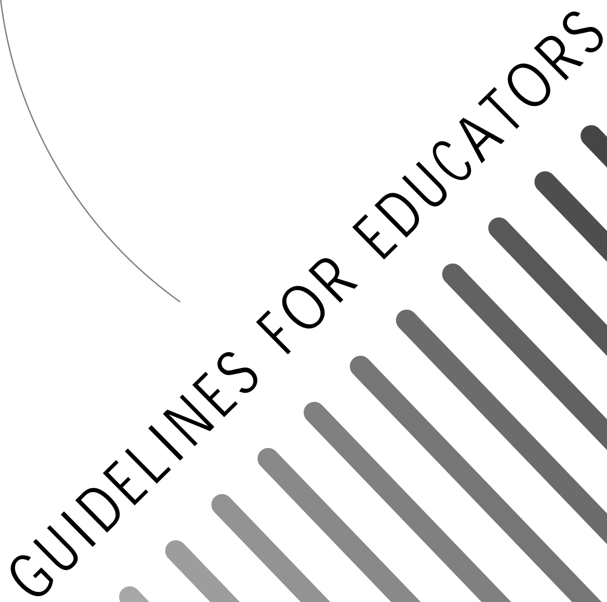
SECTION 504



MONTANA OFFICE OF
PUBLIC INSTRUCTION
NANCY KEENAN, SUPERINTENDENT

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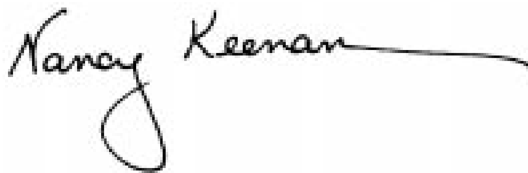
A Message from the Montana Superintendent of Public Instruction

Section 504 of the Rehabilitation Act of 1973 has been with us for more than two decades. While Montana schools have known of their obligation to provide education in a nondiscriminatory manner, schools have had minimal contact with its specific requirements since most of their energy has been directed toward providing special education services for those students with disabilities eligible under IDEA. However, advocacy organizations, parents and students have been increasingly looking to the requirements of Section 504 to ensure that the education system provides the full range of special accommodations and services necessary for students with special needs to participate in and benefit from education programs including nonacademic activities.

This manual has been developed to provide schools with assistance in meeting the requirements of Section 504. It is our hope that the manual is "user friendly," that it provides practical advice as well as "camera ready" sample policies and forms to assist school personnel in carrying out the requirements of Section 504.

We are committed to providing an equitable educational opportunity to all students in Montana's public schools. This publication should assist teachers and administrators in meeting the educational needs of a diverse student population.



January 1995

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1.0 Introduction to Section 504

"No otherwise qualified individual with handicaps in the United States...shall, solely by reason of her/his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance under any program or activity conducted by any Executive agency or by the United States Postal Service." (29 USC 794)

This short paragraph has far reaching implications for school districts. School administrators in Montana have requested that the Office of Public Instruction (OPI) provide technical assistance to districts to assure compliance with the statute.

"Handicapped individuals" will hereafter be referred to as "individuals with disabilities" in order to be consistent with current educational terminology.

Section 504 of the Rehabilitation Act was enacted in 1973. Its implementing federal regulations promulgated in 1977 are divided into six sections:

Subpart A. General Provisions
Subpart B. Employment Practices
Subpart C. Program Accessibility
Subpart D. Preschool, Elementary, and Secondary Education Requirement
Subpart E. Postsecondary Education Requirement
Subpart F. Health, Welfare, and Social Services

For many years, the main thrust of enforcement has been in the area of employment for individuals with disabilities. However, within the last several years, the Office for Civil Rights (OCR), charged with enforcement of Section 504, has become more active in enforcement of the education of individuals with disabilities sections. Advocacy organizations, likewise, have increasingly focused on Section 504's requirements to ensure that the educational system provides the full range of special accommodations and services necessary for individuals with disabilities to participate in and benefit from public school education programs and activities. The following manual focuses upon the student issues, Subparts C and D of Section 504, and not upon Subpart B (employment practices), Subpart E or Subpart F.

The statute prohibits discrimination against individuals with disabilities, including students, parents, and staff members, by public school districts receiving federal financial assistance. All programs or activities of the school district receiving federal funds are covered by Section 504 regardless of whether the specific program or activity involved is a direct recipient of federal monies.

Included in the U.S. Department of Education regulations for Section 504 is the requirement that students with disabilities be provided with a free appropriate public education (FAPE). Regulations require child-find, evaluation, provision of appropriate program and procedural safeguards to qualified individuals with disabilities in public schools in the United States.

A. *General Procedures: An Overview*

If a district has reason to suspect that because of a disability a student needs either special accommodations or related services in the regular educational environment in order to have equally effective participation in the school program, the district must evaluate the student and develop and implement a plan for the delivery of all necessary educational modifications. Requirements for the evaluation and placement process are determined by the type of disability suspected and the type of services needed by the student. The evaluation must be sufficient to assess the nature and extent of the educational impact of the disability in order to determine appropriate educational services. Determination of what services are needed must be made by a group of persons knowledgeable about the student. Decisions about Section 504 eligibility and services must be documented in the student's file and reviewed periodically. A student's program must be provided in the least restrictive environment.

Under Section 504, parents or guardians must be provided with notice of any action that changes the identification, evaluation or placement of their child. Parents or guardians are entitled to an impartial due process hearing if they disagree with district decisions.

B. *Relationship with IDEA*

Section 504 and its implementing regulation 34 Code of Federal Regulations (CFR) 104, while intended to be consistent with the Individuals with Disabilities Education Act (IDEA), are more encompassing. All individuals who receive special education and related services under IDEA are also considered to be qualified individuals under Section 504. However, all individuals who qualify for Section 504 services may not qualify for special education under IDEA.

IDEA defines as eligible only students who have certain specified types of impairments and who, because of those conditions, need special education and related services. Section 504, on the other hand, includes all students with disabilities. These students are defined as having any physical or mental impairment that substantially limits one or more major life activities, including, but not limited to, learning. Section 504 covers all students who meet this definition, even if they do not fall within the IDEA enumerated categories and do not need special education.

SECTION 504 IMPACT ON STUDENT POPULATION

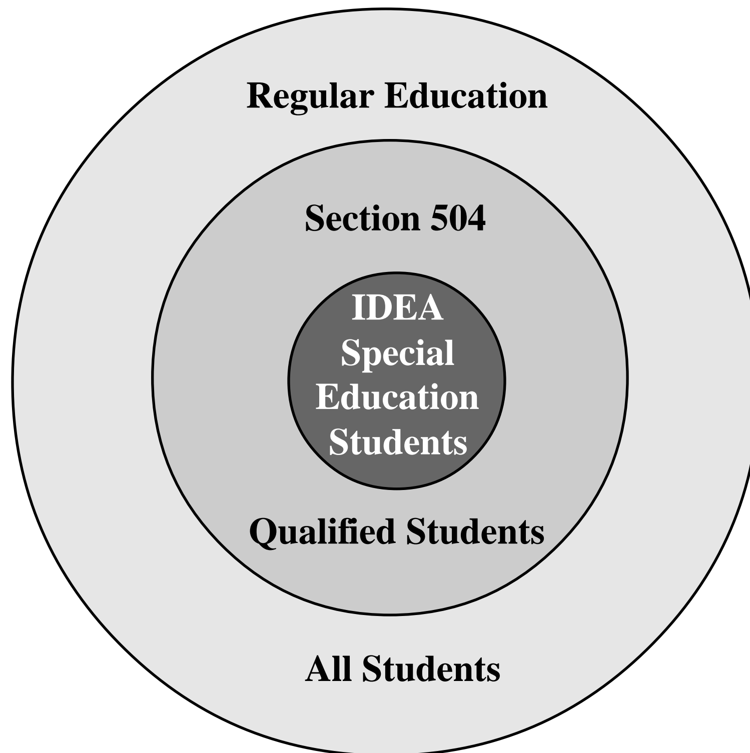


FIGURE 1—Based on conceptual model developed by Perry Zirkel

Section 504 regulations concerning provision of a free appropriate public education closely parallel requirements of IDEA. Individuals who qualify for Section 504 educational services may require an individualized, modified education program. The program must be based upon current evaluations and periodically reviewed. However, evaluations more limited than a comprehensive educational evaluation required by IDEA may be adequate.

Parents must receive notice of the proposed change in program or placement. By fulfilling responsibilities under IDEA, a district also meets Section 504 requirements. (See Appendix C for comparison.)

C. Summary

In summary, it is important to keep in mind that some students who have physical or mental impairments that substantially limit their ability to participate in the education program are entitled to protection under Section 504 even though they may not fall into IDEA categories and be covered by the special education law. It is also important to realize that Section 504 is a responsibility of the general education system and <u>not</u> the sole responsibility of special education.

ROLES OF SCHOOL PERSONNEL

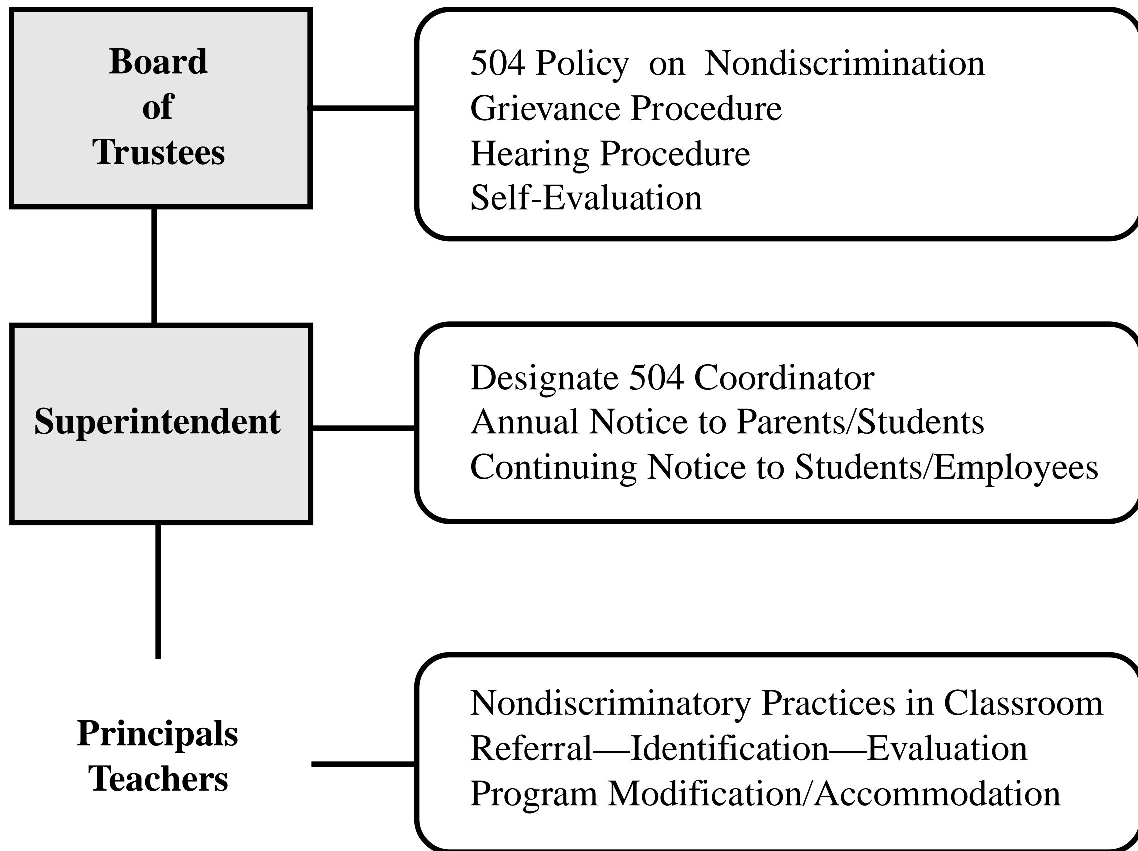


FIGURE 2

2.0 School District Responsibilities

In order to be in compliance with Section 504, a school district must implement the following procedures.

A. Written Assurance

Written assurance of nondiscrimination must be included in school board policy. Applications for federal grants also require written assurance of compliance with Section 504 on forms specified by the grant application. (34 CFR 104.5)

In addition, the Montana Board of Public Education administrative rule 10.55.802 states:

> **" The school district shall not discriminate against any student on the basis of sex, race, marital status, national origin, or handicapping condition in any area of accreditation. This includes programs, facilities, textbooks curriculum, counseling, library services, and extracurricular activities. It is the purpose of the accreditation standards to guarantee equality of educational opportunity to each person regardless of sex, race, marital status, national origin, or handicapping condition."**

B. Compliance Coordinator

A Section 504 compliance coordinator must be designated if the school district employs more than 15 persons (34 CFR 104.7[a]). The compliance coordinator is responsible for ensuring the provisions of this section are implemented including grievance procedures and identification and evaluation procedures.

The Section 504 compliance coordinator position is analogous to that of a case manager. It is the coordinator's role to synchronize school personnel in their efforts to make reasonable modifications for qualified students. The coordinator should possess the following prerequisites:

- *knowledge of the law in order to resolve disputes;*
- *flexibility/creativity in order to suggest reasonable instructional accommodations;*
- *organizational skill in order to juggle responsibilities.*

C. Notice

Written notice that the school district does not discriminate on the basis of disability in violation of Section 504 must be provided to students, parents, employees, unions, and professional organizations (34 CFR 104.8).

(a) The notice shall include a statement of nondiscrimination by the district in admission to, access to, treatment in, or employment in its programs and activities and shall name the Section 504 Compliance Coordinator.

(b) The notice must be included on recruitment materials and publications containing general information such as the student handbook. For example, the district might include the notice on school calendars, in parent-student handbooks or school newsletters or posted on the public bulletin boards in each school building.

SAMPLE NOTICE

The________ district #______ does not discriminate on the basis of disability in admission to, access to, treatment in, or employment in its programs and activities. The Section 504 Coordinator for the district is ______________________. To contact the coordinator for information or to file a grievance, please come to _______(location) or call ________(phone).

D. Grievance Procedures

The school district that employs fifteen or more persons must adopt written grievance procedures to resolve complaints of discrimination. Students, parents, or employees may file grievances (34 CFR 104.7[b]). A sample grievance procedure is on pages 28-31.

E. Annual Notice and Identification of Students with Disabilities

The school district is required to take appropriate steps to identify and locate every qualified individual living in the jurisdiction of the school district who has a disability and is of school age and is not receiving a public education. In addition, the school district is required to notify annually all individuals with disabilities and their parents or guardians of the school district's duty to provide a free appropriate education (34 CFR 104.32). A sample notice is on page 23.

F. Procedural Safeguards

Whenever a school district proposes to change the identification, evaluation or educational placement of a qualified individual, the parents or guardians must be provided with notice which includes the following procedural safeguards:

"Notice of their rights.
The opportunity to examine relevant records.
An impartial hearing with opportunity for participation by the parents or guardians of the qualified individual and representation by counsel.
A review procedure." (34 CFR 104.36)

A sample notice is found on page 27.

G. *Self-Evaluation*

The school district must have conducted a self-evaluation within one year of the date of implementation of the regulations (1977) and maintained for at least three years, a list of the interested persons consulted in the self-evaluation, a description of areas examined and any problems identified, and a description of any modifications made and of any remedial steps taken.

(NOTE EMPLOYMENT — Employment is beyond the scope of this manual. Employment regulations may be found in 34 CFR 104.3/104.11/104.12/104.13/104.14.)

BUILDING LEVEL RESPONSIBILITIES

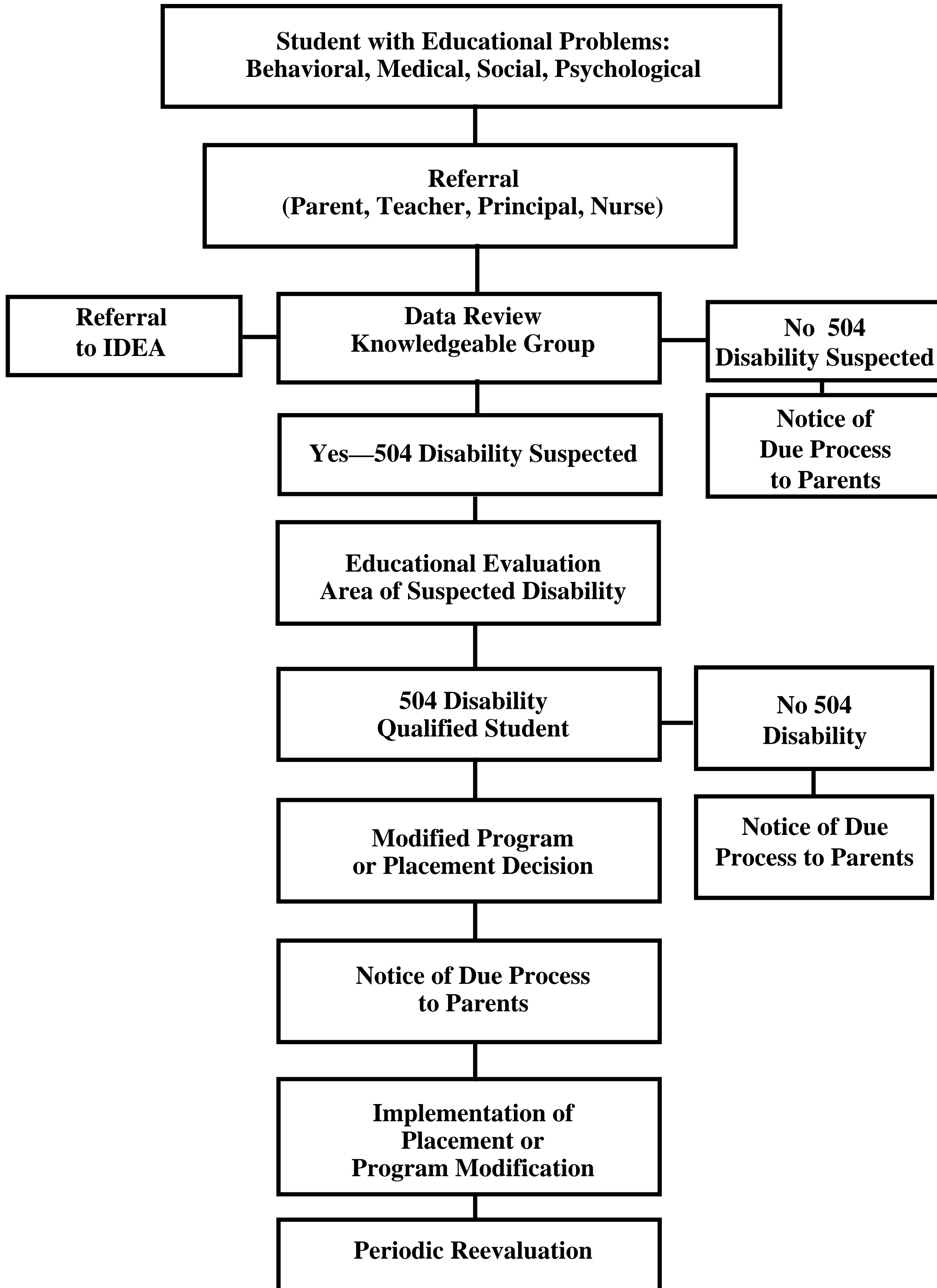


FIGURE 3

3.0 Eligibility Procedures for FAPE Under Section 504

Each school district must implement procedures to provide FAPE to eligible students. Minimum procedures include referral, evaluation, placement, reevaluation, and notice of due process rights.

A. *Referral*

Q. How does the district learn that a student may have a disability?

A. The school district may learn that a student has or may have a disability by:

parent report;
medical or health referral;
review of individual student discipline and academic records;
teacher observation; and
enrollment information from previous schools.

When the district receives such information, a Section 504 referral should be made.

B. *504 Student Determination*

Q. How does a school district determine when a student is a qualified individual?

A. When the district learns that a student may have a disability, the district must decide whether the student is a qualified individual under Section 504. Therefore, the school district must have procedures for determining whether a student has a physical or mental impairment which substantially limits one or more major life activities. These procedures should include a review process and a decision point which answers the following questions:

(a) Does the student have a physical or mental impairment?
(b) Does the impairment affect a major life activity?
(c) Does the impairment substantially limit the major life activity?

(1) If the referral provides evidence as to the possibility of a mental or physical impairment, the school district must proceed with a review of the student's current educational performance, medical and educational records and reports from parents, teachers and administrators to determine if further evaluation is necessary.

The determination of appropriate education for a qualified individual must be made by a group of persons knowledgeable about the (a) student's individual needs, (b) student's school history, (c) meaning of evaluation data, and (d) placement options. Depending upon the type of disability present, the persons at this meeting may include a school counselor, school psychologist or school nurse. Good sources of information include documentation of interven-

tions in the regular classroom, discipline records, scores on group achievement tests and special health care plans.

Examples of individuals who may be covered by 504:

1. Students undergoing lengthy psychiatric hospitalization due to depression, dysthymic disorder or other emotional problems. OCR Ruling: EHLR 353:296.

2. Students with AIDS. Doe v. Dolton Elementary School District No. 148, 694 F. Supp. 440 U.S.D.C. N.D. Ill. (1988) EHLR 441:247.

3. Attention Deficit Hyperactivity Disorder. OCR Ruling: EHLR 353:205.

4. Obesity. OCR Ruling: EHLR 307.17.

5. A drug addict or recovered drug addict. OCR Ruling: EHLR 353:190.

(2) If the school district determines that the student does not have a physical or mental impairment which substantially limits one or more major life activities and takes no further action, the school district must ensure that parents or guardians are informed of their procedural due process rights.

C. *Evaluation*

Q. What are minimum evaluation procedures?

A. Once a school district determines that a student is a 504 qualified individual, the school must initiate its procedures for evaluation.

(1) At a minimum, evaluation procedures must ensure that:

- *all tests and assessments are validated and administered by qualified personnel according to instructions provided by the producer;*
- *tests are tailored to assess specific areas of educational need and not merely those which are designed to provide a single intelligence quotient;*
- *tests measure student's ability and do not reflect the student's impairment unless designed to measure a particular deficit.*

(2) Most evaluations should include individually administered:

- *achievement tests*
- *intelligence tests*
- *adaptive behavior assessments*
- *teacher reports*
- *written observation of student's performance in classroom by person other than the child's regular education teacher*

For a student who is suspected of having cognitive delay, the evaluation must include aptitude and achievement tests, teacher recommendations, physical conditions, social or cultural background and adaptive behavior. For a student who has a severe articulation disorder the evaluation must include a standardized speech/language assessment and classroom observation. For a student with a mobility impairment, a physical therapy or occupational therapy evaluation may be necessary.

D. Development of Individualized Program

Q. If a student is qualified and needs changes in her or his program, how does a district proceed?

A. After an evaluation is completed, a group of persons knowledgeable about the student must determine what changes, if any, in the educational program need to be made to ensure that this qualified individual has the opportunity to learn comparable to that for students without disabilities.

(1) Assessment information must be considered by a group of people that includes:
- (a) the student's regular teacher;
- (b) at least one person who is knowledgeable about the meaning of the evaluation data;
- (c) an administrator or administrative designee; and
- (d) others who may provide relevant information about the student's educational performance.

(2) The group should:
- (a) review the evaluation data;
- (b) assess the disability's affect on the student's education;
- (c) determine whether specialized services are needed; and (if so)
- (d) identify those services.

(3) All assessment information should be summarized in writing and consideration of its impact documented in minutes of the meeting. All proposed changes in the student's program should be written and provided to the parent along with notice of procedural safeguards.

E. Placement

Q. When determining student placement, what assurances must the district give?

A. The district must ensure that its procedures afford that information is:

- *drawn from a variety of sources;*
- *documented and carefully considered.*

- *The district must also ensure that each placement decision is made by a group of persons knowledgeable about the child, the meaning of the evaluation data, and placement options and that the qualified individual is educated with students without disabilities to the maximum extent appropriate, to the needs of the student with disabilities. 34CFR§104.35 (c)*

The proposed changes in the qualified individual's program must be provided in the least restrictive environment. The qualified individual's program must be in the regular educational environment unless the school district demonstrates that the qualified individual's education cannot be achieved satisfactorily even with the use of supplementary aids and services.

Section 504 does not require development of an IEP with annual goals and objectives. However, a written agreement for modifications for an individualized program is strongly recommended since the school district must document its efforts to meet evaluation and placement requirements under Section 504. Implementation of IEP procedures in accordance with IDEA is one means of meeting this requirement.

F. Reevaluation

Q. Once the modifications are made, does the district have to reevaluate?

A. A school district must establish procedures which ensure that, on a periodic basis and **before any subsequent significant change in placement,** the school district conducts an evaluation. The evaluation must address all components of the initial evaluation.

School districts will be in compliance if they reevaluate students at least every three years or whenever a change in the student's condition warrants an evaluation. For example, if a student has a special health care problem and her medication changed, the school district should review the student's current program and placement to determine if changes need to be made. If the changes are significant, a comprehensive reevaluation must be conducted.

A "significant" change in placement is defined as a change in the type of program or services offered to the student or a change in the restrictiveness of the program. Examples of "significant" change in placement include the following:

- *expulsion;*
- *individual/serial suspensions exceeding 10 cumulative days in a school year;*
- *transfer of the student to home instruction;*
- *transfer of the student from elementary to departmentalized middle school settings;*
- *graduation from high school;*
- *major change in the student's classroom environment.*

G. *Procedural Safeguards*

Q. When does a school district need to give parents or guardians notice of their procedural safeguards?

A. Before a school district changes a student's placement or modifies a student's education program, the district must give notice to the parent. This includes actions taken as a result of a periodic reevaluation. Consent is not required under Section 504, although it is advised.

Q. How does a school district conduct a Section 504 impartial due process hearing?

A. A school district must provide a due process hearing procedure for resolving disputes regarding the provision of a free appropriate public education under Section 504. Unlike IDEA, Section 504 regulations do not establish timelines for submission of a hearing request, require specific criteria for selection of hearing officers, define "impartial hearing officer," nor set forth rules for conduct of the hearing. However, similar processes in other regulations provide guidelines. A sample process is on page 64.

If a school district does not establish its own due process hearing procedure for resolving disputes under Section 504, then it must use due process hearing procedures under IDEA. The school district would manage the procedure and pay costs of the hearing.

Discrimination Prohibited

The recipient of federal funds, in providing any aid, benefit, or service, may not directly, or through contractual licensing or other arrangements, discriminate against individuals with disabilities in any of the following ways.

