a peanut/tree nut allergy (PTA). Although the Section 504 Plan contained some of the requirements for providing FAPE, it failed to reference the following: district policies, procedures or protocols with the specific measures to be taken to protect the student in settings other than the student’s classroom, the cafeteria and during field trips; procedures concerning the proper handling and administration of epinephrine in the event of an anaphylactic or other serious allergy-related reaction; the staff responsible for emergency responses, specifically who will receive the training, the content of the training, or when and for how long it will take place or whether and, if so, what sanctions will be applied to individuals who harass student with peanut allergies because of those allergies. *Saluda (SC) School District One*, 47 IDELR 22 (OCR 2002). Docket No. 11-06-1102.
- In Massachusetts, the state educational agency found that a district discriminated against a first-grade student with a peanut and tree nut product allergy by failing to ban the products in classrooms because of the life threatening nature of the allergy: “given the possible fatal or near fatal allergic reaction, peanut allergy is a potentially severe allergy worthy of serious intervention in school settings given the amount of opportunity for accidental ingestion.” Instead the student was not allowed to participate in an activity involving Asian food and was assigned to a “stigmatizing and isolating table, thereby being denied equal access to a pool of other students that would have provided an opportunity to learn appropriate social pragmatics in a natural environment simultaneously with the rest of the age like peers in his class.” Arguing that a classroom ban would be an undue burden, the district instead requested parents to refrain from sending such products to school, required staff and students to wash their hands before and after eating, provided staff training on symptoms of anaphylactic reaction and administering of an Epi Pen, among other accommodations, and followed a policy that mirrored the Massachusetts Department of Education Guidelines regarding Managing Life Threatening Food Allergies. The decision, however, found the request for a ban on the offending products to be reasonable under Section 504 as it does not fundamentally alter the program in any way. It notes that that several private and public schools and school districts in Canada, Massachusetts and other states have imposed a similar ban. *Mystic Valley Regional Charter School*, 40 IDELR 275 (OCR 2004). Docket No. 03-3629.

### **Attention Deficit Disorder (ADD)/Attention Deficit Hyperactive Disorder (ADHD)**

The effect of ADD/ADHD on the student’s educational performance should be considered in determining how it substantially limits the major life activity of learning, test taking, etc.

### **OCR Decision Guidance**

- **Even if a student with ADHD maintains passing grades, he or she may be eligible for a 504 plan. The team should consider several factors, including an ADHD diagnosis, testing results, and teacher observations.**
- **Students with ADD or ADHD who are not eligible as “other health impaired,” “emotional disturbance” or “specific learning disability” under Part B of IDEA but who fall within the definition of a person with a disability under Section 504 of the Rehabilitation Act are entitled to services if the impairment is of such severity that**

it limits a major life activity of learning. Factors considered in reaching this determination include turning in homework, performance in class, and tendency to create disruption. The classification depends on the presentation of the disorder and must be determined on a case-by-case basis – it is not automatic.

- Grades of A and B, acceptable behavior and testing results within normal limits may demonstrate that a student with ADHD is not qualified under Section 504.
- If agreed-upon methods are not followed by teachers but the student is having success as demonstrated by As and Bs in all courses, a denial of FAPE may not have occurred.
- A student with ADHD whose psycho-educational testing does not reveal discrepant scores, should still be evaluated under Section 504 to determine the effects of the ADHD if he or she is frequently assigned to in-house suspension for severe behavior problems.
- Consider the following factors in determining if a student's ADHD, depression and anxiety substantially interfere with the major life activity of learning and being a student for which extra time for tests should be granted: consideration of whether the student's academic performance was at least as good as the average student; whether any absence was disability-related and whether nurse records, teacher observations or homework records demonstrate substantial interference.
- There is no hard-and-fast rule for deciding when a student with ADHD is eligible under the IDEA rather than Section 504. ADHD is a spectrum disorder and some students may receive FAPE under IDEA with an IEP while others may receive FAPE under Section 504 with a Section 504 Plan.
- There is no rule requiring that all students requesting a Section 504 Plan undergo a full psychological examination.

### **OCR Decisions**

- In Louisiana, OCR found that a district violated Section 504 when the principal swiftly denied eligibility for accommodations for an 11th grader with ADHD without the benefit of an evaluation. Because the student earned passing grades, the principal determined that the student's disability did not significantly impair his schoolwork; the student struggled to maintain a 2.0 grade point average. Parents repeatedly requested a Section 504 evaluation and medical treatment for ADHD as well as testing results from a clinical psychologist suggesting Section 504 accommodations. *New Orleans (LA) Pub. Schs.*, 50 IDELR 260 (OCR 2008). Docket No. 06-07-1409.
- In a Joint Policy Memorandum, the Office of Special Education and Rehabilitative Services clarifies the responsibilities of the local educational agency to provide regular or special education and related aids and services to those children with ADD who are not eligible under Part B but who fall within the definition of disabled person under Section 504 of the Rehabilitation Act. It further states that a student who has ADD/ADHD is entitled to services under Section 504 if the impairment is of such severity that it limits the major life activity of learning and that a separate category under IDEA for ADD conditions is not necessary; a qualifying student may be eligible under IDEA categories of "other health impairment," "specific learning disability," or "serious emotional disturbance." *Joint Policy Memorandum*, 18 IDELR 116 (OSERS 1991) (18 LRP 1911). See also *W.H. by B.H. and K.H., Clovis Unified School District*, 109 LRP 33364. ( U.S. District Ct, CA 2009). Docket No. CV F 08-0374 LJO DLB.

- In Louisiana, OCR determined that the district did not violate Section 504 for a ten-year old student with ADD, whose disorder was found not to limit a major life activity such as learning or effectively participating in school activities. The student demonstrated acceptable behavior and was making As and Bs in all classes. While the testing by a group of knowledgeable persons revealed an ADD problem, it was within normal limits of all areas tested and, therefore, the student was not found to be a qualified disabled person under Section 504. *Jefferson Parrish(LA) Pub. Schls.*, 16 IDELR 755 (OCR 1989). Docket No. 06-90-1014.
- In Texas, OCR found that although several of the teachers were inconsistent with agreed-upon methods of communications (e.g. failing to provide weekly notes and/or grades sheets or study guides) it did not constitute a denial of a free appropriate education in accordance with Section 504 for this student with ADHD. These omissions did not have an adverse effect on the student's educational performance as he received A's and B's in all courses and was promoted to 12th grade. The accommodation plan included the following instructional modifications: 1) assign preferential seating; 2) re-direct to task; 3) check for understanding; 4) provide many opportunities for review; 5) confirm and specify areas of concern on weekly calendar that AIP will send teachers on Thursday; 6) provide teacher copy of notes highlighted prior to or directly after instruction; 7) provide outline for note taking prior to or directly after instruction; 8) provide practice test during tutoring; 9) provide study guide two days prior to test; 10) allow additional time for test; 11) break test into parts; 12) provide note cards for formulas for test in math and science; 13) break long term assignments into smaller parts; 14) provide additional time for assignments; 15) encourage student to verbalize thoughts; and 16) provide positive reinforcement/feedback on grades. *Coppell (TX) Independent School District*, 46 IDELR 196 (OCR 2006). Docket No. 06-06-1161.
- In California, OCR determined that the district violated Section 504 for not assessing the effect of the ADHD on the student's ability to learn and participate in school after not qualifying for an IEP due to lack of discrepant scores. The student was frequently assigned to the in-house suspension room for severe behavior problems. *Brittan (CA) Sch. Dist.*, 16 IDELR 1226 (OCR 1990). Docket No. 09-90-1078.
- In Connecticut, the state educational agency determined that a high school student with ADD, depression, mood and anxiety disorder was not entitled to extended time on tests because although her anxiety affected her completion of homework and test preparation, her disabilities did not substantially interfere with the major life activities of learning/being a student, sleeping or test-taking under Section 504. Although the doctor suggested that the student's learning would be optimized if she were permitted extended time on tests, the district evaluated whether the student's academic performance was at least as good as the average high school student, if any lack of attendance was disability-related, nurse records, teacher observations and the student's homework record. While the disability may have demonstrated an adverse effect on test taking, it did not rise to the level of a substantial limitation such as skipping class to avoid taking tests. Additionally, the student did not typically request additional time for completion of tests nor did she typically require more time. *Westport Bd. of Education*, 40 IDELR 85. 103 LRP 48814. (SEA 2003).
- In South Carolina, OCR determined that a district did not violate Section 504 for failing to provide a Section 504 Plan based on a vague doctor's recommendation for a student diagnosed with ADD, anxiety and some depression. It was contended that the district discriminated against students with disabilities by requiring a full psychological evaluation of all students. OCR determined that there was no rule requiring all students requesting a Section 504 evaluation to undergo such an exam. The complainant



informed the district that they did not want to have the student tested because – “a child with anxiety should not be forced to go through a series of IQ and achievement tests.” However, the school wanted the student to take the Woodcock-Johnson, designed to measure general intellectual and specific cognitive abilities, scholastic aptitude, oral language, and academic achievement to know the impact the student’s disability had on his ability to learn. Instead, the student conducted a self-assessment using the Behavior Assessment System for Children evaluation instrument. While “interventions” such as tutoring, extra time for tests, weekly feedback sheet from teachers and parent-teacher conferences were offered, a Section 504 Plan was not. In this case, the psychologist who had suggested the full evaluation was under the impression that the student had been on long-term homebound instruction because of debilitating depression and anxiety and recommended a full evaluation to determine if the student qualified for special education. *Rock Hill (SC) School District*, 40 IDELR 72 (OCR 2003). Docket No. 04-03-1202.

