

SECTION 504  
OF THE  
REHABILITATION ACT OF 1973  
AND  
VERMONT SCHOOLS

A MANUAL FOR  
PARENTS, FAMILIES, AND SCHOOLS

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# INTRODUCTION

Section 504 of the Rehabilitation Act of 1973 (hereinafter Section 504) is a federal law prohibiting discrimination on the basis of disability. It applies to any entity that receives federal funding. Section 504 is similar to federal laws prohibiting discrimination in federally funded programs on the basis of race, national origin and gender. Public school districts and independent schools that directly or indirectly receive federal funds must comply with Section 504 both as providers of education to children and as employers.<sup>1</sup>

Recipients of federal funds (hereinafter referred to as recipients) are individually responsible for compliance with Section 504. If an individual feels that he or she has been subjected to unlawful discrimination by a Vermont school district or independent school, he or she may ask the U.S. Department of Education's Office for Civil Rights to investigate and enforce compliance with this law.

The Americans with Disabilities Act, (hereinafter ADA) enacted in 1991, imposes the same nondiscrimination obligations on public elementary and secondary schools as Section 504, but without the limitation of applying only to recipients of federal funds. Title II of the ADA applies to public entities, whether they receive federal funds or not.<sup>2</sup> The ADA definition of "public entity" includes state and local governments as well as any other "instrumentality" of a state or local government. Title II of the ADA also applies to independent schools that do not have religious affiliations<sup>3</sup> and other "public accommodations."<sup>4</sup> The ADA Amendments of 2008 (hereinafter 2008 Amendments) included a conforming amendment to the Rehabilitation Act of 1973 that clarified the scope of 504.<sup>5</sup> While the 2008 Amendments were expressly directed towards restoring protections eroded by the US Supreme Court in a series of employment cases brought under the ADA, these changes will also affect discrimination claims concerning students and student eligibility for 504 plans. **It is particularly important for school districts to consider whether or not they need to reassess eligibility for 504 plans in the light of the Amendments.** The 2008 Amendments expressly state that the definition of disability should be construed in favor of "broad coverage." For example, these amendments have expanded the list of "major life activities" that may be substantially limited by a disability, to include reading, thinking and concentrating. The 2008 Amendments also prohibit the consideration of most "mitigating measures" in determining whether a disability substantially limits a major life activity. See pp. 4-5.

The other major federal law affecting the education of students with disabilities is the Individuals with Disabilities Education Act (IDEA). Unlike Section 504, which is a civil rights act, the IDEA is a funding statute. Its purpose is to provide financial aid to states in their efforts to ensure adequate and appropriate educational services to children with disabilities. Theoretically, a state could reject IDEA funds and thereby avoid the responsibilities it imposes. A state or local entity cannot avoid Section 504 responsibilities, however, unless it refuses all federal funds, and then it

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<sup>1</sup> 34 C.F.R. § 104.31

<sup>2</sup> The US Department of Justice recently published new ADA rules that will go into effect shortly. For a brief summary of these rules see the ADA Fact Sheet in the appendix to this manual.

<sup>3</sup> The ADA does not apply to "religious organizations or entities controlled by religious organizations, including places of worship." 42 U.S.C. § 12187. Whether or not the ADA's religious exemption applies is a mixed question of law and fact. See *DOE v. Abington Friends School*, 480 F. 3d 252 (3rd Cir. 2007)

<sup>4</sup> See 28 C.F.R. § 36.102

<sup>5</sup> See 29 U.S.C. § 705

would remain responsible for substantial compliance with Section 504 standards through the ADA.

This handbook provides information on issues that commonly arise only in the context of Section 504 concerning students and parents as it pertains to preschool, and elementary and secondary education.<sup>6</sup> For questions about 504 and the ADA as they apply to employees please contact the Vermont Attorney General's Office or the federal Equal Employment Opportunity Commission. *See Appendix.* For information about 504 and post-secondary education please contact the Office of Civil Rights. *See Appendix.*

As the issues are discussed, it will be apparent to the reader that the most difficult questions tend to involve specific and unique fact situations. Resolution often requires an analysis of the specific facts in each case. It is important to note, therefore, that this manual is not a substitute for an individual analysis of each case and, when necessary, consultation with a knowledgeable attorney or other person with experience in dealing with Section 504 issues.