- *An individual with a disability is denied the opportunity to participate in/ benefit from an aid, benefit, or service which is afforded students without disabilities.*

- *The disabled individual is not afforded the opportunity to participate in/ benefit from an aid, benefit, or service which is equal to that afforded others.*

- *Aids, benefits, or services which are as effective as those provided to students without disabilities are not provided for the student with a disability. "Equally effective" means "equivalent" not "identical." To be equally effective, an aid, benefit, or service need not produce equal results, but must afford equal opportunity to achieve equal results.*

- *More restrictive aids, benefits, or services are provided for/to the student with disabilities. The restriction has not been determined as necessary for the disabled individual.*

- *Assistance is provided to an agency, organization, or person discriminating on the basis of disability.*

- *A person with disabilities is denied, on the basis of disability, the opportunity to participate as a member of a planning/advisory board.*

- *Enjoyment of any right, privilege, advantage, or opportunity enjoyed by others is limited.*

- *Selection of a facility site/location effectively excludes persons with disabilities.*

34 CFR 104.4

SECTION 504 POLICY/PROCEDURES CHECKLIST

(@Perry A. Zirkel, 1991)

Does your school district provide, via policy or procedures, for:		**YES**	**NO**
1a.	continuing public notice that your district does not discriminate on the basis of handicap with regard to admission or access to and treatment or employment in your programs and activities?	☐	☐
1b.	continuing internal notice (i.e., to staff and students) the same effect? [CFR Sec. 104.8 and 104.32(b)]	☐	☐
2.	identification in those notices of Sec. 504 coordinator? (34 CFR Sec. 104.7(a) and 104.8)	☐	☐
3.	a grievance procedure for handicap discrimination complaints that:		
	a. incorporates appropriate due process standards?	☐	☐
	b. provides for the prompt and equitable resolution of those complaints? [34 CFR Sec. 104.7(b)]	☐	☐
4.	reasonable accommodation for handicapped employees, such as each of the following unless it demonstrably would impose an "undue hardship" on the operation of the program:		
	a. accommodations readily accessible to and usable by handicapped persons?	☐	☐
	b. job restructuring and part-time or modified work schedules?	☐	☐
	c. acquisition or modification of equipment or devices?	☐	☐
	d. provision of readers or interpreters and other similar actions? (34 CFR Sec. 104.12)	☐	☐
5.	not using employment tests or other section criteria that tend to screen out handicapped persons unless these criteria are demonstrably job related and unless effective alternatives are not available? [34 CFR Sec. 104.13(a)]	☐	☐
6.	not making preemployment inquiries as to whether the applicant is handicapped? [34 CFR Sec. 104.14(a)]	☐	☐
7.	ready accessibility to handicapped persons to each of your programs and activities when viewed in its entirety?	☐	☐
8.	an individualized evaluation (in the native language) for any student who is believed to (a) have a physical or mental impairment which substantially limits one or more major life activities, (b) have a record of such impairment, or (c) be regarded as having such an impairment? [34 CFR Sec. 104.35 and 104.3(j)]	☐	☐
9.	for each student meeting any of the criteria in item #8, and appropriate education, which is defined as regular or special education and related aids and services that are designed to meet his/her individual needs as adequately as the needs of non-handicapped persons are met and that are based upon procedures referred to in item #10? (34 CFR Sec. 104.33)	☐	☐

		YES	NO
10.	parental notice (in the native language) of the rights to:		
	a. have an individualized evaluation (item #8)	☐	☐
	b. examine relevant records	☐	☐
	c. demand an impartial hearing with the opportunity to be represented by counsel	☐	☐
	d. obtain a subsequent review (see 34 CFR Sec. 104.36)	☐	☐
11.	When there are separate classrooms for special education, that these be comparable facilities to those for regular education. [34 CFR Sec. 104.34(c)]	☐	☐
12.	Nonacademic and extracurricular services and activities so as to provide handicapped persons with an equal opportunity for participation. (34 CFR Sec. 104.37)	☐	☐
13.	Reasonable access to your programs or activities, if any, of:		
	a. preschool education?	☐	☐
	b. day care?	☐	☐
	c. adult education? (34 CFR Sec. 104.38)	☐	☐
14.	meaningful access for handicapped parents to school-initiated activities in addition to the academic and/or disciplinary aspects of their child's education?	☐	☐

4.0 Questions Regarding Section 504 and Special Issues

A. *Transportation*

Q. Does a school district have to provide transportation to students with disabilities under Section 504?

A. The school district must provide transportation to a student with disabilities if it is necessary to ensure the student has an opportunity to participate in the educational program. For example, if the student requires a bus with a lift for a wheelchair, the district must provide the service.

The district may not discriminate in provision of transportation to students with disabilities. Unless required by a student's individual needs, the length of the bus ride for a student with disabilities may not be longer than that of students without disabilities. Likewise, the bus schedule for a student with disabilities may not lengthen or shorten the school day.

If a district proposes to change or terminate a qualified individual's transportation for inappropriate bus behavior, the district must first determine the relationship between the student's behavior and the disability and whether the modifications were appropriate. The district may terminate transportation after appropriate evaluation and determinations are made. The parent or guardian must be provided with notice of rights.

If a student is placed by a public school district in an out-of-district program not operated by the district, the student must receive transportation to and from the program at no additional cost to the parent or guardian.

B. *Residential Placement*

Q. If a student is placed in a private residential placement by the public school district in order to provide a free appropriate public education, does the school district have to pay for room and board and educational costs?

A. Residential placement must be provided at no cost to the parent or guardian only if the placement is necessary to provide a free appropriate public education [34CFR§104.33(c)(3)]. If another public agency places the student in a residential placement, the school district in which the student lives must ensure that the student receives an appropriate education. The school district is not responsible for room and board costs, but may be responsible for educational costs.

If the school district provides a free appropriate public education to a qualified individual but the **parent chooses** to place the child elsewhere, the school district is not responsible for the cost of the out-of-district placement under the provisions of Section 504.

C. *Nonacademic Services*

Q. Does a school district have to make accommodations for students with disabilities so that they may participate in programs and activities such as music or computer class, lunch and recess periods, school field trips or assemblies?

A. In providing nonacademic activities including meals, recess periods and extracurricular services, the school district must ensure that students with disabilities participate with students without disabilities to the maximum extent appropriate to the needs of the individual student with disabilities.

School districts must provide an equal opportunity to participate in all classes which are appropriate to the student's program. *Districts may not counsel students with disabilities toward more restrictive programs or career objectives.*

A district must provide an equal opportunity for students with disabilities to participate in physical education and athletics. Separate activities may be offered only if determined to be necessary for a student with disabilities. Students with disabilities may not be denied the opportunity to compete for teams or to participate in courses that are not separate or different.

The quality of educational services provided for students with disabilities must be comparable to services provided for students without disabilities. Providing equitable opportunity may require different treatment. However, separate services are not allowed unless needed to provide equitable opportunity.

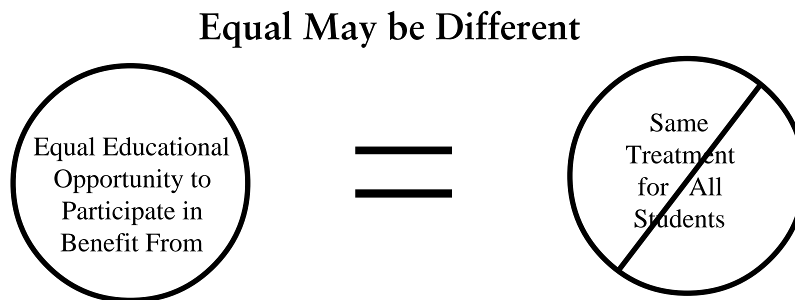


FIGURE 4

D. *Program Accessibility*

Q. Does Section 504 require all buildings to be accessible to students with mobility disabilities?

A. Facilities which were constructed prior to June 3, 1977, need not be made accessible if the program or activity in its entirety is readily accessible to persons with disabilities. Students with disabilities, however, must be afforded an equal opportunity to enjoy the full range of services offered by the district. To make a program accessible, a district can redesign equipment, reassign classes or other services to accessible buildings, assign aides to students, deliver

services at alternate accessible sites, or alter existing facilities. If these methods are effective in achieving compliance, a district need not undertake major structural changes to buildings. However, the district may not deny access to programs because the facilities are not accessible to students with disabilities. Likewise, the district may not segregate disabled students from peers by placement in segregated, although accessible, facilities.

Buildings and building additions constructed since June 3, 1977, must allow access by students with disabilities. New facility construction must be designed so that the facility is readily accessible. Facilities that are altered must be altered in a manner so that the altered portion of the facility is readily accessible. Existing facilities built before June 3, 1977, must be reviewed and a plan developed for achieving full program accessibility.

E. Section 504 Student Records

Q. Is information obtained under Section 504 subject to the confidentiality requirements of the Family Educational Rights and Privacy Act (FERPA)?

A. Section 504 records must be kept in accordance with Family Educational Rights and Privacy Act (FERPA) regulations which are located in 34 Code of Federal Regulations Part 99.

F. Drugs and Alcohol

Q. Are students who are currently using illegal drugs or alcohol protected under Section 504?

A. A school district may enforce its rules prohibiting the use, sale or possession of illegal drugs and alcohol if the rules are enforced consistently for all students. If a student, including a qualified individual with disabilities under Section 504, is currently using drugs or alcohol, the school district may use its normal disciplinary policies, including suspension, as long as proper procedures are followed. For example, if a student is disabled solely by virtue of having alcoholism, and the student breaks a school rule that alcohol cannot be consumed on school property, and the penalty as to all students for breaking that rule is expulsion, the disabled student may be expelled with no requirement for a reevaluation. This exception, however, does not apply to children who are disabled because of drug or alcohol addiction and, in addition, have some other disabling condition.

G. Students With Special Health Care Needs

Q. Do students who receive medication at school or who have extensive health care needs qualify under Section 504?

A. All students who have special health care needs should be considered for a 504 referral. Some of these student may qualify under Section 504. The school district must make reasonable accommodations for delivery of special health care plans at school. (See Special OPI Health Care Needs Manual, 1992.)

Students with Acquired Immune Deficiency Syndrome (AIDS), AIDS Related Complex (ARC), or infected with Human Immunodeficiency Virus (HIV Positive) qualify as disabled under Section 504. They qualify either as actually having an impairment substantially limiting a major life activity or as regarded as having such an impairment. Unless currently presenting a contagious risk due to the stage of the disease, the child should remain in the regular classroom.

H. ADD/ADHD

There is a growing awareness in the education community that attention deficit disorder (ADD) and attention deficit hyperactive disorder (ADHD) can result in significant learning problems for children. While estimates of the prevalence of ADD/ADHD vary widely, it is generally believed that 3 to 5 percent of school-aged children may have significant educational problems related to this disorder. ADD/ADHD is not a separate disability in IDEA. Children with this disability may meet eligibility criteria for special education services under other IDEA categories. Children with ADD/ADHD may be classified as "other health impaired" in instances where the ADD/ADHD is a chronic or acute health problem which results in limited alertness or vitality and which adversely affects educational performance. Children with ADD/ADHD may also be determined IDEA eligible under "specific learning disability" or "seriously emotionally disturbed." A school district must provide regular education and special education and related services to children with ADD/ADHD who are not IDEA eligible, but who are qualified students with disabilities under Section 504. Such services may include modified behavior management programs and provisions for administering medication. ADD/ADHD is discussed in three OCR memorandums and letters located in Appendix B.

I. Funding

Q. Can a district use IDEA monies for identification, evaluation and services for Section 504 students?

A. Section 504 is not a funding statute. Students eligible for services under Section 504 may not benefit from IDEA funds unless they are eligible for special education services under IDEA. IDEA monies may be used for evaluation of a student only if it is believed that the child will also qualify for services under one of the 13 disabling conditions as defined by IDEA.

Q. Can state special education funds be allocated for child find activities under Section 504, including activities under structured support and assistance teams to help teachers in identifying and meeting diverse student needs (10.55.805(3), ARM)?

A. Under 20-7-431(1)(a)(iv), special education state funds may be an allowable cost item for activities associated with teacher assistance teams that provide prereferral intervention.

J. Suspension/Exclusion from School

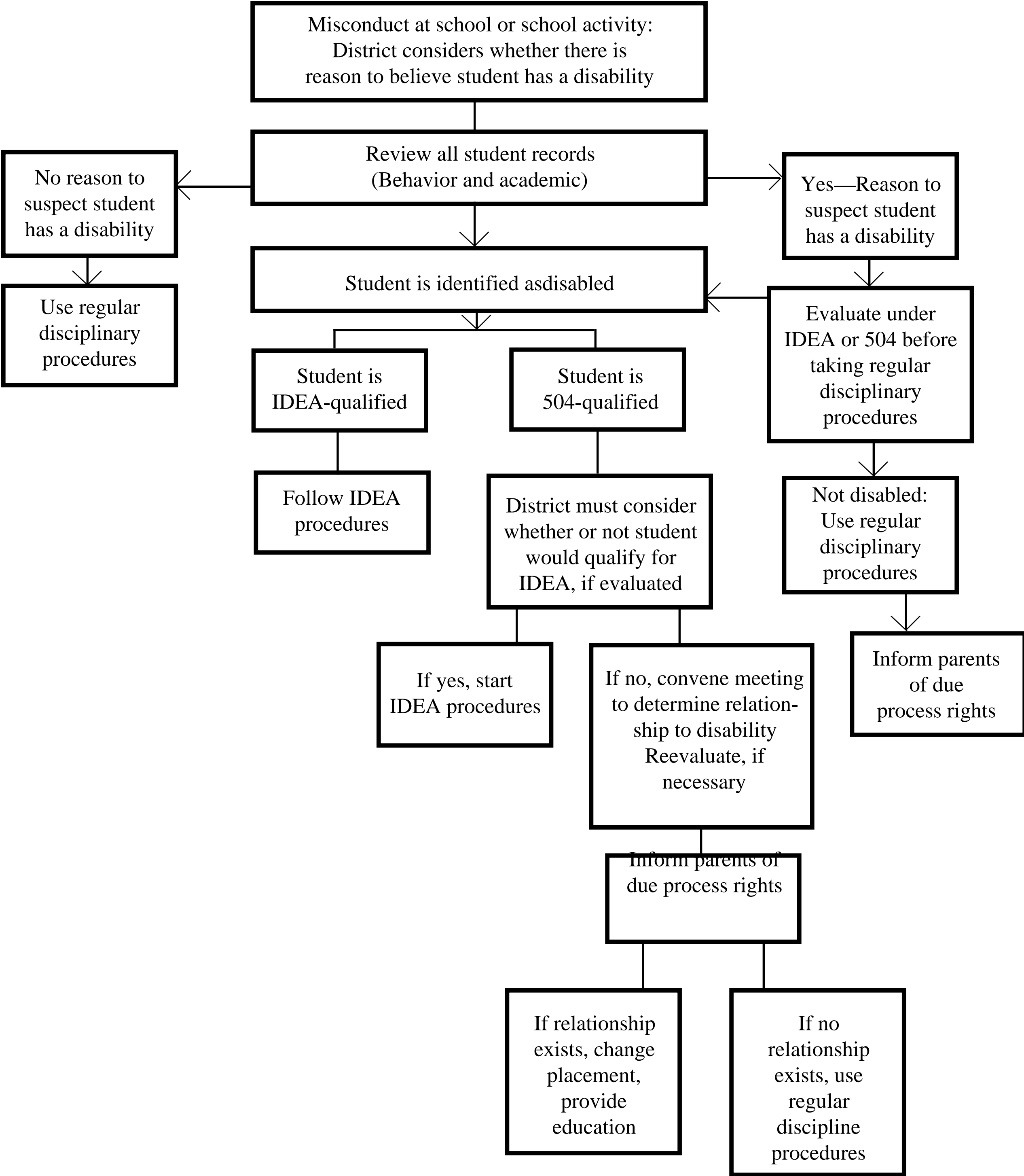
Q. May a school district suspend from school a student who is a qualified individual under Section 504?

A. A school district may suspend a qualified student provided that the district follows procedures for ensuring the student receives a free appropriate public education. In the student's current placement, a qualified student may be suspended for no more than 10 consecutive school days or a series of suspensions which creates a pattern of exclusion totaling 10 school days before a significant change in placement occurs.

Before a significant change in a student's placement, the school district must conduct a re-evaluation. The school district must convene a group of people which meets the requirements of 34 CFR 104.35 (see pages 10-11) to determine whether the misconduct is a direct manifestation of the student's disability. The decision must be based upon evaluation procedures that conform with Section 504 regulations.

If the misconduct is a direct manifestation of the student's disability, the student may not be suspended and an appropriate educational program must be developed. Parents have a right to request a due process hearing. If the misconduct is not a direct manifestation of the student's disability, the student may be excluded from school in the same manner as similarly situated students without disabilities are excluded. Parents have a right to request a due process hearing.

Suspension/expulsion of students with disabilities under Section 504 is discussed in an OCR memorandum located in Appendix B.



Whether a student is disabled or not, a temporary restraining order (TRO) is available to ensure safety of students and staff at school. Process is necessary to ensure FAPE for students qualified under IDEA. With a TRO be sure to arrange alternative educational services.

5.0 Definitions

APPROPRIATE EDUCATION—The provision of regular or special education and related aids and services that are designed to meet individual student needs as adequately as the needs of students without disabilities. The determination of appropriate education must be based upon procedures that satisfy the requirements of 34 CFR 104.34, 104.35, 104.36.

EQUALLY EFFECTIVE—Aids, benefit or service to be "equally effective" are not required to produce the identical result or level of achievement but must afford a student with disabilities an 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 student's needs [34 CFR 104(b)(2)].

FACILITY —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 [34 CFR 104.3(i)].

INDIVIDUAL WITH DISABILITIES (Handicapped Individuals)—An individual with disabilities is a person who:

(1) has a *physical or mental impairment which substantially limits one or more major life activities. The term does not include children disadvantaged by cultural, environmental, or economic factors.*

(2) has a *record or history of such an impairment. The term includes children who have been misclassified.*

(3) *is regarded as having such an impairment:*

- *The individual has a physical or mental impairment that does not substantially limit a major life activity but s/he is treated by the district as having such a limitation.*
- *The individual has a physical or mental impairment that substantially limits a major life activity only as a result of the attitudes of others toward such an impairment.*
- *The individual has no physical or mental impairment, but is treated by the district as having such an impairment.*
  34 CFR 104.3 (j)

MAJOR LIFE ACTIVITIES—Major life activities include walking, seeing, hearing, speaking, breathing, learning, working, caring for one's self, and performing manual tasks. The disability need only substantially limit one major life activity in order for the student to be eligible [34 CFR 104.3 (j)(2)(ii)].

NONACADEMIC SERVICES—Nonacademic services may include counseling services, physical recreational athletics, transportation, health services, recreational activities,

special interest groups or clubs sponsored by the school district, referrals to other agencies which provide assistance to individuals with disabilities including both employment by the school district and assistance in making outside employment [34 CFR 104.37].

PHYSICAL OR MENTAL IMPAIRMENT —A physical or mental impairment means (1) 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; endocrine; or (2) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities [34 CFR 104.3 (j)(2)(i)].

PROGRAM OR ACTIVITY—These terms mean all operations, including all instructional services or extracurricular functions of any school district receiving federal funds regardless of whether the specific program or activity involved is a direct recipient of federal funds.

QUALIFIED INDIVIDUAL —With respect to public preschool, elementary, secondary or adult educational services, a qualified individual is an individual with disabilities (1) of an age during which persons without disabilities are provided such services, or (2) of an age during which it is mandatory under state law to provide such services to persons with disabilities or (3) to whom the state is required to provide a free appropriate public education under IDEA [34 CFR 104.3(k)(2)].

6.0 Sample Forms for Section 504

The forms which follow are samples to be used at the discretion of individual school districts. They may be copied as they are, or modified to meet the specific requirements of district policy.

Form 6.1 may be used to provide notice of and general information about Section 504.

Form 6.2 delineates parent and student rights under Section 504.

Form 6.3 outlines a possible grievance procedure and provides a grievance filing form.

Forms 6.4.1 and 6.4.2 may be used for student referral.

Forms 6.5.1 and 6.5.2 may be used for reporting the proceedings of a Section 504 evaluation.

Forms 6.6.1 and 6.6.2 may be used for developing a regular education intervention plan for a qualified Section 504 student.

Form 6.7 may be used for self-evaluation.

Form 6.8 may be used for accessibility checklist.

6.1 Information Regarding Section 504 of the Rehabilitation Act of 1973

Section 504 is an Act which prohibits discrimination against persons with a disability in any program receiving federal financial assistance. The Act defines a person with a disability as anyone who:

- *Has a mental or physical impairment which substantially limits one or more major life activity (major life activities include activities such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working);*
- *Has a record of such impairment;*
- *Is regarded as having such an impairment.*

In order to fulfill its obligation under Section 504, the __________________ school district recognizes a responsibility to avoid discrimination in policies and practices regarding its personnel and students. No discrimination against any person with a disability will knowingly be permitted in any of the programs and practices in the school system.

The school district has specific responsibilities under the Act, which include the responsibility to identify, evaluate, and if the child is determined to be eligible under Section 504, to afford access to appropriate educational services.

If the parent or guardian disagrees with the determination made by the professional staff of the school district, s/he has a right to a hearing with an impartial hearing officer.

The Family Educational Rights and Privacy Act (FERPA) also specifies rights related to educational records. This Act gives the parent or guardian the right to:

- *Inspect and review his/her child's educational records;*
- *Make copies of these records;*
- *Receive a list of all individuals having access to those records;*
- *Ask for an explanation of any item in the records;*
- *Ask for an amendment to any report on the grounds that it is inaccurate, misleading, or violates the child's rights;*
- *A hearing on the issue if the school refuses to make the amendment.*

If there are questions, please feel free to contact ____________________________________
Section 504 Compliance Coordinator.

Phone _________________

6.2 Parent/Student Rights In Identification, Evaluation And Placement

Section 504 of the Rehabilitation Act of 1973
Please Keep This Explanation for Future Reference

Below is a description of the rights granted by federal law to students with disabilities. The intent of the law is to keep you fully informed concerning decisions about your child and to inform you of your rights if you disagree with any of these decisions.

You have the right to the following:

- Right to have your child with disabilities take part in, and receive benefits from public education programs without discrimination because of her or his disability.
- Right to receive all information in the parent's or guardian's native language or primary other mode of communication.
- Right to have your child receive a free appropriate public education which includes the right of the child to be educated with students without disabilities to the maximum extent appropriate.
- Right to have your child have equal opportunity to participate in school programs and extracurricular activities sponsored by the school.
- Right to receive notice a reasonable time before a district identifies, evaluates or changes your child's placement.
- Right to inspect and review all of your child's educational records, including the right to obtain copies of education records at reasonable cost unless the cost would deny you access to the records, and the right to amend the record if you believe information contained in the record is inaccurate or misleading. If the school district refuses to amend the record, you have a right to request a hearing.
- Right to have educational evaluation and placement decisions made based on information from a variety of sources and by persons who know the needs of the student, meaning of evaluation data and placement options.
- Right to periodic reevaluation and evaluation before any significant change in placement.
- Right to an impartial hearing if you disagree with the school district's proposed action. You will be an active participant. You have the right to be represented by counsel in the impartial hearing process. You have the right to appeal the impartial hearing officer's decision.

____
Section 504 Compliance Coordinator

Phone ______________________________

6.3 Grievance Policy And Procedure

Policy

It is the policy of the ______________________ Public School District to provide a learning and working environment free from discrimination. To that end, the District requests students, parents and staff to assist the Superintendent and the Board of Trustees in identifying barriers to a discrimination-free learning and working environment in our school(s). The following Grievance Procedure is provided as an avenue for the expeditious processing of complaints toward the elimination of elements that pollute the learning and working environment with unlawful discrimination.

Definitions

Grievance: a complaint alleging a violation of any policy, procedure, or practice which would be prohibited by Title IX, Section 504 and other federal and state civil rights laws, rules and regulations.

Title IX: of the Education Amendments of 1972, the 1975 Implementing Regulations, and any memoranda, directives, guidelines, or subsequent legislation that may be issued.

Section 504: the Rehabilitation Act of 1973.

Federal and State Civil Rights Laws, Rules and Regulations: 1964 Civil Rights Act, Title VI, Title VII as amended, Title IX, Age Discrimination Act of 1967 and 1975 as amended, Equal Pay Act of 1963, Section 504, the Constitution of Montana, The Montana Human Rights Act, The Montana Code of Governmental Fair Practices, and implementing federal and state rules and regulations.

Grievant(s): a student, parent, guardian or employee of the ______ Public School District who submits a grievance.

Public School District: (address)

Title IX or Title IX/Section 504 Coordinator: the employee designated to coordinate the District's efforts to comply with equity regulations and facilitate processing of complaints (hereafter Coordinator).

Day: a working day; the calculation of days in grievance processing shall exclude Saturdays, Sundays and school holidays. (20-1-305 MCA)

Ridgeway Settlement Agreement: Settlement Agreement on equity in high school inter-scholastic athletics in 1984 (hereafter Ridgeway).

<u>Basic Procedural Rights</u>: applicable to all levels of the grievance process.

The Title IX or Title IX/Section 504 Coordinator shall receive complaints, actively and independently investigate the merit of complaints, and assist the parties in resolution of complaints. The coordinator may be utilized as a resource by any party at any level of this procedure.

Relevant records shall be available in accordance with the Montana Constitution, Article II, Section 10, Right to Privacy and <u>Guidelines for Student Records</u>, Appendix E, Montana School Accreditation Standards and Procedures Manual, March 1989.

This procedure does not deny the right of the grievant to file formal complaints with other state and federal agencies (Montana Human Rights Commission or the U.S. Department of Education Office of Civil Rights) or to seek private counsel for complaints alleging discrimination.

In most instances, parents or legal guardians should be part of the hearing and resolution process. In investigations of sexual harassment, it is recommended that the grievant be accompanied by a friend, parent or advisor for support during any part of the process.

Intimidation, harassment or retaliation against any person filing a grievance or any person participating in the investigation or resolution of a grievance is a violation of law and constitutes the basis for filing a separate grievance.

All records pursuant to the grievance shall be maintained by the District separate and apart from student records for a period of not less than five (5) years. (20-1-212 MCA)

If a grievance is taken to the Board of Trustees for a formal contested case hearing, parties shall have the right to representation, to present witnesses and evidence, and to question opposing witnesses.

It is the policy of this District to process all grievances in a fair, expeditious and confidential manner.

<u>Process</u>

<u>Level 1: Principal or Immediate Supervisor</u> (Informal and optional—may be bypassed by grievant)

Many problems can be solved by an informal meeting with the parties and the principal or Coordinator. An individual with a complaint is encouraged to first discuss it with the teacher, counselor, or building administrator involved with the objective of resolving the matter promptly and informally. Employees with a complaint are encouraged to first discuss it with their principal or immediate supervisor with the same objective. An exception is that complaints of sexual harassment should be discussed with the first-line supervisor or administrator who is not involved in the alleged harassment.

Level 2: Title IX or Title IX/Section 504 Coordinator

If the complaint or issue is not resolved at Level 1, the grievant may file a written grievance stating: 1) the nature of the grievance; 2) the remedy requested; and 3) be signed and dated by the grievant. The Level 2 written grievance must be filed with the Coordinator within fifteen (15) days of the event or incident, or from the date the grievant could reasonably become aware of such occurrence.

The Coordinator has authority to investigate all written grievances. If possible, the Coordinator will resolve the grievance. If the parties cannot agree on resolution, the Coordinator will prepare a written report of the investigation which shall include the following:

- *A clear statement of the allegations of the grievance and remedy sought by the grievant.*

- A statement of the facts as contended by each of the parties.

- A statement of the facts as found by the Coordinator and identification of evidence to support each fact.

- A list of all witnesses interviewed and documents reviewed during the investigation.

- A narrative describing attempts to resolve the grievance.

- The Coordinator's conclusion as to whether the allegations in the grievance are meritorious.

If the Coordinator believes the grievance is valid, the Coordinator will recommend appropriate action to the Superintendent.

The Coordinator will complete the investigation and file the report with the Superintendent within fifteen (15) days after receipt of the written grievance. The Coordinator will send a copy of the report to the grievant.

If the Superintendent agrees with the recommendation of the Coordinator, the recommendations will be implemented.

The Coordinator and Superintendent may appoint an outside investigator once a written grievance is filed.

Level 3: The Board of Trustees

If the Superintendent rejects the recommendations of the Coordinator, and/or either party is not satisfied with the recommendations from Level 2, either party may make a written appeal within ten (10) days of receiving the report of the Coordinator to the Board of Trustees for a full contested case hearing under the rules of Montana Administrative Procedures Act. On receipt of the written appeal, the matter shall be placed on the agenda of the Board of Trustees for

consideration not later than their next regularly scheduled meeting. A decision shall be made and reported in writing to all parties within thirty (30) days of that meeting. The decision of the Board of Trustees will be final, unless the case falls within the parameters of Ridgeway. (See Level 4 below.)

Level 4: County Superintendent

If the case falls within the parameters of Ridgeway, the decision of the Board of Trustees may be appealed to the County Superintendent by filing a written appeal within thirty (30) days after the final decision of the Board pursuant to the Rules of School Controversy (10-6103 et seq. ARM; see also Ridgeway).

Other Options for Grievant

At any time during this process, a grievant may file a complaint with the Montana Human Rights Commission or with the U.S. Department of Education, Office of Civil Rights (Denver, Colorado).