### **Additional Resource**

Attention Deficit Hyperactivity Disorder (ADHD) – the instruction of children with ADHD, U.S. Department of Education.

- [Identifying and Treating Attention Deficit Hyperactivity Disorder: A Resource for School and Home 2008](#)
- [Teaching Children with Hyperactivity Disorder: Instruction Strategies and Practices 2008](#)

### **Environmental Sensitivities**

Environmental sensitivities may substantially limit the major life activity of breathing.

### **OCR Decision Guidance**

- **Consider the following accommodations for a student with multiple chemical sensitivity disorder that substantially limits a major life activity: tutoring; long distance learning; evaluation of school environment by specialist; portable air filters in classrooms; limiting staff and students from use of products with scents, products containing formaldehyde and other offending substances; use of natural fiber clothing; designating a restroom that would be cleaned and stocked with products appropriate for a chemically free/reduced environment; advance notice to student’s family of planned work on school buildings that might involve materials offensive to chemically reduced environment, and conducting outdoor physical education activity in an area that has not been treated with pesticides or fertilizers.**
- **Consider the following accommodations for a student with chemical hypersensitivity with particular sensitivity to perfumed toiletries, synthetic hydrocarbons and formaldehyde that substantially limits a major life activity: a written request that all faculty, staff and students refrain from using perfume, cologne or other scented personal care products, medical monitoring of the student by the school nurse at least twice a day, adoption of a medical protocol pertaining to oxygen, nursing reviews and tutoring, designation of a liaison relative to accommodations and monitoring, home tutoring if necessary.**
- **Consider the following accommodations for a student with environmental allergies that substantially limit a major life activity: conduct an evaluation of how the school building might affect the student’s allergies, consider parental**

**observations of student’s symptoms at home which may be related to his daytime school environment, daily cleaning of certain classrooms, installation of an air purifier in the certain areas (e.g. library), requesting staff and students to voluntarily refrain from wearing strongly scented personal care products, in-service training to its appropriate staff to address when and how to respond to Section 504 issues involving indoor air quality concerns such as considering reports of symptoms occurring outside of the school when evaluating a claim that a student is having an adverse reaction to the school environment as well as completing an evaluation of the student and the identified portion of the school building.**

- **Consider the following accommodations for a student with multiple chemical sensitivity to petroleum-based and other chemicals, including pesticides that substantially limits a major life activity: discontinue spraying for pests except for orders of the state health department and notify parents of necessary spraying, homebound program for student during school re-roofing if there is potential to trigger allergic reaction.**

### **OCR Decisions**

- In Oregon, the state educational agency determined that a student initially diagnosed with multiple Chemical sensitivity disorder (CMS) and subsequently with undifferentiated somatoform disorder, was eligible for services under Section 504. The student, however, refused the district’s plan as she rejected any psychological component to her condition. Although the accommodations for CMS were considered largely unsuccessful, the Section 504 Plan included the following: tutoring, long distance learning, evaluation of school environment by specialist; portable air filters in classrooms; notification to staff and students to refrain from use of products with scents, natural fiber clothing, products containing formaldehyde and other offending substances; cleaning and stocking designated restroom with products appropriate for a chemically free/reduced environment; advance notice to student’s family of planned work on school buildings that might involve materials offensive to chemically reduced environment; placement of outdoor physical education activity in an area that has not been treated with pesticides or fertilizers, exploration of appropriate activities and environments by Talented and Gifted personnel and counseling support. The student demonstrated inconsistencies with respect to the limitations of her allergies (e.g. going out with friends, traveling, attending university classes which were “seemingly much more polluted” than parts of the school). Although the initial Section 504 Plan was based on the initial diagnosis of multiple chemical sensitivity disorder, which the district determined lacked a scientific basis and on which the medical community was split, it was discredited by the subsequent psychological diagnosis of undifferentiated somatoform. *Salem-Keizer Sch. Dist.*, 26 IDELR 508 (SEA 1997). Docket No. 62289.
- In Massachusetts, the state educational agency found acceptable the Section 504 transition plan which was incorporated into an IEP for a student with chemical hypersensitivity with particular sensitivity to perfumed toiletries, synthetic hydrocarbons and formaldehyde. The Plan included placement in the most appropriate least restrictive environment which was the public high school with accommodations; placement at a private school suggested by the student’s parents was rejected. The IEP/504 Plan also provided for the retention of an environmental hygienist to evaluate the public school environment as well as making recommendations for accommodations including reasonable interim accommodations such as implementing all those accommodations that were successful at a prior school, including but not limited to a written request that all faculty, staff and students refrain from using perfume, cologne or other scented

personal care products, medical monitoring of the student by the school nurse at least twice a day, adoption of a medical protocol pertaining to oxygen, nursing reviews and tutoring, designation of a liaison relative to accommodations and monitoring, home tutoring if necessary as well as full implementation of the Section 504 transition plan. *Walpole Pub. Schs.*, 26 IDELR 976 (SEA 1997). Docket No. 97-1342.

- In Connecticut, OCR expressed concern that the district took a year to conduct a full evaluation of the student, failed to conduct a timely evaluation of how the school building might have affected the student's environmental allergies and failed to consider at-home observations of student's symptoms which may have been related to his daytime school environment. The district agreed to do the following if the student reenrolled: daily cleaning of certain classrooms, installation of an air purifier in the library and requesting staff and students to voluntarily refrain from wearing strongly scented personal care products. Additionally, the district agreed to provide in-service training to its special services staff to address when and how to respond to Section 504 issues. These issues involved indoor air quality concerns such as considering reports of symptoms occurring outside of the school as well as completing an evaluation of the student and the identified portion of the school building and designing and implementing a Section 504 Plan within a reasonable period of time when res. *South Windsor (CT) Public Schs.*, 37 IDELR 133 (OCR 2004). Docket No. 01-02-1010.
- In Maryland, OCR determined that the district developed and implemented appropriate interim homebound programs for siblings while their schools underwent re-roofing. One sibling was diagnosed with severe multiple chemical sensitivity to petroleum-based and other chemicals, including most pesticides, and the other the same to a lesser degree. The district also agreed to discontinue spraying for pests except for orders of the state health department and to notify parents of necessary spraying. Although only one child met the "substantially limits a major life activity" standard in Section 504, the district nonetheless considered the remedies as applicable to both students since the re-roofing process had the potential to trigger allergic reactions by both students. *Baltimore County (MD) Pub. Sch.*, 18 IDELR 1041 (OCR 1991). Docket No. 03-91-1158.

## **REGULATIONS**

### **TITLE 34 EDUCATION SUBTITLE B REGULATIONS OF THE OFFICES OF THE DEPARTMENT OF EDUCATION CHAPTER I—OFFICE FOR CIVIL RIGHTS, DEPARTMENT OF EDUCATION PART 104—NONDISCRIMINATION ON THE BASIS OF HANDICAP IN PROGRAMS OR ACTIVITIES RECEIVING FEDERAL FINANCIAL ASSISTANCE**

#### **Subpart A—General Provisions**

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**APPENDIX A TO PART 104 ANALYSIS OF FINAL REGULATION  
APPENDIX B TO PART 104 GUIDELINES FOR ELIMINATING DISCRIMINATION  
AND DENIAL OF SERVICES ON THE BASIS OF RACE, COLOR, NATIONAL  
ORIGIN, SEX, AND HANDICAP IN VOCATIONAL EDUCATION PROGRAMS**

**AUTHORITY: 20 U.S.C. 1405; 29 U.S.C. 794.**

**SOURCE: 45 FR 30936, May 9, 1980, unless otherwise noted.**

**Subpart A—General Provisions**

**§ 104.1 Purpose**

The purpose of this part is to effectuate section 504 of the Rehabilitation Act of 1973, which is designed to eliminate discrimination on the basis of handicap in any program or activity receiving federal financial assistance.

