



SECTION 504

OF THE REHABILITATION ACT OF 1973
PROCEDURAL MANUAL

HURON SCHOOL DISTRICT

June 2017

Section 504 Procedural Manual

Acknowledgements

The contents of this manual represent a compilation and interpretation of the most reliable and useful information from a variety of state and national resources. Pingora Consulting, LLC strives to provide the most accurate and current information. The use of this manual and its contents are designed to assist practitioners as a guidance tool. It is not intended to substitute for legal advice. The Pingora Consulting Team

Introduction

Section 504 is a federal civil rights law codified in the Rehabilitation Act of 1973. It provides protection against discrimination for eligible individuals with disabilities, including students in public schools. Section 504 is monitored and enforced by the Office for Civil Rights (OCR) within the United States Department of Education. The purpose of this document is to provide guidance and outline the procedures for school districts to follow regarding their obligations under Section 504. To begin to understand Section 504, it is helpful to see how it relates to other relevant laws.

Americans with Disabilities Act Amendments (ADAA)

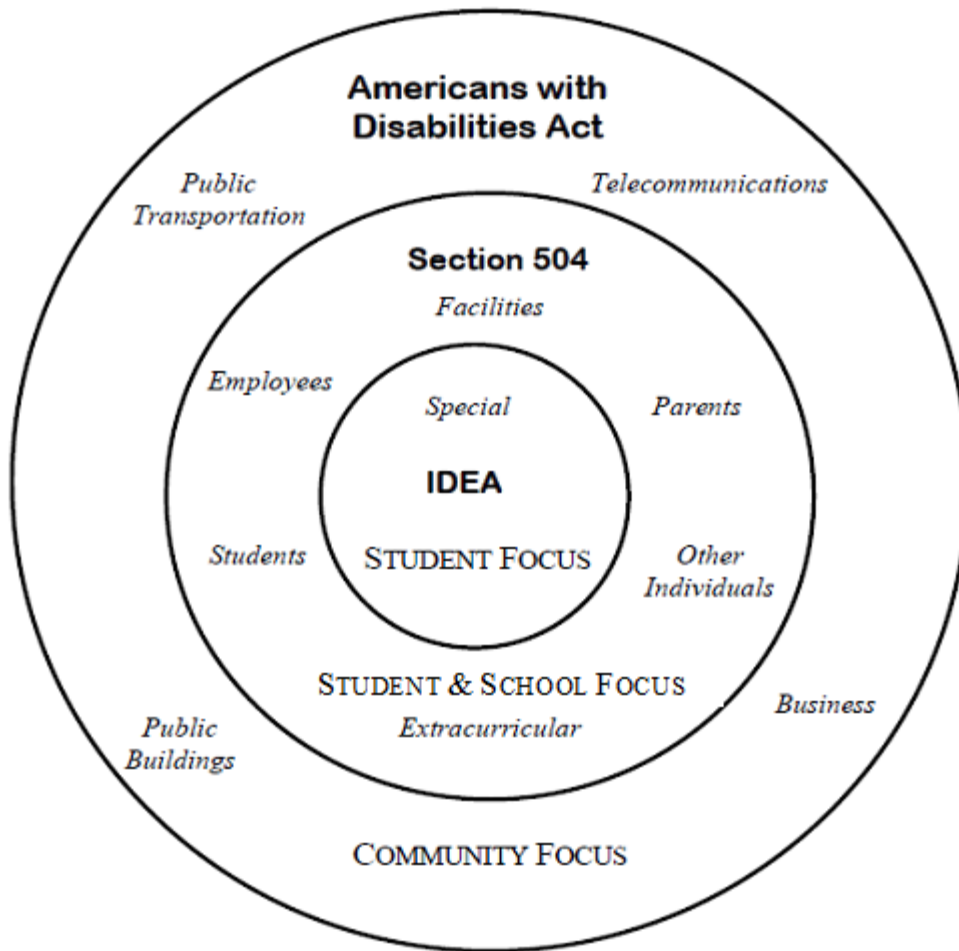
The ADAA is a federal law, which provides civil rights protections to ALL INDIVIDUALS with disabilities throughout our society, similar to the protections provided to individuals on the basis of race, color, sex, national origin, age, and religion. It guarantees equal opportunity for individuals with disabilities in public accommodations, employment, transportation, state and local government services, and telecommunications. The most recent ADA amendments occurred in 2008.

Section 504

The Section 504 regulations require a school district to provide a "free appropriate public education" (FAPE) to each qualified student with a disability who is in the school district's jurisdiction, regardless of the nature or severity of the disability. Under Section 504, FAPE consists of the provision of regular or special education and related aids and services designed to meet the student's individual educational needs as adequately as the needs of nondisabled students are met. Qualified Section 504 students are provided appropriate educational services according to a Section 504 Service Plan. Section 504 also provides equal opportunities for access to nonacademic activities for disabled students.

Individuals with Disabilities Education Act (IDEA)

The IDEA was originally enacted in 1975 to ensure that students with disabilities have the opportunity to receive FAPE that emphasizes special education and related services designed to meet their unique needs and to protect the rights of student with disabilities.



Frequently Used Terms

Appropriate Education

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 disabled students as adequately as the needs of non-disabled students are met and (ii) are based upon adherence to procedures that satisfy the requirements of Section 504.

Disabled Person

A disabled person means any person who (i) has a physical or mental impairment (ii) has a record of having such an impairment, or (iii) is regarded as having such an impairment, and the impairment substantially limits one or more major life activities.

Educational Placements

A program of service designed to meet an eligible student's educational needs in a setting with students who are not disabled to the maximum extent appropriate.

Equal Access

An equal opportunity for a qualified person with a disability to participate in or benefit from educational aids, benefits, or services.

Evaluation/Reevaluation

A school district shall conduct an evaluation of any student who, because of a disability, needs or is believed to need special education or related services. An evaluation is necessary before taking any action with respect to the initial placement of the student in regular or special education. Prior to any subsequent significant change in placement, a reevaluation is required.

Free Appropriate Public Education (FAPE)

FAPE refers to the provision of regular or special education and related aids and services that are designed to meet the individual educational needs of students with disabilities as adequately as the needs of students without disabilities are met and is based upon adherence to procedures that satisfy the requirements of Subpart D of Section 504. School districts must provide FAPE to each qualified student in its jurisdiction. FAPE must be provided without cost.

Fundamental Alteration

A modification of an activity that alters such an essential aspect of the activity that it would be unacceptable even if it affected all participants equally.

Grievance Procedure

A school district 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 Section 504.

Individualized Education Plan (IEP)

Under the IDEA, an IEP is a written statement that is developed, reviewed, and revised in accordance with the IDEA's requirements in order to provide FAPE to a student with a disability.