Source: OPI Model Grievance Policy and Procedure, 1991.

6.3 Section 504 Grievance Procedure/Form

Following is the grievance procedure to resolve discrimination complaints:

- An alleged grievance under Section 504 must be filed in writing fully setting out the circumstances giving rise to such grievance.
- Such claims must be made in writing and filed with the district's Section 504 compliance coordinator: ________________________________
- The Section 504 compliance coordinator will appoint a hearing officer who will conduct the hearing within ____ working days after the request is received.
- A hearing officer shall give the parent, student, or employee full and fair opportunity to present evidence relevant to the issues raised under the grievance. The parent, student, or employee may, at their own expense, be assisted or represented by individuals of his or her own choice, including an attorney.
- The district's hearing officer shall make his/her decision in writing within ____ working days after the hearing.
- If the parent, student, or employee disagrees with the decision of the hearing officer, an appeal may be filed with the Board of Trustees.

Section 504 Student Referral Form

Grievance Filing Form

Date ____________________

Your name____

Your school and/or position ____

Place where you may be reached ____

Address ____

Phone ____

Nature of your grievance. (Please describe the policy or action you believe may be in violation of Title IX or other civil rights statute: please identify any person(s) you believe may be responsible.)

____

____

If others are affected by the possible violation, please give their names and/or positions:

____

____

Please describe any corrective action you wish to see taken with regard to the possible violation. You may also provide other information relevant to this grievance.

____

____

____

____

____

____

Signature of Grievant Date

____

Signature of Person Receiving Grievance

____

Date Location

6.4.1 Section 504 Referral Form

I. Personal Information

Student:______________________________ Date of Birth: ________________

Parent: ______________________________ Phone No.: _________________

Address:______________________________ School: _____________________

Teacher:______________________________ Grade: ______________________

Referred by: __________________________ Date of Referral: ____________

II. Background Information

A. Reason for Referral: ____

____

____

B. Strategies/Interventions To Date (attach copies of documentation): _________

____

____

C. Additional Information Requested: ______________________________________

____

____

III. Referral Direction (Principal Only)

____

____

____

Principal's Signature Date

Copy to: Regular Education Teacher, Building Principal, and Superintendent

6.5.1 Section 504 Regular Education Evaluation and Intervention Plan

1. Personal Information

Student: ______________________________ Date of Birth: ________________

Parent: ______________________________ Phone No.: _________________

Address: ______________________________ School: _____________________

Teacher: ______________________________ Grade: ______________________

Referred by: __________________________ Date of Referral: ____________

II. Regular Education Intervention Plan

A. A Section 504 conference was convened on behalf of the above-mentioned student on ____________________________.
Date

B. The following data was presented: ______________________________________

____

____

C. Options Discussed: ____

____

____

D. Least Restrictive Environment discussed: __________________________________

____

____

E. This student's Multidisciplinary Group has determined that the disability is projected to be _____ short-term (three months or less) or _____ long-term.

F. On the basis of the data presented, the following decision was made:

_____ 1. The student is identified as a Section 504 disabled student and qualifies for REIP services.

_____ 2. The student is not disabled.

Copy to: Regular Education Teacher, Building Principal, and Superintendent

Section 504 Evaluation Report Form

6.6.1 Section 504 Regular Education Intervention Plan

Name: ______________________________ Date of Meeting: ____________

School:______________________________ Date of Birth: ______________

Grade: ______________________________

1. Describe the nature of the concern:

____
____
____

2. Describe the basis for the determination of disability (if any):

____
____
____

3. Describe how the disability affects a major life activity:

____
____
____

4. Describe the reasonable accommodations that are necessary

____
____
____

Review/Reassessment Date: ________________________________
(must be completed)

Participants (Name and title)

____________________________ ________________________
____________________________ ________________________
____________________________ ________________________
____________________________ ________________________
____________________________ ________________________
____________________________ ________________________

cc: Student's Cumulative File

Attachment: Information Regarding Section 504 of the Rehabilitation Act of 1973.

Sample Classroom/Facility Accommodations

As local districts develop policies and procedures for guiding referral and identification of students determined to be disabled under Section 504, it is critical that information concerning this law and its impact on local school districts be shared with principals and building-level staff. The intent of Section 504 is to “accommodate” for differences within the regular education environment. For this to be accomplished, all staff must be provided with awareness activities and given specific information concerning the district’s procedures for dealing with Section 504 referrals.

As individual students are identified the classroom teacher may need specific training in the area of the identified disability. The following classroom/facility accommodations are presented as examples of ways in which Section 504 disabilities may be successfully addressed within regular education.

Communication

Modify parent/student/teacher communications.

Develop a daily/weekly journal
Develop parent/student/school contacts
Schedule periodic parent/teacher meetings
Provide parents with duplicate sets of text

Modify staff communications.

Identify resource staff
Network with other staff
Schedule building team meetings
Maintain ongoing communication with building principal

Modify school/community agency communication.

Identify and communicate with appropriate agency personnel working with student
Assist in agency referrals
Provide appropriate carryover in the school environment

Organization/Management

Modify the instructional day.

Allow student more time to pass in hallways
Modify class schedule

Modify the classroom organization/structure.

Adjust placement of student within classroom (e.g., study carrel, proximity to teacher, etc.)

Increase/decrease opportunity for movement
Determine appropriate classroom assignment (e.g., open versus structured)
Reduce stimuli

Modify the district's policies/procedures.

Allow increase in number of excused absences for health reasons
Adjust transportation/parking arrangements
Approve early dismissal for service agency appointments

Alternative Teaching Strategies

Modify teaching methods.

Adjust testing procedures (e.g., length of time, administer orally, tape record answers)
Individualize classroom/homework assignments
Utilize technology (computers, tape recorders, calculators, etc.)

Modify materials. For example:

Utilize legible materials (i.e., scratch the dittos?)
Utilize materials that address the student's learning style (e.g., visual, tactile, auditory, etc.)
Adjust reading level of materials

Student Precautions

Modify the classroom/building climate for health purposes.

Use an air purifier in classroom
Control temperature
Accommodate specific allergic reactions

Modify classroom/building to accommodate equipment needs.

Plan for evacuation for wheelchair-bound students
Schedule classes in accessible areas

Modify building health/safety procedures.

Administer medication
Apply universal precautions
Accommodate special diets

,

6.7 Supplemental Information About Section 504 Self-Evaluation Requirements

Purpose

Basic information about Section 504 self-evaluation requirements has been provided in an earlier Technical Assistance Guide (TAG) entitled "Section 504 Transition Plan and Self-Evaluation Information."[1] This earlier TAG contains important information essential to understanding the self-evaluation process and agencies are encouraged to carefully review it. The purpose of this TAG is to provide agencies with a Self-Evaluation Review Form that may assist them to organize and carry out self-evaluation efforts for their non-employment programs and activities.[2]

Information

The Self-Evaluation Review Form is being provided to agencies as a part of the Department of Justice's ongoing technical assistance effort. Use of the Review Form does not eliminate the need for a careful review of Section 504 regulatory requirements and a thorough knowledge of the agency's programs and activities. Because of the diversity of federal agency programs and activities and the general nature of the Review Form, use of the Review Form, by itself, does not ensure that all aspects of the agency's programs and activities have been reviewed or reviewed properly. The fact that this form has been provided to agencies by the Department of Justice does not mean that it must be used or that it is the only useful and effective way of evaluating an agency's programs and activities. ***The Review Form is a tool designed to assist agencies in developing their own approach to conducting a Section 504 self-evaluation and ensuring that individuals with handicaps can participate in all of the agency's programs and activities. The Department does not recommend that agencies use the Review Form without first carefully considering how the Section 504 self-evaluation process applies to their own programs and activities.***

[1]TAG-87-1 is available from the Coordination and Review Section, Civil Rights Division, U.S. Department of Justice, Washington, D.C. 20530 (202) 724-2222 (Voice), (202) 724-7678 (TDD).

[2]Section 501 of the Rehabilitation Act, which is administered by the Equal Employment Opportunity Commission (EEOC), addresses employment discrimination. Federal agencies should refer to the regulation implementing Section 501 and the supporting information developed by EEOC for guidance about eliminating discrimination on the basis of disability in their programs. The regulation implementing Section 501 and the related information can be obtained from the Equal Employment Opportunity Commission, 1801 "L" Street, NW, Washington, D.C. 20507, (202) 634-6260 (Voice), (202) 634-7057 (TDD).

The form is organized into General Instructions and the topical areas listed below. As indicated, the Department of Justice has additional information available relevant to several of the areas to be reviewed.[3]

1. Agency Personnel Responsible for the Section 504 Self-Evaluation Process

2. Notification

3. Policies that Limit the Participation of Individuals with Disabilities in Agency Programs and Activities

4. Information and Training for Staff

5. Complaints

6. Use of Contractors

7. Accessibility of New and Newly Acquired Facilities (see TAG's-86-2, 87-5, 88-8)

8. Transportation

9. Decisions About Undue Financial and Administrative Burdens

10. Telephone Communication (see TAG's 84-2, 86-2, 87-2, 88-2)

11. Documents and Publications (see TAG's 84-3, 85-1, 85-3, 88-6)

12. Interpreters (see TAG's 84-1, 85-1)

13. Readers and Amanuenses (see TAG's 85-1, 88-1)

14. Assistive Listening Devices (see TAG's 85-1, 85-2)

15. Audio-Visual Presentations (see TAG's 84-4, 87-4, 88-7)

16. Automated Electronic Equipment (see TAG 87-3)

17. Emergency Evacuation

18. Participation of Individuals with Disabilities in the Self-Evaluation Process (see TAG 88-9)

[3] Copies of the TAG's cited are available from the Coordination and Review Section, Civil Rights Division, U.S. Department of Justice, Washington, D.C. 20530 (202) 724-2222 (Voice, (202) 724-7678 (TDD).

Availability in Alternate Formats

This document is available, on request, from the Coordination and Review Section (see address below) in the following formats.

Audiotape

Large Print

Braille

Computer Disk

Resources

A list of resources has been compiled and can be obtained by contacting:

Coordination and Review Section
Civil Rights Division
U.S. Department of Justice
Washington, D.C. 20530
(202) 724-2222 (Voice)
(202) 724-7678 (TDD)

Self-Evaluation Review Form General Instructions

1. ***List all of the programs and activities conducted by the agency and provide a concise description of each.*** (For a discussion of what programs and activities should be reviewed, see TAG 5-87-1.) Each description should explain the purpose of the program or activity and provide information on the following items, among others, when appropriate.

- How non-employees participate in the program.
- What role publications and other Government documents play in the program.
- What role telephone access plays in the program.
- What function meetings, hearings, training sessions, and other forms of assembly play in the program.
- What the role of television, video, and other audio-visual presentations is in the program.
- How the agency notifies the public about the program.
- What the role of contractors is in the agency's programs.
- What the role of transportation services is in the program.
- What role reading rooms, libraries, or similar facilities have in the program.
- What role automated equipment plays in the program.

2. ***Collect and document the policies and practices that govern the administration of each of the agency's programs and activities.*** An agency's policies may be in the form of written policies, manuals, policy directives, administrative directives, guidance memoranda, and unwritten policies. Whether this compilation is done for each program and activity individually or for the program as a whole depends on the number and complexity of the programs and activities. For purposes of this TAG, the Review Form is designed to address each program and activity separately. Agencies are encouraged to tailor the form to their own needs.

3. ***Analyze how the agency's policies and practices, or lack of such, affect or might affect individuals with disabilities.*** The information gathered about the agency's programs and activities in step one above should help identify some of those aspects of program operation to be examined. The overall goal is to determine what conditions must be present for individuals with different kinds of disabilities to participate fully in the agency's programs and activities. In this analysis the agency must take into account the fact that discrimination can happen not only as a result of what is in its policies but also as a result of what is not in its policies.

4. ***Make and document changes and additions to agency policy.***

5. ***Obtain comments on the draft self-evaluation from individuals with disabilities and other interested persons.***

Self-Evaluation Review Form

Agency name:

Agency program:

Location of program:

Brief description of program:

1. ***Agency Personnel Responsible for Section 504 Self-Evaluation***

✍ Identify agency personnel and the agency unit(s) responsible for conducting the self-evaluation.

2. ***Notification***

✍ Describe how the agency notifies the public about its nondiscrimination policies and what special procedures are used for individuals with disabilities.

✍ Describe the existing written policy and how it has been communicated to all appropriate program staff.

✍ Describe the policy that needs to be established.

✍ Describe how the agency notifies the public and other interested parties that agency meetings, hearings, and conferences will be held in accessible locations and that auxiliary aids will be provided, upon request, to participants with disabilities.

✍ List the appropriate documents to include policy statements about nondiscrimination.

✍ List the appropriate unit in the agency to establish such a policy.

✍ Give the date that the policy was established and distributed to staff and a citation for the policy.

3. ***Policies that Limit the Participation of Individuals with Disabilities in Agency Programs and Activities***

✍ List all sources of policies (including statutes, regulations, and subregulatory sources such as policy directives and guidance memoranda, manuals and other guidelines) that govern the administration of the agency's programs.

✍ List agency program eligibility and admission criteria or licensing standards and procedures that establish standards for Federal and non-Federal programs and activities. Particular attention should be paid to policies incorporating or establishing:

➤ physical or mental fitness or performance requirements;
➤ safety standards;
➤ testing requirements;
➤ educational requirements;
➤ work experience requirements;
➤ income level requirements;
➤ credit rating requirements;
➤ requirements based on disability;
➤ requirements that prohibit participation because of disability; and
➤ insurability requirements.

Policies concerning these areas may have the effect of limiting or excluding the participation of persons with disabilities in programs and activities and should, therefore, be the subject of close scrutiny.

- Describe how these policies were examined to determine if they had the purpose of effect of excluding or limiting the participation of individuals with disabilities in programs and activities.

- List the policies and practices that have the direct or indirect effect of excluding or limiting the participation of individuals with disabilities in agency programs and activities.

- List any such policies that will be altered or eliminated.

- Describe how these changes were communicated to agency staff and the public.

- List any such policies that will be retained by the agency.

- Describe how the agency determined that the retention of such policies was justified.

4. ***Information and Training for Staff***

✍ What staff members need to be aware of the agency's obligations under Section 504 and agency policies designed to enable persons with disabilities to participate in agency programs and activities?

✍ List steps to be taken to ensure that staff fully understand agency policy of nondiscrimination on the basis of disability and can take all appropriate steps to facilitate the participation of individuals with disabilities in agency programs and activities.

✍ List agency unit(s) responsible for taking the steps indicated above.

5. ***Complaints***

✍ Identify the agency unit responsible for receiving and processing complaints.

✍ Describe the process by which complaints are processed.

✍ Describe the ways in which the agency notifies staff and program participants about the complaint process.

✍ Indicate the appropriate policy source to include information about complaints.

✍ Give the date the policy was established and distributed to staff and give a citation for the policy.

6. ***Use of Contractors***

✍ List contractors that are used by the agency to conduct programs or activities on behalf of the agency.

✍ Describe steps that have been taken to ensure that agency procurement officials understand Section 504 requirements as they apply to contractors.

✍ Provide language included in agency contracts to ensure that contractors are aware of their obligations to take steps to facilitate the participation of individuals with disabilities in programs and activities they operate on behalf of the agency.

✍ Indicate the appropriate policy source to include information about Section 504 requirements as they apply to contractors.

✍ Give a date that the policy was established and distributed to staff and give a citation for the policy.

7. ***Accessibility of New and Newly Acquired Facilities***

✍ List the steps taken to ensure that all future construction and renovation work will be carried out in accordance with UFAS.

- Describe the steps taken to ensure that all newly acquired space in existing facilities is accessible.

- Identify the agency unit responsible for taking these steps.

- Indicate the appropriate policy source to include information about new and newly acquired buildings.

- Give the date the policy was established and distributed to staff and contractors and give a citation for the policy.

8. ***Transportation***

- Describe any transportation programs in which the agency is involved.

- Describe the steps that have been taken to ensure that these programs are accessible to individuals with disabilities.

- Indicate the agency unit responsible for transportation policy.

- Identify the appropriate policy source to include information on transportation.

✍ Give the date the policy was established and distributed to staff and give a citation for the policy.

9. ***Decisions about Undue Financial and Administrative Burdens***

✍ Identify the individual responsible for making the final decision about undue financial and administrative burdens.

✍ Describe the agency's procedure for ensuring that such decisions are made properly and expeditiously.

✍ Indicate the appropriate policy source to include information about undue financial and administrative burdens.

✍ Give the date the policy was established and distributed to staff and give a citation for the policy.

10. ***Telephone Communication***

✍ Describe the means the agency has for communicating effectively over the telephone with hearing-impaired persons.

✍ List the location and telephone numbers of telecommunication devices for the deaf (TDDs) that the agency has installed to facilitate communication with hearing-impaired persons.

- ✍ Indicate in what agency, commercial telephone, or TDD directories the TDD numbers have been listed.

- ✍ Describe the arrangements the agency has made with any TDD relay services to facilitate communication with hearing-impaired persons.

- ✍ If the agency uses "800" incoming WATS telephone service in its program, indicate what steps have been taken to ensure that this service is usable by persons with hearing impairments.

- ✍ Describe the steps that have been taken to ensure that the agency's documents published in the *Federal Register* list a TDD number.

- ✍ What steps have been taken to familiarize appropriate staff with the operation of TDDs and other effective means of communicating over the telephone with hearing-impaired persons?

- ✍ What agency unit is responsible for ensuring that telephone communication is accessible?

- ✍ Indicate what policy source includes information on telephone communication accessibility.

- ✍ Give the date the policy was established and distributed to staff and give a citation for the policy.

11. ***Documents and Publications***

✍ List all agency publications and documents that are available to the public.

✍ Describe the policy that determines which documents are made available in alternate formats (audiotape, large print, Braille, computer disk, etc.) and which are not.

✍ Describe agency policy affecting portrayal with disabilities in publications.

✍ What procedures have been established to ensure that documents can be put in alternate formats?

✍ What agency unit is responsible for making documents and publications available in alternate formats?

✍ Indicate what policy source includes information on making agency documents and publications available in alternate formats.

✍ Give the date that the policy was established and distributed to staff and give a citation for the policy.

12. *Interpreters*

✍ List all agency activities where a sign language and/or oral interpreter might be needed to ensure that persons with hearing impairments can fully participate.

✍ Describe the process by which the agency secures the services of interpreters.

✍ Indicate how the agency ensures that interpreters are provided in an expeditious manner at meetings, interviews, conferences, public appearances by agency officials, and hearings.

✍ Describe how the agency ensures that its use of interpreters results in effective communication.

✍ What agency unit is responsible for making interpreters available in agency programs and activities?

✍ Indicate what policy source includes information on providing interpreters.

✍ Give the date that the policy was established and distributed to staff and give a citation for the policy.

13. ***Readers and Amanuenses***

✍ List all agency programs and activities where readers for persons with vision impairments and amanuenses for persons with manual impairments might be needed to ensure that such individuals can participate fully in the program or activity.

✍ Describe the process by which the agency secures the services of readers and amanuenses.

✍ Indicate how the agency ensures that readers and amanuenses will be provided in libraries, hearings, conferences, meetings, and in other contexts in an expeditious manner.

✍ What agency unit is responsible for ensuring that readers and amanuenses are provided in the agency's programs and activities?

✍ Indicate what policy source includes information on providing amanuenses and readers in agency programs and activities.

✍ Give the date that the policy was established and distributed to staff and give a citation for the policy.

14. ***Assistive Listening Devices***

✍ Describe the methods the agency has for ensuring that individuals with hearing impairments who do not read sign language can participate effectively in meetings, conferences, and hearings.

✍ If assistive listening devices are provided, describe the policy for providing assistive listening devices (ALDs) in agency programs and activities.

✍ What agency unit is responsible for providing ALDs in the agency's programs and activities?

✍ Indicate the policy source that includes information about providing ALDs in agency programs and activities.

✍ Give the date that the policy was established and distributed to staff and give a citation for the policy.

15. ***Audio-Visual Presentations***

✍ Describe the ways that audio-visual presentations (film, videotape, or television) are used by the agency in its programs and activities.

✍ Indicate if these presentations are captioned and, if they are not, indicate what steps have been taken to ensure that hearing-impaired persons can benefit from these presentations.

✍ Describe the policy for making audio-visual presentations accessible to individuals with disabilities.

✍ Describe agency policy affecting the portrayal of individuals with disabilities in audio-visual presentations.

✍ Indicate the policy source that includes the information about making audio-visual presentations used by the agency accessible to individuals with disabilities.

✍ What agency unit is responsible for ensuring that audio-visual presentations are accessible to individuals with disabilities?

✍ Give the date that the policy was established and distributed to staff and give a citation for the policy.

16. ***Automated Electronic Equipment***

✍ Describe the ways that the agency uses automated electronic equipment, including automated telephone equipment, in its program and activities.

✍ Describe the steps that have been taken to determine if the automated electronic equipment is accessible to and usable by individuals with disabilities.

✍ What agency unit is responsible for ensuring that automated electronic equipment is accessible to and usable by individuals with disabilities?

✍ Indicate the policy source that includes information about the accessibility of automated electronic equipment to individuals with disabilities.

✍ Give the date the policy was established and distributed to staff and give a citation for the policy.

17. Emergency Evacuation

✍ Describe how the agency notifies employees and members of the public of an emergency.

✍ List equipment that is employed to notify individuals with disabilities of an emergency.

✍ What agency unit is responsible for establishing and implementing emergency evacuation procedures?

✍ Indicate what policy source includes information on emergency evacuation procedures.

✍ Give the date that the policy was established and distributed to staff and give a citation for the policy.

18. ***Participation of Individuals with Disabilities and Other Interested Persons in the Self-Evaluation Process***

- Describe the ways that individuals with disabilities and other interested persons are involved in the self-evaluation process.

- Indicate whether the general public or only selected groups or individuals will be involved in the self-evaluation process.

- Indicate how the agency will ensure that comments from persons with a variety of disabling conditions will be solicited.

- Indicate if notice of the availability for comment on the self-evaluation will be published in the *Federal Register.*

- What agency unit is responsible for securing comment on the self-evaluation for the agency?

Section 504 Checklist of Accessibility

Procedural Safeguards
Impartial Due Process Hearing

A parent of a qualified individual with disabilities or the school district may request a due process hearing with respect to actions regarding the identification, evaluation, or educational placement of students, who, because of disability, need or are believed to need special instruction or related services. At a minimum, the impartial hearing must have an opportunity for participation by the student's parents or guardian and representation by counsel, and a review procedure. Compliance with the procedural safeguards of Section 615 of the Individuals with Disabilities Education Act is one means of meeting this requirement.

1. The school district is responsible for ensuring that an impartial hearing process is available. If the district does not have an impartial hearing process available, the district should use Rules 10.16.2401 through 10.16.2417, Administrative Rules of Montana.

2. If the district does not have a process for review of the impartial due process hearing officer's decision, the district should use procedures found in statute 2-4-701, Montana Code Annotated.

3. Mediation is available to the parties if both the parent and the school district voluntarily agree to resolve the dispute through mediation. It is important to remember that the district may not REQUIRE the parents to refer the dispute to mediation. The Office of Public Instruction will provide a list of trained mediators upon request.

Steps in Impartial Hearing Process

1. Written request for impartial hearing received by school district.

2. Official notice of impartial hearing request sent to parties. If strike list is used, strike list is sent at this time.

3. Impartial hearing officer appointed by school district.

4. Pre-hearing conference. Schedule date, place and time for hearing. Identify issues to be heard. Identify facts with which both parties agree.

5. Hearing.

6. Written report from hearing officer.

7. Review of hearing officer report if requested by either party.

Appendix A

Federal Register, May 9, 1980
Section 504
1990 Amendments to the Rehabilitation Act of 1973

Appendix A to Part 104—Analysis of Final Regulation Subpart A—General Provisions

Definitions—1. *Recipient.* Section 104.23 contains definitions used throughout the regulation.

One comment requested that the regulation specify that nonpublic elementary and secondary schools that are not otherwise recipients do not become recipients by virtue of the fact their students participate in certain federally funded programs. The Secretary believes it unnecessary to amend the regulation in this regard, because almost identical language in the Department's regulations implementing title VI and title IX of the Education Amendments of 1972 has consistently been interpreted so as not to render such schools recipients. These schools, however, are indirectly subject to the substantive requirements of this regulation through the application of §104.4(b)(iv), which prohibits recipients from assisting agencies that discriminate on the basis of handicap in providing services to beneficiaries of the recipients' programs.

2. *Federal financial assistance*. In §104.3(h), defining federal financial assistance, a clarifying change has been made: procurement contracts are specifically excluded. They are covered, however, by the Department of Labor's regulation under section 503. The Department has never considered such contracts to be contracts of assistance; the explicit exemption has been added only to avoid possible confusion.

The proposed regulation's exemption of contracts of insurance or guaranty has been retained. A number of comments argued for its deletion on the ground that section 504, unlike title VI and title IX, contains no statutory exemption for such contracts. There is no indication, however, in the legislative history of the Rehabilitation Act of 1973 or of the amendments to that Act in 1974, that Congress intended section 504 to have a broader application, in terms of federal financial assistance, than other civil rights statutes. Indeed, Congress directed that section 504 be implemented in the same manner as titles VI and IX. In view of the long established exemption of contracts of insurance or guaranty under title VI, we think it unlikely that Congress intended section 504 to apply to such contracts.

3. *Handicapped person.* Section 104.3(j), which defines the class of persons protected under the regulation, has not been substantially changed. The definition of handicapped person in paragraph (j)(1) conforms to the statutory definition of handicapped person that is applicable to section 504, as set forth in section 111(a) of the Rehabilitation Act Amendments of 1974, Pub. L. 93-516.

The first of the three parts of the statutory and regulatory definition includes any person who has a physical or mental impairment that substantially limits one or more major life activities. Paragraph (j)(2)(i) further defines physical or mental impairments. The definition does not set forth a list of specific diseases and conditions that constitute physical or mental impairments because of the difficulty of ensuring the comprehensiveness of any such list. The term includes, however, such diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, and, as discussed below, drug addiction and alcoholism.

It should be emphasized that a physical or mental impairment does not constitute a handicap for purposes of section 504 unless its severity is such that it results in a substantial limitation of one or more major life activities. Several comments observed the lack of any definition in the proposed regulation of the phrase "substantially limits." The Department does not believe that a definition of this term is possible at this time.

A related issue raised by several comments is whether the definition of handicapped person is unreasonably broad. Comments suggested narrowing the definition in various ways. The most common recommendation was that only "traditional" handicaps be covered. The Department continues to believe, however, that it has no flexibility within the statutory definition to limit the term to persons who have those severe, permanent, or progressive conditions that are most commonly regarded as handicaps. The Department intends, however, to give particular attention in its enforcement of section 504 to eliminating discrimination against persons with the severe handicaps that were the focus of concern in the Rehabilitation Act of 1973.

The definition of handicapped person also includes specific limitations on what persons are classified as handicapped under the regulation. The first of the three parts of the definition specifies that only physical and mental handicaps are included. Thus, environmental, cultural, and economic disadvantage are not in themselves covered; nor are prison records, age, or homosexuality. Of course, if a person who has any of these characteristics also has a physical or mental handicap, the person is included within the definition of handicapped person.

In paragraph (j)(2)(i), physical or mental impairment is defined to include, among other impairments, specific learning disabilities. The Department will interpret the term as it is used in section 602 of the Education of the Handicapped Act, as amended. Paragraph (15) of section 602 uses the term "specific learning disabilities" to describe such conditions as perceptual handicaps, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia.

Paragraph (j)(2)(i) has been shortened, but not substantively changed, by the deletion of clause (C), which made explicit the inclusion of any condition which is mental or physical but whose precise nature is not at present known. Clauses (A) and (B) clearly comprehend such conditions.

The second part of the statutory and regulatory definition of handicapped person includes any person who has a record of a physical or mental impairment that substantially limits a major life activity. Under the definition of "record" in paragraph (j)(2)(iii), persons who have a history of a handicapping condition but no longer have the condition, as well as persons who have been incorrectly classified as having such a condition, are protected from discrimination under section 504. Frequently occurring examples of the first group are persons with histories of mental or emotional illness, heart disease, or cancer; of the second group, persons who have been misclassified as mentally retarded.