**§ 104.2 Application**

This part applies to each recipient of federal financial assistance from the Department of Education and to the program or activity that receives such assistance.

**§ 104.3 Definitions**

As used in this part, the term:

- (a) **The Act** means the Rehabilitation Act of 1973, Pub. L. 93 112, as amended by the Rehabilitation Act Amendments of 1974, Pub. L. 93 516, 29 U.S.C. 794.
- (b) **Section 504** means section 504 of the Act.
- (c) **Education of the Handicapped Act** means that statute as amended by the Education for all Handicapped Children Act of 1975, Pub. L. 94 142, 20 U.S.C. 1401 et seq.
- (d) **Department** means the Department of Education.
- (e) **Assistant Secretary** means the Assistant Secretary for Civil Rights of the Department of Education.
- (f) **Recipient** means any state or its political subdivision, any instrumentality of a state or its political subdivision, any public or private agency, institution, organization, or other entity, or any person to which federal financial assistance is extended directly or through another recipient, including any successor, assignee, or transferee of a recipient, but excluding the ultimate beneficiary of the assistance.
- (g) **Applicant for assistance** means one who submits an application, request, or plan required to be approved by a Department official or by a recipient as a condition to becoming a recipient.
- (h) **Federal financial assistance** means any grant, loan, contract (other than a procurement contract or a contract of insurance or guaranty), or any other arrangement by which the Department provides or otherwise makes available assistance in the form of:

- (1) Funds;
- (2) Services of federal personnel; or
- (3) Real and personal property or any interest in or use of such property, including:
  - (i) Transfers or leases of such property for less than fair market value or for reduced consideration; and
  - (ii) Proceeds from a subsequent transfer or lease of such property if the federal share of its fair market value is not returned to the federal government.
- (i) **Facility** means all or any portion of buildings, structures, equipment, roads, walks, parking lots, or other real or personal property or interest in such property.
- (j) **Handicapped person** -- (1) **Handicapped persons** means any person who (i) has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.
- (2) As used in paragraph (j)(1) of this section, the phrase:
  - (i) **Physical or mental impairment** means (A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito urinary; hemic and lymphatic; skin; and endocrine; or (B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.
  - (ii) **Major life activities** means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.
  - (iii) **Has a record of such an impairment** means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.
  - (iv) **Is regarded as having an impairment means** (A) has a physical or mental impairment that does not substantially limit major life activities but that is treated by a recipient as constituting such a limitation; (B) has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or (C) has none of the impairments defined in paragraph (j)(2)(i) of this section but is treated by a recipient as having such an impairment.
- (k) **Program or activity means** all of the operations of--
  - (1)(i) A department, agency, special purpose district, or other instrumentality of a State or of a local government; or
  - (ii) The entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

- (2)(i) A college, university, or other postsecondary institution, or a public system of higher education; or
- (ii) A local educational agency (as defined in 20 U.S.C. 8801), system of vocational education, or other school system;
- (3)(i) An entire corporation, partnership, or other private organization, or an entire sole proprietorship--
  - (A) If assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or
  - (B) Which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or
- (ii) The entire plant or other comparable, geographically separate facility to which federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or
- (4) Any other entity which is established by two or more of the entities described in paragraph (k)(1), (2), or (3) of this section; any part of which is extended federal financial assistance. (Authority: 29 U.S.C. 794(b))
- (l) **Qualified handicapped person** means:
  - (1) With respect to employment, a handicapped person who, with reasonable accommodation, can perform the essential functions of the job in question;
  - (2) With respect to public preschool elementary, secondary, or adult educational services, a handicapped person (i) of an age during which nonhandicapped persons are provided such services, (ii) of any age during which it is mandatory under state law to provide such services to handicapped persons, or (iii) to whom a state is required to provide a free appropriate public education under section 612 of the Education of the Handicapped Act; and
  - (3) With respect to postsecondary and vocational education services, a handicapped person who meets the academic and technical standards requisite to admission or participation in the recipient's education program or activity;
  - (4) With respect to other services, a handicapped person who meets the essential eligibility requirements for the receipt of such services.
- (m) **Handicap** means any condition or characteristic that renders a person a handicapped person as defined in paragraph (j) of this section.

#### § 104.4 Discrimination prohibited

- (a) **General.** No qualified handicapped person shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives federal financial assistance.



- (b) ***Discriminatory actions prohibited.*** (1) A recipient, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of handicap:
- (i) Deny a qualified handicapped person the opportunity to participate in or benefit from the aid, benefit, or service;
  - (ii) Afford a qualified handicapped person an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;
  - (iii) Provide a qualified handicapped person with an aid, benefit, or service that is not as effective as that provided to others;
  - (iv) Provide different or separate aid, benefits, or services to handicapped persons or to any class of handicapped persons unless such action is necessary to provide qualified handicapped persons with aid, benefits, or services that are as effective as those provided to others;
  - (v) Aid or perpetuate discrimination against a qualified handicapped person by providing significant assistance to an agency, organization, or person that discriminates on the basis of handicap in providing any aid, benefit, or service to beneficiaries of the recipients program or activity;
  - (vi) Deny a qualified handicapped person the opportunity to participate as a member of planning or advisory boards; or
  - (vii) Otherwise limit a qualified handicapped person in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving an aid, benefit, or service.
- (2) For purposes of this part, aids, benefits, and services, to be equally effective, are not required to produce the identical result or level of achievement for handicapped and nonhandicapped persons, but must afford handicapped persons equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement, in the most integrated setting appropriate to the person's needs.
- (3) Despite the existence of separate or different aid, benefits, or services provided in accordance with this part, a recipient may not deny a qualified handicapped person the opportunity to participate in such aid, benefits, or services that are not separate or different.
- (4) A recipient may not, directly or through contractual or other arrangements, utilize criteria or methods of administration (i) that have the effect of subjecting qualified handicapped persons to discrimination on the basis of handicap, (ii) that have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the recipient's program or activity with respect to handicapped persons, or (iii) that perpetuate the discrimination of another recipient if both recipients are subject to common administrative control or are agencies of the same State.
- (5) In determining the site or location of a facility, an applicant for assistance or a recipient may not make selections (i) that have the effect of excluding handicapped persons from,

denying them the benefits of, or otherwise subjecting them to discrimination under any program or activity that receives federal financial assistance or (ii) that have the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the program or activity with respect to handicapped persons.

- (6) As used in this section, the aid, benefit, or service provided under a program or activity receiving federal financial assistance includes any aid, benefit, or service provided in or through a facility that has been constructed, expanded, altered, leased or rented, or otherwise acquired, in whole or in part, with federal financial assistance.
- (c) **Aid, benefits or services limited by federal law.** The exclusion of nonhandicapped persons from aid, benefits, or services limited by federal statute or executive order to handicapped persons or the exclusion of a specific class of handicapped persons from aid, benefits, or services limited by federal statute or executive order to a different class of handicapped persons is not prohibited by this part.

### § 104.5 Assurances required

- (a) **Assurances.** An applicant for federal financial assistance to which this part applies shall submit an assurance, on a form specified by the Assistant Secretary, that the program or activity will be operated in compliance with this part. An applicant may incorporate these assurances by reference in subsequent applications to the Department.
- (b) **Duration of obligation.** (1) In the case of federal financial assistance extended in the form of real property or to provide real property or structures on the property, the assurance will obligate the recipient or, in the case of a subsequent transfer, the transferee, for the period during which the real property or structures are used for the purpose for which federal financial assistance is extended or for another purpose involving the provision of similar services or benefits.
  - (2) In the case of federal financial assistance extended to provide personal property, the assurance will obligate the recipient for the period during which it retains ownership or possession of the property.
  - (3) In all other cases the assurance will obligate the recipient for the period during which federal financial assistance is extended.
- (c) **Covenants.** (1) Where federal financial assistance is provided in the form of real property or interest in the property from the Department, the instrument effecting or recording this transfer shall contain a covenant running with the land to assure nondiscrimination for the period during which the real property is used for a purpose for which the federal financial assistance is extended or for another purpose involving the provision of similar services or benefits.
  - (2) Where no transfer of property is involved but property is purchased or improved with federal financial assistance, the recipient shall agree to include the covenant described in paragraph (b)(2) of this section in the instrument effecting or recording any subsequent transfer of the property.