Least Restrictive Environment (LRE)

A school district shall educate, or shall provide for the education of, each qualified disabled student in its jurisdiction with students who are not disabled to the maximum extent appropriate to meet the needs of the disabled student. A district shall place a disabled student in the regular educational environment unless it is demonstrated that the education of the student in the regular environment with the use of supplementary aids and services cannot be achieved satisfactorily.

Major Bodily Functions

Pursuant to the ADAAA, such functions include immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions. This list is not exhaustive.

Major Life Activity

Pursuant to the ADAAA, functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. This list is not exhaustive. In the ADAAA, additional examples including eating, sleeping, standing, lifting, bending, reading, concentrating, thinking, and communicating.

Manifestation Determination

The process for determining if a student's misconduct is related to his/her disability. The conduct is a manifestation of disability if: 1) the conduct in question was caused by, or had a direct and substantial relationship to, the student's disability; or 2) if the conduct in question was the direct result of the school district's failure to implement the Section 504 Plan.

Parent

The Section 504 parent refers to a biological or adoptive parent, a guardian, or the student who has reached the age of majority (unless the student is subject to legal guardianship).

Physical or Mental Impairment

Pursuant to the ADAAA, (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 intellectual disability, organic brain syndrome, emotional or mental illness and specific learning disabilities. A physical or mental impairment does not constitute a disability unless its severity is such that it results in a substantial limitation of one or more major life activities.

Procedural Safeguards

A procedure established and implemented by a school district that provides a parent with notice regarding evaluation and placement, the right to examine relevant records, and an impartial hearing.

Reasonable Accommodation

A term used in the employment context to refer to modifications or adjustments employers make to a job application process, the work environment, the manner or circumstances under which the position held or desired is customarily performed, or that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment. This term is sometimes used incorrectly to refer to related aids and services in the elementary and secondary school context or to refer

to academic adjustments, reasonable modifications, and auxiliary aids and services in the postsecondary school context.

Reasonable Modification

A modification to a policy, practice, procedure or program that does not fundamentally alter the nature of an activity is considered a reasonable modification.

Section 504 Coordinator

Each school district (assuming it has 15 or more employees) must designate at least one individual to supervise its compliance efforts. It is advisable to have a Section 504 School Contact at each school to assist the school building in implementing Section 504 and serve as the school's contact for Section 504 Team functions.

Section 504 Plan

A Section 504 Plan should be in writing and address the following components:

- **The nature of the student's disability and the major life activity it limits.** Students are eligible for Section 504 protection if they have a physical or mental impairment that substantially limits one or more major life activities or if they have a record of or are regarded as having such an impairment. In the school context, the major life activity affected most frequently is learning; however, it is not limited to that. It is the duty of the Section 504 Team to evaluate the student and determine if the disability substantially limits a major life activity.
- **The basis for determining the disability.** Section 504, like the IDEA, requires schools to meet certain evaluation procedures, which must be documented in the Section 504 Plan.
- **The educational impact of the disability.** The Section 504 Team must describe how the disability affects the student's educational performance so appropriate services and accommodations can be provided.
- **FAPE.** Section 504's FAPE standard requires school districts to provide services that are designed to meet the individual needs of students with disabilities as adequately as the needs of students without disabilities are met.
- **Placement in the LRE** Section 504 has an LRE requirement that imposes a duty on the Section 504 Team to place a student with a disability in the regular education environment unless the school district can show that education in the regular environment with the use of supplementary aids and services cannot be achieved satisfactorily.

Section 504 Team

A group of persons knowledgeable about the student, knowledgeable about the meaning of the evaluation data, the placement options, the legal requirements to place a disabled student in the least restrictive environment, and the legal obligation to provide comparable facilities to disabled students. The team shall include the

Section 504 Coordinator or designee, the Section 504 School Contact, parents, and professionals knowledgeable about the student.

Significant Change of Placement

A significant change in placement means a significant change in the type or amount of educational or related aids or services that a school district provides to a disabled student.

Substantially Limits

Means: (a) the inability to perform a major life activity that the average person in the general population can perform; or (b) substantial limitation as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration which the average person in the general population can perform the same major life activity.

Overview of District Section 504 Responsibilities

- I Section 504, Subpart C requires school districts to provide facilities that are accessible to persons with disabilities. No qualified disabled person shall, because the school district's facilities are inaccessible to or unusable by disabled persons, be denied the benefits of, be excluded from participation in, or otherwise be subjected to discrimination under any program or activity. However, school districts are not required to make each of its facilities, or every part of a facility accessible for use by disabled persons. If a school district operates a separate facility for disabled students, it must be comparable to other facilities operated by the school district.
- II Section 504, Subpart D requires school districts to provide a free appropriate public education to each qualified disabled student who is in the school district's jurisdiction, regardless of the nature or severity of the student's disability. In implementing the procedural requirements of Section 504, Subpart D, the school district must:
 - 1 Provide written assurance of nondiscrimination.
 - 2 Designate an employee to coordinate (Section 504 Coordinator) compliance with Section 504 (required if there are 15 or more employees—recommended for all).
 - 3 Adopt and implement grievance procedures, which incorporate due process standards, to resolve complaints of discrimination.
 - 4 Provide notice to students and parents stating that the district does not discriminate on the basis of disability. The notification shall identify the employee responsible for compliance with Section 504. Notice must be included in student/parent handbook.
 - 5 Identify and locate qualified children with disabilities within its jurisdiction (Child Find).
 - 6 Annually notify students with disabilities and their parents of the school district's responsibilities under Section 504.
 - 7 Provide parents with the following procedural safeguards:
 - a Written notice of their rights.

- b An opportunity to review relevant records.
- c Grievance procedures.
- d Due process hearing procedures, including review.

Compliance with the procedural safeguards under the IDEA is one way of meeting these requirements. The Section 504 Coordinator is the person responsible for ensuring the components of Section 504 are met.