The third part of the statutory and regulatory definition of handicapped person includes any person who is regarded as having a physical or mental impairment that substantially limits one or more major life activities. It includes many persons who are ordinarily considered to be handicapped but who do not technically fall within the first two parts of the statutory definition, such as persons with a limp. This part of the definition also includes some persons who might not ordinarily be

considered handicapped, such as persons with disfiguring scars, as well as persons who have no physical or mental impairment but are treated by a recipient as if they were handicapped.

4. *Drug addicts and alcoholics.* As was the case during the first comment period, the issue of whether to include drug addicts and alcoholics within the definition of handicapped person was of major concern to many commenters. The arguments presented on each side of the issue were similar during the two comment periods, as was the preference of commenters for exclusion of this group of persons. While some comments reflected misconceptions about the implications of including alcoholics and drug addicts within the scope of the regulation, the Secretary understands the concerns that underlie the comments on this question and recognizes that application of section 504 to active alcoholics and drug addicts presents sensitive and difficult questions that must be taken into account in interpretation and enforcement.

The Secretary has carefully examined the issue and has obtained a legal opinion from the Attorney General. That opinion concludes that drug addiction and alcoholism are "physical or mental impairments" within the meaning of section 7(6) of the Rehabilitation Act of 1973, as amended, and that drug addicts and alcoholics are therefore handicapped for purposes of section 504 if their impairment substantially limits one of their major life activities. The Secretary therefore believes that he is without authority to exclude these conditions from the definition. There is a medical and legal consensus that alcoholism and drug addiction are diseases, although there is disagreement as to whether they are primarily mental or physical. In addition, while Congress did not focus specifically on the problems of drug addiction and alcoholism in enacting section 504, the committees that considered the Rehabilitation Act of 1973 were made aware of the Department's long-standing practice of treating addicts and alcoholics as handicapped individuals eligible for rehabilitation services under the Vocational Rehabilitation Act.

The Secretary wishes to reassure recipients that inclusion of addicts and alcoholics within the scope of the regulation will not lead to the consequences feared by many commenters. It cannot be emphasized too strongly that the statute and the regulation apply only to discrimination against qualified handicapped persons solely by reason of their handicap. The fact that drug addition and alcoholism may be handicaps does not mean that these conditions must be ignored in determining whether an individual is qualified for services or employment opportunities. On the contrary, a recipient may hold a drug addict or alcoholic to the same standard of performance and behavior to which it holds others, even if any unsatisfactory performance or behavior is related to the person's drug addiction or alcoholism. In other words, while an alcoholic or drug addict may not be denied services or disqualified from employment solely because of his or her condition, the behavioral manifestations of the condition may be taken into account in determining whether he or she is qualified.

With respect to the employment of a drug addict or alcoholic, if it can be shown that the addiction or alcoholism prevents successful performance of the job, the person need not be provided the employment opportunity in question. For example, in making employment decisions, a recipient may judge addicts and alcoholics on the same basis it judges all other applicants and employees. Thus, a recipient may consider for all applicants including drug addicts and alcoholics past personnel records, absenteeism, disruptive, abusive, or dangerous behavior, violations of rules and unsatisfactory work performance. Moreover, employers may enforce rules prohibiting the possession or use of alcohol or drugs in the work-place, provided that such rules are enforced against all employees.

With respect to other services, the implications of coverage, of alcoholics and drug addicts are two-fold: first, no person may be excluded from services solely by reason of the presence or history of these conditions; second, to the extent that the manifestations of the condition prevent the person from meeting the basic eligibility requirements of the program or cause substantial interference with the operation of the program, the condition may be taken into consideration. Thus, a college may not exclude an addict or alcoholic as a student, on the basis of addiction or alcoholism, if the person can successfully participate in the education program and complies with the rules of the college and if his or her behavior does not impede the performance of other students.

Of great concern to many commenters was the question of what effect the inclusion of drug addicts and alcoholics as handicapped persons would have on school disciplinary rules prohibiting the use or possession of drugs or alcohol by students. Neither such rules nor their application to drug addicts or alcoholics is prohibited by this regulation, provided that the rules are enforced evenly with respect to all students .

5. *Qualified handicapped person.* Paragraph (k) of §104.3 defines the term "qualified handicapped person." Throughout the regulation, this term is used instead of the statutory term "otherwise qualified handicapped person." The Department believes that the omission of the work "otherwise" is necessary in order to comport with the intent of the statute because, read literally, "otherwise" qualified handicapped persons include persons who are qualified except for their handicap, rather than in spite of their handicap. Under such a literal reading, a blind person possessing all the qualifications for driving a bus except sight could be said to be "otherwise qualified" for the job of driving. Clearly, such a result was not intended by Congress. In all other respects, the terms "qualified" and "otherwise qualified" are intended to be interchangeable.

Section 104.3(k)(1) defines a qualified handicapped person with respect to employment as a handicapped person who can, with reasonable accommodation, perform the essential functions of the job in question. The term "essential functions" does not appear in the corresponding provision of the Department of Labor's section 503 regulation, and a few commenters objected to its inclusion on the ground that a handicapped person should be able to perform all job tasks. However, the Department believes that inclusion of the phrase is useful in emphasizing that handicapped persons should not be disqualified simply because they may have difficulty in performing tasks that bear only a marginal relationship to a particular job. Further, we are convinced that inclusion of the phrase is not inconsistent with the Department of Labor's application of its definition.

Certain commenters urged that the definition of qualified handicapped person be amended so as explicitly to place upon the employer the burden of showing that a particular mental or physical characteristic is essential. Because the same result is

achieved by the requirement contained in paragraph (a) of §104.13, which requires an employer to establish that any selection criterion that tends to screen out handicapped persons is job-related, that recommendation has not been followed.

Section 104.3(k)(2) defines qualified handicapped person, with respect to preschool, elementary, and secondary programs, in terms of age. Several commenters recommended that eligibility for the services be based upon the standard of substantial benefit, rather than age, because of the need of many handicapped children for early or extended services if they are to have an equal opportunity to benefit from education programs. No change has been made in this provision, again because of the extreme difficulties in administration that would result from the choice of the former standard. Under the remedial action provisions of §104.6(a)(3), however, persons beyond the age limits prescribed in §104.3(k)(2) may in appropriate cases be required to be provided services that they were formerly denied because of a recipient's violation of section 504.

Section 104.3(k)(3) states that a handicapped person is qualified for preschool, elementary, or secondary services if the person is of an age at which nonhandicapped persons are eligible for such services or at which State law mandates the provision of educational services to handicapped persons. In addition, the extended age ranges for which recipients must provide full educational opportunity to all handicapped persons in order to be eligible for assistance under the Education of the Handicapped Act generally, 3-18 as of September 1978, and 3-21 as of September 1980 are incorporated by reference in this paragraph.

Section 104.3(k)(3) defines qualified handicapped person with respect to postsecondary educational programs. As revised, the paragraph means that both academic and technical standards must be met by applicants to these programs. The term "technical standards" refers to all nonacademic admissions criteria that are essential to participation in the program in question.

6. *General prohibitions against discrimination.* Section 104.4 contains general prohibitions against discrimination applicable to all recipients of assistance from this Department.

Paragraph (b)(1)(i) prohibits the exclusion of qualified handicapped persons from aids, benefits, or services, and paragraph (ii) requires that equal opportunity to participate or benefit be provided. Paragraph (iii) requires that services provided to handicapped persons be as effective as those provided to the nonhandicapped. In paragraph (iv), different or separate services are prohibited except when necessary to provide equally effective benefits.

In this context, the term "equally effective," defined in paragraph (b)(2), is intended to encompass the concept of equivalent, as opposed to identical, services and to acknowledge the fact that in order to meet the individual needs of handicapped persons to the same extent that the corresponding needs of nonhandicapped persons are met, adjustments to regular programs or the provision of different programs may sometimes be necessary. This standard parallels the one established under title VI of Civil Rights Act of 1964 with respect to the provision of educational services to students whose primary language is not English. See Lau v. Nichols, 414 U.S. 563 (1974). To be equally effective, however, an aid, benefit, or service need not produce equal results; it merely must afford an equal opportunity to achieve equal results.

It must be emphasized that, although separate services must be required in some instances, the provision of unnecessarily separate or different services is discriminatory. The addition to paragraph (b)(2) of the phrase "in the most integrated setting appropriated to the person's needs" is intended to reinforce this general concept. A new paragraph (b)(3) has also been added to §104.4, requiring recipients to give qualified handicapped persons the option of participating in regular programs despite the existence of permissibly separate or different programs. The requirement has been reiterated in §§104.38 and 104.47 in connection with physical education and athletics programs.

Section 104.4(b)(1)(v) prohibits a recipient from supporting another entity or person that subjects participants or employees in the recipient's program to discrimination on the basis of handicap. This section would, for example, prohibit financial support by a recipient to a community recreational group or to a professional or social organization that discriminates against handicapped persons. Among the criteria to be considered in each case are the substantiality of the relationship between the recipient and the other entity, including financial support by the recipient, and whether the other entity's activities relate so closely to the recipient's program or activity that they fairly should be considered activities of the recipient itself. Paragraph (b)(1)(vi) was added in response to comment in order to make explicit the prohibition against denying qualified handicapped persons the opportunity to serve on planning and advisory boards responsible for guiding federally assisted programs or activities.

Several comments appeared to interpret §104.4(b)(5), which proscribes discriminatory site selection, to prohibit a recipient that is located on hilly terrain from erecting any new buildings at its present site. That, of course, is not the case. This paragraph is not intended to apply to construction of additional buildings at an existing site. Of course, any such facilities must be made accessible in accordance with the requirements of §104.23.

7. *Assurances of compliance.* Section 104.5(a) requires a recipient to submit to the Assistant Secretary an assurance that each of its programs and activities receiving or benefiting from Federal financial assistance from this Department will be conducted in compliance with their regulation. Many commenters also sought relief from the paperwork requirements imposed by the Department's enforcement of its various civil rights responsibilities by requesting the Department to issue one form incorporating title VI, title IX, and section 504 assurances. The Secretary is sympathetic to this request. While it is not feasible to adopt a single civil rights assurance form at this time, the Office for Civil Rights will work toward that goal.

8. *Private rights of action.* Several comments urged that the regulation incorporate provision granting beneficiaries a private right of action against recipients under section 504. To confer such a right is beyond the authority of the executive branch of Government. There is, however, case law holding that such a right exists. Lloyd v. Regional Transportation Authority, 548 F. 2d 1277 (7th Cir. 1977); see Hairston v. Drosick, Civil No. 75-0691 (S.D. W. Va. Jan 14, 1976); Gurmankin v. Castanzo, 411 F. Supp. 982 (E.D. Pa. 1976); cf. Lau v. Nichols, supra.

9. *Remedial action.* Where there has been a finding of

discrimination, §104.6 requires a recipient to take remedial action to overcome the effects of the discrimination. Actions that might be required under paragraph (a)(1) include provision of services to persons previously discriminated against, reinstatement of employees and development of a remedial action plan. Should a recipient fail to take required remedial action, the ultimate sanctions of court action or termination of Federal financial assistance may be imposed.

Paragraph (a)(2) extends the responsibility for taking remedial action to a recipient that exercises control over a noncomplying recipient. Paragraph (a)(3) also makes clear that handicapped persons who are not in the program at the time that remedial action is required to be taken may also be the subject of such remedial action. This paragraph has been revised in response to comments in order to include persons who would have been in the program if discriminatory practices had not existed. Paragraphs (a) (1), (2), and (3) have also been amended in response to comments to make plain that, in appropriate cases, remedial action might be required to redress clear violations of the statute itself that occurred before the effective date of this regulation.

10. *Voluntary action.* In §104.6(b), the term "voluntary action" has been substituted for the term "affirmative action" because the use of the latter term led to some confusion. We believe the term "voluntary action" more accurately reflects the purpose of the paragraph. This provision allows action, beyond that required by the regulation, to overcome conditions that led to limited participation by handicapped persons, whether or not the limited participation was caused by any discriminatory actions on the part of the recipient. Several commenters urged that paragraphs (a) and (b) be revised to require remedial action to overcome effects of prior discriminatory practices regardless of whether there has been an express finding of discrimination. The self-evaluation requirement in paragraph (c) accomplishes much the same purpose.

11. *Self-evaluation.* Paragraph (c) requires recipients to conduct a self-evaluation in order to determine whether their policies or practices may discriminate against handicapped persons and to take steps to modify any discriminatory policies and practices and their effects. The Department received many comments approving of the addition to paragraph (c) of a requirement that recipients seek the assistance of handicapped persons in the self-evaluation process. This paragraph has been further amended to require consultation with handicapped persons or organizations representing them before recipients undertake the policy modifications and remedial steps prescribed in paragraphs (c) (ii) and (iii).

Paragraph (c)(2), which sets forth the recordkeeping requirements concerning self-evaluation, now applies only to recipients with fifteen or more employees. This change was made as part of an effort to reduce unnecessary or counterproductive administrative obligations on small recipients. For those recipients required to keep records, the requirements have been made more specific; records must include a list of persons consulted and a description of areas examined, problems identified, and corrective steps taken. Moreover, the records must be made available for public inspection.

12. *Grievance procedure.* Section 104.7 requires recipients with fifteen or more employees to designate an individual responsible for coordinating its compliance efforts and to adopt a grievance procedure. Two changes were made in the section in response to comment. A general requirement that appropriate due process procedures be followed has been added. It was decided that the details of such procedures could not at this time be specified because of the varied nature of the persons and entities who must establish the procedures and of the programs to which they apply. A sentence was also added to make clear that grievance procedures are not required to be made available to unsuccessful applicants for employment or to applicants for admission to colleges and universities.

The regulation does not require that grievance procedures be exhausted before recourse is sought from the Department. However, the Secretary believes that it is desirable and efficient in many cases for complainants to seek resolution of their complaints and disputes at the local level and therefore encourages them to use available grievance procedures.

A number of comments asked whether compliance with this section or the notice requirements of 104.8 could be coordinated with comparable action required by the title IX regulation. The Department encourages such efforts.

13. *Notice.* Section 104.8 (formerly §84.9) sets forth requirements for dissemination of statements of nondiscrimination policy by recipients.

It is important that both handicapped persons and the public at large be aware of the obligations of recipients under section 504. Both the Department and recipients have responsibilities in this regard. Indeed the Department intends to undertake a major public information effort to inform persons of their rights under section 504 and this regulation. In §104.8 the Department has sought to impose a clear obligation on major recipients to notify beneficiaries and employees of the requirements of section 504, without dictating the precise way in which this notice must be given. At the same time, we have avoided imposing requirements on small recipients (those with fewer than fifteen employees) that would create unnecessary and counterproductive paper work burdens on them and unduly stretch the enforcement resources of the Department.

Section 104.8(a), as simplified, requires recipients with fifteen or more employees to take appropriate steps to notify beneficiaries and employees of the recipient's obligations under section 504. The last sentence of §104.8(a) has been revised to list possible, rather than required, means of notification. Section 104.8(b) requires recipients to include a notification of their policy of nondiscrimination in recruitment and other general information materials.

In response to a number of comments, §104.8 has been revised to delete the requirements of publication in local newspapers, which has proved to be both troublesome and ineffective. Several commenters suggested that notification on separate forms be allowed until present stocks of publications and forms are depleted. The final regulation explicitly allows this method of compliance. The separate form should, however, be included with each significant publication or form that is distributed.

Section 104 which prohibited the use of materials that might give the impression that a recipient excludes qualified handicapped persons from its program, has been deleted. The Department is convinced by the comments that this provision is unnecessary and difficult to apply. The Department encourages recipients, however, to include in their recruitment and other

general information materials photographs of handicapped persons and ramps and other features of accessible buildings.

Under new §104.9 the Assistant Secretary may, under certain circumstances, require recipients with fewer than fifteen employees to comply with one or more of these requirements. Thus, if experience shows a need for imposing notice or other requirements on particular recipients or classes of small recipients, the Department is prepared to expand the coverage of these sections.

14. *Inconsistent State laws.* Section 104.10(a) states that compliance with the regulation is not excused by State or local laws limiting the eligibility of qualified handicapped persons to receive services or to practice an occupation. The provision thus applies only with respect to state or local laws that unjustifiably differentiate on the basis of handicap.

Paragraph (b) further points out that the presence of limited employment opportunities in a particular profession, does not excuse a recipient from complying with the regulation. Thus, a law school could not deny admission to a blind applicant because blind lawyers may find it more difficult to find jobs than do nonhandicapped lawyers.

Subpart B—Employment Practices

Subpart B prescribes requirements for nondiscrimination in the employment practices of recipients of Federal financial assistance administered by the Department. This subpart is consistent with the employment provisions of the Department's regulation implementing title IX of the Education Amendments of 1972 (34 CFR, Part 106) and the regulation of the Department of Labor under section 503 of the Rehabilitation Act, which requires certain Federal contractors to take affirmative action in the employment and advancement of qualified handicapped persons. All recipients subject to title IX are also subject to this regulation. In addition, many recipients subject to this regulation receive Federal procurement contracts in excess of $2,500 and are therefore also subject to section 503.

15. *Discriminatory practices.* Section 104.11 sets forth general provisions with respect to discrimination in employment. A new paragraph (a)(2) has been added to clarify the employment obligations of recipients that receive Federal funds under Part B of the Education of the Handicapped Act, as amended (EHA). Section 606 of the EHA obligates elementary or secondary school systems that receive EHA funds to take positive steps to employ and advance in employment qualified handicapped persons. This obligation is similar to the nondiscrimination requirement of section 504 but requires recipients to take additional steps to hire and promote handicapped persons. In enacting section 606 Congress chose the words "positive steps" instead of "affirmative action" advisedly and did not intend section 606 to incorporate the types of activities required under Executive Order 11246 (affirmative action on the basis of race, color, sex, or national origin) or under sections 501 and 503 of the Rehabilitation Act of 1973.

Paragraph (b) of §104.11 sets forth the specific aspects of employment covered by the regulation. Paragraph (c) provides that inconsistent provisions of collective bargaining agreements do not excuse noncompliance.

16. *Reasonable accommodation.* The reasonable accommodation requirement of 104.12 generated a substantial number of comments. The Department remains convinced that its approach is both fair and effective. Moreover, the Department of Labor reports that it has experienced little difficulty in administering the requirements of reasonable accommodation. The provision therefore remains basically unchanged from the proposed regulation.

Section 104.12 requires a recipient to make reasonable accommodation to the known physical or mental limitations of a handicapped applicant or employee unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its program. Where a handicapped person is not qualified to perform a particular job, where reasonable accommodation does not overcome the effects of a person's handicap, or where reasonable accommodation causes undue hardship to the employer, failure to hire or promote the handicapped person will not be considered discrimination.

Section 104.12(b) lists some of the actions that constitute reasonable accommodation. The list is neither all-inclusive nor meant to suggest that employers must follow all of the actions listed.

Reasonable accommodation includes modification of work schedules, including part-time employment, and job restructuring. Job restructuring may entail shifting nonessential duties to other employees. In other cases, reasonable accommodation may include physical modifications or relocation of particular offices or jobs so that they are in facilities or parts of facilities that are accessible to and usable by handicapped persons. If such accommodations would cause undue hardship to the employer, they need not be made.

Paragraph (c) of this section sets forth the factors that the Office for Civil Rights will consider in determining whether an accommodation necessary to enable an applicant or employee to perform the duties of a job would impose an undue hardship. The weight given to each of these factors in making the determination as to whether an accommodation constitutes undue hardship will vary depending on the facts of a particular situation. Thus, a small day-care center might not be required to expend more than a nominal sum, such as that necessary to equip a telephone for use by a secretary with impaired hearing, but a large school district might be required to make available a teacher's aide to a blind applicant for a teaching job. The reasonable accommodation standard in §104.12 is similar to the obligation imposed upon Federal contractors in the regulation implementing section 503 of the Rehabilitation Act of 1973, administered by the Department of Labor. Although the wording of reasonable accommodation provisions of the two regulations is not identical, the obligation that the two regulations impose is the same, and the Federal Government's policy in implementing the two sections will be uniform. The Department adopted the factors listed in paragraph (c) instead of the "business necessity" standard of the Labor regulation because that term seemed inappropriate to the nature of the programs operated by the majority of institutions subject to this regulation, e.g., public school systems, colleges and universities. The factors listed in paragraph (c) are intended to make the rationale underlying the business necessity standard applicable to an understandable by recipients of ED funds.

17. *Tests and selection criteria.* Revised §104.13(a) prohibits employers from using test or other selection criteria that screen out or tend to screen out handicapped persons unless the

test or criterion is shown to be job-related and alternative tests and criteria that do not screen out or tend to screen out as many handicapped persons are not shown by the Assistant Secretary to be available. This paragraph is an application of the principle established under title VII of the Civil Rights Act of 1964 in Griggs v. Duke Power Company, 401 U.S. 424 (1971).

Under the proposed section, a statistical showing of adverse impact on handicapped persons was required to trigger an employer's obligation to show that employment criteria and qualifications relating to handicap were necessary. This requirement was changed because the small number of handicapped persons taking tests would make statistical showings of "disproportionate, adverse effect" difficult and burdensome. Under the altered, more workable provision, once it is shown that an employments test substantially limits the opportunities of handicapped persons, the employer must show the test to be job-related. A recipient is no longer limited to using predictive validity studies as the method for demonstrating that a test or other selection criterion is in fact job-related. Nor, in all cases, are predictive validity studies sufficient to demonstrate that a test or criterion is job-related. In addition, §104.13(a) has been revised to place the burden on the Assistant Secretary, rather than the recipient, to identify alternate tests.

Section 104.13(b) requires that a recipient take into account that some tests and criteria depend upon sensory, manual, or speaking skills that may not themselves be necessary to the job in question but that may make the handicapped person unable to pass the test. The recipient must select and administer tests so as best to ensure that the test will measure the handicapped person's ability to perform on the job rather than the person's ability to see, hear, speak, or perform manual tasks, except, of course, where such skills are the factors that the test purports to measure. For example, a person with a speech impediment may be perfectly qualified for jobs that do not or need not, with reasonable accommodation, require ability to speak clearly. Yet, if given an oral test, the person will be unable to perform in a satisfactory manner. The test results will not, therefore, predict job performance but instead will reflect impaired speech.

18. *Preemployment inquiries.* Section 104.14, concerning preemployment inquiries, generated a large number of comments. Commenters representing handicapped persons strongly favored a ban on preemployment inquiries on the ground that such inquiries are often used to discriminate against handicapped persons and are not necessary to serve any legitimate interests of employers. Some recipients, on the other hand, argued that preemployment inquiries are necessary to determine qualifications of the applicant, safety hazards caused by a particular handicapping condition, and accommodations that might be required.

The Secretary has concluded that a general prohibition of preemployment inquiries is appropriate. However, a sentence has been added to paragraph (a) to make clear that an employer may inquire into an applicant's ability to perform job-related tasks but may not ask if the person has a handicap. For example, an employer may not ask on an employment form if an applicant is visually impaired but may ask if the person has a current driver's license (if that is a necessary qualification for the position in question). Similarly, employers may make inquiries about an applicant's ability to perform a job safely. Thus, an employer may not ask if an applicant is an epileptic but may ask whether the person can perform a particular job without endangering other employees.

Section 104.14(b) allows preemployment inquiries only if they are made in conjunction with required remedial action to correct past discrimination, with voluntary action to overcome past conditions that have limited the participation of handicapped persons, or with obligations under section 503 of the Rehabilitation Act of 1973. In these instances, paragraph (b) specifies certain safeguards that must be followed by the employer.

Finally, the revised provision allows an employer to condition offers of employment to handicapped persons on the results of medical examinations, so long as the examinations are administered to all employees in a nondiscriminatory manner and the results are treated on a confidential basis.

19. *Specific acts of discrimination.* Sections 104.15 (recruitment), 140.16 (compensation), 104.17 (job classification and structure) and 104.18 (fringe benefits) have been deleted from the regulation as unnecessary duplicative of §104.11 (discrimination prohibited). The deletion of these sections in no way changes the substantive obligations of employers subject to this regulation from those set forth in the July 16 proposed regulation. These deletions bring the regulation closer in form to the Department of Labor's section 503 regulation.

A proposed section, concerning fringe benefits, had allowed for differences in benefits or contributions between handicapped and nonhandicapped persons in situations only where such differences could be justified on an actuarial basis. Section 104.11 simply bars discrimination in providing fringe benefits and does not address the issue of actuarial differences. The Department believes that currently available data and experience do not demonstrate a basis for promulgating a regulation specifically allowing for differences in benefits or contributions.

Subpart C—Program Accessibility

In general, Subpart C prohibits the exclusion of qualified handicapped persons from federally assisted programs or activities because a recipient's facilities are inaccessible or unusable.

20. *Existing facilities.* Section 104.22 maintains the same standard for nondiscrimination in regard to existing facilities as was included in the proposed regulation. The section states that a recipient's program or activity, when viewed in its entirety, must be readily accessible to and usable by handicapped persons. Paragraphs (a) and (b) make clear that a recipient is not required to make each of its existing facilities accessible to handicapped persons if its program as a whole is accessible. Accessibility to the recipient's program or activity may be achieved by a number of means, including redesign of equipment, reassignment of classes or other services to accessible buildings, and making aides available to beneficiaries. In choosing among methods of compliance, recipients are required to give priority consideration to methods that will be consistent with provision of services in the most appropriate integrated setting. Structural changes in existing facilities are required only where there is no other feasible way to make the recipient's program accessible.

Under §104.22, a university does not have to make all of its existing classroom buildings accessible to handicapped students if some of its buildings are already accessible and if it is possible to reschedule or relocate enough classes so as to offer all required courses and a reasonable selection of elective courses in accessible facilities. If sufficient relocation of classes is not possible using existing facilities, enough alterations to ensure program accessibility are required. A university may not exclude a handicapped student from a specifically required course offering because it is not offered in an accessible location, but it need not make every section of that course accessible.

Commenters representing several institutions of higher education have suggested that it would be appropriate for one postsecondary institution in a geographical area to be made accessible to handicapped persons and for other colleges and universities in that area to participate in that school's program, thereby developing an educational consortium for the postsecondary education of handicapped students. The Department believes that such a consortium, when developed and applied only to handicapped persons, would not constitute compliance with §104.22, but would discriminate against qualified handicapped persons by restricting their choice in selecting institutions of higher education and would, therefore, be inconsistent with the basic objectives of the statute.

Nothing in this regulation, however, should be read as prohibiting institutions from forming consortia for the benefit of all students. Thus, if three colleges decide that it would be cost-efficient for one college to offer biology, the second physics, and the third chemistry to all students at the three colleges, the arrangement would not violate section 504. On the other hand, it would violate the regulation if the same institutions set up a consortium under which one college undertook to make its biology lab accessible, another its physics lab, and a third its chemistry lab, and under which mobility-impaired handicapped students (but not other students) were required to attend the particular college that is accessible for the desired courses.

Similarly, while a public school district need not make each of its buildings completely accessible, it may not make only one facility or part of a facility accessible if the result is to segregate handicapped students in a single setting.

All recipients that provide health, welfare, or other social services may also comply with §104.22 by delivering services at alternate accessible sites or making home visits. Thus, for example, a pharmacist might arrange to make home deliveries of drugs. Under revised §104.22(c), small providers of health, welfare, and social services (those with fewer than fifteen employees) may refer a beneficiary to an accessible provider of the desired service, but only if no means of meeting the program accessibility requirement other than a significant alteration in existing facilities is available. The referring recipient has the responsibility of determining that the other provider is in fact accessible and willing to provide the service.

A recent change in the tax law may assist some recipients in meeting their obligations under this section. Under section 2122 of the Tax Reform Act of 1976, recipients that pay federal income tax are eligible to claim a tax deduction of up to $25,000 for architectural and transportation modifications made to improve accessibility for handicapped persons. See 42 FR 17870 (April 4, 1977), adopting 26 CFR 7.190.