- (3) Where federal financial assistance is provided in the form of real property or interest in the property from the Department, the covenant shall also include a condition coupled with a right to be reserved by the Department to revert title to the property in the event of a breach of the covenant. If a transferee of real property proposes to mortgage or otherwise encumber the real property as security for financing construction of new, or improvement of existing, facilities on the property for the purposes for which the property was transferred, the Assistant Secretary may, upon request of the transferee and if necessary to accomplish such financing and upon such conditions as he or she deems appropriate, agree to forbear the exercise of such right to revert title for so long as the lien of such mortgage or other encumbrance remains effective.

#### § 104.6 Remedial action, voluntary action, and self-evaluation

- (a) **Remedial action.** (1) If the Assistant Secretary finds that a recipient has discriminated against persons on the basis of handicap in violation of section 504 or this part, the recipient shall take such remedial action as the Assistant Secretary deems necessary to overcome the effects of the discrimination.
- (2) Where a recipient is found to have discriminated against persons on the basis of handicap in violation of section 504 or this part and where another recipient exercises control over the recipient that has discriminated, the Assistant Secretary, where appropriate, may require either or both recipients to take remedial action.
- (3) The Assistant Secretary may, where necessary to overcome the effects of discrimination in violation of section 504 or this part, require a recipient to take remedial action (i) with respect to handicapped persons who are no longer participants in the recipient's program or activity but who were participants in the program or activity when such discrimination occurred or (ii) with respect to handicapped persons who would have been participants in the program or activity had the discrimination not occurred.
- (b) **Voluntary action.** A recipient may take steps, in addition to any action that is required by this part, to overcome the effects of conditions that resulted in limited participation in the recipient's program or activity by qualified handicapped persons.
- (c) **Self evaluation.** (1) A recipient shall, within one year of the effective date of this part:
  - (i) Evaluate, with the assistance of interested persons, including handicapped persons or organizations representing handicapped persons, its current policies and practices and the effects thereof that do not or may not meet the requirements of this part;
  - (ii) Modify, after consultation with interested persons, including handicapped persons or organizations representing handicapped persons, any policies and practices that do not meet the requirements of this part; and
  - (iii) Take, after consultation with interested persons, including handicapped persons or organizations representing handicapped persons, appropriate remedial steps to eliminate the effects of any discrimination that resulted from adherence to these policies and practices.

- (2) A recipient that employs fifteen or more persons shall, for at least three years following completion of the evaluation required under paragraph (c)(1) of this section, maintain on file, make available for public inspection, and provide to the Assistant Secretary upon request:
- (i) A list of the interested persons consulted,
  - (ii) A description of areas examined and any problems identified, and
  - (iii) A description of any modifications made and of any remedial steps taken.

#### **§ 104.7 Designation of responsible employee and adoption of grievance procedures**

- (a) **Designation of responsible employee.** A recipient that employs fifteen or more persons shall designate at least one person to coordinate its efforts to comply with this part.
- (b) **Adoption of grievance procedures.** A recipient that employs fifteen or more persons shall adopt grievance procedures that incorporate appropriate due process standards and that provide for the prompt and equitable resolution of complaints alleging any action prohibited by this part. Such procedures need not be established with respect to complaints from applicants for employment or from applicants for admission to postsecondary educational institutions.

#### **§ 104.8 Notice**

- (a) A recipient that employs fifteen or more persons shall take appropriate initial and continuing steps to notify participants, beneficiaries, applicants, and employees, including those with impaired vision or hearing, and unions or professional organizations holding collective bargaining or professional agreements with the recipient that it does not discriminate on the basis of handicap in violation of section 504 and this part. The notification shall state, where appropriate, that the recipient does not discriminate in admission or access to, or treatment or employment in, its program or activity. The notification shall also include an identification of the responsible employee designated pursuant to 104.7(a). A recipient shall make the initial notification required by this paragraph within 90 days of the effective date of this part. Methods of initial and continuing notification may include the posting of notices, publication in newspapers and magazines, placement of notices in recipients' publication, and distribution of memoranda or other written communications.
- (b) If a recipient publishes or uses recruitment materials or publications containing general information that it makes available to participants, beneficiaries, applicants, or employees, it shall include in those materials or publications a statement of the policy described in paragraph (a) of this section. A recipient may meet the requirement of this paragraph either by including appropriate inserts in existing materials and publications or by revising and reprinting the materials and publications.

#### **§ 104.9 Administrative requirements for small recipients**

The Assistant Secretary may require any recipient with fewer than fifteen employees, or any class of such recipients, to comply with 104.7 and 104.8, in whole or in part, when the Assistant

Secretary finds a violation of this part or finds that such compliance will not significantly impair the ability of the recipient or class of recipients to provide benefits or services.

### **§ 104.10 Effect of state or local law or other requirements and effect of employment opportunities**

- (a) The obligation to comply with this part is not obviated or alleviated by the existence of any state or local law or other requirement that, on the basis of handicap, imposes prohibitions or limits upon the eligibility of qualified handicapped persons to receive services or to practice any occupation or profession.
- (b) The obligation to comply with this part is not obviated or alleviated because employment opportunities in any occupation or profession are or may be more limited for handicapped persons than for nonhandicapped persons.

### **Subpart B -- Employment Practices**

#### § 104.11 Discrimination prohibited

- (a) **General.** (1) No qualified handicapped person shall, on the basis of handicap, be subjected to discrimination in employment under any program or activity to which this part applies.
- (2) A recipient that receives assistance under the Education of the Handicapped Act shall take positive steps to employ and advance in employment qualified handicapped persons in programs or activities assisted under that Act.
- (3) A recipient shall make all decisions concerning employment under any program or activity to which this part applies in a manner which ensures that discrimination on the basis of handicap does not occur and may not limit, segregate, or classify applicants or employees in any way that adversely affects their opportunities or status because of handicap.
- (4) A recipient may not participate in a contractual or other relationship that has the effect of subjecting qualified handicapped applicants or employees to discrimination prohibited by this subpart. The relationships referred to in this paragraph include relationships with employment and referral agencies, with labor unions, with organizations providing or administering fringe benefits to employees of the recipient, and with organizations providing training and apprenticeships.
- (b) **Specific activities.** The provisions of this subpart apply to:
  - (1) Recruitment, advertising, and the processing of applications for employment;
  - (2) Hiring, upgrading, promotion, award of tenure, demotion, transfer, layoff, termination, right of return from layoff and rehiring;
  - (3) Rates of pay or any other form of compensation and changes in compensation;
  - (4) Job assignments, job classifications, organizational structures, position descriptions, lines of progression, and seniority lists;

- (5) Leaves of absence, sick leave, or any other leave;
  - (6) Fringe benefits available by virtue of employment, whether or not administered by the recipient;
  - (7) Selection and financial support for training, including apprenticeship, professional meetings, conferences, and other related activities, and selection for leaves of absence to pursue training;
  - (8) Employer sponsored activities, including those that are social or recreational; and
  - (9) Any other term, condition, or privilege of employment.
- (c) A recipient's obligation to comply with this subpart is not affected by any inconsistent term of any collective bargaining agreement to which it is a party.

#### **§ 104.12 Reasonable accommodation**

- (a) A recipient shall make reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its program or activity.
- (b) Reasonable accommodation may include:
  - (1) Making facilities used by employees readily accessible to and usable by handicapped persons, and
  - (2) Job restructuring, part time or modified work schedules, acquisition or modification of equipment or devices, the provision of readers or interpreters, and other similar actions.
- (c) In determining pursuant to paragraph (a) of this section whether an accommodation would impose an undue hardship on the operation of a recipient's program or activity, factors to be considered include:
  - (1) The overall size of the recipient's program or activity with respect to number of employees, number and type of facilities, and size of budget;
  - (2) The type of the recipient's operation, including the composition and structure of the recipient's workforce; and
  - (3) The nature and cost of the accommodation needed.
- (d) A recipient may not deny any employment opportunity to a qualified handicapped employee or applicant if the basis for the denial is the need to make reasonable accommodation to the physical or mental limitations of the employee or applicant.

#### **§ 104.13 Employment criteria**

- (a) A recipient may not make use of any employment test or other selection criterion that screens out or tends to screen out handicapped persons or any class of handicapped persons unless:
  - (1) The test score or other selection criterion, as used by the recipient, is shown to be job related for the position in question, and
  - (2) Alternative job related tests or criteria that do not screen out or tend to screen out as many handicapped persons are not shown by the Director to be available.
- (b) A recipient shall select and administer tests concerning employment so as best to ensure that, when administered to an applicant or employee who has a handicap that impairs sensory, manual, or speaking skills, the test results accurately reflect the applicant's or employee's job skills, aptitude, or whatever other factor the test purports to measure, rather than reflecting the applicant's or employee's impaired sensory, manual, or speaking skills (except where those skills are the factors that the test purports to measure).