Overview of the Section 504 Process

In order to be in compliance with the substantive requirements of Section 504, Subpart D, school districts must have a system in place to conduct the following activities:

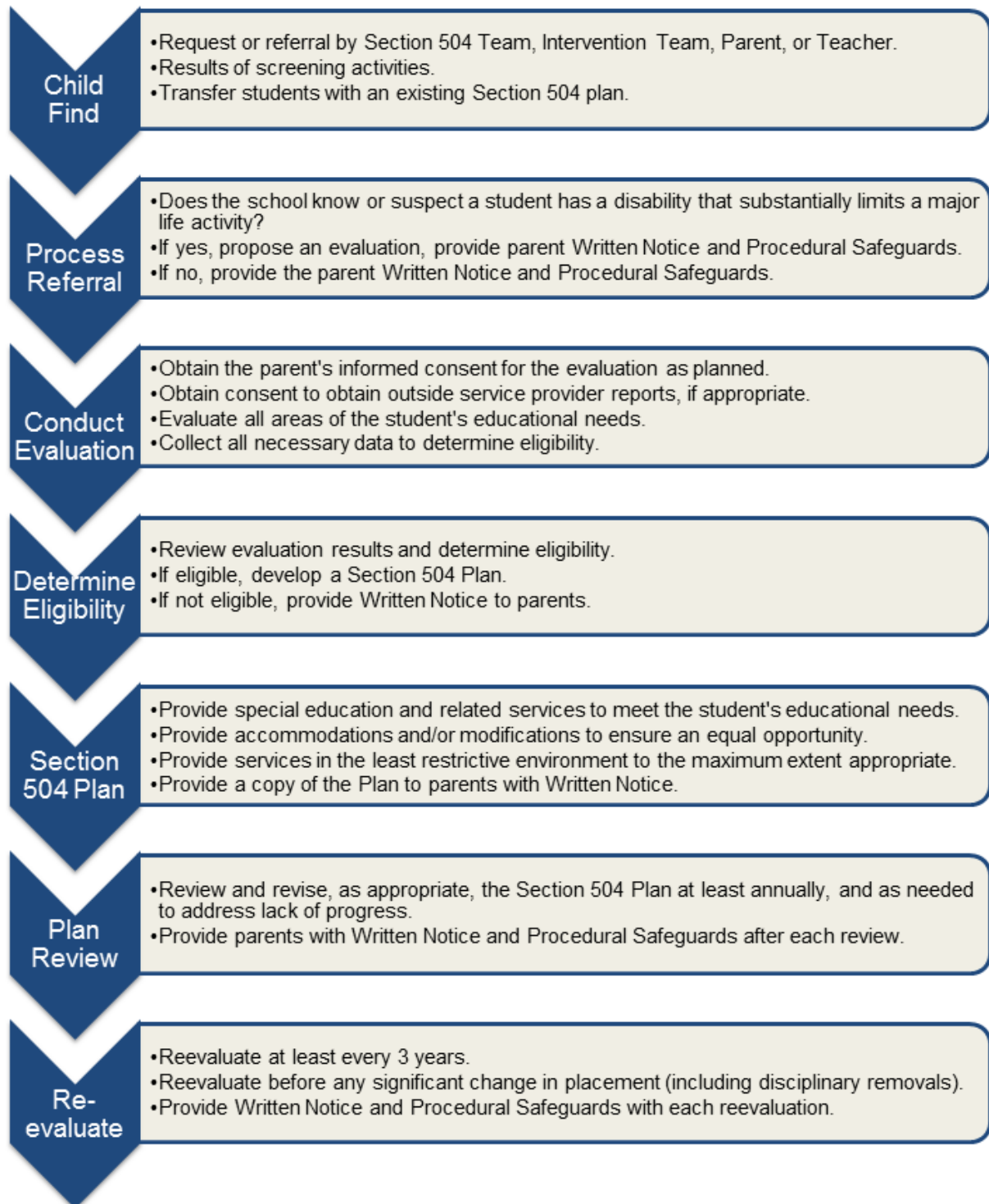
- 1 Child Find
- 2 Referral Process
- 3 Conduct Evaluation
- 4 Determine Eligibility
- 5 Develop the Section 504 Plan
- 6 Review the Plan
- 7 Reevaluate

The Section 504 Team will assist and guide the process consistent with the school district's policies and/or procedures.

Implementation of the safeguards and processes in the IDEA is one means of meeting the requirements of Section 504.

Keep in mind that the purpose of Section 504 is to afford students with disabilities equal opportunities to obtain the same results, to gain the same benefits, or to reach the same level of achievement as their non-disabled peers. While Section 504 does not guarantee success for students with disabilities, it does guarantee an equal opportunity for success.

SECTION 504 PROCESS FLOWCHART



Section 504 Procedures

I. Child Find Procedures

- a Parents, teachers, intervention teams, or Section 504 Teams (or other school representatives) may refer a student for an evaluation who is suspected or known to need special education and/or related services because of a disability. The person may obtain a model referral form from the Section 504 Coordinator or School Contact, who will assist with making the referral, and the Section 504 Team in collecting appropriate student data. Use of the model form is recommended, but not required.
- b Parent requests for evaluation are not required to be in writing.
- c A student does not have to have a formal diagnosis to be referred for consideration as a disabled student pursuant to Section 504.
- d Transfer students from out of state should be treated as a new referral.

II. Referral Process

- a The Section 504 Team must process the referral. The Section 504 Team must determine if the Team suspects that the student is a student with a disability (a student who (i) has a physical or mental impairment (ii) has a record of having such an impairment, or (iii) is regarded as having such an impairment, and the impairment substantially limits one or more major life activities).
- b If the Team suspects that the student has a disability under Section 504, it must propose to conduct an evaluation and provide the parent with Written Notice of its decision. Prior to conducting the initial evaluation, the school district must obtain the informed consent of the parent.
- c If the Team does not suspect that the student has a disability under Section 504, it must provide the parent with Written Notice of its decision.
- d Parents must be provided with a copy of their Procedural Safeguards.

III. Evaluation Procedures:

- a **Evaluations** An evaluation is usually initiated by a request from a parent, a referral from a teacher, or from an intervention team. A school district is required to evaluate the student only when it has reason to believe the student needs special education and related services. If a student needs or is believed to need special education or related services, the district must evaluate the student prior to initial placement in a regular or special education program and reevaluate the student before any significant change in placement. An evaluation is not required when the Section 504 Team does not believe that the student is in need of special education or related services.
- b The school district must establish policies and procedures for evaluation and placement which ensure that tests and other evaluation materials: have been validated for the specific purpose for which they are used and are administered by trained personnel; are tailored to assess educational need and are not merely based on IQ scores; and reflect aptitude, achievement or

- whatever else the tests purport to measure and do not reflect the student's impaired sensory, manual or speaking skills (unless the test is designed to measure these particular deficits). There is no entitlement to an independent educational evaluation in Section 504.
- c Prior to implementation of services, the parents must be notified and the student must be evaluated by qualified personnel using appropriate assessment methods and tools. Parental consent and Written Notice are required before a student is initially evaluated and/or placed. If a parent refuses consent for an initial evaluation and the school district suspects a student is eligible, school districts may use due process hearing procedures to seek to override the parents' denial of consent.
 - d The evaluation and placement process is determined by the type of suspected disability and the type of services the student may need. The evaluation must be sufficient to accurately and comprehensively assess the nature and extent of the disability in order to recommend appropriate services. Utilization of the state regulations and evaluation standards for IDEA is an acceptable means of meeting the evaluation requirements of Section 504. Parents are entitled to a copy of the eligibility report and if eligible, Section 504 Plan. If parents do not attend the meeting, a copy should be sent to them.
 - e **Eligibility Determinations** The Section 504 Team has the responsibility for determining eligibility and appropriate modifications, related aids or services for the student, and should be composed of the Section 504 Coordinator or School Contact, parents and professionals knowledgeable about the student. Other persons may be invited to attend the Section 504 meeting by the parents and/or the school district. The group should review the nature of the disability, how it affects the student's education, and thereafter, decide what, if any, services are necessary for the provision of a FAPE.