Several commenters expressed concern about the feasibility of compliance with the program accessibility standard. The Secretary believes that the standard is flexible enough to permit recipients to devise ways to make their programs accessible short of extremely expensive or impractical physical changes in facilities. Accordingly, the section does not allow for waivers. The Department is ready at all times to provide technical assistance to recipients in meeting their program accessibility responsibilities. For this purpose, the Department is establishing a special technical assistance unit. Recipients are encouraged to call upon the unit staff for advice and guidance both on structural modifications and on other ways of meeting the program accessibility requirement.

Paragraph (d) has been amended to require recipients to make all nonstructural adjustments necessary for meeting the program accessibility standard within sixty days. Only where structural changes in facilities are necessary will a recipient be permitted up to three years to accomplish program accessibility. It should be emphasized that the three-year time period is not a waiting period and that all changes must be accomplished as expeditiously as possible. Further, it is the Department's belief, after consultation with experts in the field, that outside ramps to buildings can be constructed quickly and at relatively low cost. Therefore, it will be expected that such structural additions will be made promptly to comply with §104.22(d).

The regulation continues to provide, as did the proposed version, that a recipient planning to achieve program accessibility by making structural changes must develop a transition plan for such changes within six months of the effective date of the regulation. A number of commenters suggested extending that period to one year. The secretary believes that such an extension is unnecessary and unwise. Planning for any necessary structural changes should be undertaken promptly to ensure that they can be completed within the three-year period. The elements of the transition plan as required by the regulation remain virtually unchanged from the proposal but §104.22(d) now includes a requirement that the recipient make the plan available for public inspection.

Several commenters expressed concern that the program accessibility standard would result in the segregation of handicapped persons in educational institutions. The regulation will not be applied to permit such a result. See §104.4(c)(2)(iv), prohibiting unnecessary separate treatment; §104.35, requiring that students in elementary and secondary schools be educated in the most integrated setting appropriate to their needs; and new §104.43(d), applying the same standard to postsecondary education.

We have received some comments from organizations of handicapped persons on the subject of requiring, over an extended period of time, a barrier-free environment that is, requiring the removal of all architectural barriers in existing facilities. The Department has considered these comments but has decided to take no further action at this time concerning these suggestions, believing that such action should only be considered in light of experience in implementing the program accessibility standard.

21. *New construction.* Section 104.23 requires that all new facilities, as well as alterations that could affect access to and use of existing facilities, be designed and constructed in a

manner so as to make the facility accessible to and usable by handicapped persons. Section 104.23(a) has been amended so that it applies to each newly constructed facility if the construction was commended after the effective date of the regulation. The words "if construction has commenced" will be considered to mean "if groundbreaking has taken place." Thus, a recipient will not be required to alter the design of a facility that has progressed beyond groundbreaking prior to the effective date of the regulation.

Paragraph (b) requires certain alterations to conform to the requirement of physical accessibility in paragraph (a). If an alteration is undertaken to a portion of a building the accessibility of which could be improved by the manner in which the alteration is carried out, the alteration must be made in that manner. Thus, if a doorway or wall is being altered, the door or other wall opening must be made wide enough to accommodate wheelchairs. On the other hand, if the alteration consists of altering ceilings, the provisions of this section are not applicable because this alteration cannot be done in a way that affects the accessibility of that portion of the building. The phrase "to the maximum extend feasible" has been added to allow for the occasional case in which the nature of an existing facility is such as to make it impractical or prohibitively expensive to renovate the building in a manner that results in its being entirely barrier-free. In all such cases, however, the alteration should provide the maximum amount of physical accessibility feasible.

[As proposed, §104.23(c) required compliance with the American National Standards Institute (ANSI) standard on building accessibility as the minimum necessary for compliance with the accessibility requirement of §104.23(a) and (b). The reference to the ANSI standard created some ambiguity, since the standard itself provides for waivers where other methods are equally effective in providing accessibility to the facility. [42]]

[42] This paragraph was deleted per an amendment to the Section 504 regulations at 45 Fed. Reg. 52141, Dec. 19, 1990. The new language of the amendment is provided above in §104.23(c).

Moreover, the Secretary does not wish to discourage innovation in barrier-free construction by requiring absolute adherence to a rigid design standard. Accordingly, §104.23(c) has been revised to permit departures from particular requirements of the ANSI standard where the recipient can demonstrate that equivalent access to the facility is provided.

Section 104.23(d) of the proposed regulation, providing for a limited deferral of action concerning facilities that are subject to section 502 as well as section 504 of the Act, has been deleted. The Secretary believes that the provision is unnecessary and inappropriate to this regulation. The Department will, however, seek to coordinate enforcement activities under this regulation with those of the Architectural and Transportation Barriers Compliance Board.

Subpart D—Preschool, Elementary, and Secondary Education

Subpart D sets forth requirements for nondiscrimination in preschool, elementary, secondary, and adult education programs and activities, including secondary vocational education programs. In this context, the term "adult education" refers only to those educational programs and activities for adults that are operated by elementary and secondary schools.

The provisions of Subpart D apply to state and local educational agencies. Although the subpart applies, in general, to both public and private education programs and activities that are federally assisted, §§104.32 and 104.33 apply only to public programs and §104.39 applies only to private programs; §§104.35 and 104.36 apply both to public programs and to those private programs that include special services for handicapped students.

Subpart B generally conforms to the standards established for the education of handicapped persons in Mills v Board of Education of the District of Columbia, 348 F. Supp. 866 (D.D.C. 1972), Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania, 344 F. Supp. 1257 (E.D. 1971), 343 F. Supp. 279 (E.D. Pa. 1972), and Lebanks v. Spears, 60, F.R.D. 135 (E.D. La. 1973), as well as in the Education of the Handicapped Act, as amended by Pub. L. 94-142 (the EHA).

The basic requirements common to those cases, to the EHA, and to this regulation are (1) that handicapped persons, regardless of the nature or severity of their handicap, be provided a free appropriate public education, (2) that handicapped students be educated with nonhandicapped students to the maximum extent appropriate to their needs, (3) that educational agencies undertake to identify and locate all unserved handicapped children, (4) that evaluation procedures be improved in order to avoid the inappropriate education that results from the misclassification of students, and (5) that procedural safeguard be established to enable parents and guardians to influence decisions regarding the evaluation and placement of their children. These requirements are designed to ensure that no handicapped child is excluded from school on the basis of handicap and, if a recipient demonstrates that placement in a regular educational setting cannot be achieved satisfactorily, that the student is provided with adequate alternative services suited to the student's needs without additional cost to the student's parents or guardian. Thus, a recipient that operates a public school system must either educate handicapped children in its regular program or provide such children with an appropriate alternative education at public expense.

It is not the intention of the Department, except in extraordinary circumstances, to review the result of individual placement and other educational decisions, so long as the school district complies with the "process" requirements of this subpart (concerning identification and location, evaluation, and due process procedures). However, the Department will place a high priority on investigating cases which may involve exclusion of a child from the education system or a pattern or practice of discriminatory placements or education.

22. *Location and notification.* Section 104.32 requires public schools to take steps annually to identify and locate handicapped children who are not receiving an education and to publicize to handicapped children and their parents the rights and duties established by section 504 and this regulation. This section has been shortened without substantive change.

23. *Free appropriate public education.* Under §104.33(a), a recipient is responsible for providing a free appropriate public education to each qualified handicapped person who is in the

recipient's jurisdiction. The word "in" encompasses the concepts of both domicile and actual residence. If a recipient places a child in a program other than its own, it remains financially responsible for the child, whether or not the other program is operated by another recipient or educational agency. Moreover, a recipient may not place a child in a program that is inappropriate or that otherwise violates the requirements of Subpart D. And in no case may a recipient refuse to provide services to a handicapped child in its jurisdiction because of another person's or entity's failure to assume financial responsibility.

Section 104.33(b) concerns the provision of appropriate educational services to handicapped children. To be appropriate, such services must be designed to meet handicapped children's individual educational needs to the same extent that those of nonhandicapped children are met. An appropriate education could consist of education in regular classes, education in regular classes with the use of supplementary services, or special education and related services. Special education may include specially designed instruction in classrooms, at home, or in private or public institutions and may be accompanied by such related services as developmental, corrective, and other supportive services (including psychological, counseling, and medical diagnostic services). The placement of the child must however, be consistent with the requirements of §104.34 and be suited to his or her educational needs.

The quality of the educational services provided to handicapped students must equal that of the services provided to nonhandicapped students; thus, handicapped student's teachers must be trained in the instruction of persons with the handicap in question and appropriate materials and equipment must be available. The Department is aware that the supply of adequately training teachers may, at least at the outset of the imposition of this requirement, be insufficient to meet the demand of all recipients. This factor will be considered in determining the appropriateness of the remedy for noncompliance with this section. A new §104.33(b)(2) has been added, which allows this requirement to be met through the full implementation of an individualized education program developed in accordance with the standard of the EHA.

Paragraph (c) of §104.33 sets forth the specific financial obligations of a recipient. If a recipient does not itself provide handicapped persons with the requisite services, it must assume the cost of any alternate placement. If, however, a recipient offers adequate services and if alternate placement is chosen by a student's parent or guardian, the recipient need not assume the cost of the outside services. (If the parent or guardian believes that his or her child cannot be suitably educated in the recipient's program, he or she may make use of the procedures established in §104.36.) Under this paragraph, a recipient's obligation extends beyond the provision of tuition payments in the case of placement outside the regular program. Adequate transportation must also be provided. Recipients must also pay for psychological services and those medical services necessary for diagnostic and evaluative purposes.

If the recipient places a student, because of his or her handicap, in a program that necessitates his or her being away from home, the payments must also cover room and board and nonmedical care (including custodial and supervisory care). When residential care is necessitated not by the student's handicap but by factors such as the student's home conditions, the recipient is not required to pay the cost of room and board.

Two new sentences have been added to paragraph (c)(1) to make clear that a recipient's financial obligations need not be met solely through its own funds. Recipients may rely on funds from any public or private source including insurers and similar third parties.

The EHA requires a free appropriate education to be provided to handicapped children "no later than September 1, 1978," but section 504 contains no authority for delaying enforcement. To resolve this problem, a new paragraph (d) has been added to §104.33. Section 104.33(d) requires recipients to achieve full compliance with the free appropriate public education requirements of §104.33 as expeditiously as possible, but in no event later than September 1, 1978. The provision also makes clear that, as of the effective date of this regulation, no recipient may exclude a qualified handicapped child from its educational program. This provision against exclusion is consistent with the order of providing services set forth in section 612(3) of the EHA, which places the highest priority on providing services to handicapped children who are not receiving an education.

24. *Educational setting.* Section 104.34 prescribes standards for educating handicapped persons with nonhandicapped persons to the maximum extent appropriate to the needs of the handicapped person in question. A handicapped student may be removed from the regular educational setting only where the recipient can show that the needs of the student would, on balance, be served by placement in another setting.

Although under §104.34, the needs of the handicapped person are determinative as to proper placement, it should be stressed that, where a handicapped student is so disruptive in a regular classroom that the education of other students is significantly impaired, the needs of the handicapped child cannot be met in that environment. Therefore, regular placement would not be appropriate to his or her needs and would not be required by §104.34.

Among the factors to be considered in placing a child is the need to place the child as close to home as possible. A new sentence has been added to paragraph (a) requiring recipients to take this factor into account. As pointed out in several comments, the parents' right under §104.36 to challenge the placement of their child extends not only to placement in special classes or separate schools but also to placement in a distant school and, in particular, to residential placement. An equally appropriate educational program may exist closer to home; this issue may be raised by the parent or guardian under §§104.34 and 104.36.

New paragraph (b) specified that handicapped children must also be provided nonacademic services in as integrated a setting as possible. This requirement is especially important for children whose educational needs necessitate their being solely with other handicapped children during most of each day. To the maximum extent appropriate, children in residential settings are also to be provided opportunities for participation with other children.

Section 104.34(c) requires that any facilities that are identifiable as being for handicapped students be comparable in quality to other facilities of the recipient. A number of comments objected to this section on the basis that it encourages the creation and maintenance of such facilities. This is not the intent

of the provision. A separate facility violates section 504 unless it is indeed necessary to the provision of an appropriate education to certain handicapped students. In those instances in which such facilities are necessary (as might be the case, for example, for severely retarded persons), this provision requires that the educational services provided be comparable to those provided in the facilities of the recipient that are not identifiable as being for handicapped persons.

25. *Evaluation and placement.* Because the failure to provide handicapped persons with an appropriate education is so frequently the result of misclassification or misplacement, §104.33(b)(1) makes compliance with its provisions contingent upon adherence to certain procedures designed to ensure appropriate classification and placement. These procedures, delineated in §§104.35 and 104.36, are concerned with testing and other evaluation methods and with procedural due process rights.

Section 104.35(a) requires that an individual evaluation be conducted before any action is taken with respect either to the initial placement of a handicapped child in a regular or special education program or to any subsequent significant change in that placement. Thus, a full reevaluation is not required every time an adjustment in placement is made. "Any action" includes denials of placement.

Paragraphs (b) and (c) of §104.35 establishes procedures designed to ensure that children are not misclassified, unnecessarily labeled as being handicapped, or incorrectly placed because of inappropriate selection, administration, or interpretation of evaluation materials. This problem has been extensively documented in "Issues in the Classification of Children," a report by the Project on Classification of Exceptional Children, in which the HEW Interagency Task Force participated. The provisions of these paragraphs are aimed primarily at abuses in the placement process that result from misuse of, or undue or misplaced reliance on, standardized scholastic aptitude tests.

Paragraph (b) has been shortened but not substantively changed. The requirement in former subparagraph (1) that recipients provide and administer evaluation materials in the native language of the student has been deleted as unnecessary, since the same requirement already exists under title VI and is more appropriately covered under that statute. Paragraphs (1) and (2) are, in general, intended to prevent misinterpretation and similar misuse of test scores and, in particular, to avoid undue reliance on general intelligence tests. Subparagraph (3) requires a recipient to administer tests to a student with impaired sensory, manual, or speaking skills in whatever manner is necessary to avoid distortion of the test results by the impairment. Former subparagraph (4) has been deleted as unnecessarily repetitive of the other provisions of this paragraph.

Paragraph (c) requires a recipient to draw upon a variety of sources in the evaluation process so that the possibility of error in classification is minimized. In particular, it requires that all significant factors relating to the learning process, including adaptive behavior, be considered. (Adaptive behavior is the effectiveness with which the individual meets the standards of personal independence and social responsibility expected of his or her age and cultural group.) Information from all sources must be documented and considered by a group of persons, and the procedure must ensure that the child is placed in the most integrated setting appropriate.

The proposed regulation would have required a complete individual reevaluation of the student each year. The Department has concluded that it is inappropriate in the section 504 regulation to require full reevaluations on such a rigid schedule. Accordingly, §104.35(c) requires periodic reevaluations and specifies that reevaluations in accordance with the EHA will constitute compliance. The proposed regulation implementing the EHA allows reevaluation at three-year intervals except under certain specified circumstances.

Under §104.36, a recipient must establish a system of due process procedures to be afforded to parents or guardians before the recipient takes any action regarding the identification, evaluation, or educational placement of a person who, because of handicap, needs or is believed to need special education or related services. This section has been revised. Because the due process procedures of the EHA, incorporated by reference in the proposed section 504 regulation , are inappropriate for some recipients not subject to that Act, the section now specifies minimum necessary procedures: notice, a right to inspect records, an impartial hearing with a right to representation by counsel, and a review procedure. The EHA procedures remain one means of meeting the regulation's due process requirements, however, and are recommended to recipients as a model.

26. *Nonacademic services.* Section 104.37 requires a recipient to provide nonacademic and extracurricular services and activities in such manner as is necessary to afford handicapped students an equal opportunity for participation. Because these services and activities are part of a recipient's education program, they must, in accordance with the provisions of §104.34, be provided in the most integrated setting appropriate.

Revised paragraph (c)(2) does permit separation or differentiation with respect to the provision of physical education and athletics activities, but only if qualified handicapped students are also allowed the opportunity to compete for regular teams or participate in regular activities. Most handicapped students are able to participate in one or more regular physical education and athletics activities. For example, a student in a wheelchair can participate in regular archery course, as can a deaf student in a wrestling course.

Finally, the one-year transition period provided in a proposed section was deleted in response to the almost unanimous objection of commenters to that provision.

27. *Preschool and adult education.* Section 104.38 prohibits discrimination on the basis of handicap in preschool and adult education programs. Former paragraph (b), which emphasized that compensatory programs for disadvantaged children are subject to section 504, has been deleted as unnecessary, since it is comprehended by paragraph (a).

28. *Private education.* Section 104.39 sets forth the requirements applicable to recipients that operate private education programs and activities. The obligations of these recipients have been changed in two significant respects: first, private schools are subject to the evaluation and due process provisions of the subpart only if they operate special education programs; second, under §104.39(b), they may charge more for providing services to handicapped students than to nonhandicapped students to the extent that additional charges can be justified by increased costs.

Paragraph (a) of §104.39 is intended to make clear that recipients that operate private education programs and activities are not required to provide an appropriate education to handicapped students with special educational needs if the recipient does not offer programs designed to meet those needs. Thus, a private school that has no program for mentally retarded persons is neither required to admit such a person into its program nor to arrange or pay for the provision of the person's education in another program. A private recipient without a special program for blind students, however, would not be permitted to exclude, on the basis of blindness, a blind applicant who is able to participate in the regular program with minor adjustments in the manner in which the program is normally offered.

Subpart E—Postsecondary Education

Subpart E prescribes requirements for nondiscrimination in recruitment, admission, and treatment of students in postsecondary education programs and activities, including vocational education.

29 *Admission and recruitment.* In addition to a general prohibition of discrimination on the basis of handicap in §104.42(a), the regulation delineates, in §104.42(b), specific prohibitions concerning the establishment of limitations of admission of handicapped students, the use of tests or selection criteria, and preadmission inquiry. Several changes have been made in this provision.

Section 104.42(b) provides that postsecondary educational institutions may not use any test or criterion for admission that has a disproportionate, adverse effect on handicapped persons unless it has been validated as a predictor of academic success and alternate tests or criteria with a less disproportionate, adverse effect are shown by the Department to be available. There are two significant changes in this approach from the July 16 proposed regulation.

First, many commenters expressed concern that §104.42(b)(2)(ii) could be interpreted to require a "global search" for alternate tests that do not have a disproportionate, adverse impact on handicapped persons. This was not the intent of the provision and, therefore, it has been amended to place the burden on the Assistant Secretary for Civil Rights, rather than on the recipient, to identify alternate tests.

Second, a new paragraph (d), concerning validity studies, has been added. Under the proposed regulation, overall success in an education program, not just first-year grades, was the criterion against which admissions tests were to be validated. This approach has been changed to reflect the comment of professional testing services that use of first-year grades would be less disruptive of present practice and that periodic validity studies against overall success in the education program would be sufficient check on the reliability of first-year grades.

Section 104.42(b)(3) also requires a recipient to assure itself that admissions tests are selected and administered to applicants with impaired sensory, manual, or speaking skills in such manner as is necessary to avoid unfair distortion of test results. Methods have been developed for testing the aptitude and achievement of persons who are not able to take written tests or even to make the marks required for mechanically scored objective tests; in addition, methods for testing persons with visual or hearing impairments are available. A recipient, under this paragraph, must assure itself that such methods are used with respect to the selection and administration of any admissions tests that it uses.

Section 104.42(b)(3)(iii) has been amended to require that admissions tests be administered in facilities that, on the whole, are accessible. In this context, "on the whole" means that not all of the facilities need be accessible so long as a sufficient number of facilities are available to handicapped persons.

Revised §104.42(b)(4) generally prohibits preadmission inquiries as to whether an applicant has a handicap. The considerations that led to this revision are similar to those underlying the comparable revision of §104.14 on preemployment inquiries. The regulation does, however, allow inquiries to be made, after admission but before enrollment, as to handicaps that may require accommodation.

New paragraph (c) parallels the section on preemployment inquiries and allows postsecondary institutions to inquire about applicants' handicaps before admission, subject to certain safeguards, if the purpose of the inquiry is to take remedial action to correct past discrimination or to take voluntary action to overcome the limited participation of handicapped persons in postsecondary educational institutions.

Proposed §104.42(c), which would have allowed different admissions criteria in certain cases for handicapped persons, was widely misinterpreted in comments from both handicapped persons and recipients. We have concluded that the section is unnecessary, and it has been deleted.

30. *Treatment of students.* Section 104.43 contains general provisions prohibiting the discriminatory treatment of qualified handicapped applicants. Paragraph (b) requires recipients to ensure that equal opportunities are provided to its handicapped students in education programs and activities that are not operated by the recipient. The recipient must be satisfied that the outside education program or activity as a whole is nondiscriminatory. For example, a college must ensure that discrimination on the basis of handicap does not occur in connection with teaching assignments of student teachers in elementary or secondary schools not operated by the college. Under the "as a whole" wording, the college could continue to use elementary or secondary school systems that discriminate if, and only if, the college's student teaching program, when viewed in its entirety, offered handicapped student teachers the same range and quality of choice in student teaching assignments afforded nonhandicapped students.

Paragraph (c) of this section prohibits a recipient from excluding qualified handicapped students from any course, course of study, or other part of its education program or activity. This paragraph is designed to eliminate the practice of excluding handicapped persons from specific courses and from areas of concentration because of factors such as ambulatory difficulties of the student or assumptions by the recipient that no job would be available in the area in question for a person with that handicap.

New paragraph (d) requires postsecondary institutions to operate their programs and activities so that handicapped students are provided services in the most integrated setting appropriate. Thus, if a college had several elementary physics classes and had moved one such class to the first floor of the science building to accommodate students in wheelchairs, it

would be a violation of this paragraph for the college to concentrate handicapped students with no mobility impairments in the same class.

31. *Academic adjustments.* Paragraph (a) of §104.44 requires that a recipient make certain adjustments to academic requirements and practices that discriminate or have the effect of discriminating on the basis of handicap. This requirement, like its predecessor in the proposed regulation, does not obligate an institution to waive course or other academic requirements. But such institutions must accommodate those requirements to the needs of individual handicapped students. For example, an institution might permit an otherwise qualified handicapped student who is deaf to substitute an art appreciation or music history course for a required course in music appreciation or could modify the manner in which the music appreciation course is conducted for the deaf student. It should be stressed that academic requirements that can be demonstrated by the recipient to be essential to its program of instruction or to particular degrees need not be changed.

Paragraph (b) provides that postsecondary institutions may not impose rules that have the effect of limiting the participation of handicapped students in the education program. Such rules include prohibition of tape recorders or braillers in classrooms and dog guides in campus buildings. Several recipients expressed concern about allowing students to tape record lectures because the professor may later want to copyright the lectures. This problem may be solved by requiring students to sign agreements that they will not release the tape recording or transcription or otherwise hinder the professor's ability to obtain a copyright.

Paragraph (c) of this section, concerning the administration of course examinations to students with impaired sensory, manual, or speaking skills, parallels the regulation's provisions on admissions testing (§104.42(b)) and will be similarly interpreted.

Under §104.44(d), a recipient must ensure that no handicapped student is subject to discrimination in the recipient's program because of the absence of necessary auxiliary educational aids. Colleges and universities expressed concern about the costs of compliance with this provision.

The Department emphasizes that recipients can usually meet this obligation by assisting students in using existing resources for auxiliary aids such as state vocational rehabilitation agencies and private charitable organizations. Indeed, the Department anticipates that the bulk of auxiliary aids will be paid for by state and private agencies, not by colleges or universities. In those circumstances where the recipient institution must provide the educational auxiliary aide, the institution has flexibility in choosing the methods by which the aids will be supplied. For example, some universities have used students to work with the institution's handicapped students. Other institutions have used existing private agencies that tape texts for handicapped students free of charge in order to reduce the number of readers needed for visually impaired students.

As long as no handicapped person is excluded from a program because of the lack of an appropriate aid, the recipient need not have all such aids on hand at all times. Thus, readers need not be available in the recipient's library at all times so long as the schedule of times when a reader is available is established, is adhered to, and is sufficient. Of course, recipients are not required to maintain a complete braille library.

32. *Housing.* Section 104.45(a) requires postsecondary institutions to provide housing to handicapped students at the same cost as they provide it to other students and in a convenient, accessible, and comparable manner. Commenters, particularly blind persons pointed out that some handicapped persons can live in any college housing and need not wait to the end of the transition period in Subpart C to be offered the same variety and scope of housing accommodations given to nonhandicapped persons. The Department concurs with this position and will interpret this section accordingly.

A number of colleges and universities reacted negatively to paragraph (b) of this section. It provides that, if a recipient assists in making off-campus housing available to its students, it should develop and implement procedures to assure itself that off-campus housing, as a whole, is available to handicapped students. Since postsecondary institutions are presently required to assure themselves that off-campus housing is provided in a manner that does not discriminate on the basis of sex (§106.32 of the title IX regulation), they may use the procedures developed under title IX in order to comply with §104.45(b). It should be emphasized that not every off-campus living accommodation need be made accessible to handicapped persons.

33. *Health and insurance.* A proposed section, providing that recipients may not discriminate on the basis of handicap in the provision of health related services, has been deleted as duplicative of the general provisions of §104.43. This deletion represents no change in the obligation of recipients to provide nondiscriminatory health and insurance plans. The Department will continue to require that nondiscriminatory health services be provided to handicapped students. Recipients are not required, however, to provide specialized services and aids to handicapped persons in health programs. If, or example, a college infirmary treats only simple disorders such as cuts, bruises, and colds, its obligation to handicapped persons is to treat such disorders for them.

34. *Financial assistance.* Section 104.46(a), prohibiting discrimination in providing financial assistance, remains substantively the same. It provides that recipients may not provide less assistance to or limit the eligibility of qualified handicapped persons for such assistance, whether the assistance is provided directly by the recipient or by another entity through the recipient's sponsorship. Awards that are made under wills, trusts, or similar legal instruments in a discriminatory manner are permissible, but only if the overall effect of the recipient's provision of financial assistance is not discriminatory on the basis of handicap.

It will not be considered discriminatory to deny, on the basis of handicap, an athletic scholarship to a handicapped person if the handicap renders the person unable to qualify for the award. For example, a student who has a neurological disorder might be denied a varsity football scholarship on the basis of his inability to play football, but a deaf person could not, on the basis of handicap, be denied a scholarship for the school's diving team. The deaf person could, however, be denied a scholarship on the basis of a comparative diving ability.

Commenters on §104.46(b), which applies to assistance in obtaining outside employment for students, expressed similar concerns to those raised under §104.43(b), concerning coopera-

tive programs. This paragraph has been changed in the same manner as §104.43(b) to include the "as a whole" concept and will be interpreted in the same manner as §104.43(b).

35. *Nonacademic services.* Section 104.47 establishes nondiscrimination standards for physical education and athletics counseling and placement services, and social organizations. This section sets the same standards as does §104.38 of Subpart D, discussed above, and will be interpreted in a similar fashion.

Subpart F—Health, Welfare, and Social Services

Subpart F applies to recipients that operate health, welfare, and social service programs. The Department received fewer comments on this subpart than on others.

Although many commented that Subpart F lacked specificity, these commenters provided neither concrete suggestions nor additions. Nevertheless, some changes have been made, pursuant to comment, to clarify the obligations of recipients in specific areas. In addition, in an effort to reduce duplication in the regulation, the section governing recipients providing health services has been consolidated with the section regulating providers of welfare and social services. Since the separate provisions that appeared in the proposed regulation were almost identical, no substantive change should be inferred from their consolidation.

Several commenters asked whether Subpart F applies to vocational rehabilitation agencies whose purpose is to assist in the rehabilitation of handicapped persons. To the extent that such agencies receive financial assistance from the Department, they are covered by Subpart F and all other relevant subparts of the regulation. Nothing in this regulation, however, precludes such agencies from servicing only handicapped persons. Indeed, §104.4(c) permits recipients to offer services or benefits that are limited by federal law to handicapped persons or classes of handicapped persons.