#### § 104.14 Preemployment inquiries

- (a) Except as provided in paragraphs (b) and (c) of this section, a recipient may not conduct a preemployment medical examination or may not make preemployment inquiry of an applicant as to whether the applicant is a handicapped person or as to the nature or severity of a handicap. A recipient may, however, make preemployment inquiry into an applicant's ability to perform job related functions.
- (b) When a recipient is taking remedial action to correct the effects of past discrimination pursuant to 104.6 (a), when a recipient is taking voluntary action to overcome the effects of conditions that resulted in limited participation in its federally assisted program or activity pursuant to 104.6(b), or when a recipient is taking affirmative action pursuant to section 503 of the Act, the recipient may invite applicants for employment to indicate whether and to what extent they are handicapped, **Provided**, That:
  - (1) The recipient states clearly on any written questionnaire used for this purpose or makes clear orally if no written questionnaire is used that the information requested is intended for use solely in connection with its remedial action obligations or its voluntary or affirmative action efforts; and
  - (2) The recipient states clearly that the information is being requested on a voluntary basis, that it will be kept confidential as provided in paragraph (d) of this section, that refusal to provide it will not subject the applicant or employee to any adverse treatment, and that it will be used only in accordance with this part.
- (c) Nothing in this section shall prohibit a recipient from conditioning an offer of employment on the results of a medical examination conducted prior to the employee's entrance on duty, **Provided**, That:
  - (1) All entering employees are subjected to such an examination regardless of handicap, and
  - (2) The results of such an examination are used only in accordance with the requirements of this part.

- (d) Information obtained in accordance with this section as to the medical condition or history of the applicant shall be collected and maintained on separate forms that shall be accorded confidentiality as medical records, except that:
- (1) Supervisors and managers may be informed regarding restrictions on the work or duties of handicapped persons and regarding necessary accommodations;
  - (2) First aid and safety personnel may be informed, where appropriate, if the condition might require emergency treatment; and
  - (3) Government officials investigating compliance with the Act shall be provided relevant information upon request.

### **Subpart C--Accessibility**

#### **§ 104.21 Discrimination prohibited**

No qualified handicapped person shall, because a recipient's facilities are inaccessible to or unusable by handicapped persons, be denied the benefits of, be excluded from participation in, or otherwise be subjected to discrimination under any program or activity to which this part applies.

#### **§ 104.22 Existing facilities**

- (a) **Accessibility.** A recipient shall operate its program or activity so that when each part is viewed in its entirety, it is readily accessible to handicapped persons. This paragraph does not require a recipient to make each of its existing facilities or every part of a facility accessible to and usable by handicapped persons.
- (b) **Methods.** A recipient may comply with the requirements of paragraph (a) of this section through such means as redesign of equipment, reassignment of classes or other services to accessible buildings, assignment of aides to beneficiaries, home visits, delivery of health, welfare, or other social services at alternate accessible sites, alteration of existing facilities and construction of new facilities in conformance with the requirements of 104.23, or any other methods that result in making its program or activity accessible to handicapped persons. A recipient is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with paragraph (a) of this section. In choosing among available methods for meeting the requirement of paragraph (a) of this section, a recipient shall give priority to those methods that serve handicapped persons in the most integrated setting appropriate.
- (c) **Small health, welfare, or other social service providers.** If a recipient with fewer than fifteen employees that provides health, welfare, or other social services finds, after consultation with a handicapped person seeking its services, that there is no method of complying with paragraph (a) of this section other than making a significant alteration in its existing facilities, the recipient may, as an alternative, refer the handicapped person to other providers of those services that are accessible.
- (d) **Time period.** A recipient shall comply with the requirement of paragraph (a) of this section within sixty days of the effective date of this part except that where structural changes in



facilities are necessary, such changes shall be made within three years of the effective date of this part, but in any event as expeditiously as possible.

- (e) **Transition plan.** In the event that structural changes to facilities are necessary to meet the requirement of paragraph (a) of this section, a recipient shall develop, within six months of the effective date of this part, a transition plan setting forth the steps necessary to complete such changes. The plan shall be developed with the assistance of interested persons, including handicapped persons or organizations representing handicapped persons. A copy of the transition plan shall be made available for public inspection. The plan shall, at a minimum:
- (1) Identify physical obstacles in the recipient's facilities that limit the accessibility of its program or activity to handicapped persons;
  - (2) Describe in detail the methods that will be used to make the facilities accessible;
  - (3) Specify the schedule for taking the steps necessary to achieve full accessibility in order to comply with paragraph (a) of this section and, if the time period of the transition plan is longer than one year, identify the steps of that will be taken during each year of the transition period; and
  - (4) Indicate the person responsible for implementation of the plan.
- (f) **Notice.** The recipient shall adopt and implement procedures to ensure that interested persons, including persons with impaired vision or hearing, can obtain information as to the existence and location of services, activities, and facilities that are accessible to and useable by handicapped persons.

#### § 104.23 New construction

- (a) **Design and construction.** Each facility or part of a facility constructed by, on behalf of, or for the use of a recipient shall be designed and constructed in such manner that the facility or part of the facility is readily accessible to and usable by handicapped persons, if the construction was commenced after the effective date of this part.
- (b) **Alteration.** Each facility or part of a facility which is altered by, on behalf of, or for the use of a recipient after the effective date of this part in a manner that affects or could affect the usability of the facility or part of the facility shall, to the maximum extent feasible, be altered in such manner that the altered portion of the facility is readily accessible to and usable by handicapped persons.
- (c) **Conformance with Uniform Federal Accessibility Standards.** (1) Effective as of January 18, 1991, design, construction, or alteration of buildings in conformance with sections 3 8 of the Uniform Federal Accessibility Standards (UFAS) (Appendix A to 41 C.F.R. subpart 101 19.6) shall be deemed to comply with the requirements of this section with respect to those buildings. Departures from particular technical and scoping requirements of UFAS by the use of other methods are permitted where substantially equivalent or greater access to and usability of the building is provided.

- (2) For purposes of this section, section 4.1.6(1)(g) of UFAS shall be interpreted to exempt from the requirements of UFAS only mechanical rooms and other spaces that, because of their intended use, will not require accessibility to the public or beneficiaries or result in the employment or residence therein of persons with physical handicaps.
- (3) This section does not require recipients to make building alterations that have little likelihood of being accomplished without removing or altering a load bearing structural member.

[45 FR 30936, May 9, 1980; 45 FR 37426, June 3, 1980, as amended at 55 FR 52138, 52141, Dec. 19, 1990]

## Subpart D -- Preschool, Elementary, and Secondary Education

### § 104.31 Application of this subpart

Subpart D applies to preschool, elementary, secondary, and adult education programs or activities that receive federal financial assistance and to recipients that operate, or that receive federal financial assistance for the operation of, such programs or activities.

### § 104.32 Location and notification

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.

### § 104.33 Free appropriate public education

- (a) **General.** A recipient that operates a public elementary or secondary education program or activity shall provide a free appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction, regardless of the nature or severity of the person's handicap.
  - (b) **Appropriate education.** (1) For the purpose of this subpart, the provision of 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.
- (2) Implementation of an Individualized Education Program developed in accordance with the Education of the Handicapped Act is one means of meeting the standard established in paragraph (b)(1)(i) of this section.
  - (3) A recipient may place a handicapped person or refer such a person for aid, benefits, or services other than those that it operates or provides as its means of carrying out the

requirements of this subpart. If so, the recipient remains responsible for ensuring that the requirements of this subpart are met with respect to any handicapped person so placed or referred.

- (c) **Free education** -- (1) **General.** For the purpose of this section, the provision of a free education is the provision of educational and related services without cost to the handicapped person or to his or her parents or guardian, except for those fees that are imposed on non-handicapped persons or their parents or guardian. It may consist either of the provision of free services or, if a recipient places a handicapped person or refers such person for aid, benefits, or services not operated or provided by the recipient as its means of carrying out the requirements of this subpart, of payment for the costs of the aid, benefits, or services. Funds available from any public or private agency may be used to meet the requirements of this subpart. Nothing in this section shall be construed to relieve an insurer or similar third party from an otherwise valid obligation to provide or pay for services provided to a handicapped person.
- (2) **Transportation.** If a recipient places a handicapped person or refers such person for aid, benefits, or services not operated or provided by the recipient as its means of carrying out the requirements of this subpart, the recipient shall ensure that adequate transportation to and from the aid, benefits, or services is provided at no greater cost than would be incurred by the person or his or her parents or guardian if the person were placed in the aid, benefits, or services operated by the recipient.
- (3) **Residential placement.** If a public or private residential placement is necessary to provide a free appropriate public education to a handicapped person because of his or her handicap, the placement, including nonmedical care and room and board, shall be provided at no cost to the person or his or her parents or guardian.
- (4) **Placement of handicapped persons by parents.** If a recipient has made available, in conformance with the requirements of this section and 104.34, a free appropriate public education to a handicapped person and the person's parents or guardian choose to place the person in a private school, the recipient is not required to pay for the person's education in the private school. Disagreements between a parent or guardian and a recipient regarding whether the recipient has made a free appropriate public education available or otherwise regarding the question of financial responsibility are subject to the due process procedures of 104.36.
- (d) **Compliance.** A recipient may not exclude any qualified handicapped person from a public elementary or secondary education after the effective date of this part. A recipient that is not, on the effective date of this regulation, in full compliance with the other requirements of the preceding paragraphs of this section shall meet such requirements at the earliest practicable time and in no event later than September 1, 1978.