### **SUMMARY OF SECTION 504**

Section 504 prohibits discrimination on the basis of disability. The Rehabilitation Act itself states the nondiscrimination standard:

*“No otherwise qualified individual with a disability in the United States shall, solely by reason of her or his disability, 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.”*

The regulations adopted by the U.S. Department of Education, Office for Civil Rights (OCR) to govern the enforcement of Section 504 elaborate on this standard by prohibiting certain “discriminatory actions.” Among the actions prohibited by the regulations are the following:

- Denying a qualified person with a disability the opportunity to participate in or benefit from the aid, benefit or service provided by an entity covered by the Act;
- Affording a qualified person with a disability an opportunity to participate that is not equal to that afforded others;
- Providing a qualified person with a disability an aid, benefit, or service that is not as effective as that provided to others;
- Providing different or separate benefits or services to qualified persons with disabilities or to any class of qualified persons with disabilities unless such action is necessary to provide benefits or services that are as effective as those provided to others;
- Aiding or perpetuating discrimination against a qualified person with a disability by providing significant assistance to an agency, organization or person that discriminates on the basis of disability in providing any aid benefit or services;

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<sup>6</sup> For these requirements, *See* 34 C.F.R. Part 104, Subpart D

- Otherwise limiting a qualified person with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others.<sup>7</sup>

### Terms Used in Section 504

**An “appropriate education”** in the context of 504 means:

- “The provision of regular or special education and related aids and services that are (1) designed to meet individual educational needs of persons with disabilities as adequately as the needs of non-handicapped person are met and (2) are based upon adherence to procedures that satisfy the requirements of Section 504.<sup>8</sup>

**A free education for 504 purposes** is:

- The provision of educational and related services without cost to the qualified person with a disability or to his or her parents or guardian, except for those fees that are imposed on non-disabled persons or their parents or guardians. It may consist either of the provision of free services or if a recipient places a qualified person with a disability or refers such person for aid, benefits or services not operated or provided by the recipient, of payment of the costs of the aids benefits or services. Funds available from any public or private agency may be used to meet this obligation and this requirement does not relieve an insurer or similar third party from an otherwise valid obligation to pay for services provided to a person with a disability.<sup>9</sup>

**A qualified individual with a disability (or a qualified “handicapped” person<sup>10</sup>)** is one who:

- Has a physical or mental impairment which substantially limits one or more major life activities;
- Has a record of such an impairment; or
- Is regarded as having such an impairment; and
  - with respect to public preschool, elementary or secondary education is of an age where it is mandatory under state law to provide such services or
  - with respect to other services meets the essential eligibility requirements.<sup>11</sup>

**A physical or mental impairment** means:

- Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal;
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<sup>7</sup> 34 C.F.R. § 104.4

<sup>8</sup> 34 C.F.R. § 104.33 (b)

<sup>9</sup> 34 C.F. R. § 104.33 (c)

<sup>10</sup> Federal regulations still use the term “qualified handicapped person” but the 2008 Amendments use the term “qualified person with a disability.” For the purposes of this manual the term qualified person with a disability has been substituted for the term handicapped person.

<sup>11</sup> See 34 C.F.R. § 104.3 (j) & (l)

special sense organs; respiratory, including speech organs; cardiovascular, reproductive, digestive, genito-urinary; hemetic and lymphatic; skin; and endocrine; or

- Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness and specific learning disability.

**Major life activities** were redefined in the 2008 Amendments. These include, but are not limited to, activities such as caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating and working. In addition, a major life activity includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine and reproductive functions.<sup>12</sup>

The determination of whether or not an individual has an impairment that substantially limits a major life activity must be made **without** taking into account the ameliorative effects of mitigating measures, with the exception of ordinary glasses or contact lenses.<sup>13</sup> This is a major change in the criteria for 504 eligibility. Previously mitigating measures were taken into consideration.