Many comments suggested requiring state social service agencies to take an active role in the enforcement of section 504 with regard to local social service providers. The Department believes that the possibility for federal-state cooperation in the administration and enforcement of section 504 warrants further consideration.

A number of comments also discussed whether section 504 should be read to require payment of compensation to institutionalized handicapped patients who perform services for the institution in which they reside. The Department of Labor has recently issued a proposed regulation under the Fair Labor Standards Act (FLSA) that covers the question of compensation for institutionalized persons, 42 FR 15224 (March 18, 1977). This Department will seek information and comment from the Department of Labor concerning that agency's experience administering the FLSA regulation.

36. *Health, welfare, and other social service providers.* Section 104.52(a) has been expanded in several respects. The addition of new paragraph (a)(2) is intended to make clear the basic requirement of equal opportunity to receive benefits or services in the health, welfare, and social service areas. The paragraph parallels §§104.4(b)(ii) and 104.43(b). New paragraph (a)(3) requires the provision of effective benefits or services, as defined in §104.4(b)(2) (i.e., benefits or services which "afford handicapped persons equal opportunity to obtain the same result (or) to gain the same benefit * * *").

Section 104.52(a) also includes provisions concerning the limitation of benefits or services to handicapped persons and the subjection of handicapped persons to different eligibility standards. One common misconception about the regulation is that it would require specialized hospitals and other health care providers to treat all handicapped persons. The regulation makes no such requirement. Thus, a burn treatment center need not provide other types of medical treatment to handicapped persons unless it provides such medical services to nonhandicapped persons. It could not, however, refuse to treat the burns of a deaf person because of his or her deafness.

Commenters had raised the question of whether the prohibition against different standards of eligibility might preclude recipients from providing special services to handicapped persons or classes of handicapped persons. The regulation will not be so interpreted, and the specific section in question has been eliminated. Section 104.4(c) makes clear that special programs for handicapped persons are permitted.

A new paragraph (a)(5) concerning the provision of different or separate services or benefits has been added. This provision prohibits such treatment unless necessary to provide qualified handicapped persons with benefits and services that are as effective as those provided to others.

Section 104.52(b) has been amended to cover written material concerning waivers of rights or consent to treatment as well as general notices concerning health benefits or services. The section requires the recipient to ensure that qualified handicapped persons are not denied effective notice because of their handicap. For example, recipients could use several different types of notice in order to reach persons with impaired vision or hearing, such as brailled messages, radio spots, and tactical devices on cards or envelopes to inform blind persons of the need to call the recipient for further information.

Section 104.52(c) is a new section requiring recipient hospitals to establish a procedure for effective communication with persons with impaired hearing for the purpose of providing emergency health care. Although it would be appropriate for a hospital to fulfill its responsibilities under this section by having a full-time interpreter for the deaf on staff, there may be other means of accomplishing the desired result of assuring that some means of communication is immediately available for deaf persons needing emergency treatment.

Section 104.52(c), also a new provision, requires recipients with fifteen or more employees to provide appropriate auxiliary aids for persons with impaired sensory, manual, or speaking skills. Further, the Assistant Secretary may require a small provider to furnish auxiliary aids where the provision of aids would not adversely affect the ability of the recipient to provide its health benefits or service.

37. *Treatment of drug addicts and alcoholics.* Section 104.53 is a new section that prohibits discrimination in the treatment and admission of drug and alcohol addicts to hospitals and outpatient facilities. Section 104.53 prohibits discrimination against drug abusers by operators of outpatient facilities, despite the fact that section 407 pertains only to hospitals, because of the broader application of section 504. This provision does not mean that all hospitals and outpatient facilities must treat drug addiction and alcoholism. It simply means, for example, that a cancer clinic may not refuse to treat cancer

1990 Amendments to Section 504 of the Rehabilitation Act of 1973

29 USC § 706(8)

(A) Except as otherwise provided in subparagraph (B), the term "individual with handicaps" means any individual who (i) has a physical or mental disability which for such individual constitutes or results in a substantial handicap to employment and (ii) can reasonably be expected to benefit in terms of employability from vocational rehabilitation services provided pursuant to subchapters I and II of this chapter.

(B) Subject to subparagraphs (C) and (D), the term "individual with handicaps" means, for purposes of subchapters IV and V of this chapter, any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.

(C) (i) for purposes of title V, the term "individual with handicaps" does not include an individual who is currently engaging in the illegal use of drugs, when a covered entity acts on the basis of such use.

(ii) Nothing in clause (i) shall be construed to exclude as an individual with handicaps an individual who—

(I) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use;

(II) is participating in a supervised rehabilitation program and is no longer engaging in such use; or

(III) is erroneously regarded as engaging in such use, but is not engaging in such use; except that it shall not be a violation of this Act for a covered entity to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual described in subclause (I) and (II) is no longer engaging in the illegal use of drugs.

(iii) Notwithstanding clause (i), for purposes and activities providing health services and services provided under title I, II and III, an individual shall not be excluded from the benefits of such programs or activities on the basis of his or her current illegal use of drugs if he or she is otherwise entitled to such services.

(iv) For purposes of programs and activities providing educational services, local educational agencies may take disciplinary action pertaining to the use or possession of illegal drugs or alcohol against any handicapped student who currently is engaging in the illegal use of drugs or in the use of alcohol to the same extent that such disciplinary action is taken against nonhandicapped students. Furthermore, the due process procedures at 34 CFR 104.36 shall not apply to such disciplinary actions.

(v) For purposes of sections 503 and 504 as such sections relate to employment, the term "individual with handicaps" does not include any individual who is an alcoholic whose current use of alcohol prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol abuse, would constitute a direct threat to property or the safety of others.

(D) For the purposes of sections 793 and 794 of this title, as such sections relate to employment, such term does not include an individual who has a currently contagious disease or infection and who, by reason of such disease or infection, would constitute a direct threat to the health or safety or other individuals or who, by reason of the currently contagious disease or infection, is unable to perform the duties of the job.

Add new section at end of §706, as follows:

(22) (A) The term "drug" means a controlled substance, as defined in schedules I through V of section 202 of the Controlled Substances Act (21 U.S.C. 812).

(B) The term "illegal use of drugs" means the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act. Such term does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law.

Appendix B

DEPARTMENT OF EDUCATION
OFFICE OF CIVIL RIGHTS
OCR Letter to Educators from Williams
Chief State School Officers Memoranda
IDEA and 504 Register ADD/ADHD
Senior Staff Memoranda:
Distinctions Between Section 504 and IDEA
Illegal Use of Drugs and/or Alcohol
OCR Peelan Letter
Letter from Department of Education
RE: Clarification of Policies Regarding
Needs of Children with ADD
OCR Facts: Section 504 Coverage of
Children with ADD

UNITED STATES DEPARTMENT OF EDUCATION

OFFICE FOR CIVIL RIGHTS

April 29, 1992

Dear Colleague:

Secretary of Education Lamar Alexander has committed the Department of Education to sending the strongest possible signal that education is the door to opportunity for all Americans. The Department's **AMERICA 2000** strategy is designed to help communities educate all their children well, and to meet world class standards. To help ensure equal educational opportunity for all Americans—which is indispensable to achieving our National Education Goals—the Office for Civil Rights (OCR) will continue its vigorous enforcement of our Federal civil rights statutes and thereby contribute to the achievement of the goals and underlying objectives of **AMERICA 2000**.

One of the four civil rights laws enforced by OCR is Section 504 of the Rehabilitation Act of 1973, which requires that all children with handicaps be afforded equal educational opportunities in federally funded programs and activities, such as our public schools. Because I feel certain you share my commitment to equal educational opportunity, I am writing to alert you to two compliance problems that are occurring with increased frequency. One concerns the failure to provide comparable facilities and services for students with handicaps. The other concerns shorter instructional school days and longer bus rides for students with handicaps due to transportation scheduling.

I would like to take this opportunity to review with you the requirements of Section 504. (A copy of the regulation is enclosed for your reference.) I also want to share with you specific examples of the kinds and quality of services and treatment provided to students with handicaps that are in violation of Section 504.

The Section 504 regulation states that a recipient may not afford a qualified handicapped person an opportunity to participate in or benefit from any aid, benefit, or service that is not equal to that afforded to others. Thus, facilities provided for students with handicaps must be comparable to those provided for nonhandicapped students. Students with handicaps also must receive an equal opportunity to participate in transportation services. Transportation schedules must not result in these students spending appreciably more time on buses than nonhandicapped students, and transportation schedules must be designed to ensure arrival and departure times that do not reduce the length of the school day for students with handicaps for whom a shorter school day has not been prescribed on an individual basis.

A recent review of selected Section 504 letters of findings conducted by my staff revealed that the services and treatment provided to students with handicaps too often were not comparable to those provided to nonhandicapped students. I am concerned that these are not isolated instances; rather, the problems have been found nationwide. A few examples of the types of problems that have been recurring are presented below.

- Classes for students with handicaps were held in storage rooms, home economics rooms, partitioned offices and other areas that were not conducive to an appropriate learning environment.

- Classroom sizes were not adequate to accommodate some of the specific educational, physical, and/or medical needs of students with handicaps.

- Teachers were not provided adequate support or supplies to enable them to give their students an equal education. In some instances, it was found that teachers had to go to unusual lengths to obtain supplies. In one school district, no clerical or secretarial staff was available for teachers of students with handicaps, and teachers had to leave their classes to answer the telephone, while teachers of nonhandicapped students had appropriate clerical assistance.

- Students with handicaps who use bus transportation received an instructional school day substantially shorter than that of nonhandicapped students. In one school district, bus transportation was not provided to a student with a handicap on days when the weather was inclement.

- Some mobility-impaired students did not receive transportation until five months into the school term because the school district did not own an accessible bus.

- Some students with handicaps had school bus rides in excess of four hours and 45 minutes each day because of bus scheduling. These rides were much longer than the bus rides of other students. As a result, many of these handicapped students arrived at school wet. Others became hyperactive and required additional medication.

In each of the examples outlined above, students with handicaps were not provided an education comparable to that provided to nonhandicapped students. I bring these problems to your attention so that we may work cooperatively to ensure that students with handicaps receive the equal educational services and treatment to which they are entitled. State education officials, school administrators, and others responsible for the education of students with handicaps must be aware of these problems and ensure that school districts understand their obligation to provide students with handicaps with facilities and services comparable to those provided to nonhandicapped students. I encourage school districts that are concerned that there may be compliance problems with current or planned programs to contact the appropriate OCR regional office for technical assistance. For your convenience, I am enclosing a list of our regional offices.

I appreciate your attention to this matter.

Sincerely,

Michael L. Williams
Assistant Secretary
for Civil Rights

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES

Memorandum

Date: September 16, 1991

To: Chief State School Officers

From: Robert R. Davila
Assistant Secretary
Office of Special Education and Rehabilitative Services

Michael L. Williams
Assistant Secretary
Office for Civil Rights

John T. MacDonald
Assistant Secretary
Office of Elementary and Secondary Education

Subject: Clarification of Policy to Address the Needs of Children with Attention Deficit Disorders within General and/or Special Education

I. **Introduction**

There is a growing awareness in the education community that attention deficit disorder (ADD) and attention deficit hyperactive disorder (ADHD) can result in significant learning problems for children with those conditions. [1] While estimates of the prevalence of ADD vary widely, we believe that three to five percent of school-aged children may have significant educational problems related to this disorder. Because ADD has broad implications for education as a whole, the Department believes it should clarify State and local responsibility under Federal law for addressing the needs of children with ADD in the schools. Ensuring that these students are able to reach their fullest potential is an inherent part of the National education goals and AMERICA 2000. The National goals, and the strategy for achieving them, are based on the assumptions that: (1) all children can learn and benefit from their education; and (2) the educational community must work to improve the learning opportunities for all children.

This memorandum clarifies the circumstances under which children with ADD are eligible for special education services under Part B of the Individuals with Disabilities Education Act (Part B), as well as the Part B requirements for evaluation of such children's unique educational needs. This memorandum will also clarify the responsibility of State and local educational agencies (SEAs and LEAs) to provide special education and related services to eligible children with ADD under Part B. Finally, this memorandum clarifies the responsibilities of LEAs to provide regular or special education and related aids and services to those children with ADD who are not eligible under Part B, but who fall within the definition of "handicapped person" under Section 504 of the Rehabilitation Act of 1973. Because of the overall educational responsibility to provide services for these children, it is important that general and special education coordinate their efforts.

[1] While we recognize that the disorders ADD and ADHD vary, the term ADD is being used to encompass children with both disorders.

II. Eligibility for Special Education and Related Services under Part B

Last year during the reauthorization of the Education of the Handicapped Act [now the Individuals with Disabilities Education Act], Congress gave serious consideration to including ADD in the definition of "children with disabilities" in the statute. The Department took the position that ADD does not need to be added as a separate disability category in the statutory definition since children with ADD who require special education and related services can meet the eligibility criteria for services under Part B. This continues to be the Department's position.

No change with respect to ADD was made by Congress in the statutory definition of "children with disabilities;" however, language was included in Section 102(a) of the Education of the Handicapped Act Amendments of 1990 that required the Secretary to issue a Notice of Inquiry (NOI) soliciting public comment on special education for children with ADD under Part B. In response to the NOI (published November 29, 1990 in the Federal Register), the Department received over 2000 written comments, which have been transmitted to the Congress. Our review of these written comments indicates that there is confusion in the field regarding the extent to which children with ADD may be served in special education programs conducted under Part B.

A. Description of Part B

Part B requires SEAs and LEAs to make a free appropriate public education (FAPE) available to all eligible children with disabilities and to ensure that the rights and protections of Part B are extended to those children and their parents. 20 U.S.C. 1412(2); 34 CFR §§300.121 and 300.2. Under Part B, FAPE, among other elements, includes the provision of special education and related services, at no cost to parents, in conformity with an individualized education program (IEP). 34 CFR §300.4.

In order to be eligible under Part B, a child must be evaluated in accordance with 34 CFR §§300.530-300.534 as having one or more specified physical or mental impairments, and must be found to require special education and related services by reason of one or more of these impairments. [2] 20 U.S.C. 1401(a)(1); 34 CFR §300.5. SEAs and LEAs must ensure that children with ADD who are determined eligible for services under Part B receive special education and related services designed to meet their unique needs, including special education and related services needs arising from the ADD. A full continuum of placement alternatives, including the regular classroom, must be available for providing special education and related services required in the IEP.

B. Eligibility for Part B services under the "Other Health Impaired" Category

The list of chronic or acute health problems included within the definition of "other health impaired" in the Part B regulations is not exhaustive. The term "other health impaired" includes chronic or acute impairments that result in limited alertness, which adversely affects educational performance. Thus, children with ADD should be classified as eligible for services under the "other health impaired" category in instances where the ADD is a chronic or acute health problem that results in limited alertness, which adversely affects educational performance. In other words, children with ADD, where the ADD is a chronic or acute health problem resulting in limited alertness, may be considered disabled under Part B solely on the basis of this disorder within the "other health impaired" category in situations where special education and related services are needed because of the ADD.

C. Eligibility for Part B services under Other Disability Categories

Children with ADD are also eligible for services under Part B if the children satisfy the criteria applicable to other disability categories. For example, children with ADD are also eligible for services under the "specific learning disability" category of Part B if they meet the criteria stated in §§300.5(b)(9) and 300.541 or under the "seriously emotionally disturbed" category of Part B if they meet the criteria stated in §300.5(b)(8).

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[2] The Part B regulations define 11 specified disabilities. 34 CFR §300.5(b)(1)-(11). The Education of the Handicapped Act Amendments of 1990 amended the Individuals with Disabilities Education Act [formerly the Education of the Handicapped Act] to specify that autism and traumatic brain injury are separate disability categories. See section 602(a)(1) of the Act, to be codified at 20 U.S.C. 1401(a)(1).

III. Evaluations under Part B

A. Requirements

SEAs and LEAs have an affirmative obligation to evaluate a child who is suspected of having a disability to determine the child's need for special education and related services. Under Part B, SEAs and LEAs are required to have procedures for locating, identifying and evaluating all children who have a disability or are suspected of having a disability and are in need of special education and related services. 34 CFR §§300.128 and 300.220. This responsibility, known as "child find," is applicable to all children from birth through 21, regardless of the severity of their disability.

Consistent with this responsibility and the obligation to make FAPE available to all eligible children with disabilities, SEAs and LEAs must ensure that evaluations of children who are suspected of needing special education and related services are conducted without undue delay. 20 U.S.C. 1412(2). Because of its responsibility resulting from the FAPE and child find requirements of Part B, an LEA may not refuse to evaluate the possible need for special education and related services of a child with a prior medical diagnosis of ADD solely by reason of that medical diagnosis. However, a medical diagnosis of ADD alone is not sufficient to render a child eligible for services under Part B.

Under Part B, before any action is taken with respect to the initial placement of a child with a disability in a program providing special education and related services, "a full and individual evaluation of the child's educational needs must be conducted in accordance with requirements of §300.532." 34 CFR §300.531. Section 300.532(a) requires that a child's evaluation must be conducted by a multidisciplinary team, including at least one teacher or other specialist with knowledge in the area of suspected disability.

B. Disagreements over Evaluations

Any proposal or refusal of an agency to initiate or change the identification, evaluation, or educational placement of the child, or the provision of FAPE to the child is subject to the written prior notice requirements of 34 CFR §§300.504-300.505. [3] If a parent disagrees with the LEA's refusal to evaluate a child or the LEA's evaluation and determination that the child does not have a disability for which the child is eligible for services under Part B, the parent may request a due process hearing pursuant to 34 CFR §§300.506-300.513 of the Part B regulations.

IV. Obligations Under Section 504 of SEAs and LEAs to Children with ADD Found Not to Require Special Education and Related Services Under Part B

Even if a child with ADD is found not to be eligible for services under Part B, the requirements of Section 504 of the Rehabilitation Act of 1973 (Section 504) and its implementing regulation at 34 CFR Part 104 may be applicable. Section 504 prohibits discrimination on the basis of handicap by recipients of Federal funds. Since Section 504 is a civil rights law, rather than a funding law, its requirements are framed in different terms than those of Part B. While the Section 504 regulation was written with an eye to consistency with Part B, it is more general, and there are some differences arising from the differing natures of the two laws. For instance, the protections of Section 504 extend to some children who do not fall within the disability categories specified in Part B.

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[3] Section 300.505 of the Part B regulations sets out the elements that must be contained in the prior written notice to parents:

(1) A full explanation of all the procedural safeguards available to the parents under Subpart E;
(2) A description of the action proposed or refused by the agency, an explanation of why the agency proposes or refuses to take the action, and a description of any options the agency considered and the reasons why those options were rejected;
(3) A description of each evaluation procedure, test, record, or report the agency uses as a basis for the proposal or refusal; and
(4) A description of any other factors which are relevant to the agency's proposal or refusal.

A. Definition

Section 504 requires every recipient that operates a public elementary or secondary education program to address the needs of children who are considered "handicapped persons" under Section 504 as adequately as the needs of nonhandicapped persons are met. "Handicapped person" is defined in the Section 504 regulation as any person who has a physical or mental impairment which substantially limits a major life activity (e.g., learning). 34 CFR §104.3(j). Thus, depending on the severity of their condition, children with ADD may fit within that definition.

B. Programs and Services Under Section 504

Under Section 504, an LEA must provide a free appropriate public education to each qualified handicapped child. A free appropriate public education, under Section 504, consists of regular or special education and related aids and services that are designed to meet the individual student's needs and based on adherence to the regulatory requirements on educational setting, evaluation, placement, and procedural safeguards. 34 CFR §§104.33, 104.34, 104.35, and 104.36. A student may be handicapped within the meaning of Section 504, and therefore entitled to regular or special education and related aids and services under the Section 504 regulation, even though the student may not be eligible for special education and related services under Part B.

Under Section 504, if parents believe that their child is handicapped by ADD, the LEA must evaluate the child to determine whether he or she is handicapped as defined by Section 504. If an LEA determines that a child is not handicapped under Section 504, the parent has the right to contest that determination. If the child is determined to be handicapped under Section 504, the LEA must make an individualized determination of the child's educational needs for regular or special education or related aids and services. 34 CFR §104.35. For children determined to be handicapped under Section 504, implementation of an individualized education program developed in accordance with Part B, although not required, is one means of meeting the free appropriate public education requirements of Section 504. [4] The child's education must be provided in the regular education classroom unless it is demonstrated that education in the regular environment with the use of supplementary aids and services cannot be achieved satisfactorily. 34 CFR §104.34.

Should it be determined that the child with ADD is handicapped for purposes of Section 504 and needs only adjustments in the regular classroom, rather than special education, those adjustments are required by Section 504. A range of strategies is available to meet the educational needs of children with ADD. Regular classroom teachers are important in identifying the appropriate educational adaptions and interventions for many children with ADD.

SEAs and LEAs should take the necessary steps to promote coordination between special and regular education programs. Steps also should be taken to train regular education teachers and other personnel to develop their awareness about ADD and its manifestations and the adaptations that can be implemented in regular education programs to address the instructional needs of these children. Examples of adaptations in regular education programs should include the following:

> providing a structured learning environment; repeating and simplifying instructions about in-class and homework assignments; supplementing verbal instructions with visual instructions; using behavioral management techniques; adjusting class schedules; modifying test delivery; using tape recorders, computer-aided instruction, and other audiovisual equipment; selecting modified textbooks or workbooks; and tailoring homework assignments.

Other provisions range from consultation to special resources and may include reducing class size; use of one-on-one tutorials; classroom aides and note-takers; involvement of a "services coordinator" to oversee implementation of special programs and services, and possible modification of nonacademic times such as lunchroom, recess, and physical education.

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[4] Many LEAs use the same process for determining the needs of students under Section 504 that they use for implementing Part B.

Through the use of appropriate adaptations and interventions in regular classes, many of which may be required by Section 504, the Department believes that LEAs will be able to effectively address the instructional needs of many children with ADD.

C. Procedural Safeguards Under Section 504

Procedural safeguards under the Section 504 regulation are stated more generally than in Part B. The Section 504 regulation requires the LEA to make available a system of procedural safeguards that permits parents to challenge actions regarding the identification, evaluation, or educational placement of their handicapped child whom they believe needs special education or related services. 34 CFR §104.36. The Section 504 regulation requires that the system of procedural safeguards include notice, an opportunity for the parents or guardian to examine relevant records, an impartial hearing with opportunity for participation by the parents or guardian and representation by counsel, and a review procedure. Compliance with procedural safeguards of Part B is one means of fulfilling the Section 504 requirement. [5] However, in an impartial due process hearing raising issues under the Section 504 regulation, the impartial hearing officer must make a determination based upon that regulation.

V. Conclusion

Congress and the Department have recognized the need to provide information and assistance to teachers, administrators, parents and other interested persons regarding the identification, evaluation, and instructional needs of children with ADD. The Department has formed a work group to explore strategies across principal offices to address this issue. The work group also plans to identify some ways that the Department can work with the education associations to cooperatively consider the programs and services needed by children with ADD across special and regular education.

In fiscal year 1991, the Congress appropriated funds for the Department to synthesize and disseminate current knowledge related to ADD. Four centers will be established in Fall, 1991 to analyze and synthesize the current research literature on ADD relating to identification, assessment, and interventions. Research syntheses will be prepared in formats suitable for educators, parents and researchers. Existing clearinghouses and networks, as well as Federal, State and local organizations will be utilized to disseminate these research syntheses to parents, educators and administrators, and other interested persons.

In addition, the Federal Resource Center will work with SEAs and the six regional resource centers authorized under the Individuals with Disabilities Education Act to identify effective identification and assessment procedures, as well as intervention strategies being implemented across the country for children with ADD. A document describing current practice will be developed and disseminated to parents, educators and administrators, and other interested persons through the regional resource centers network, as well as by parent training centers, other parent and consumer organizations, and professional organizations. Also, the Office for Civil Rights' ten regional offices stand ready to provide technical assistance to parents and educators.

It is our hope that the above information will be of assistance to your State as you plan for the needs of children with ADD who require special education and related services under Part B, as well as for the needs of the broader group of children with ADD who do not qualify for special education and related services under Part B, but for whom special education or adaptations in regular education programs are needed. If you have any questions, please contact Jean Peelen, Office for Civil Rights; (Phone: 202/732-1635), Judy Schrag, Office of Special Education Programs (Phone: 202/732-1007); or Dan Bonner, Office of Elementary and Secondary Education (Phone: 202/401-0984).

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[5] Again, many LEAs and some SEAs are conserving time and resources by using the same due process procedures for resolving disputes under both laws.

UNITED STATES DEPARTMENT OF EDUCATION

WASHINGTON, DC 20202

Memorandum

October 24, 1988

To: OCR Senior Staff

From: LeGree S. Daniels
Assistant Secretary for Civil Rights

Subject: Distinction Between Section 504 and the Education of the Handicapped Act

This memorandum provides clarification of the requirements concerning elementary and secondary education under Section 504 of the Rehabilitation Act of 1973 (Section 504) and Part B of the Education of the Handicapped Act (EHA). The Office for Civil Rights (OCR) has responsibility for enforcing Section 504, while the Office of Special Education and Rehabilitative Services (OSERS) has responsibility for the EHA. In any discussion of the two laws it is useful to bear in mind the respective origins and purposes of the statutes. The EHA, a grant statute, attaches many specific conditions to the receipt of Federal funds. Section 504, mandating nondiscrimination on the basis of handicap, is less specific. The regulations implementing Section 504 and the EHA have significant similarities and differences, a few of which are addressed in this memorandum.

Subpart D of the Section 504 regulation (34 C.F.R. Part 104) and of Appendix A—Analysis of Final Regulation—indicate ways in which Section 504 and the EHA intersect. Three sections of the Section 504 regulation (§§104.33(b)(2), 104.35(d), and 104.36) state that one means for recipients to comply with Section 504 with respect to those sections, is to comply with the EHA. OCR, therefore, sometimes must review recipients' activities in light of the EHA, making a thorough familiarity with the EHA essential. Consistency with the standard enunciated in the EHA in these specified areas is compliance with Section 504.

Since consistency with the EHA is only one means of complying with these three provisions of the Section 504 regulation, however, noncompliance determinations cannot rest solely on the conclusion that a recipient has not met the standards of the EHA. While a recipient may comply with these three sections of the Section 504 regulation by complying with the EHA, failure to meet the EHA standard does not necessarily constitute a violation of Section 504, and must not be the basis for OCR's analytic approach or conclusions.

When a state announces that it will fulfill the requirements of Section 504 by carrying out EHA requirements, OCR may not find a Section 504 violation based on failure to comply with the EHA. OCR lacks authority to adopt standards of another statute in an effort to simplify its investigations. Moreover, OCR should never appear to provide an official interpretation of the EHA and its implementing regulation, nor imply that it makes findings of compliance or noncompliance under the EHA. In all cases, OCR must make an independent determination with respect to compliance with Section 504. In the interest of consistency in the interpretation of Section 504 and the EHA, the EHA regulations and case law may provide guidance on the reasonable interpretation of Section 504. However, there is no simple rule for when and how to apply EHA case law to specific issues. As in the application of Title VII case law, in some instances, analogies may be drawn, depending on judicial reasoning, statutory language, and legislative intent. Discussed below are a few examples of fact situations, drawn from actual OCR cases, that have presented difficulties.

Definitions/Coverage

Coverage of the two statutes and their respective implementing regulations is couched in different terms. Section 504 applies to all qualified handicapped persons in federally funded programs and activities. In contrast, the EHA applies only to children having impairments specified in the statute and regulation "who because of those impairments need special education and related services." (34 C.F.R. §300.5.) Appendix A to the Section 504 regulation contains indications of

an intent to make the two laws consistent, for example, by adopting the EHA definition of "specific learning disabilities." While the resultant coverage may, in many cases, be similar, the analytical approach is different. OCR's approach must always be that of the Section 504 regulation.