IV. Plan Development and Implementation

- a **Plan Development** The plan developed by the Section 504 Team is based on the individual student's needs and least restrictive environment considerations. The Section 504 Plan must represent FAPE based on an individual student's needs. The Plan will document the Team's decisions and will include the services and supports necessary to provide FAPE.
- b **Free Appropriate Public Education (FAPE)** School district must provide FAPE (regular or special education and related aids and services) to a qualified student with a disability in the school district's jurisdiction. Instruction must be individually designed to meet the needs of the disabled student as adequately as the needs of non-disabled students. The Section 504 Team documents the agreed on services in the Section 504 Plan. The quality of educational services provided to students with disabilities must be equivalent to the services provided to non-disabled students. When necessary, FAPE must include:

- *Regular or special education and related aids and services.* Schools must ensure that services (i) are designed to meet the individual educational needs of disabled persons as adequately as the needs of nondisabled persons are met, and (ii) are based upon adherence to procedures that satisfy the Section 504 requirements pertaining to educational setting, evaluation and placement, and procedural safeguards.
 - *Reasonable accommodations.* When used in the education context, the term often refers to reasonable modifications and related aids and services in elementary and secondary schools. The term is sometimes used to describe Section 504 services.
 - *Related services, including transportation.* The term refers to developmental, corrective, and other supportive services, including psychological, counseling and medical diagnostic services, and transportation. If a school district provides transportation to all its students within a certain geographic area, it may not discriminate in its provision of transportation to students with disabilities or impairments. The length of the bus rides for students with disabilities should not be longer than that of non-disabled students. If a school district places a student in a program not operated by the school district, the school district must ensure that adequate transportation to and from the program is provided at no greater cost than would be incurred by the parent if the student were placed in the program operated by the school district.
 - *Residential placement.* The placement must be provided by the school district at no cost to the parent if necessary to provide FAPE. This includes educational services, non-medical care, and room and board.
- c **EXCEPTION: Parental Placements.** If the school district offers FAPE to a student but the parent chooses to place the student elsewhere, the school district is not responsible to pay for the placement. Disagreements regarding program availability and financial responsibility are subject to due process procedures. A copy of the Plan must be provided to parents and made available to school personnel responsible for the implementation of the services and supports in the student's Section 504 Plan. The Plan must be filed and maintained in the student's education records.
- d **Placement** In making placement decisions, the Section 504 Team must:
- Draw upon information from a variety of sources;
 - Ensure that all information is documented and considered;
 - Ensure that the placement decision is made by a group of persons including those who are knowledgeable about the student, the meaning of the evaluation data and placement options; and
 - Ensure that the placement decision is in conformity with the least restrictive environment requirements.
- e Before a significant change in a student's placement, the Section 504 Team must reevaluate the student consistent with Section VI.
- f **Least Restrictive Environment (LRE)**

- **Academic setting** A school district must ensure that a student is educated with non-disabled peers to the maximum extent appropriate. A school district must educate students who are disabled with non-disabled students in the least restrictive environment to the maximum extent appropriate. In order to remove a student from the regular educational environment, the school district must justify that education of the student in the regular education environment with the use of supplementary aids and services cannot be achieved satisfactorily.
 - **Nonacademic setting** In providing or arranging for the provision of nonacademic and extracurricular services and activities, including meals and recess periods, the school district shall ensure that disabled students participate with non-disabled students to the maximum extent appropriate to the needs of the disabled student.
- g Nonacademic Services** A school district must provide nonacademic and extracurricular services and activities in a manner to afford disabled students an equal opportunity for participation in those services and activities. This means making reasonable modifications and providing aids and services that are necessary to ensure an equal opportunity to participate unless the school district can show that doing so would be a fundamental alteration to its program. School districts may adopt bona fide safety standards needed to implement its extracurricular program or activity. Schools may also require a level of skill or ability for participation in a competitive program or activity.
- h** These nonacademic and extracurricular services and activities may include counseling services, physical recreational athletics, transportation, health services, recreational activities, special groups or clubs sponsored by the district, referrals to outside agencies, and employment of students. A district may offer disabled students physical education and athletic activities that are separate or different from those offered to non-disabled students only if separation or differentiation is consistent with the LRE provisions and only if no disabled student is denied the opportunity to compete for teams or to participate in courses that are not separate or different.

Discipline and Section 504 Students

I. Discipline in General:

It is OCR's policy that when the exclusion of a student with a disability is permanent (expulsion), or for an indefinite period, or for more than 10 consecutive school days, the exclusion constitutes a significant change in placement. A series of suspensions that are 10 days each or fewer in duration may create a pattern of exclusion that constitutes a significant change in placement. The determination of whether the series of suspensions creates a pattern of exclusions that constitutes a significant change in placement must be made on a case-by-case basis. Among the factors considered in determining whether a series of disciplinary removals or suspensions has resulted in a significant change in placement are 1) length of each suspension, 2)

proximity of the suspensions to one another, and 3) total amount of time the student is excluded from school.

Prior to implementing an exclusion that constitutes a significant change in placement, the school district must first conduct a manifestation determination of the student. Section 504 protects disabled students from being improperly removed from school for misconduct that is related to their disability.

As a general rule, Section 504 and IDEA apply to the disciplinary removal of disabled students in a similar manner. IDEA requires a manifestation determination within 10 school days of a significant change in placement for disciplinary infractions.

Section 504 requires a reevaluation before a significant change in placement. OCR has interpreted the manifestation determination to be a component of the reevaluation necessary under Section 504 before significantly changing a student's placement for a disciplinary infraction.

See Appendix A: Discipline Zones for a chart to assist with implementing the disciplinary procedures to ensure compliance with Section 504.

II. Manifestation Determination:

If a disabled student's misconduct is a manifestation of his or her disability, the school district cannot implement a disciplinary action that constitutes a significant change in the student's placement. If a disabled student's misconduct is not a manifestation of his or her disability, the district can discipline the student in the same manner that it disciplines non-disabled students for the same misconduct, keeping in mind that removals considered to be a significant change in placement require reevaluation prior to the change in placement. Under Section 504, unlike IDEA, the district does not have to provide a disabled student educational services during the period of time the student is properly removed from school for disciplinary reasons. However, students must be given the same access to services that are available to non-disabled students who are long-term suspended or expelled, including access to re-entry programs.