Examples of mitigating measures described in the 2008 Amendments that **cannot** be taken into account when determining eligibility include:

- Medication, medical supplies, equipment, or appliances, low vision devices<sup>14</sup> ( again this does not include ordinary eyeglasses or contact lenses) prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices or oxygen therapy equipment and supplies;
- Use of assistive technology;
- Reasonable accommodations or auxiliary aids or services;
- Learned behavioral or adaptive neurological modifications.

**Auxiliary aids and services** as used above include:

- Qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments;
- Qualified readers, taped texts or other effective methods of making visually delivered materials available to individuals with visual impairments;
- Acquisition or modification of equipment or devices;

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<sup>12</sup> 42 U.S.C. § 12102 (a)(2)

<sup>13</sup> Ordinary eyeglasses or contact lenses means lenses that are intended to fully correct visual acuity or eliminate refractive error. See 42 U.S.C. § 12101 (a)(3)(E) (i)-(ii)

<sup>14</sup> The term low vision devices means devices that magnify, enhance or otherwise augment a visual image. See 42 U.S.C. § 12101 (a)(3)(E)(iii)



- Other similar services and actions.

The 1998 Amendments also contain the following provisions concerning what constitutes a physical or mental impairment for the purposes of determining whether or not a person is a qualified individual with a disability:

- An individual meets the requirements of “being regarded as having such an impairment” if the individual establishes the s/he has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment whether or not this impairment limits or is perceived to limit a major life activity.<sup>15</sup>
- An individual will not meet the requirement of having been regarded as having a physical or mental impairment if the impairment is transitory or minor. A transitory impairment is impairment with an actual or expected duration of 6 months or less.<sup>16</sup>
- An impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability.<sup>17</sup>
- An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.<sup>18</sup>

The 2008 Amendments expressly state that the previous ADA regulations defining the term “substantially limits” as “significantly restricted” was inconsistent with federal intent in that this standard was too high. Whether an impairment “substantially limits” a major life activity may be difficult to determine. OCR is currently evaluating whether any changes to its regulations,

guidance or other publications are in need of revision in the light of the 2008 Amendments. The effect of impairment on a major life activity is measured by comparing the individual’s ability to that of an average person in the general population. In the case of a student, this means that the effect of an impairment should be determined by comparing the student’s ability to that of other students in his or her age or grade generally, not merely to other students in the same classroom, or even in the same school. OCR has said that a student with impairment who is nevertheless succeeding in regular education cannot be viewed as substantially limited in the major life activity of learning. On the other hand, a student who is advancing from year to year while functioning further and further below expected norms for his or her age may be substantially limited.<sup>19</sup>

**A recipient of federal funds means:**

- Any state or its political subdivision, any instrumentality of a state or its political subdivision, any public or private agency, institution, organization or other entity, or any

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<sup>15</sup> 42 U.S.C. § 12102 (a)(3)(A).

<sup>16</sup> 42 U.S.C. § 12102 (a)(3)(B).

<sup>17</sup> 42 U.S.C. § 12102 (a)(3)(C).

<sup>18</sup> 42 U.S.C. § 12102 (a)(3)(D).

<sup>19</sup> See *Saginaw City School District*, EHLR 352:4123 (OCR 1987)

person to which Federal financial assistance is extended directly or through another recipient.<sup>20</sup>

**Program or activity** means:

- All programs or activities of the Vermont Department of Education and all schools and school districts receiving federal funds regardless of whether the specific program or activity involved is the recipient of federal funds.

**Is regarded as having an impairment** means:

- Has a physical or mental impairment that does not substantially limit major life activities but that is treated by a recipient as constituting such a limitation;
- Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or
- Has none of the impairments defined above but is treated by a recipient as having such an impairment.