### § 104.34 Educational setting

- (a) **Academic setting.** A recipient to which this subpart applies shall educate, or shall provide for the education of, each qualified handicapped person in its jurisdiction with persons who are not handicapped to the maximum extent appropriate to the needs of the handicapped

person. A recipient shall place a handicapped person in the regular educational environment operated by the recipient unless it is demonstrated by the recipient that the education of the person in the regular environment with the use of supplementary aids and services cannot be achieved satisfactorily. Whenever a recipient places a person in a setting other than the regular educational environment pursuant to this paragraph, it shall take into account the proximity of the alternate setting to the person's home.

- (b) **Nonacademic settings.** In providing or arranging for the provision of nonacademic and extracurricular services and activities, including meals, recess periods, and the services and activities set forth in 104.37(a)(2), a recipient shall ensure that handicapped persons participate with nonhandicapped persons in such activities and services to the maximum extent appropriate to the needs of the handicapped person in question.
- (c) **Comparable facilities.** If a recipient, in compliance with paragraph (a) of this section, operates a facility that is identifiable as being for handicapped persons, the recipient shall ensure that the facility and the services and activities provided therein are comparable to the other facilities, services, and activities of the recipient.

### § 104.35 Evaluation and placement

- (a) **Preplacement evaluation.** A recipient that operates a public elementary or secondary education program or activity shall conduct an evaluation in accordance with the requirements of paragraph (b) of this section of any person who, because of handicap, needs or is believed to need special education or related services before taking any action with respect to the initial placement of the person in regular or special education and any subsequent significant change in placement.
- (b) **Evaluation procedures.** A recipient to which this subpart applies shall establish standards and procedures for the evaluation and placement of persons who, because of handicap, need or are believed to need special education or related services which ensure that:
  - (1) Tests and other evaluation materials have been validated for the specific purpose for which they are used and are administered by trained personnel in conformance with the instructions provided by their producer;
  - (2) Tests and other evaluation materials include those tailored to assess specific areas of educational need and not merely those which are designed to provide a single general intelligence quotient; and
  - (3) Tests are selected and administered so as best to ensure that, when a test is administered to a student with impaired sensory, manual, or speaking skills, the test results accurately reflect the student's aptitude or achievement level or whatever other factor the test purports to measure, rather than reflecting the student's impaired sensory, manual, or speaking skills (except where those skills are the factors that the test purports to measure).
- (c) **Placement procedures.** In interpreting evaluation data and in making placement decisions, a recipient shall (1) draw upon information from a variety of sources, including

aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior, (2) establish procedures to ensure that information obtained from all such sources is documented and carefully considered, (3) ensure that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options, and (4) ensure that the placement decision is made in conformity with 104.34.

- (d) **Reevaluation.** A recipient to which this section applies shall establish procedures, in accordance with paragraph (b) of this section, for periodic reevaluation of students who have been provided special education and related services. A reevaluation procedure consistent with the Education for the Handicapped Act is one means of meeting this requirement.

### § 104.36 Procedural safeguards

A recipient that operates a public elementary or secondary education program or activity shall establish and implement, with respect to actions regarding the identification, evaluation, or educational placement of persons who, because of handicap, need or are believed to need special instruction or related services, a system of procedural safeguards that includes notice, an opportunity for the parents or guardian of the person to examine relevant records, an impartial hearing with opportunity for participation by the person's parents or guardian and representation by counsel, and a review procedure. Compliance with the procedural safeguards of section 615 of the Education of the Handicapped Act is one means of meeting this requirement.

### § 104.37 Nonacademic services

- (a) **General.** (1) A recipient to which this subpart applies shall provide non academic and extracurricular services and activities in such manner as is necessary to afford handicapped students an equal opportunity for participation in such services and activities.
- (2) Nonacademic and extracurricular services and activities may include counseling services, physical recreational athletics, transportation, health services, recreational activities, special interest groups or clubs sponsored by the recipients, referrals to agencies which provide assistance to handicapped persons, and employment of students, including both employment by the recipient and assistance in making available outside employment.
- (b) **Counseling services.** A recipient to which this subpart applies that provides personal, academic, or vocational counseling, guidance, or placement services to its students shall provide these services without discrimination on the basis of handicap. The recipient shall ensure that qualified handicapped students are not counseled toward more restrictive career objectives than are nonhandicapped students with similar interests and abilities.
- (c) **Physical education and athletics.** (1) In providing physical education courses and athletics and similar aid, benefits, or services to any of its students, a recipient to which this subpart applies may not discriminate on the basis of handicap. A recipient that offers physical education courses or that operates or sponsors interscholastic, club, or intramural athletics shall provide to qualified handicapped students an equal opportunity for participation.

- (2) A recipient may offer to handicapped students physical education and athletic activities that are separate or different from those offered to nonhandicapped students only if separation or differentiation is consistent with the requirements of 104.34 and only if no qualified handicapped student is denied the opportunity to compete for teams or to participate in courses that are not separate or different.

### § 104.38 Preschool and adult education

A recipient to which this subpart applies that provides preschool education or day care or adult education may not, on the basis of handicap, exclude qualified handicapped persons and shall take into account the needs of such persons in determining the aid, benefits, or services to be provided.

### § 104.39 Private education

- (a) A recipient that provides private elementary or secondary education may not, on the basis of handicap, exclude a qualified handicapped person if the person can, with minor adjustments, be provided an appropriate education, as defined in 104.33(b)(1), within that recipient's program or activity.
- (b) A recipient to which this section applies may not charge more for the provision of an appropriate education to handicapped persons than to nonhandicapped persons except to the extent that any additional charge is justified by a substantial increase in cost to the recipient.
- (c) A recipient to which this section applies that provides special education shall do so in accordance with the provisions of 104.35 and 104.36. Each recipient to which this section applies is subject to the provisions of 104.34, 104.37, and 104.38.

## Subpart E -- Postsecondary Education

### § 104.41 Application of this subpart

Subpart E applies to postsecondary education programs or activities, including postsecondary vocational education programs or activities, that receive federal financial assistance and to recipients that operate, or that receive federal financial assistance for the operation of, such programs or activities.

### § 104.42 Admissions and recruitment

- (a) **General.** Qualified handicapped persons may not, on the basis of handicap, be denied admission or be subjected to discrimination in admission or recruitment by a recipient to which this subpart applies.
- (b) **Admissions.** In administering its admission policies, a recipient to which this subpart applies:
  - (1) May not apply limitations upon the number or proportion of handicapped persons who may be admitted;

- (2) May not make use of any test or criterion for admission that has a disproportionate, adverse effect on handicapped persons or any class of handicapped persons unless (i) the test or criterion, as used by the recipient, has been validated as a predictor of success in the education program or activity in question and (ii) alternate tests or criteria that have a less disproportionate, adverse effect are not shown by the Assistant Secretary to be available.
- (3) Shall assure itself that (i) admissions tests are selected and administered so as best to ensure that, when a test is administered to an applicant who has a handicap that impairs sensory, manual, or speaking skills, the test results accurately reflect the applicant's aptitude or achievement level or whatever other factor the test purports to measure, rather than reflecting the applicant's impaired sensory, manual, or speaking skills (except where those skills are the factors that the test purports to measure); (ii) admissions tests that are designed for persons with impaired sensory, manual, or speaking skills are offered as often and in as timely a manner as are other admissions tests; and (iii) admissions tests are administered in facilities that, on the whole, are accessible to handicapped persons; and
- (4) Except as provided in paragraph (c) of this section, may not make preadmission inquiry as to whether an applicant for admission is a handicapped person but, after admission, may make inquiries on a confidential basis as to handicaps that may require accommodation.
- (c) **Preadmission inquiry exception.** When a recipient is taking remedial action to correct the effects of past discrimination pursuant to 104.6(a) or when a recipient is taking voluntary action to overcome the effects of conditions that resulted in limited participation in its federally assisted program or activity pursuant to 104.6(b), the recipient may invite applicants for admission to indicate whether and to what extent they are handicapped, **Provided**, That:
  - (1) The recipient states clearly on any written questionnaire used for this purpose or makes clear orally if no written questionnaire is used that the information requested is intended for use solely in connection with its remedial action obligations or its voluntary action efforts; and
  - (2) The recipient states clearly that the information is being requested on a voluntary basis, that it will be kept confidential, that refusal to provide it will not subject the applicant to any adverse treatment, and that it will be used only in accordance with this part.
- (d) **Validity studies.** For the purpose of paragraph (b)(2) of this section, a recipient may base prediction equations on first year grades, but shall conduct periodic validity studies against the criterion of overall success in the education program or activity in question in order to monitor the general validity of the test scores.