- a **Significant Change in Placement** A significant change in placement means a significant change in the type or amount of educational or related aids or services that a school district provides to a disabled student. A significant change in placement may include but is not limited to:
 - Terminating eligibility under Section 504;
 - Initiating or terminating a service;
 - Significantly increasing or decreasing the amount of a service;
 - Disciplinary actions that exclude a student from school for more than 10 consecutive school days in a school year; and/or
 - Disciplinary actions that create a pattern of exclusion from school (e.g., cumulative short-term suspensions that are each 10 school days or fewer in duration that create a pattern of exclusion due to the length of each suspension, the proximity in time of the suspensions, the total amount of time the student was excluded from school, and the similarities of the behaviors that led to the suspensions).
- b **In-School Suspension** To be considered as a substitute for suspension without being a significant change of placement, an in-school suspension

- must provide an educational benefit equivalent to that provided to students who are in school. For Section 504 students with certain disabilities, the school must consider whether an in-school suspension that normally expects students to work semi-independently in an environment where they are subject to restricted movements, have limited restroom breaks, and must be silent for extended periods provides an educational benefit equivalent to that provided to students in regular classrooms. In some cases, particularly for periods greater than 10 days, in-school suspension may constitute a significant change in a student's placement because it may interrupt the educational programming called for in the student's Section 504 Plan.
- c **Conducting a Manifestation Determination** The manifestation determination requirement is triggered by a disciplinary removal that constitutes a significant change in placement. Usually, a short-term suspension of 10 days or less does not constitute a significant change in the student's placement. However, a series of removals of less than 10 days may be a change in placement if the removals constitute a pattern. (See the Significant Change in Placement section.)
- d Conducting a manifestation determination requires a student's Section 504 Team to consider information from a variety of sources to answer two questions:
- **Is the misconduct in question caused by, or does it have a direct and substantial relationship to the student's disability?**
 - This determination must be based upon information and data from a variety of sources related to the student's behavior and must be recent enough to afford an understanding of the student's current behavior. Misconduct is a manifestation of a disability if it "is caused by the disability" or "has a direct and substantial relationship to the disability." Misconduct is not a manifestation of a disability if it bears only a relationship to the student's disability.
 - **Is the misconduct in question the direct result of a failure to implement the Section 504 Plan?**
 - This determination must be based upon information from a variety of sources, including, as appropriate, aptitude and achievement tests, teacher reports, physical condition, social or cultural background, and/or adaptive behavior. If the student is eligible for Section 504 and there is no current Section 504 Plan in place for the student, a new Section 504 Plan should be immediately drafted.
- e If the student's Section 504 Team answered BOTH questions no, then student's misconduct is not a manifestation of his/her disability. The student may be given the same sanction as would be given to a non-disabled student under the same circumstances.
- f *If the student's Section 504 Team answered BOTH questions no, then student's misconduct is not a manifestation of his/her disability. The student may be given the same sanction as would be given to a non-disabled student under the same circumstances.*

- g If the answer to EITHER question is yes, then the conduct MUST be considered a manifestation of the student's disability. If the Section 504 Team determines that a student's misconduct was a manifestation of the student's disability, the student must be returned to school and to the same educational placement prior to the disciplinary removal. The school should conduct (or review if it already exists) a functional behavioral assessment of the student's behavior AND implement a behavior intervention plan (or review if it already exists) to address the behavior so it does not recur.
- h *If it is determined that the misconduct is caused by the disability, the student may not be disciplined and the evaluation team must conduct a reevaluation to determine whether the student's current educational placement is appropriate. The manifestation determination process may be a component of the reevaluation.*
- i The results of the manifestation determination should be documented in a Written Notice and shared with parents. This notification will inform the parents of their right to initiate a due process hearing to challenge the school's decision.
- j **Reevaluation** Before changing the educational placement of a student a result of misconduct, the school district must conduct a reevaluation. This reevaluation may be used to determine the student's placement during and/or after the disciplinary removal. The act of conducting a manifestation determination could be considered a component of a reevaluation. After determining that the student's behavior is a manifestation of his/her disability, the school district must conduct a reevaluation to determine whether the student's current educational placement is appropriate. This reevaluation should include a functional behavioral assessment for the purpose of reviewing and/or amending the student's Section 504 Plan to incorporate a behavior intervention plan. (See Section VI.)

Procedural Safeguards

I. Written Notice (with regard to any action pertaining to a student's identification, evaluation, or educational placement)

Section 504 gives parents the right to challenge school district decisions regarding the identification, evaluation, and/or educational placement of their student. The district must provide written notice to a student's parent before it takes any action regarding the identification, evaluation, and/or placement of their student, and provide the parent an opportunity to challenge the action if they disagree. "Any action" may include a decision not to evaluate a student and/or denial of placement.

II. Opportunity to Examine Records:

Section 504 gives parents the opportunity to examine all relevant records of their child. The school district should respond promptly to a parent's request to examine their child's records.

III. Grievance Procedures for Section 504 Discrimination Complaints:

Anyone shall have a means of resolving a claim of disability discrimination using a school district's Grievance Procedure. Individuals alleging that the school district is in violation of Section 504 or its administrative regulations, should submit a written statement setting out the alleged violation in specific terms, describing the incident or activity involved, the individuals involved and the dates, times and locations involved. Written complaints should be submitted to the school district's Section 504 Coordinator.

a Grievance Process

- 1 Within a reasonable amount of time of the school district's receipt of the complaint by mail or fax, the district shall:
 - Assign an individual to investigate allegations outlined in the written complaint;
 - Provide parent with Procedural Safeguards;
 - Request additional information from all parties if necessary to commence the investigation; and
 - Thoroughly investigate each allegation in the complaint.
- 2 When the investigation is complete, the Section 504 Coordinator shall compile a written report summarizing the results of the investigation and what corrective measures, if any, are deemed necessary if the complaint is substantiated.
- 3 The written report shall be provided to the complainant within a reasonable period of time after the complaint was received.
- 4 If the outcome of the investigation does not satisfactorily resolve the matter for the complainant, the complainant may file a request for due process hearing with the school district's board of education to review the decision.