## 504 AND FAPE

A recipient of federal funds operating an elementary or secondary education program or activity must provide a free appropriate education (FAPE) to each qualified person with a disability in the recipient's jurisdiction regardless of the nature or severity of the person's disability. The programmatic, or "FAPE" requirements of Section 504 apply to students who are currently disabled. **The fact that a student "has a record of having an impairment" or is "regarded as**

**having an impairment" is not a basis for providing a FAPE** and schools are not required to develop 504 plans for such students.<sup>21</sup> These provisions are however relevant to discrimination claims concerning whether the student has been subjected to a negative action as a result of the perception that the student has a disability or because the student is regarded as having a disability.<sup>22</sup>

There is no upper age limit in Vermont to the entitlement to public education. A person is entitled to attend a public school in Vermont until that person earns a high school diploma, regardless of how old he or she may be.

Under Vermont law, legal residency determines whether a student is within a school district's jurisdiction. The residence of a minor Vermont student for educational purposes is generally where either of his or her parents legally resides.<sup>23</sup> If a student resides with one parent, but attends school in the district of his or her other parent's Vermont residence, the district of attendance is the district responsible for providing a FAPE.

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<sup>20</sup> See 34 C.F.R. § 104.3 (f)

<sup>21</sup> *Protecting Students With Disabilities*, OCR Guidance 2005, as revised after 2008 Amendments, No. 37

<sup>22</sup> *OCR Policy memorandum* (1992)

<sup>23</sup> 16 V.S.A. § 1075 (a)(1)

The educational setting must be the regular educational environment unless it is demonstrated that the education of the person in the regular education environment, with the use of supplementary aids and services, cannot be achieved satisfactorily.<sup>24</sup> This mainstreaming requirement applies to nonacademic settings and extracurricular activities as well, such as meals, recess, athletics, clubs etc. to the extent appropriate to the needs of the student in question.<sup>25</sup>

**OCR has consistently maintained that public elementary and secondary schools must provide academic program accommodations to eligible students regardless of their cost.**<sup>26</sup>

When two accommodations would each be adequate to meet the FAPE standard, the lower cost accommodation may be chosen.

If a district contracts with alternative education programs, the district must insure that a student with a disability has an equal opportunity to participate in alternative education, even if the programs themselves do not receive any federal funds.<sup>27</sup>

### **Parental Responsibilities to Pay For Accommodations For Students In Choice Towns Or When Placed In A Private School As Part Of A Public School 504 Plan.**

When a Vermont school district pays tuition to an independent school on behalf of a resident student, the cost of accommodations to the student's program required by Section 504 may **not** be charged to the parents of that student. OCR has indicated that an independent school may include the cost of Section 504 accommodations in its regular tuition charge. Under Vermont

law, the resident district of the student would then be obligated to pay the tuition amount allowed under Vermont's tuition statutes. If the independent school bills the cost of accommodations separately, the district of residence and the independent school must determine whether, under any applicable agreement they may have, the separate charge will in fact be paid by the resident district. Section 504 does not dictate an answer to this question. OCR has advised that it is a matter for the sending district and receiving school to resolve. It may be resolved in any manner, so long as the parents are not required to pay the additional amount, and so long as there is no delay in providing needed services to the child.<sup>28</sup>

### **Parental Placement of Children in Independent Schools as an Alternative to Publicly Funded Education.**

Federal regulations prohibit recipient independent schools from excluding students with disabilities for whom they are able to provide an appropriate education with "minor adjustments."<sup>29</sup> If parents privately place a child in a recipient independent school, the school may add a surcharge, or increase its tuition charge, to pay for the cost of providing Section 504 accommodations. The Section 504 regulations limit the amount of this charge somewhat. The regulations provide that an independent school may not charge more for the provision of an appropriate education to students with disabilities than to non-disabled students "except to the

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<sup>24</sup> 34 C.F.R. § 104.34

<sup>25</sup> 34 C.F.R. § 104.34 (b)

<sup>26</sup> *Letter to Zirkel*, 16 ELHR 1177 (OCR 1990)( The reasonable accommodation standard does not apply to the FAPE requirement for 504 students.)