The Section 504 regulation at §104.3(j) specifies:

> (1) "Handicapped persons" means any person who (i) has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment. . . .
>
> (2) (ii) "Major life activities" means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

<u>Example 1</u>

Facts: A student has been identified as addicted to drugs, a handicap under the Section 504 regulation. No other handicapping condition has been identified that would require special education services that would trigger eligibility for services under the EHA. The student is truant from school, and most of his teachers believe that his educational needs are not being met and that the truancy is caused by his handicap. However, the school district limits its provision of services to individuals who would be eligible for special education under the EHA, has a blanket policy of not considering drug or alcohol addition to be a physical or mental impairment, and refuses to evaluate the student.

Analysis: OCR's analysis is not tied to the child's ineligibility for special education services under the EHA. Section 504 coverage in some instances will be narrower and in other instances will be broader than that of the EHA. While eligibility for special education virtually always is an indication that a child is handicapped or believed to be handicapped, the converse is not always true. The critical consideration is that OCR must follow the Section 504 regulatory definitions. In this case, OCR would find a violation of Section 504 because the district may not limit its services to students who have handicapping conditions recognized under the EHA. The case offers an example of a situation in which a district might, at the same time, be in violation of Section 504 and in compliance with the EHA. This student has a handicap, as defined by the Section 504 regulation, so the school district must determine whether his educational needs are being met to the extent that the needs of nonhandicapped students are met. (This memorandum does not address what services are appropriate or what disciplinary actions may be taken with respect to drug use.)

<u>Example 2</u>

Facts: A student enrolled in the regular education program has juvenile rheumatoid arthritis, which requires periodic administration of medication during the school day. Without the medication, the child's ability to benefit from education is hampered. After completion of EHA procedures, the district determines the child is not in need of special education. Because, under EHA definitions, related aids and services may be limited to those necessary to enable a child to benefit from special education, the school district claims no obligation to assist the child with her medication.

Analysis: The child has a physical impairment that substantially limits a major life activity. Although not considered to be entitled to special education under the EHA, she would be a handicapped person covered by Section 504.

<u>Appropriate Public Education</u>

The Section 504 regulation requires that recipients provide a free appropriate public education (FAPE) to qualified handicapped persons. The regulation at §104.33(b) states:

> (1) For the purpose of this subpart, the provision of an appropriate education is the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and (ii) are based upon adherence to

> procedures that satisfy the requirements of §§104.34, 104.35, and 104.36.
>
> (2) Implementation of an individualized education program developed in accordance with the Education of the Handicapped Act is one means of meeting the standard established in paragraph (b)(1)(i). . . .

Implementation of an individualized education program (IEP) that has been developed in accordance with the EHA meets the FAPE requirements of Section 504. However, implementation of an IEP document that fails to meet the requirements of the EHA does not necessarily violate Section 504 because Section 504 does not require the development of an IEP document. The content of an IEP document that does not meet the requirements of the EHA nevertheless may serve as important evidence of whether the requirements of Section 504 have been met.

OCR's analytical approach, therefore, does not track a recipient's alleged failure to have or implement correctly an IEP document. The approach is to determine whether a child's needs were determined on an individualized basis, whether the evaluation and placement procedures that were applied conformed with those specified in the Section 504 regulation, and whether the placement, aids, and services identified by the recipient through this process as necessary to meet the student's individual needs are being provided. Although the EHA regulation contains more detailed requirements for determining and recording the educational needs of and services to handicapped students, and a recipient has developed procedures for conforming with the EHA, OCR's analysis of Section 504 compliance is not coextensive with an analysis of the recipient's compliance with the parallel sections of the EHA regulation.

Example 3

Facts: On the basis of an appropriate evaluation that identified speech problems, a psychological disorder, and a specific learning disability, a recipient provides speech, reading, and psychological services. A month later, an IEP document is signed specifying the services that will be provided: three hours per week of speech therapy, one hour per week of psychological counseling, and five hours per week of special reading instruction. The child receives the reading and psychological services as specified, but receives only two hours per week of speech therapy.

Analysis: The recipient has violated the Section 504 regulation at §104.33(b). The violation is not that the recipient failed to fully implement the IEP document. The violation, under Section 504, is the failure to provide the services that the recipient identified, through the appropriate process, as necessary for that child. The recipient must make a determination of the child's needs for educational services and related aids, and the IEP document ordinarily is the source of evidence that an appropriate determination was made of those needs, meeting the individualization requirements of §104.33 and the evaluation and placement requirements of §§104.34 and 104.35. This recipient has determined the needs appropriately but has not met those needs. OCR should not analyze the facts in terms of imperfections in or deviations from the IEP document. However, this does not mean that OCR makes an independent judgment of the child's needs; nor does it mean that OCR substitutes its judgment for the recipient's in determining need. Further, Section 504 does not require that an IEP document be in place before the appropriately determined services are provided, even though the EHA regulation requires that the IEP be in effect prior to provision of services. (§300.342.) The required process is the one prescribed by the Section 504 regulation at §§104.34-104.36.

Example 4

Facts: A handicapped child has an IEP that has not been signed by her parent or teacher and that has not been formally reviewed for 13 months. The EHA requires an annual IEP review, attended by a person qualified to supervise or provide special education other than the child's teacher, the child's teacher, and the child's parent. (34 C.F.R. §300.344.)

Analysis: The mere fact that the IEP document lacks certain signatures would not violate either the EHA nor Section 504. Absent further allegations, for example, that the educational services no longer meet the child's needs, or that there may be a pattern of unreasonable delays in evaluating and placing students, the fact that the IEP has not been reviewed in 13 months would not constitute a violation of Section 504. As in all decisions made by OCR, reasonableness and the totality of the circumstances should be considered.

Example 5

Facts: A multiply handicapped child's IEP specifies that speech, language, and occupational services, and remedial mathematics will be provided. The IEP does not include annual long-term goals and short-term objectives or the number of minutes per week or days per week for speech and language services. However, the child receives speech, language, and occupational services, and remedial mathematics on a regular basis.

Analysis: These facts alone do not establish a violation of Section 504. In a case like this, when the information needed does not appear in the IEP document, OCR must look beyond the IEP document to determine whether the school district has identified the child's needs, described the necessary program somewhere, and provided services in amounts that the district had determined are necessary, according to the process requirements of the Section 504 regulation. The Section 504 regulation at §104.33, by implication, requires that needs and services be identified with sufficient specificity (not necessarily in the IEP document) to assure OCR that the child's needs have been decided on an individual basis. Further, the procedural provisions at §104.36 require that parents have notice (not necessarily in writing) of actions regarding their child's evaluation, placement, and services. However, the facts should not be analyzed in terms of the detail and completeness of the IEP document, according to standards specified in the EHA regulation, as Section 504 does not require development of an IEP document. While the content of the IEP document is the most important piece of evidence, if the information is not there, OCR must go further to determine whether the decisions regarding the amount of time necessary for each service were made at all, and, if so, if they were made properly through the evaluation process. Note that this does not mean that the recipient must meet a need identified by an individual participant in an IEP meeting; nor does it mean that OCR makes an independent determination of services needed. The conclusion of the IEP committee ordinarily indicates the recipient's determination of the child's needs.

Evaluation/Reevaluation

The EHA regulation is more specific than the Section 504 regulation about the evaluation process. The EHA regulation requires that children be reevaluated "every three years or more frequently if conditions warrant or if the child's parent or teachers requests an evaluation." (§300.534.) In contrast, Section 504 requires evaluation of any child believed to need special education before initial placement and any significant change in placement. (§104.35(a).) Further, it requires "periodic reevaluation," adding that a reevaluation procedure consistent with the EHA is one means of meeting this requirement. (§104.35(d).)

Example 6

Facts: A student remains in a placement for three years and one month without a full reevaluation, although reevaluations are conducted in specific areas, as necessary, and services in those areas are altered in response to apparent needs. The EHA requires that handicapped children in special education be reevaluated every three years, and the State Plan under Part B of the EHA specifies that handicapped children will be reevaluated every three years.

Analysis: Even though the recipient has made known its intention to meet the requirements of the EHA, and the EHA requires reevaluation every three years, the failure to conduct a reevaluation after three years and one month does not automatically violate Section 504. The Section 504 regulation requires "periodic reevaluations." The state's adoption of the EHA three-year standard is evidence that the state considers three years to be the appropriate standard for "periodic reevaluations." However, OCR's analysis should not be in terms of deviations from the EHA standard; it should be in terms of a failure to evaluate students periodically, the Section 504 standard.

Example 7

Facts: A child is evaluated, identified as trainable mentally retarded, and placed in a self-contained classroom in a regular public school. The child's IEP calls for interaction with nonhandicapped children at lunch and music. In accordance with the new IEPs, developed by appropriately knowledgeable persons, but without benefit of reevaluation, the next year all trainable mentally retarded children from that program are placed in a separate school for handicapped children only. The state permits a change in placement based on an evaluation that is one to three years old.

Analysis: Although no attempt is made here to define a "significant" change in placement, a change from placement in a regular public school with contact with nonhandicapped children to a school for handicapped children only is plainly significant. The recipient in this case has violated Section 504 by making a significant change in the child's placement without reevaluating her. Moreover, the fact that placements of all trainable mentally retarded students are changed is some indication that placement decisions were not made on an individual basis. The fact that the new placement is contained in an IEP document that meets the state's specific procedural requirements for the EHA does not ensure compliance with Section 504 evaluation requirements.

Due Process

The Section 504 regulation at §104.36 requires that recipients provide procedural safeguards regarding identification, evaluation, and placement of persons who, because of handicap, need or are believed to need special instruction or related services. This requires examining official policies and procedures, as well as the application of the policies and procedures to individual students. The only procedural safeguards specified in Subpart D of the Section 504 regulation are provided at 34 C.F.R. §104.36:

> [N]otice, an opportunity for the parents or guardian of the person to examine relevant records, an impartial hearing with opportunity for participation by the person's parents or guardian and representation by counsel, and a review procedure. Compliance with the procedural safeguards of section 615 of the Education of the Handicapped Act is one means of meeting this requirement.

Although compliance with EHA procedural safeguards is one way to comply with procedural requirements of Section 504, deviations from procedural safeguards specified at Subpart E of the EHA regulation do not necessarily equate with violations of Section 504, even if the recipient specifies that it intends to comply with Section 504 by complying with the procedural requirements of the above. Parents must have notice (not necessarily in writing) of actions regarding the identification, evaluation, and placement of their children. Parents also must have a right to an impartial hearing regarding their child's evaluation or placement. They must have an opportunity to examine relevant records and to be represented by counsel at the hearing. A procedure must be available for a higher level review of the hearing decision.

OCR should evaluate the procedures offered in a particular case to determine whether they meet these requirements. OCR would determine whether parents were notified of their due process rights, for example, when a recipient refused to evaluate their child, whether they were permitted to examine records, whether the hearing officer was impartial, whether the parents were permitted counsel, and whether an impartial review process was provided.

Example 8

Facts: A parent requests access to her son's records, and a staff member gives her a report containing the names and confidential information about other children. Subpart E of the EHA regulation requires that participating agencies protect the confidentiality of personally identifiable information. (§300.572.)

Analysis: The Section 504 regulation contains no confidentiality requirements. It is immaterial that the recipient states that it will comply with Section 504 by complying with the procedural requirements of the EHA. Allegations of breach of confidentiality should be referred to OSERS and to the Family Education Rights and Privacy Act Office in the Department of Education.

Conclusion

In sum, compliance with Section 504 must be determined on the basis of an analysis of the facts in accordance with standards contained in the Section 504 regulation. While compliance with certain provisions of the EHA is one way to comply with Section 504, noncompliance with the EHA is not automatically noncompliance with Section 504. Nor is compliance with the EHA automatic compliance with Section 504, except for those three sections mentioned specifically in the Section 504 regulation. Under no circumstances should OCR imply that it provides an official interpretation of the EHA or that it makes findings under the EHA.

If you have any questions about the content of this memorandum, you may contact me or have a member of your staff contact Jean Peelen at 732-1641.

UNITED STATES DEPARTMENT OF EDUCATION
WASHINGTON, DC 20202

January 28, 1991

To: OCR Senior Staff

From: Richard D. Komer
Deputy Assistant Secretary for Policy

Subject: Changes made by the Americans with Disabilities Act to the Definition of Handicapped Person under the Rehabilitation Act

The Americans with Disabilities Act (ADA), P.L. 101-336, signed by President Bush on July 26, 1990, amended Section 7(8) of the Rehabilitation Act of 1973 with consequences relevant to OCR and recipients subject to its jurisdiction.

First, the definition of individual with handicaps is narrowed to exclude persons ". . . currently engaging in the illegal use of drugs. . . ." Second, this exclusionary language is limited to allow former users, or those participating in drug rehabilitation programs, to qualify as persons with handicaps. Third, local educational agencies are explicitly authorized to take disciplinary action against handicapped students using drugs or alcohol to the same extent as they may take action against nonhandicapped students, and the due process safeguards required by 34 C.F.R. 104.36 are specifically declared inapplicable to such proceedings.

The amendment reads, in pertinent part:

> (C) (i) For purposes of title V, the term "individual with handicaps" does not include an individual who is currently engaging in the illegal use of drugs, when a covered entity acts on the basis of such use.
>
> (ii) Nothing in clause (i) shall be construed to exclude as an individual with handicaps an individual who—
>
> > (I) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use;
> >
> > (II) is participating in a supervised rehabilitation program and is no longer engaging in such use; or
> >
> > (III) is erroneously regarded as engaging in such use, but is not engaging in such use; except that it shall not be a violation of this Act for a covered entity to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual described in subclause (I) and (II) is no longer engaging in the illegal use of drugs.
>
> (iii) Notwithstanding clause (i), for purposes of activities providing health services and services provided under Title I, II, and III, an individual shall not be excluded from the benefits of such programs or activities on the basis of his or her current illegal use of drugs if he or she is otherwise entitled to such services.
>
> (iv) For purposes of programs and activities providing educational services, local educational agencies may take disciplinary action pertaining to the use or possession of illegal drugs or alcohol against any handicapped student who currently is engaging in the illegal use of drugs or in the use of alcohol to the same extent that such disciplinary action is taken against nonhandicapped students. Furthermore, the due process procedures at 34 C.F.R. 104.36 shall not apply to such disciplinary actions.
>
> (v) For purposes of Section 503 and 504 as such Sections relate to employment, the term "individual with handicaps" does not include any individual who is an alcoholic whose current use of alcohol prevents such individual from performing the duties of the job in question or whose employment, by reason of such current

alcohol abuse would constitute a direct threat to property or the safety of others.

(D) For the purpose of Sections 793 and 794 of this Title, as such Sections relate to employment, such term does not include an individual who has a currently contagious disease or infection and who, by reason of such disease or infection, would constitute a direct threat to the health or safety of other individuals or who, by reason of the currently contagious disease or infection, is unable to perform the duties of the job.

* * * *

(22) (A) The term "drug" means a controlled substance, as defined in schedules I through V of Section 202 of the Controlled Substances Act (21 U.S.C. 812).

(B) The term "illegal use of drugs" means the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act. Such term does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law.

This memo compares the new language with the current OCR Section 504 regulation and policy notes potential conflicts. [1]

<u>Currently Engaging in the Illegal Use of Drugs.</u>

The definition of individual with handicaps in the Section 504 statutes, adopted in 1974, which was supplemented with the second sentence regarding employment in 1978, read as follows:

(B) Subject to the second sentence of this subparagraph, the term "individual with handicaps" means, for purposes of subchapters IV and V of this chapter, any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment. For purposes of Sections 793 and 794 of this title as such sections relate to employment, such term does not include any individual who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others. P.L. 95-602 §122(a), 92 Stat 2955, 2984-85 (1978).

The regulations at 34 C.F.R., Part 104, which implement this language do not contain any reference to drug addicts or alcoholics. However, Appendix A of the regulation says:

The Secretary has carefully examined the issue [of whether to include drug addicts and alcoholics within the definition of handicapped person] and has obtained a legal opinion from the Attorney General. That opinion concludes that drug addiction and alcoholism are "physical or mental impairments" within the meaning of Section 7(6) of the Rehabilitation Act of 1973, as amended, and that drug addicts and alcoholics are therefore handicapped for [sic] therefore believes that he is without authority to exclude these conditions from the definition. 34 C.F.R. Part 104, Appendix A, p. 386.

There are two matters to note. First, the new definition distinguishes current use from the status of drug addiction. In the Subsection following the new definition the Congress provided that a person undergoing treatment for drug addiction could, if they are no longer using drugs, become a person with handicaps. Thus, by prohibiting current use the new definition penalizes a subset of behaviors of the condition of drug addiction, not the condition itself. Since drug addiction, accompanied by non-use remains a condition covered by the Rehabilitation Act, the new definition does not conflict with the policy that regards drug addiction as a handicap. The legal question of whether the new definition is so inconsistent with the policy that that policy has no further force and effect,[2] in this instance can be answered in the negative. The two can be reconciled.

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[1] Most provisions of the ADA do not become effective for 18 to 24 months in order to allow for an orderly transition into full compliance. However, Title 5, which contains the changed definition, has no stated effected date and consequently became effective on July 26, 1990. <u>Lapeyre v. U.S.,</u> 19 Wall (US) 191, 21 L.Ed. 606 (1873); 73 Am. Jur. 2d, <u>Statutes</u> Section 361.

> However, the new emphasis on current drug use is inconsistent with Appendix A's description of how drug abusers are to be treated by recipients providing employment and services other than employment (that is, elementary and secondary and postsecondary educational services).

Currently Engaging in the Illegal Use of Drugs—Employment

The new definition conflicts with current policy in employment matters. As noted in the preceding section, the regulations do not mention drug abusers or alcoholics in relation to employment. But Appendix A, in explaining the policy on employment of drug addicts and alcoholics, provides that

> With respect to the employment of a drug addict or alcoholic, if it can be shown that the addiction or alcoholism prevents successful performance of the job, the person need not be provided the employment opportunity in question. For example, in making employment decisions, a recipient may judge addicts and alcoholics on the same basis it judges all other applicants and employees. Thus, a recipient may consider—for all applicants including drug addicts and alcoholics—past personnel records, absenteeism, disruptive, abusive, or dangerous behavior, violations of rules and unsatisfactory work performance. Moreover, employers may enforce rules prohibiting the possession or use of alcohol or drugs in the work-place, provided that such rules are enforced against all employees. 34 C.F.R. Part 104, Appendix A, p. 386.

The new definition eliminates the need for this review of behavior as it pertains to drug users. [3] If a drug addict is "currently" using drugs, an employer may, on that basis, choose not to employ (or may discipline or discharge a person already employed) without considering whether that person is able to perform the duties of the job or whether that person constitutes a threat to others. In other words, a current drug user can never be a qualified handicapped person because a current drug user can never be handicapped.

Under the previously described rule for measuring the impact of statutory enactments on existing regulations, the policy expressed in the Section 504 Appendix, that grants some protection under the Rehabilitation Act to current drug user employees cannot have any further effect, since it cannot be reconciled with the new definition. [4]

Currently Engaging in the Illegal Use or Possession of Drugs or Alcohol—Elementary and Secondary Education

Section 512(a) of the ADA also adds a new subsection to the Rehabilitation Act that allows local educational agencies to take disciplinary action against handicapped students to the same extent as it would take action against nonhandicapped students, as follows:

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[2] U.S. v. Larinonoff, 431 U.S. 864, 97 S.Ct. 2150 (1977) (Navy regulation divesting rights to re-enlistment bonus struck down for inconsistency with both old and new compensation statutes); 2 Am. Jur. 2d, Administrative Law 300.

[3] The ADA does not change the status of alcoholics in regard to employment. A new subsection (v) is added to subsection 7(9), which re-enacts these same (Appendix) standards for alcoholics. The new subsection reads as follows:

> For purposes of sections 503 and 504 as such sections relate to employment, the term "individual with handicaps" does not include any individual who is an alcoholic whose current use of alcohol prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol abuse, would constitute a direct threat to property or the safety of others.

[4] Certain court decisions construing the term "person with handicaps" in employment cases involving drug addicts had already determined that current users had no rights under the Rehabilitation Act, Burka v. New York City Transit Authority, 680 F. Supp. 590, (S.D. N.Y., 1988); Davis v. Bucher, 451 F. Supp. 791 (D.C. Pa., 1978). However, the Supreme Court has merely noted that the 1978 amendment regarding drug abusers was not "free of ambiguity," New York City Transit Authority v. Beazer, 440 U.S. 568, 582; 99 S. Ct. 1355, 1363; 59 L. Ed. 2d 587 (1979).

> (iv) For purposes of programs and activities providing educational services, local educational agencies may take disciplinary action pertaining to the use or possession of illegal drugs or alcohol against any handicapped student who currently is engaging in the illegal use of drugs or in the use of alcohol to the same extent that such disciplinary action is taken against nonhandicapped students. Furthermore, the due process procedures at 34 C.F.R. 104.36 shall not apply to such disciplinary actions. [5]

The regulations have no direct counterpart to these disciplinary structures, but Appendix A states that

> Of great concern to many commenters was the question of what effect the inclusion of drug addicts and alcoholics as handicapped persons would have on school disciplinary rules prohibiting the use or possession of drugs or alcohol by students. Neither such rules nor their application to drug addicts or alcoholics is prohibited by this regulation, provided that the rules are enforced evenly with respect to all students. 34 C.F.R. Part 104, Appendix A, p. 387.

Under this language, OCR has issued policy guidance which recognizes that students who are handicapped by drug addiction or alcoholism may be disciplined to the same extent as other students, but that a student who is handicapped by some other condition in addition to drug addiction or alcoholism must be evaluated and afforded due process prior to disciplinary action that would constitute a significant change in placement. [6]

The new subsection added by the ADA allows a local educational agency to discipline persons who are engaging in the illegal use of drugs or the use of alcohol, who are handicapped by conditions other than drug addiction or alcoholism, for possession or use of illegal drugs or alcohol without providing the evaluation required by current regulations, and without providing the due process procedure described in the Section 504 regulations. There are several indications that Congress intended this outcome although it did not explicitly say so. The section uses the phrase "handicapped student" which, after having been defined to exclude current users, seems to imply that a handicapped student for purposes of the subsection is one who is handicapped by some other condition. Furthermore, the original Senate version of the ADA contained a provision that read as follows:

> Notwithstanding any other provision of law, but subject to subsection (C) with respect to programs and activities providing education and the last sentence of this paragraph, the term 'individual with a handicap' does not include any individual who currently uses illegal drugs, except that an individual who is otherwise handicapped shall not be excluded from the protections of this Act if such individual also uses or is also addicted to drugs. Cong. Rec., September 12, 1989, p. S10961.

This language was deleted from the final version, and the clear implication is that rights to educational services under the act can be lost by use of drugs or alcohol.

However, under the new subsection, possession of illegal drugs or alcohol does not result in a loss of protections unless the handicapped student is also currently using drugs or alcohol. For example, if a school finds illegal drugs in the locker of a mentally retarded student, they may discipline that student as if he had no handicap only if they can also show that he is currently using drugs. Otherwise they must provide a re-evaluation to determine, among other things, whether the misbehavior was a manifestation of the handicap, as required by current Section 504 policy.

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[5] Please note that in the area of elementary and secondary education the amendment affects current use of both drugs and alcohol.

[6] Memorandum to OCR Senior Staff, October 28, 1988, "Long-term Suspension or Expulsion of Handicapped Students," PES Document Number 168. See also School Board of Prince William County Virginia v. Malone, (E.D. Va. 1984), 1983-84 EHLR DEC. 555:402, a case in which another handicapping condition was present and the school board's failure to evaluate prior to expulsion for drug possession was held to be a violation of the EHA.

Currently Engaging in the Illegal Use of Drugs—Postsecondary Education

In connection with providers of postsecondary education, Appendix A says,

> With respect to other services, the implications of coverage, of alcoholics and drug addicts are two-fold: first, no person may be excluded from services solely by reason of the presence or history of these conditions; second, to the extent that the manifestations of the condition prevent the person from meeting the basic eligibility requirements of the program or cause substantial interference with the operation of the program, the condition may be taken into consideration. Thus, a college may not exclude an addict or alcoholic as a student, on the basis of addiction or alcoholism, if the person can successfully participate in education program and complies with the rules of the college and if his or her behavior does not impede the performance of other students. 34 C.F.R. Part 104, Appendix A, p. 386.

While the new statutory definition does not directly address postsecondary education, it is clear from the text of the amendment that a current drug user may be excluded from postsecondary programs, whether or not he or she is able to successfully participate in the program, is able to abide by the rules, and does not present an impediment to other students. Thus the amendment renders the Appendix statement null and void as applied to current users of drugs.

However, the loss of these rights in all settings is limited to situations in which a recipient "acts on the basis of such use" and if action is taken on another basis, the protections of the act do apply. Senator Harkin, commenting on amendments to the Senate bill, explained that

> . . . current users of illegal drugs, disabled or not, are not protected by this act from actions based on their current use of illegal drugs. At the same time, the fact that a disabled person is a current user of illegal drugs, does not mean that the person is not protected under the act when actions are taken against that individual, not on the basis of the current use of illegal drugs, but on the basis of the disability. Cong. Rec., September 15, 1989, p. S11225.

Summary

The effect of the new definition of "individual with handicaps" can be summarized as follows:

1. In connection with the provision of educational services, not including employment, current drug users are not covered by the Rehabilitation Act and recipients do not have to consider whether the individual could successfully participate in the program and/or not impede others (this will be applied to postsecondary settings as well as others specifically covered in the amendment);

2. In connection with employment, current drug users are not protected by the Rehabilitation Act and recipients do not have to show that such an individual could perform the duties of the job and/or not imperil others;

3. If an individual is undergoing drug rehabilitation and is no longer using drugs, that person may not be excluded from the receipt of services and recipients are still required to judge whether that individual is a "qualified" handicapped individual;

4. There is no change in the treatment of alcoholics, except as noted below;

5. Local educational agencies may discipline a student who is handicapped by drug addiction or alcoholism, as well as by any other condition, and is using drugs or alcohol, for use or possession of illegal drugs and use or possession of alcohol without liability under the Rehabilitation Act provided that the disciplinary action is co-extensive with discipline of nonhandicapped students; and

6. Local educational agencies are not required to provide due process in such disciplinary actions.

If you have any questions about the content of this memorandum, feel free to call me or have a member of your staff contact Jean Peelen at 732-1641.

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES

March 14, 1994

Ms. Michele Williams
Advocates for Children's Education
8004 S.W. 198 Terrace
Miami, Florida 33189

Dear Ms. Williams:

Thank you for the opportunity to respond to your concerns regarding children with attention deficit disorder and children with attention deficit hyperactive disorder (referred to in this letter as children with ADD). These concerns were set forth in your letter dated June 14, 1993, to Robert R. Davila, former Assistant Secretary, Office of Special Education and Rehabilitative Services; your letter dated June 14, 1993, to John T. MacDonald, former Assistant Secretary, Office of Elementary and Secondary Education; your letter dated May 6, 1993, to Judy A. Schrag, former Director, Office of Special Education Programs; and your letter dated June 14, 1993, to Jean Peelen, Director, Elementary and Secondary Education Policy Division, Office for Civil Rights. In your letters, you seek further clarification of Department of Education (Department) policies with respect to children with ADD.

Based on your inquiry, it is apparent that you are familiar with the Department Memorandum dated September 16, 1991, entitled "Clarification of Policy to Address the Needs of Children with Attention Deficit Disorders within General and/or Special Education" (Clarification Memorandum). Your questions concern the requirements of two Federal laws: Part B of the Individuals with Disabilities Education Act (Part B) and Section 504 of the Rehabilitation Act of 1973 (Section 504). The Office of Special Education and Rehabilitative Services (OSERS), of which the Office of Special Education Programs (OSEP) is a component, is responsible for administering Part B and for interpreting the requirements of Part B and its implementing regulations at 34 CFR Part 300. The Office for Civil Rights (OCR) is responsible for enforcing Section 504 and for interpreting the Section 504 implementing regulations at 34 CFR Part 104. Copies of the Department's regulations implementing Part B and Section 504 are enclosed for your information. Your questions and the Department's responses are set forth below.