IV. Hearing Procedures for Parents and Students (with recommended timelines):

a. Right to Due Process In the event a parent wishes to contest an action or omission on the part of the district with regard to the identification, evaluation, or placement of a disabled student under Section 504, the parent has a right to an impartial hearing before an impartial hearing officer. Omissions on the part of a school district with regard to a disabled student might include, for example, the district's failure to identify a student eligible for services under Section 504. Thus, a student's identification as eligible for services under Section 504 is not an absolute prerequisite to the right to due process.

b. Parent Participation & Representation A parent has the right to participate, speak, and present information at the due process hearing, and to be represented by legal counsel or any other type of advocate or representative of their choice at their expense. If a parent is to be represented by a licensed attorney at the due process hearing, he or she must inform the district's Section 504 Coordinator and the appointed hearing officer of that fact in writing at least seven (7) calendar days prior to the

hearing date. Failure to notify the Section 504 Coordinator and the appointed hearing officer of that fact in writing shall constitute good cause for a continuance of the hearing date. (See "Continuances" below).

c. Initiation of Due Process Procedures A parent who wishes to challenge a district's action or omission with regard to the identification, evaluation, or placement of a disabled student must submit a written Request for a Due Process Hearing to the district's Section 504 Coordinator. Such a written request must make clear that the parent is seeking a due process hearing under Section 504 before an impartial Section 504 Hearing Officer. The written request may be made on a model form provided by the district for that purpose. Use of the Request for Section 504 Due Process Hearing form is recommended, but not required.

d. Appointment of a Hearing Officer Within fifteen (15) days of the date of receipt of a Request for a Due Process Hearing, the district will appoint an impartial Hearing Officer to preside over the hearing and issue a decision. The Hearing Officer will be hired by the district as an independent contractor at no expense to the parent. The Hearing Officer shall not be a current employee of the district, and shall not be related to any member of the district's governing board. The Hearing Officer need not be an attorney, but shall be familiar with the requirements of Section 504 and the district's Hearing Procedures under Section 504. The district's choice of an impartial Hearing Officer is final and may not be made an issue at the due process hearing, since such an issue would not relate to the identification, evaluation, or placement of a disabled student under Section 504. If a parent disputes the impartiality of the appointed Hearing Officer, he or she may raise such issue in a review of the Hearing Officer's opinion by a court of competent jurisdiction (See "Review Procedure" below), or in a complaint to the appropriate Office for Civil Rights regional office. (See Complaints to the Office for Civil Rights (OCR).)

e. Scheduling of Hearing The appointed Hearing Officer shall issue an Order Setting Hearing Date to the parent and the district's Section 504 Coordinator in writing at his or her earliest opportunity. Such Order shall set a date for a hearing to be held within fifteen (15) days of the date of issuance of the Hearing Officer's Order. The Order shall also set forth a mutually agreeable time and place for the hearing.

f. Pre-Hearing Conference The Hearing Officer may also order a Pre-Hearing Conference at which the parent or his or her representative will state and clarify the issues to be addressed at the hearing. The Pre-Hearing Conference can also serve to resolve preliminary matters, clarify jurisdictional issues, and answer the parties' questions regarding the hearing process.

g. Continuances Upon a showing of good cause, the Hearing Officer, at his or her discretion, may grant a continuance of the hearing date and set a new hearing date by issuing a written Order.

h. Dismissals If, after the Pre-Hearing Conference, the Hearing Officer finds that the parent, as a matter of law, alleges and raises no factual

claims or legal issues that come within his or her jurisdiction as a Section 504 Hearing Officer, he or she may dismiss the hearing and issue an order to that effect explaining the bases for such finding.

i. Conduct of Hearing The hearing shall be conducted in an informal, non-adversarial manner. The hearing shall be closed or open to the public, at the parent's request. The parties are free to provide the Hearing Officer with information or opinion as to the validity and weight to be given the information presented to him or her.

j. Recording Instead of a formal written transcript produced by a court reporter, the entire due process hearing will be tape-recorded. The parent may obtain a copy of the tape recording at his or her request. In order for an accurate recording to be made, the parties and witnesses shall introduce themselves at the beginning of their presentations. If a parent proceeds to a review of the due process hearing decision to a court of competent jurisdiction (See "Review Procedure" below), the district will prepare a written transcript of the hearing tape recording to be offered to the court as an exhibit.

k. Witnesses Witnesses will present their information in narrative form, without the traditional question and answer format of legal proceedings.

l. Submission of Documentary Exhibits As part of their presentations, the parties may submit any reports, evaluations, correspondence, notes, or any other documents that may support their positions and that the Hearing Officer will admit at his or her discretion. Each separate documentary exhibit submitted to the Hearing Officer by either party must be marked numerically (i.e., Parent 1, Parent 2; District 1, District 2, etc.). The Hearing Officer may, in the exercise of his or her discretion, reasonably limit the number of documents to be submitted for his or her review, as well as the number of witnesses and the length and/or scope of their presentations or statements.

m. Conclusion of the Hearing At the conclusion of all presentations, the Hearing Officer will close the hearing and set a date for the issuance of the written decision. The Hearing Officer may make an oral ruling at the conclusion of the hearing or take the case under advisement, but must in all cases issue a written opinion addressing and ruling on all issues raised by the Petitioner and indicating what corrective action, if any, the district must take. Formal findings of fact and conclusions of law, however, are not required. The decision must be issued to both parties within fifteen (15) days after the hearing.

n. Decision Timeline A decision must be issued within forty-five (45) days after the date the Request for a Due Process Hearing is received by the district.

o. Remedies and Relief The Hearing Officer must confine his or her orders and rulings to those matters that involve identification, evaluation, or placement of children under Section 504 and to the provisions of the

regulations implementing Section 504. A Hearing Officer may not award attorneys' fees as a part of relief granted to a parent.

p. Review Procedure If not satisfied by the decision of the Hearing Officer, a parent may seek review of the hearing decision in a court of competent jurisdiction.

V. Right to file a Complaint with the Office for Civil Rights (OCR):

A parent may file a complaint with the Office for Civil Rights (OCR) if the parent alleges that the LEA violated any provision or regulation of Section 504. OCR's focus is on the process the district follows to identify, evaluate, and/or provide an education placement for a disabled student and to provide procedural due process to the student's parent and/or guardian.

Except in extraordinary circumstances, OCR does not review the result of individual placement and/or other educational decisions so long as the district complies with the procedural requirements of Section 504 relating to identification and/or location of students with disabilities, evaluation of such students, and/or due process. Accordingly, OCR generally will not evaluate the content of a Section 504 Plan or an IEP. Any disagreement regarding the content of a Section 504 Plan can be resolved through a due process hearing.

The filing of a complaint does not affect the hearing process or the time lines set forth in the hearing procedure. OCR addresses Section 504 complaints separately and independently of the local hearing process, in accordance with the guidelines set for in OCRs Case Processing Manual. A parent should contact OCR or consult its Case Processing Manual concerning timeframes for filing OCR complaints. The address of the national OCR and the address of the regional office serving your state can be found here: [Office For Civil Rights](#).