<sup>27</sup> 34 C.F.R. § 104.3 (f); 29 U.S.C. § 794(b)(3)(A)(ii)

<sup>28</sup> *Letter to Yudien*, March 7, 2000 (OCR)

<sup>29</sup> 34 C.F.R. § 104.39(a)

extent that any additional charge is justified by a “substantial increase in costs.”<sup>30</sup> Federal law does not specify what constitutes a “substantial increase in costs.”

## SECTION 504 AS COMPARED TO THE IDEA

Those familiar with the requirements of IDEA will notice the similarity in the reference to FAPE. However, the Section 504 standard of what is “appropriate” differs from the IDEA “appropriate” standard. The IDEA requires a program to be individually designed and reasonably calculated to provide educational benefit. Under Section 504, an appropriate program must be individually designed to meet the needs of the student as adequately as the needs of non-disabled students are met. For example, a policy of providing one hour per day of homebound instruction to all persons with disabilities would violate this standard because it fails to consider the individual needs of students. The Section 504 FAPE standard also requires that teachers be trained in the instruction of persons with the particular disabilities they are assigned to teach, and appropriate materials and equipment must be available.

### Eligibility

The IDEA lists disabling conditions that entitle a child to special education. Additionally, in order to be entitled to receive services under the IDEA and Vermont law, the disabling condition must have an adverse effect on a student’s education and result in a need for special education. In contrast, 504 does not define eligibility as precisely.

Eligibility for a Section 504 plan is not limited to listed disabling conditions. Students may be disabled and eligible under Section 504, but not under the IDEA. However, if a child is eligible for special education, he or she will most likely be protected under Section 504 but this is not automatic. *See Ellenberg v. New Mexico Military Institute*, \_\_\_ F3d\_\_\_; WL 1977486 ( C.A. 10 2009.) (Eligibility for special education does not automatically result in eligibility for 504 purposes.); *Cert denied*, U.S. 12/14/09 (No. 09-429)( The U.S. Supreme Court denied the student’s petition for certiorari effectively preserving the ruling by the Tenth Circuit.)

Vermont’s current special education regulation, Rule 2362.2.6 of the State Board Manual of Rules and Practices (SBEM), states that when a special education evaluation and planning team (EPT) determines that a student has a disability, but is not eligible for special education, it shall recommend accommodations, as needed in such areas as assessment procedures, curriculum, material or programmatic adaptations, behavior management interventions, and supplemental aids and services. These recommendations must be included in the EPT report and the report must be referred to the student’s building administrator who shall arrange for a 504 team to consider whether the student needs a 504 plan. The EPT may act as a 504 team for the purposes of determining eligibility with the consent of the building administrator.

Federal regulations also make clear that certain conditions, such as drug or alcohol addiction or heart disease, which would not be considered disabilities under the IDEA, may be disabilities under Section 504. While Section 504 requires that the condition “substantially limit a major life activity,” it need not necessarily adversely affect the student’s educational performance in order to qualify him or her for Section 504 accommodations in the school setting.

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<sup>30</sup> 34 C.F.R. § 104.39 (b)

A medical diagnosis alone is not sufficient to qualify a student for a 504 plan. However, a physician's diagnosis may be considered along with other sources of information in evaluating the student.<sup>31</sup>

Examples of potentially qualifying disabilities under Section 504 that may not typically be covered under the IDEA are:

- Communicable diseases: AIDS, AIDS related complex (ARC) or asymptomatic carriers of the AIDS virus (HIV), tuberculosis;
- Temporary disabling conditions<sup>32</sup>: Students injured in accidents, or suffering short-term illnesses.
- Attention Deficit Disorder - Attention Deficit Hyperactivity Disorder (ADD/ADHD) where the adverse effect on educational performance required for special education eligibility is not shown;
- Chronic asthma and severe allergies;
- A physical condition such as spina bifida, hemophilia and conditions requiring children to use crutches, wheel chairs or other assistive devices;
- Diabetes; or
- Allergies.