#### § 104.43 Treatment of students; general

- (a) No qualified handicapped student shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any academic, research, occupational training, housing, health insurance, counseling, financial aid, physical education, athletics, recreation, transportation, other

extracurricular, or other postsecondary education aid, benefits, or services to which this subpart applies.

- (b) A recipient to which this subpart applies that considers participation by students in education programs or activities not operated wholly by the recipient as part of, or equivalent to, and education program or activity operated by the recipient shall assure itself that the other education program or activity, as a whole, provides an equal opportunity for the participation of qualified handicapped persons.
- (c) A recipient to which this subpart applies may not, on the basis of handicap, exclude any qualified handicapped student from any course, course of study, or other part of its education program or activity.
- (d) A recipient to which this subpart applies shall operate its program or activity in the most integrated setting appropriate.

#### § 104.44 Academic adjustments

- (a) **Academic requirements.** A recipient to which this subpart applies shall make such modifications to its academic requirements as are necessary to ensure that such requirements do not discriminate or have the effect of discriminating, on the basis of handicap, against a qualified handicapped applicant or student. Academic requirements that the recipient can demonstrate are essential to the instruction being pursued by such student or to any directly related licensing requirement will not be regarded as discriminatory within the meaning of this section. Modifications may include changes in the length of time permitted for the completion of degree requirements, substitution of specific courses required for the completion of degree requirements, and adaptation of the manner in which specific courses are conducted.
- (b) **Other rules.** A recipient to which this subpart applies may not impose upon handicapped students other rules, such as the prohibition of tape recorders in classrooms or of dog guides in campus buildings, that have the effect of limiting the participation of handicapped students in the recipient's education program or activity.
- (c) **Course examinations.** In its course examinations or other procedures for evaluating students' academic achievement, a recipient to which this subpart applies shall provide such methods for evaluating the achievement of students who have a handicap that impairs sensory, manual, or speaking skills as will best ensure that the results of the evaluation represents the student's achievement in the course, rather than reflecting the student's impaired sensory, manual, or speaking skills (except where such skills are the factors that the test purports to measure).
- (d) **Auxiliary aids.** (1) A recipient to which this subpart applies shall take such steps as are necessary to ensure that no handicapped student is denied the benefits of, excluded from participation in, or otherwise subjected to discrimination because of the absence of educational auxiliary aids for students with impaired sensory, manual, or speaking skills.  
(2) Auxiliary aids may include taped texts, interpreters or other effective methods of making orally delivered materials available to students with hearing impairments, readers in



libraries for students with visual impairments, classroom equipment adapted for use by students with manual impairments, and other similar services and actions. Recipients need not provide attendants, individually prescribed devices, readers for personal use or study, or other devices or services of a personal nature.

#### § 104.45 Housing

- (a) **Housing provided by the recipient.** A recipient that provides housing to its nonhandicapped students shall provide comparable, convenient, and accessible housing to handicapped students at the same cost as to others. At the end of the transition period provided for in subpart C, such housing shall be available in sufficient quantity and variety so that the scope of handicapped students' choice of living accommodations is, as a whole, comparable to that of nonhandicapped students.
- (b) **Other housing.** A recipient that assists any agency, organization, or person in making housing available to any of its students shall take such action as may be necessary to assure itself that such housing is, as a whole, made available in a manner that does not result in discrimination on the basis of handicap.

#### § 104.46 Financial and employment assistance to students

- (a) **Provision of financial assistance.** (1) In providing financial assistance to qualified handicapped persons, a recipient to which this subpart applies may not,
- (i) On the basis of handicap, provide less assistance than is provided to nonhandicapped persons, limit eligibility for assistance, or otherwise discriminate or
- (ii) Assist any entity or person that provides assistance to any of the recipient's students in a manner that discriminates against qualified handicapped persons on the basis of handicap.
- (2) A recipient may administer or assist in the administration of scholarships, fellowships, or other forms of financial assistance established under wills, trusts, bequests, or similar legal instruments that require awards to be made on the basis of factors that discriminate or have the effect of discriminating on the basis of handicap only if the overall effect of the award of scholarships, fellowships, and other forms of financial assistance is not discriminatory on the basis of handicap.
- (b) **Assistance in making available outside employment.** A recipient that assists any agency, organization, or person in providing employment opportunities to any of its students shall assure itself that such employment opportunities, as a whole, are made available in a manner that would not violate subpart B if they were provided by the recipient.
- (c) **Employment of students by recipients.** A recipient that employs any of its students may not do so in a manner that violates subpart B.

#### § 104.47 Nonacademic services

- (a) **Physical education and athletics.** (1) In providing physical education courses and athletics and similar aid, benefits, or services to any of its students, a recipient to which this subpart applies may not discriminate on the basis of handicap. A recipient that offers physical education courses or that operates or sponsors intercollegiate, club, or intramural athletics shall provide to qualified handicapped students an equal opportunity for participation in these activities.
- (2) A recipient may offer to handicapped students physical education and athletic activities that are separate or different only if separation or differentiation is consistent with the requirements of 104.43(d) and only if no qualified handicapped student is denied the opportunity to compete for teams or to participate in courses that are not separate or different.
- (b) **Counseling and placement services.** A recipient to which this subpart applies that provides personal, academic, or vocational counseling, guidance, or placement services to its students shall provide these services without discrimination on the basis of handicap. The recipient shall ensure that qualified handicapped students are not counseled toward more restrictive career objectives than are nonhandicapped students with similar interests and abilities. This requirement does not preclude a recipient from providing factual information about licensing and certification requirements that may present obstacles to handicapped persons in their pursuit of particular careers.
- (c) **Social organizations.** A recipient that provides significant assistance to fraternities, sororities, or similar organizations shall assure itself that the membership practices of such organizations do not permit discrimination otherwise prohibited by this subpart.

## Subpart F -- Health, Welfare, and Social Services

### § 104.51 Application of this subpart

Subpart F applies to health, welfare, and other social service programs or activities that receive federal financial assistance and to recipients that operate, or that receive federal financial assistance for the operation of, such programs or activities.

### § 104.52 Health, welfare, and other social services

- (a) General. In providing health, welfare, or other social services or benefits, a recipient may not, on the basis of handicap:
- (1) Deny a qualified handicapped person these benefits or services;
  - (2) Afford a qualified handicapped person an opportunity to receive benefits or services that is not equal to that offered nonhandicapped persons;
  - (3) Provide a qualified handicapped person with benefits or services that are not as effective (as defined in 104.4(b)) as the benefits or services provided to others;
  - (4) Provide benefits or services in a manner that limits or has the effect of limiting the participation of qualified handicapped persons; or

- (5) Provide different or separate benefits or services to handicapped persons except where necessary to provide qualified handicapped persons with benefits and services that are as effective as those provided to others.
- (b) **Notice.** A recipient that provides notice concerning benefits or services or written material concerning waivers of rights or consent to treatment shall take such steps as are necessary to ensure that qualified handicapped persons, including those with impaired sensory or speaking skills, are not denied effective notice because of their handicap.
- (c) **Emergency treatment for the hearing impaired.** A recipient hospital that provides health services or benefits shall establish a procedure for effective communication with persons with impaired hearing for the purpose of providing emergency health care.
- (d) **Auxiliary aids.** (1) A recipient to which this subpart applies that employs fifteen or more persons shall provide appropriate auxiliary aids to persons with impaired sensory, manual, or speaking skills, where necessary to afford such persons an equal opportunity to benefit from the service in question.
  - (2) The Assistant Secretary may require recipients with fewer than fifteen employees to provide auxiliary aids where the provision of aids would not significantly impair the ability of the recipient to provide its benefits or services.
  - (3) For the purpose of this paragraph, auxiliary aids may include brailled and taped material, interpreters, and other aids for persons with impaired hearing or vision.