Additional Resources

Dear Colleague Letter (OCR 2013) (Reasonable modification and fundamental alteration in extracurricular activities).

<http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201301-504.html>

Dear Colleague Letter (OSERS and OSEP 2013) (Bullying of students with disabilities).

<http://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/bullyingdcl-8-20-13.pdf>

Dear Colleague Letter (OCR 2012) (ADAA FAQ).

<http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201109.html>

Dear Colleague Letter (OCR 2012) (Section 504 FAQ).

<http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201109.html>

Creating Equal Opportunities for Children and Youth with Disabilities to Participate in Physical Education and Extracurricular Athletics (OCR 2010) (OCR procedures to investigate complaints.)

<http://www2.ed.gov/policy/speced/guid/idea/equal-pe.pdf>

OCR Case Processing Manual (U.S. Department of Education 2011).

<http://www2.ed.gov/about/offices/list/ocr/docs/ocrspm.html>

OCR Case Processing Manual (U.S. Department of Education 2011).

<http://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.html>

Dear Colleague Letter (OCR 2010) (District response to bullying).

<http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.html>

Dear Colleague Letter (OCR 2010) (OCR 2009) (Public school choice requirements).

<http://www2.ed.gov/about/offices/list/ocr/letters/colleague-20090108.html>

Dear Colleague Letter (OCR 2008) (Report Cards and Transcripts for Students with Disabilities).

<http://www2.ed.gov/about/offices/list/ocr/letters/colleague-20081017.html>

Dear Colleague Letter (OCR 2008) (OCR 2007) (Participation in accelerated programs).

<http://www2.ed.gov/about/offices/list/ocr/letters/colleague-20071226.html>

Q & A

What is Section 504?

Section 504 is a federal civil rights law designed to eliminate disability discrimination in programs and activities that receive federal funds. All public school districts receive federal funds. Therefore, denying a disabled student FAPE constitutes disability discrimination.

Who enforces Section 504 compliance?

The U.S. Department of Education enforces Section 504 through the Office for Civil Rights (OCR). OCR investigates individual complaints of disability discrimination, including complaints that a school district is denying a disabled student FAPE. OCR's focus is on the process a district follows to identify, evaluate, and provide an educational placement to a disabled student, and to provide procedural due process to the student's parent or guardian. Except in extraordinary circumstances, OCR will not review the result of individual placement and other educational decisions, as long as a district complies with Section 504's procedural requirements regarding identification, evaluation, placement, and due process. The proper forum for pure educational disputes, in which a school district has followed the correct process to make an educational decision but the parents or guardian disagree with the result of the decision, is a Section 504 due process hearing.

Does Section 504 have a child find requirement?

Yes. The district cannot wait until eligible children present themselves and request services. The district has an affirmative duty to conduct a "child find" at least annually, during which the district must make efforts to notify disabled students and their parents of the district's obligations to provide a FAPE. 34 C.F.R. §104.32. Schools can efficiently satisfy this duty by adding the Section 504 child find notice to that required under IDEA.

What is an appropriate evaluation under Section 504?

Recipient school districts must establish standards and procedures for initial evaluations and periodic reevaluations 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 services and supports. 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 factors 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 all 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.

Must a recipient school district obtain parental consent prior to conducting an initial evaluation?

Yes. OCR has interpreted Section 504 to require districts to obtain parental permission for initial evaluations. If a district suspects a student needs or is believed to need special instruction or related services and parental consent is withheld, the IDEA and Section 504 provide that districts may use due process hearing procedures to seek to override the parents' denial of consent for an initial evaluation.

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 ADAA, 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.

What is the difference between impairment and disability under Section 504?

There is a distinction between impairment and a disability. There are many more people with impairments than there are people with disabilities. The difference lies in the effect the impairment has on the person. If the impairment causes a substantial limitation of a major life activity then the person has a disability. If the impairment does not substantially limit the person, then it is just an impairment, not a disability.

How should a school district view a temporary impairment?

A temporary impairment does not constitute a disability for purposes of Section 504 unless its severity is such that it results in a substantial limitation of one or more major life activities for an extended period of time. The issue of whether a temporary impairment is substantial enough to be a disability must be resolved on a case-by-case basis, taking into consideration both the duration (or expected duration) of the impairment and the extent to which it actually limits a major life activity of the affected individual.

What is a Free Appropriate Public Education under Section 504?

FAPE refers to the provision of regular or special education and related aids and services that are designed to meet individual education needs of students with disabilities as adequately as the needs of students without disabilities are met and is based upon adherence to procedures that satisfy the requirements of Section 504, Subpart D. Related aids and services include any aid or service that a student needs to participate in and benefit from a school district’s educational program.

What services are available for students with disabilities under Section 504?

Public elementary and secondary school districts are required to provide FAPE to qualified students with disabilities. Section 504 requires recipients to provide to students with disabilities appropriate educational services designed to meet the individual needs of disabled students to the same extent as the needs of students without disabilities are met. An appropriate education for a student with a disability under the Section 504 regulations could consist of education in regular classrooms, education in regular classes with supplementary services, and/or special education and related services.

How does a school district ensure equal opportunity for participation in programs and services, including extracurricular athletics?

School districts must make reasonable modifications and provide those aids and services that are necessary to ensure an equal opportunity to participate, unless the school district can show that doing so would be a fundamental alteration to its program.

Is a Section 504 re-evaluation similar to an IDEA reevaluation? 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.

If a student is eligible for services under both the IDEA and Section 504, must a school district develop both an individualized education program (IEP) under the IDEA and a Section 504 plan under Section 504?

No. If a student is eligible under IDEA, he or she must have an IEP. Under the Section 504 regulations, one way to meet Section 504 requirements for FAPE is to implement an IEP consistent with IDEA.

What are the requirements for schools to suspend or expel Section 504 students?

The removal of an eligible student for greater than 10 school days in a school year is considered a significant change in placement, entitling the student to additional protections. Following the IDEA discipline provisions is one way to ensure the protection of a student's procedural rights and maintain compliance with OCR.

What are the responsibilities of regular education teachers with respect to implementation of Section 504 plans? What are the consequences if the district fails to implement the plans?

Regular education teachers must implement the provisions of Section 504 plans when those plans govern the teachers' treatment of students for whom they are responsible. If the teachers fail to implement the plans, such failure can cause the school district to be in noncompliance with Section 504.