### Evaluations

The Section 504 regulations require that, if a student “needs or is believed to need special education or related services,” the district must evaluate the student at its own cost prior to initial placement in a regular or special education program and before any “significant change in placement.”<sup>33</sup>

An evaluation meeting particular criteria is not required when neither the district nor the parents believe that the child is in need of special education or related services. However, the district should have current medical or other information in order to make needed accommodations to the student's program. A medical diagnosis alone is not sufficient to automatically qualify a student for a 504 plan but would warrant consideration of whether an evaluation is appropriate.

The district must establish policies and procedures for evaluation and placement that assure that tests and other evaluation materials:

- Are administered by trained personnel and valid for the purpose of the evaluation;

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<sup>31</sup> *Protecting Students With Disabilities*, OCR Guidance 2005 as revised after 2008 Amendments, No. 24

<sup>32</sup> *Id.* at No. 34

<sup>33</sup> 34 C.F.R. § 104.35 (a)

- Are tailored to assess educational need and are not merely based on IQ scores;
- Reflect ability to learn or achievement or whatever else the tests intend to measure and do not reflect the student's impaired sensory, manual or speaking skills (unless the test is designed to measure these particular deficits).<sup>34</sup>

If a parent refuses to consent to a 504 evaluation the school district may request a due process hearing and seek a decision ordering such an evaluation.<sup>35</sup>

### Independent Evaluations

Unlike the IDEA, there is no right to an independent evaluation under Section 504. Although school districts are not required by Section 504 to fund independent evaluations, a school district should consider independent evaluations provided by parents when interpreting evaluation data and making placement decisions. In at least one instance, the OCR has said that meeting the regulatory requirement that information from a variety of sources be considered when making placement decisions obligates a district to consider an independent evaluation obtained by a parent.<sup>36</sup>

### Consent to 504 Services

If a parent refuses to consent to 504 services for an eligible student the school may request a due process hearing to seek an order compelling the student's participation in a 504 plan.<sup>37</sup> Federal regulations enacted in December of 2008 expressly prohibit a school district from using due process proceedings to override a parent's refusal to consent to special education services.<sup>38</sup>

### IEPS

Although Section 504 does not require a school district to develop an IEP with annual goals and objectives for a student eligible under Section 504, it is recommended that the district document in writing that the 504 Team met and arrived at the agreed-upon services. The resulting Section 504 "plan" must be reviewed and updated at least annually. The use of an IEP is one means of meeting the Section 504 standards.<sup>39</sup>

### Related Services

When it comes to the provision of "accommodations" or "related aids and services," there is little distinction between IDEA and Section 504. According to the Federal regulation that defines a free appropriate education for Section 504 purposes, a school must provide:

- regular or special education and related aids and services that are designed to meet

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<sup>34</sup> 34 C.F.R. § 104.35 (b)(3)

<sup>35</sup> *Protecting Students With Disabilities*, OCR Guidance 2005 as revised after 2008 Amendments, No. 27

<sup>36</sup> *Randolph (MA) Public School*, 21 IDELR 816 (OCR 1994).

<sup>37</sup> *Protecting Students with Disabilities*, OCR Guidance 2005 as revised after 2008 Amendments, No. 43

<sup>38</sup> 34 C.F.R. § 300.300 (b)(4)

<sup>39</sup> 34 C.F.R. § 104.33 (b)(2)

individual educational needs of disabled persons as adequately as the needs of nondisabled persons are met.<sup>40</sup>

The IDEA provides a non-exclusive list of “related services.” Section 504 does not provide such a list, but services such as counseling, transportation and residential placements are specifically mentioned in the Section 504 regulations, in addition to “nonacademic and extracurricular-services”.<sup>41</sup> If a public or private residential placement is necessary to provide a FAPE, the placement, including non-medical care and room and board, must be provided at no cost to the student or his/her parents. If a recipient school refers a student off site for aids, benefits or services necessary to provide a FAPE then the recipient must ensure that adequate transportation is provided at no greater cost to the student or his/her parents than would be incurred if the aids, benefits or services occurred on site.<sup>42</sup>

### Transition Services

Transition services, explicitly required for students by the IDEA since 1990, are not required by the Section 504 regulations.