### § 104.53 Drug and alcohol addicts

A recipient to which this subpart applies that operates a general hospital or outpatient facility may not discriminate in admission or treatment against a drug or alcohol abuser or alcoholic who is suffering from a medical condition, because of the person's drug or alcohol abuse or alcoholism.

### § 104.54 Education of institutionalized persons

A recipient to which this subpart applies and that operates or supervises a program or activity that provides aid, benefits or services for persons who are institutionalized because of handicap shall ensure that each qualified handicapped person, as defined in 104.3(k)(2), in its program or activity is provided an appropriate education, as defined in 104.33(b). Nothing in this section shall be interpreted as altering in any way the obligations of recipients under subpart D.

## Subpart G -- Procedures

### § 104.61 Procedures

The procedural provisions applicable to title VI of the Civil Rights Act of 1964 apply to this part. These procedures are found in 100.6 100.10 and part 101 of this title.

## **CHAPTER THREE:**

### **OFFICE FOR CIVIL RIGHTS GUIDANCE**

This chapter provides links to important guidance from the Office for Civil Rights of the U.S. Department of Education's website ([www.ed.gov](http://www.ed.gov)). The guidance addresses current issues such as harassment and bullying, the education of students with disabilities with respect Section 504 of the Rehabilitation Act and the Americans with Disabilities Act Amendments Act, accelerated programs such as Advanced Placement and International Baccalaureate, rights and responsibilities in preparing for postsecondary education, as well as guidance for educators regarding transition issues to postsecondary education for students with disabilities.

**“Dear Colleague Letter: Students with Disabilities in Extracurricular Athletics,” U.S. Department of Education, Office for Civil Rights, January 25, 2013**

The U.S. Department of Education provides an overview of the obligations of public elementary and secondary schools under Section 504 of the Rehabilitation Act (Section 504), and the Department’s Section 504 regulations; cautions schools against making decisions based on presumptions and stereotypes; details the specific Section 504 regulations that require students with disabilities to have an equal opportunity for participation in nonacademic and extracurricular services and activities; and discusses the provision of separate or different athletic opportunities. [View the Dear Colleague Letter: Students with Disabilities in Extracurricular Athletics on the Office for Civil Rights’ webpage](#)<sup>3</sup>.

**“Dear Colleague Letter: Questions and Answers on the ADA Amendments Act of 2008 for Students with Disabilities Attending Public Elementary and Secondary Schools,” U.S. Department of Education, Office for Civil Rights, January 19, 2012**

The Office for Civil Rights of the U.S. Department of Education provides additional guidance for school officials on the effects of the Americans with Disabilities Act Amendments Act (ADAAA) of 2008. In a question and answer format, it addresses how the ADAAA alters coverage under Section 504 and Title II, district policies as well as the interrelationship to health plans. [View “Questions and Answers on the ADA Amendments Act of 2008 for Students with Disabilities Attending Public Elementary and Secondary Schools” on the Office for Civil Rights’ webpage](#).<sup>4</sup>

**“Creating Equal Opportunities For Children and Youth with Disabilities To Participate in Physical Education and Extracurricular Athletics,” OCR and the Office of Special Education and Rehabilitative Services, Office of Special Education Programs, Washington DC, 2011**

The Office for Civil Rights of the U.S. Department of Education, the Office of Special Education and Rehabilitative Service and the Office of Special Education Programs provide suggestions and resources to increase opportunities for students with disabilities in physical education and athletic extracurricular activities. Suggestions address accessibility, equipment, personnel preparation, teaching style, management of behavior and program options, curriculum assessment, progress, achievement, and grading. [View “Creating Equal Opportunities For Children and Youth with Disabilities To Participate in Physical Education and Extracurricular Athletics” on the Office for Civil Rights’ webpage](#).<sup>5</sup>

**“Dear Colleague Letter: Harassment and Bullying,” Assistant Secretary for Civil Rights, U.S. Department of Education, October 26, 2010**

The Office for Civil Rights of the U.S. Department of Education provides guidance concerning the obligations of school districts to protect students from student-on-student harassment on the basis of sex, race, color and national origin, and disability. The letter clarifies the relationship between bullying and discriminatory harassment, provides examples of harassment, and illustrates how a school should respond in each case. [View the Dear Colleague Letter: Harassment and Bullying on the Office for Civil Rights’ webpage](#).<sup>6</sup>

**“Protecting Students With Disabilities: Frequently Asked Questions about Section 504 and the Education of Children with Disabilities,” Office for Civil Rights, U.S. Department of Education, March 17, 2011**

The Office for Civil Rights of the U.S. Department of Education provides clarification regarding the requirements of Section 504 of the Rehabilitation Act of 1973 in light of the Americans with Disabilities Amendments Act of 2008. In a question and answer format, it addresses the interrelationship of IDEA and Section 504, what students are protected under Section 504, the evaluation process, placement - the types of services a student needs - and procedural safeguards. [View the FAQ: Section 504 and the Education of Children with Disabilities on the Office for Civil Rights’ webpage.](#) See Endnote 2 above

**“Dear Colleague Letter: Access by Students with Disabilities to Challenging Academic Programs,” Assistant Secretary for Civil Rights, U.S. Department of Education, December 26, 2007**

The Office for Civil Rights of the U.S. Department of Education provides guidance regarding the rights of students with disabilities to participate in accelerated programs such as Advanced Placement and International Baccalaureate. It addresses eligibility requirements as well as special education or related aids and services to which a student is legally entitled under IDEA or Section 504 of the Rehabilitation Act of 1973 while enrolled in accelerated. [View the Dear Colleague Letter: Access by Students with Disabilities to Challenging Academic Programs on the Office for Civil Rights webpage.](#)<sup>7</sup>

**“Students with Disabilities Preparing for Postsecondary Education: Know Your Rights and Responsibilities,” Office for Civil Rights, U.S. Department of Education, September 2007**

The Office for Civil Rights of the U.S. Department of Education provides information for students with disabilities who are planning to attend postsecondary education regarding their rights and responsibilities. It also addresses the obligations of postsecondary institutions, which include vocational and career schools, two- and four-year colleges, and universities, with respect to academic adjustments, auxiliary aids and services for students with disabilities. [View the Office for Civil Rights’ guidance for students with disabilities preparing for postsecondary education.](#)<sup>8</sup>

**“Transition of Students with Disabilities To Postsecondary Education: A Guide for High School Educators,” Office for Civil Rights, U.S. Department of Education, March 2007**

The Office for Civil Rights of the U.S. Department of Education provides guidance in a question and answer format for high school educators regarding the issues pertinent to students with disabilities and transition to postsecondary education. It addresses the admission process, obtaining services and the nature of and process for obtaining academic adjustments and auxiliary aids and services. [View the Office for Civil Rights’ guidance regarding students with disabilities and transition to postsecondary education on the Office for Civil Rights’ webpage.](#)<sup>9</sup>

## Website References

- <sup>1</sup> Minnesota Manual of Accommodations for Students with Disabilities in Instruction and Assessment, A Guide to Selecting, Administering, and Evaluating the Use of Accommodations, 2008-2009 and Training Guide. National Center on Educational Outcomes, 2008 – <http://www.cehd.umn.edu/nceo/Teleconferences/tele16/default.html>
- <sup>2</sup> Protecting Students with Disabilities - Frequently Asked Questions About Section 504 and the Education of Children with Disabilities. Office for Civil Rights, U. S. Department of Education, March 17, 2011 – <http://www2.ed.gov/about/offices/list/ocr/504faq.html>
- <sup>3</sup> Dear Colleague Letter: Students with Disabilities in Extracurricular Athletics – <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201301-504.html>
- <sup>4</sup> Q&A on the ADA Amendments Act of 2008 for Students with Disabilities Attending Public Elementary and Secondary Schools – <http://www2.ed.gov/about/offices/list/ocr/docs/dcl-504faq-201109.html>
- <sup>5</sup> Creating Equal Opportunities For Children and Youth with Disabilities To Participate in Physical Education and Extracurricular Athletics – <http://www2.ed.gov/policy/speced/guid/idea/equal-pe.pdf>
- <sup>6</sup> Dear Colleague Letter: Harassment and Bullying – <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf>
- <sup>7</sup> Dear Colleague Letter: Access by Students with Disabilities to Challenging Academic Programs – <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-20071226.pdf>
- <sup>8</sup> Students with Disabilities Preparing for Postsecondary Education: Know Your Rights and Responsibilities – <http://www2.ed.gov/about/offices/list/ocr/transition.html>
- <sup>9</sup> Transition of Students with Disabilities To Postsecondary Education: A Guide for High School Educators – <http://www2.ed.gov/about/offices/list/ocr/transitionguide.html>