34 C.F.R. Part 104: The Section 504 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 DISABILITY IN PROGRAMS OR ACTIVITIES RECEIVING FEDERAL FINANCIAL ASSISTANCE

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 disability 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 Disabled Act* means that statute as amended by the Education for all Disabled 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) *Disabled person -- (1) Disabled 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 disabled person* means:

(1) With respect to employment, a disabled 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 disabled person (i) of an age during which nondisabled persons are provided such services, (ii) of any age during which it is mandatory under state law to provide such services to disabled persons, or (iii) to whom a state is required to provide a free appropriate public education under section 612 of the Education of the Disabled Act; and

(3) With respect to postsecondary and vocational education services, a disabled 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 disabled person who meets the essential eligibility requirements for the receipt of such services.

(m) *Disability* means any condition or characteristic that renders a person a disabled person as defined in paragraph (j) of this section.

104.4 Discrimination prohibited.

(a) *General.* No qualified disabled person shall, on the basis of disability, 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 disability:

(i) Deny a qualified disabled person the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualified disabled 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 disabled 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 disabled persons or to any class of disabled persons unless such action is necessary to provide qualified disabled persons with aid, benefits, or services that are as effective as those provided to others;

(v) Aid or perpetuate discrimination against a qualified disabled person by providing significant assistance to an agency, organization, or person that discriminates on the basis of disability in providing any aid, benefit, or service to beneficiaries of the recipients program or activity;

(vi) Deny a qualified disabled person the opportunity to participate as a member of planning or advisory boards; or

(vii) Otherwise limit a qualified disabled 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 disabled and nondisabled persons, but must afford disabled 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 disabled 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 disabled persons to discrimination on the basis of disability, (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 disabled 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 disabled 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 disabled 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 nondisabled persons from aid, benefits, or services limited by Federal statute or executive order to disabled persons or the exclusion of a specific class of disabled persons from aid, benefits, or services limited by Federal statute or executive order to a different class of disabled 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 disability 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 disability 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 disabled 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 disabled 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 disabled 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 disabled persons or organizations representing disabled 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 disabled persons or organizations representing disabled persons, any policies and practices that do not meet the requirements of this part; and

(iii) Take, after consultation with interested persons, including disabled persons or organizations representing disabled 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 disability 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 disability, imposes prohibitions or limits upon the eligibility of qualified disabled 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 disabled persons than for nondisabled persons.

Subpart B -- Employment Practices

104.11 Discrimination prohibited.

(a) *General.* (1) No qualified disabled person shall, on the basis of disability, 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 Disabled Act shall take positive steps to employ and advance in employment qualified disabled 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 disability 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 disability.

(4) A recipient may not participate in a contractual or other relationship that has the effect of subjecting qualified disabled 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 disabled 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 disabled 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 disabled 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 disabled persons or any class of disabled 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 disabled 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 disability 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 disabled person or as to the nature or severity of a disability. 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 disabled, *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 disability, 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 disabled 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 disabled person shall, because a recipient's facilities are inaccessible to or unusable by disabled 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 disabled 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 disabled 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 disabled 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 disabled 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 disabled 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 disabled 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 disabled persons or organizations representing disabled 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 disabled 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 disabled 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 disabled 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 disabled 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 CFR 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 disabilities.

(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 disabled person residing in the recipient's jurisdiction who is not receiving a public education; and
- (b) Take appropriate steps to notify disabled 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 disabled person who is in the recipient's jurisdiction, regardless of the nature or severity of the person's disability.

(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 disabled persons as adequately as the needs of nondisabled 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 Disabled Act is one means of meeting the standard established in paragraph (b)(1)(i) of this section.

(3) A recipient may place a disabled 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 disabled 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 disabled person or to his or her parents or guardian, except for those fees that are imposed on non-disabled persons or their parents or guardian. It may consist either of the provision of free services or, if a recipient places a disabled 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 disabled person.

(2) *Transportation.* If a recipient places a disabled 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 disabled person because of his or

her disability, 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 disabled 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 disabled 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 disabled 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 disabled person in its jurisdiction with persons who are not disabled to the maximum extent appropriate to the needs of the disabled person. A recipient shall place a disabled 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 disabled persons participate with nondisabled persons in such activities and services to the maximum extent appropriate to the needs of the disabled 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 disabled 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 disability, 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 disability, 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 student, 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 Disabled 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 disability, 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 Disabled 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

disabled 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 disabled 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 disability. The recipient shall ensure that qualified disabled students are not counseled toward more restrictive career objectives than are nondisabled 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 disability. A recipient that offers physical education courses or that operates or sponsors interscholastic, club, or intramural athletics shall provide to qualified disabled students an equal opportunity for participation.

(2) A recipient may offer to disabled students physical education and athletic activities that are separate or different from those offered to nondisabled students only if separation or differentiation is consistent with the requirements of 104.34 and only if no qualified disabled 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 disability, exclude qualified disabled 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 disability, exclude a qualified disabled 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 disabled persons than to nondisabled 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 disabled persons may not, on the basis of disability, 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 disabled persons who may be admitted;

(2) May not make use of any test or criterion for admission that has a disproportionate, adverse effect on disabled persons or any class of disabled 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 disability 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 disabled 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 disabled person but, after admission, may make inquiries on a confidential basis as to disabilities 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 disabled, *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 disabled student shall, on the basis of disability, 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 disabled persons.

(c) A recipient to which this subpart applies may not, on the basis of disability, exclude any qualified disabled 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 disability, against a qualified disabled 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 disabled 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 disabled 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 disability 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 disabled 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 nondisabled students shall provide comparable, convenient, and accessible housing to disabled 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 disabled students' choice of living accommodations is, as a whole, comparable to that of nondisabled 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 disability.

104.46 Financial and employment assistance to students.

(a) *Provision of financial assistance.* (1) In providing financial assistance to qualified disabled persons, a recipient to which this subpart applies may not,

(i) On the basis of disability, provide less assistance than is provided to nondisabled 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 disabled persons on the basis of disability.

(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 disability only if the overall effect of the award of scholarships, fellowships, and other forms of financial assistance is not discriminatory on the basis of disability.

(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 disability. A recipient that offers physical education courses or that operates or sponsors intercollegiate, club, or intramural athletics shall provide to qualified disabled students an equal opportunity for participation in these activities.

(2) A recipient may offer to disabled 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 disabled 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 disability. The recipient shall ensure that qualified disabled students are not counseled toward more restrictive career objectives than are nondisabled 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 disabled 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 disability:

(1) Deny a qualified disabled person these benefits or services;

(2) Afford a qualified disabled person an opportunity to receive benefits or services that is not equal to that offered nondisabled persons;

(3) Provide a qualified disabled 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 disabled persons; or

(5) Provide different or separate benefits or services to disabled persons except where necessary to provide qualified disabled 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 disabled persons, including those with impaired sensory or speaking skills, are not denied effective notice because of their disability.

(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 disability shall ensure that each qualified disabled 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.