1. When (i) ADD is identified through P.L. 94-142, Part B evaluation criteria; (ii) is a chronic or acute health problem limiting alertness (attention); and (iii) adversely affects educational performance, is ADD recognized under Part B?

One of the areas that the Department addressed in the Clarification Memorandum was the eligibility of children with ADD under the "other health impairment" (OHI) disability category. As the Department has previously advised, a child with ADD could be eligible as a child with a disability under the OHI disability category solely by reason of ADD if the ADD is a chronic or acute health problem; the child experiences limited alertness by reason of the ADD; the ADD adversely affects the child's educational performance and, as a result, the child needs special education and related services.

2. When conditions (i), (ii), and (iii) are met as above, is a student only covered by Part B or covered by both Part B and Section 504?

Section 504 employs a functional definition of disability. As set forth at 34 CFR §104.3(j), to be covered by Section 504 in these circumstances, a child must have a physical or mental impairment that substantially limits one or more major life activities. Whether a child's ADD is an impairment that constitutes a substantial limitation must be determined on an individual basis. While is it possible that a child with ADD might be covered by Section 504, but might not be eligible for services under Part B, the reverse—that the child is eligible for services under Part B, but is not covered by Section 504—is difficult to imagine.

3. Is ADD a distinct disability from SLD, dyslexia, etc., deserving of remedies and interventions specifically tailored to alleviate its interferences with the learning process?

A determination of whether a child with ADD is eligible for services under Part B must be made through the evaluation

procedures at 34 CFR §§300.530-300.534. A child with ADD may be served under one of several disability categories such as SLD or serious emotional disturbance (SED) or OHI, if the child meets the eligibility criteria for the specific disability category. See 34 CFR §300.7. Please note that dyslexia itself does not constitute a discrete disability category under Part B, but rather is a subcategory of the disability category "specific learning disability," defined at 34 CFR §300.7(b)(10).

Because of its functional focus, Section 504 does not contemplate distinct disabilities. Under Section 504, a school district is required to provide FAPE to each qualified individual with a disability, regardless of the nature or severity of the disability. 34 CFR §104.33(a).

4. Is it mandatory that schools conduct a medical assessment and evaluation (or re-evaluation) when ADD is suspected?

Our response assumes that this question is addressing medical assessment and medical evaluation, rather than medical assessment and general evaluation.

Part B does not necessarily require a school district to conduct a medical evaluation for the purpose of determining whether a child has ADD. If a public agency believes that a medical evaluation by a licensed physician is needed as part of the evaluation to determine whether a child suspected of having ADD meets the eligibility criteria of the OHI category, or any other disability category under Part B, the school district must ensure that this evaluation is conducted at no cost to the parents.

If the school district believes that there are other effective methods for determining whether a child suspected of having ADD meets the eligibility requirements of the OHI category, or any other disability category under Part B, then it would be permissible to use qualified personnel other than a licensed physician to conduct the evaluation as long as all of the protections in evaluation procedures, set forth in the requirements at 34 CFR §§300.530-300.534, are met. However, it would not be inconsistent with Part B for a State to impose a requirement that a school district ensure that a medical evaluation by a licensed physician is conducted as a part of an evaluation. This medical evaluation, however, would have to be at no cost to the child or his/her parents.

Like Part B, Section 504 does not necessarily require a school district to conduct a medical assessment. If a school district determines, based on the facts and circumstances in an individual case, that a medical assessment is necessary to make an appropriate evaluation consistent with 34 CFR §104.35(a) and (b), then the district must ensure that the child receives this assessment at no cost to the parents. If alternative assessment methods meet the evaluation criteria, then these methods may be used in lieu of a medical assessment.

5. Do children with ADD require separate "ADD classes" or are they to be served along a range of placements from mainstream to self-contained, depending upon the students' individual needs?

Part B contains least restrictive environment (LRE) requirements that are equally applicable to children with ADD who have been determined eligible for services under Part B. Under these LRE requirements, each public agency must ensure that all children with disabilities are educated with nondisabled children to the maximum extent appropriate, and that special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 34 CFR §300.550(b) (1)-(2). This provision states Part B's strong preference for educating children with disabilities in regular classes with appropriate support services. Further, this LRE requirement prohibits a school district from placing a child with a disability outside of a regular classroom if educating the child in the regular classroom, with supplementary aids and support services, can be achieved satisfactorily. The child's individualized education program (IEP), which sets forth the individualized and appropriate program of special education and related services provided to the child, constitutes the basis for the child's placement decision. Further, Part B requires that each child with a disability be educated in the school or facility as close as possible to the child's home, that is, the school that he or she would attend if not disabled, unless the child's IEP requires another arrangement. 34 CFR §300.552.

Recognizing that the regular classroom may not be the appropriate placement for all children, Part B also requires public agencies to ensure the availability of a continuum of alternative placements, or a range of placement options, to meet the needs of children with disabilities for special education and related services. 34 CFR §300.551(a). The options on this

continuum include "instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions." 34 CFR §300.551(b)(1). Further, these options must be made available to the extent necessary to implement each child's IEP. 34 CFR §300.552(b).

Section 504's LRE requirement is virtually identical to that of Part B. 34 CFR §104.34 (a) and (b). School districts must provide whatever placements are necessary to provide FAPE in the least restrictive environment.

6. May a child be given detentions, suspensions or expulsions for behaviors that are a direct outgrowth or symptom of his handicap?

Generally, student discipline is a State and local matter. However, when children who are eligible for services under Part B are involved, the requirements of Part B as they pertain to discipline of children with disabilities apply. Part B has been found by the United States Supreme Court in its decision in Honig v. Doe, 108 S. Ct. 592 (1988), to prohibit State or local school authorities from unilaterally excluding children with disabilities from the classroom for dangerous or disruptive conduct arising from their disability. Under Part B, exclusion of a student with a disability from school for longer than 10 school days constitutes a change in placement, and the parents must be given written prior notice of the proposed placement change, including an explanation of applicable procedural safeguards and due process rights should they wish to challenge the proposed placement decision. 34 CFR §§300.504-300.505. School officials may, however, use their normal discipline procedures, such as temporary suspension for up to 10 school days. In addition, the use of study carrels, timeouts, detentions, or other restrictions in privileges would be permissible, to the extent that they would not be inconsistent with the child's IEP. This determination must be made, on a case-by-case basis, in light of the particular facts and circumstances.

A suspension or disciplinary removal of a student with a disability for more than 10 school days, which constitutes a change in placement, may not be imposed without a determination by a group of persons, as described in the Part B regulations at 34 CFR §§300.344 and 300.533(a)(3), that the student's misconduct is not a manifestation of the student's disability. If a removal of a student with a disability from school for a period of up to 10 school days is being contemplated, no prior determination by the group of persons described at 34 CFR §§300.533(a)(3) and 300.344 as to whether the student's misconduct is related to the student's disability is required. If the group determines that the misconduct is not a manifestation of the student's disability, the school district may impose normal disciplinary measures subject to the parents' right to request a due process hearing on whether the manifestation determination was correct, which would stay any long-term suspension or expulsion until the review proceedings are completed.

If the group determines that the student's misconduct is a manifestation of the student's disability, the student may not be suspended for more than 10 school days. If the misconduct is related to the disability, it is appropriate to review the student's placement. Nonpunitive changes in placement may be appropriate and should be implemented subject to applicable procedural safeguards. If the parents request a due process hearing under 34 CFR §300.506 to challenge an LEA's proposal to change the student's placement, that action may not be unilaterally taken over the parent's objections until all administrative and judicial review proceedings have been completed. Under Part B, even during a disciplinary removal that exceeds 10 school days, schools may not cease educational services to students with disabilities. This is so, regardless of whether the student's misconduct is determined to be a manifestation of the student's disability.

Under Section 504, long-term suspensions of more than 10 days and, in some cases, cumulative short-term suspensions exceeding 10 days constitute a significant change of placement. It should be noted that in-school discipline that removes the child from the educational program will be viewed, for this purpose, as a suspension. Prior to a significant change in placement, 34 CFR §104.35(a) requires reevaluation, following the procedural safeguards in 34 CFR §104.36. The first step in this reevaluation is to determine whether the misconduct leading to the disciplinary action was caused by the child's disability. A group of persons, which must include individuals personally familiar with the child and knowledgeable about special education and which may be the same group that made the initial placement decision, must be convened for this purpose. If the group determines that the misconduct does not arise from the disability, the child may be disciplined in the same manner as similarly situated children without disabilities are disciplined. On the other hand, if the group determines that the misconduct is caused by the disability, the group must continue the reevaluation, following the requirements of 34 CFR §§104.35 and 104.36, to determine if the child's current placement is appropriate. This procedure is explained in detail in two Memorandums to OCR Senior Staff, dated October 28, 1988, and November 13, 1989. Copies of these documents are enclosed.

Occasional detentions and similar forms of discipline do not require reevaluation or determination of the cause of the misconduct under Section 504. Generally detentions, for example, would not constitute a significant change in

placement, particularly if they occur before or after instructional hours. If, however, a pattern of disciplinary actions for behaviors caused by or symptomatic of the child's disability develops, there might be sufficient cause to believe that a Section 504 violation is occurring.

7. If the services a child with ADD requires are offered only within a program for children who are severely emotionally disturbed, must the child be "shoehorned" into that category and labeled SED in order to get those services, even though exposure to worse and more bizarre behaviors and exposure to clinically mentally ill children is detrimental to children with ADD because they "copycat" everything they see, and they are distracted by the outbursts of others. Or should the school district create comparable programs designed to improve the behaviors of the children with ADD in an atmosphere less distracting to them?

Initially, we want to correct your assumption that Part B requires that a particular child accept a particular label in order to be eligible for and receive required special education and related services. The entitlement under Part B is the entitlement of each eligible child with a disability to FAPE and not to a particular label, such as specific learning disability, serious emotional disturbance, other health impairment, or any other eligible disability category under Part B. Rather, the child's IEP, which must reflect the child's educational needs, forms the basis for the placement decision, and not the category of the child's disability.

Under Part B, each child's placement must be determined at least annually on the basis of the child's IEP. 34 CFR §300.552(a)(2) and Note. Each child's IEP must contain, among other elements, a statement of the specific special education and related services to be provided to the child and the extent that the child will be able to participate in regular educational programs. 34 CFR §300.346(a)(3). The overriding rule is that each child's placement must be determined on an individual basis.

Further, placement decisions may not be based on factors such as the category of disability, the configuration of the delivery system, the availability of educational or related services, the availability of space, or administrative convenience. In addition to the LRE provisions summarized above, the requirements of 34 CFR §300.533 are applicable to placement decisions for eligible children with disabilities under Part B. In making placement decisions, public agencies must draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior. 34 CFR §300.533(a)(1). Each child's placement must be made by a group of persons, including persons knowledgeable about the child, the meaning of evaluation data, and placement options. 34 CFR §300.533(a)(3).

Section 504 also guarantees FAPE in the least restrictive environment appropriate to the needs of children with disabilities; and the continuing focus on the individual educational needs of each child would preclude "shoehorning" children into inappropriate placements. 34 CFR §§104.33(a) and 104.34. The most significant difference between the FAPE requirements of Section 504 and those of Part B is that Part B requires FAPE, consisting of special education and related services, implemented on the basis of an IEP document, whereas Section 504 requires FAPE, consisting of regular or special education and related aids and services, as implemented by any appropriate means, including, but not limited to, an IEP. 34 CFR §104.33(b)(1) and (2).

8. Are teachers allowed to refuse to implement ADD interventions in regular classrooms because it is "extra work" or "not in a Union contract?"

9. Can a teacher refuse to teach a child who has ADD/ADHD?

Because these questions are related, we are issuing a combined response. Neither Part B or Section 504 confers specific responsibilities on teachers. Rather, specific rights and protections are afforded to children with disabilities and their parents, if the children are eligible under Part B or covered by Section 504. However, the provisions of a collective bargaining agreement cannot authorize a school district's failure to provide the rights and protections guaranteed under Part B to all eligible children with disabilities and their parents and guaranteed under Section 504 to all qualified individuals with disabilities and their parents.

Part B also requires States to have procedures for ensuring an adequate supply of qualified personnel, as the term "qualified" is defined in 34 CFR §300.15. 34 CFR §§300.381 and 300.121. Determinations as to which personnel will provide services to a child eligible for services under Part B are left to State and local educational authorities.

10. Are teachers' unions allowed to make contracts which contain rules that are in opposition to civil rights laws such as Section 504?

11. Can a teachers' union be brought up before OCR for violation of students' civil rights by promulgation of rules and regulations that deny children's civil rights?

Because these questions are related, we are issuing a combined response. Implementation of any collective bargaining agreement or of any rules and regulations that have the effect of limiting the participation of children with disabilities in the regular educational environment or of imposing other burdens on children with disabilities or of making the aids, benefits, and services provided by the school district less effective than those provided to other students would constitute a violation of Section 504 and its implementing regulation. In enforcing Section 504, however, OCR has no jurisdiction over entities that do not receive Federal funding through the Department. As long as a teachers' union does not receive such funding, OCR could not dictate the terms of any collective bargaining agreement it proposes or find the union in violation of Section 504 and its implementing regulation if the terms of the proposed contract prove to be discriminatory. OCR could, however, find a school district in violation if it ratified such a collective bargaining agreement and then attempted to use it as a justification for not meeting the LRE requirement or for restricting children with disabilities in obtaining aids, benefits, or services or for providing these children with aids, benefits, and services that are not as effective as those provided to nondisabled children.

12. a) If a class action suit is brought against a state for which a settlement requires a great deal of money be available to provide the mandated services, will OCR accordingly determine what amount will be sufficient to meet the needs and order the state's appropriations committee to make the necessary provisions? b) Would school districts be held in violation if they gave no services requiring expenditures until such monies became available, whether or not partial or full funding might be already accessible in their own budgets?

In seeking to remedy violations of Section 504, OCR does not determine what amount of money is necessary to eliminate the violations. If a complaint is made against a school district, OCR investigates to determine if violations are occurring. If OCR identifies civil rights violations, it then attempts to obtain corrective action from the district, including a corrective action plan that sets forth what actions the school district needs to take and over what period of time. If money is required to remedy a violation affecting a class of complainants, for example, OCR does not become involved in the process of appropriating the necessary funds. When the school district submits a corrective action plan to OCR, the school district becomes responsible for obtaining the funds necessary to comply with that corrective action plan within the agreed time frames. If the school district does not submit an acceptable plan to OCR, or of it does not fulfill the terms of the corrective action plan that it has submitted to OCR, it may become subject to enforcement proceedings, which could result in the termination of or failure to renew Federal financial assistance.

13. Can administrative personnel who continue to refuse to implement policies mandating evaluations, strategies, interventions, classrooms, and teacher training according to P.L. 94-142, Section 504, and the Clarification of Policy mentioned above (in spite of their full knowledge of these) be held personally liable for violations of civil rights?

If administrative personnel refuse to implement policies necessary for compliance with Section 504, their employer, usually an LEA or an SEA, is liable for any resulting civil rights violation as long as the employer is under the jurisdiction of OCR. Neither Part B nor Section 504 contains language holding individuals personally responsible for the civil rights violations perpetrated in the course of their employment.

I hope that the above information clarifies the Department's policies on children with ADD. If we can be of further assistance, please let us know.

Sincerely,

Thomas Hehir, Director
Office of Special Education Programs

Jeanette J. Lim, Director
Policy Enforcement and Program Service
Office for Civil Rights

OCR FACTS:
Section 504 Coverage of Children with ADD

Question: What is ADD?

Answer: Attention Deficit Disorder (ADD) is a neurobiological disability. It is characterized by: attention skills that are developmentally inappropriate; impulsivity; and, in some cases, hyperactivity.

Question: Are all children with ADD automatically protected under Section 504?

Answer: NO. Some children with ADD may have a disability within the meaning of Section 504; others may not. Children must meet the Section 504 definition of disability to be protected under the regulation. Under Section 504, a "person with disabilities" is defined as any person who has a physical or mental impairment which substantially limits a major life activity (e.g., learning). Thus, depending on the severity of their condition, children with ADD may or may not fit within that definition.

Question: Must children thought to have ADD be evaluated by school districts?

Answer: YES. If parents believe that their child has a disability, whether by ADD or any other impairment, and the school district has reason to believe that the child may need special education or related services, the school district must evaluate the child. If the school district does not believe the child needs special education or related services, and thus does not evaluate the child, the school district must notify the parents of their due process rights.

Question: Must school districts have a different evaluation process for Section 504 and the IDEA?

Answer: NO. School districts may use the same process for evaluating the needs of students under Section 504 that they use for implementing IDEA.

Question: Can school districts have a different evaluation process for Section 504?

Answer: YES. School districts may have a separate process for evaluating the needs of students under Section 504. However, they must follow the requirements for evaluation specified in the Section 504 regulation.

Question: Is a child with ADD, who has a disability within the meaning of Section 504 but not under the IDEA, entitled to receive special education services?

Answer: YES. If a child with ADD is found to have a disability within the meaning of Section 504, he or she is entitled to receive any special education services the placement team decides are necessary.

Question: Can a school district refuse to provide special education services to a child with ADD because he or she does not meet the eligibility criteria under the IDEA?

Answer: NO.

Question: Can a child with ADD, who is protected under Section 504, receive related aids and services in the regular educational setting?

Answer: YES. Should it be determined that a child with ADD has a disability within the meaning of Section 504 and needs only adjustments in the regular classroom, rather than special education, those adjustments are required by Section 504.

Question: Can parents request a due process hearing if a school district refuses to evaluate their child for ADD?

Answer: YES. In fact, parents may request a due process hearing to challenge any actions regarding the identification, evaluation, or educational placement of their child with a disability, whom they believe needs special education or related services.

Question: Must a school district have a separate hearing procedure for Section 504 and the IDEA?

Answer: NO. School districts may use the same procedures for resolving disputes under both Section 504 and the IDEA. In fact, many local school districts and some state education agencies are conserving time and resources by using the same due process procedures. However, education agencies should ensure that hearing officers are knowledgeable about the requirements of Section 504.

OCR Memorandum—April 29, 1993

Jeanette J. Lim, Acting Assistant Secretary for Civil Rights

OCR released a memorandum to the regional civil rights offices in an effort to clarify the responsibility of school districts in evaluating children with attention deficit disorder (ADD). In a previous joint memorandum, OCR had stated that "if parents believe that their child is disabled by ADD, the LEA (local educational agency) must evaluate the child to determine whether he or she has a disability as defined by Section 504." To OCR's dismay, this statement has become misinterpreted to mean that school districts are duty-bound to evaluate every child suspected of having ADD, based solely on parental suspicion and demand. In order to clarify the original statement, OCR explained in its latest memorandum that if parents believe their child has ADD, and the LEA has reason to believe that the child needs special education or related services, then the LEA must evaluate the child to determine whether he or she is disabled under Section 504. On the other hand, if the LEA does not believe that the child needs special education or related services and refuses to evaluate the child, then the LEA is only required to notify the parents of their due process rights.

It recently has come to our attention that many school districts and parents appear to be misinterpreting a statement contained in the September 16, 1991, memorandum concerning "Clarification of Policy to Address the Needs of Children with Attention Deficit Disorders within General and/or Special Education." This statement, on page 6 of the memorandum, concerns the responsibility of local education agencies (LEAs) to evaluate children suspected of having ADD. The statement reads as follows:

> Under Section 504, if parents believe that their child is disabled by ADD, the LEA must evaluate the child to determine whether he or she has a disability as defined by Section 504.

A similar version of this statement is contained in the Questions and Answers Handout (Handout) on ADD, entitled "OCR Facts: Section 504 Coverage of Children with ADD." The Handout was attached to a model technical assistance (TA) presentation on ADD, disseminated to Regions on October 31, 1991, and is used as a TA resource.

The intent of this statement was to reaffirm that children suspected of having ADD and believed (by the LEA) to need special education or related services would have to be evaluated by the LEA pursuant to Section 504. These children are afforded protection and rights as any other children with disabilities under Section 504. This statement was necessary since many school districts, prior to issuance of the September 21, 1991, memorandum, held the position that they were not obliged to evaluate any child suspected of having ADD since it was not a disability specifically listed in the Individuals with Disabilities Education Act.

To our dismay, this statement has been interpreted to mean that school districts are required to evaluate *every* child suspected of having ADD, based *solely on parental suspicion and demand.* This was not the intent of the statement. Rather, under Section 504, if parents believe their child has a disability, whether by ADD or any other impairment, *and the LEA has reason to believe the child needs special education or related services,* the LEA must evaluate the child to determine whether he or she is disabled as defined by Section 504. *If the LEA does not believe that the child needs special education or related services, and thus refuses to evaluate the child, the LEA must notify the parents of their due process rights.*

This memorandum is intended to clarify the responsibility of LEAs to evaluate children suspected of having ADD, based on parental request. We have also taken the opportunity to revise the Handout, as appropriate. (See answer to the question "Must children thought to have ADD be evaluated by school districts?" on the first page of the Handout.) In addition, the Handout has been revised to reflect the term "disability" instead of "handicap," consistent with the 1992 Amendments to the Rehabilitation Act of 1973 (October 29, 1992). Please have your staff discard the October 1991 version of the Handout and replace it with the attached.

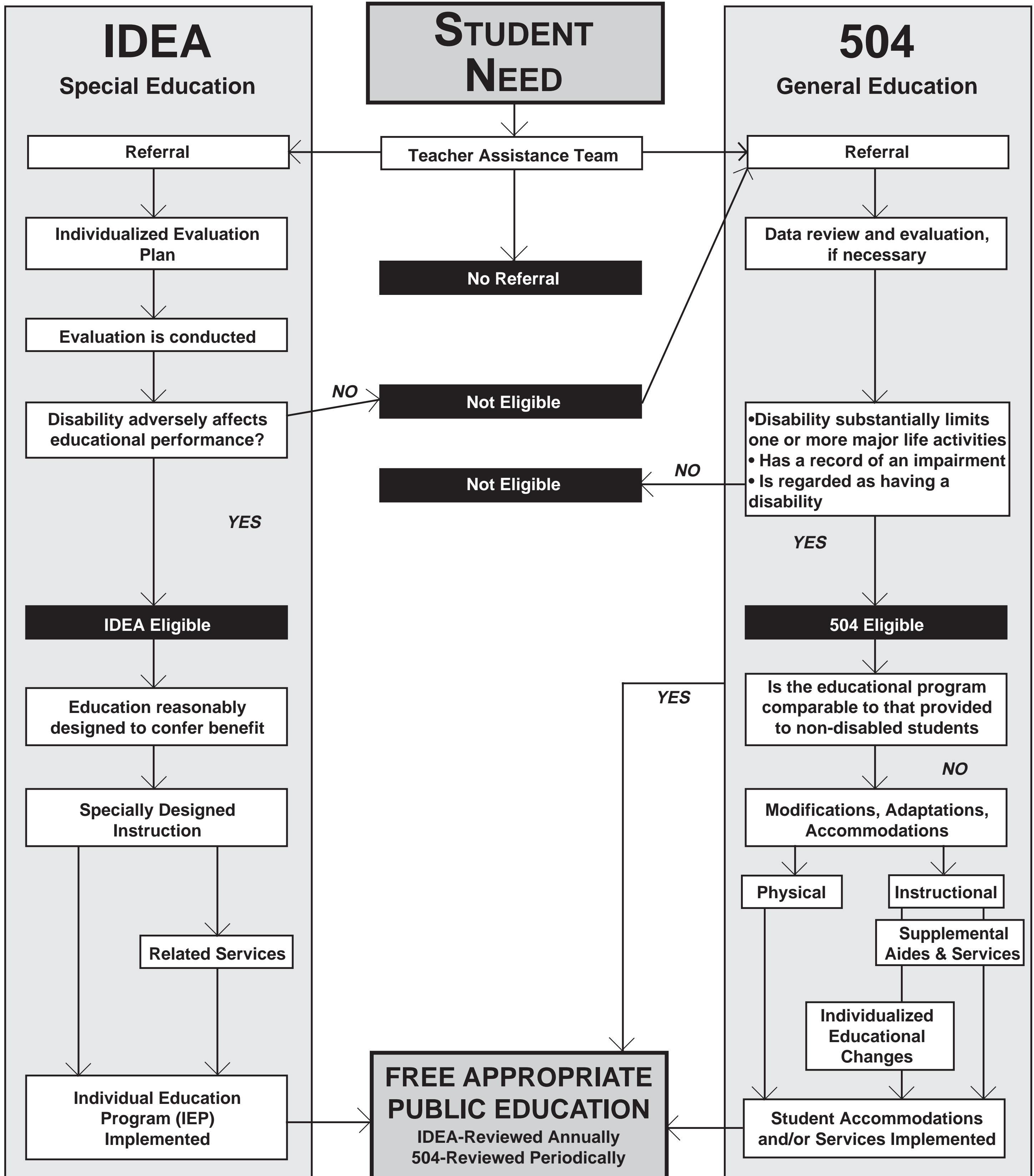
If you have any questions regarding this memorandum, please contact Jean Peelen, Director, Elementary and Secondary Education Policy Division, at (202) 205-8637.

Appendix C

Comparison IDEA/Section 504/ADA
Comparison IDEA/Section 504 Placement Process

Guidelines for Educators

Placement Process



Developed by MPRRC. Modified by OPI 1994.

Appendix D

Additional References
Regional OCR Offices

U.S. Department of Education
Office of Civil Rights
Regional Civil Rights Offices

REGION I
Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, Vermont

Mr. Thomas J. Hibino
Regional Civil Rights Director
Office for Civil Rights, Region I
U.S. Department of Education
J.W. McCormack Post Office and
Courthouse Building, Room 222, 01-0061
Boston, Massachusetts 02109-4557
Comm (617) 223-9662; TDD (617) 223-9695
FAX: (617) 223-9669

REGION II
New Jersey, New York, Puerto Rico, Virgin Islands

Ms. Paula D. Kuebler
Regional Civil Rights Director
Office for Civil Rights, Region II
U.S. Department of Education
26 Federal Plaza, 33rd Floor, Room 33-130, 02-1010
New York, New York 10278-0082
Comm (212) 264-5180; TDD (212) 264-9464
FAX: (212) 264-3803

REGION III
Delaware, District of Columbia, Maryland, Pennsylvania, Virginia, West Virginia

Dr. Robert A. Smallwood
Regional Civil Rights Director
Office for Civil Rights, Region III
U.S. Department of Education
3535 Market Street, Room 6300, 03-2010
Philadelphia, Pennsylvania 19104-3326
Comm (215) 596-6787; TDD (215) 596-6794
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REGION IV
Alabama, Florida, Georgia, North Carolina, South Carolina, Tennessee

Mr. Archie B. Meyer, Sr.
Regional Civil Rights Director
Office for Civil Rights, Region IV
U.S. Department of Education
101Marietta Tower, Suite 2700, 04-3010
Atlanta, Georgia 30301-2048
Comm (404) 331-2954; TDD (404) 331-7236
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REGION V
Cleveland, Illinois, Indiana, Michigan, Minnesota, Ohio, Wisconsin

Mr. Kenneth A. Mines
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U.S. Department of Education
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Chicago, Illinois 60605-1202
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FAX: (312) 353-4888; CLEVELAND: (312) 522-4970

REGION VI
Arkansas, Louisiana, Mississippi, Oklahoma, Texas

Mr. Taylor D. August
Regional Civil Rights Director
Office for Civil Rights, Region VI
U.S. Department of Education
1200 Main Tower Building, Suite 2260, 06-5010
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REGION VII
Iowa, Kansas, Kentucky, Missouri, Nebraska

Mr. Charles J. Nowell
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U.S. Department of Education
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Kansas City, Missouri 64153
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REGION VIII
Arizona, Colorado, Montana, New Mexico, North Dakota, South Dakota, Utah, Wyoming

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REGION IX
California

Mr. John E. Palomino
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Office for Civil Rights, Region IX
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Old Federal Building, 09-8010
50 United Nations Plaza, Room 239
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REGION X
Alaska, American Samoa, Guam, Hawaii, Idaho, Nevada, Oregon, Washington, Trust Territory of the Pacific Islands

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