### Extended School Year Services

The IDEA regulations of 1999 require that extended school year (ESY) services be provided to special education students when IEP teams make individually based determinations that such services are necessary. The Section 504 regulations do not address the provision of ESY services for students who are eligible only under Section 504. In a small number of instances, OCR has interpreted the Section 504 regulations to require the provision of ESY services, but only when the individual needs of a student are considered and shown to require an extended school year in order to provide a FAPE.<sup>43</sup>

When a school district provides extended school year programs to students generally, it may not exclude disabled students from those programs on the basis of their disabilities. Nor may a district provide ESY services to students with certain disabilities while excluding students with other disabilities; a district may not discriminate between particular disabilities.

### Transportation

If a district places a student in a program not operated by the district, the district must assure that adequate transportation to and from the program is provided at no greater cost than the parent would have paid to transport the child to the district.<sup>44</sup> If a district provides transportation to all its students within a certain geographic area, it may not discriminate in its provision of transportation to students with disabilities.<sup>45</sup> Under Vermont law providing transportation is left to the discretion of the local school board.<sup>46</sup>

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<sup>40</sup> 34 C.F.R. §104.33

<sup>41</sup> 34 C.F.R. §§ 104.33 (c )(2) & (3) and 104.37 (a)(2)

<sup>42</sup> See 34 C.F.R. § 104.33 ( c )(2)

<sup>43</sup> See e.g. *Baltimore City (MD) Public Schools*, EHLR 352:185 ( OCR 1989)

<sup>44</sup> 34 C.F.R. § 104.33 (c)(2).

<sup>45</sup> 34 C.F.R. § 104.4 (b)(i)

<sup>46</sup> 16 V.S.A. § 1222

## Residential Placement

The Section 504 regulations provide that “(I)f placement in a public or private residential program is necessary to provide a free appropriate public education to a person with a disability because of his or her disability, the program, including non-medical care and room and board, shall be provided at no cost to the person or his or her parent or guardian.”<sup>47</sup> Under Section 504, such a placement would be required only when it is shown that the student cannot receive an appropriate program any other way.

### Unilateral Out-of-District Placements

If the district offers a free appropriate public education to a student but the parent chooses to place the child elsewhere, the district is not responsible to pay for the placement chosen by the parent.<sup>48</sup> This is substantially the same as the unilateral placement provision in the IDEA. If a district’s program is appropriate and a parent places a child in an independent school, the district is not responsible for the student’s tuition, nor is the school district required to provide the special education or Section 504 component in the independent school setting.

The Section 504 regulations also provide that, when there is a disagreement between a parent and a school district about whether the district has made a FAPE available, or has met its financial responsibilities, the disagreement should be resolved through a due process hearing.<sup>49</sup> A school district may provide Section 504 services at an independent school, or at other agreed upon locations, as long as the parents and district agree, and there are no other legal constraints such as those that might be imposed by a placement in a religious school.

### Placement Procedures

As under the IDEA, in interpreting evaluation data and making placement decisions, the district must:

- Draw upon information from a variety of sources;
- Assure that all information is documented and considered;
- Ensure that the placement decision is made by a group of persons including those who are knowledgeable about the child, the meaning of the evaluation data and placement options;
- Ensure that the student is educated with his/her non-disabled peers to the maximum extent appropriate.<sup>50</sup>

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<sup>47</sup> 34 C.F.R. § 104.33 (c)(3)

<sup>48</sup> 34 C.F.R. § 104.33 (c)(4)

<sup>49</sup> *Id.*

<sup>50</sup> 34 C.F.R. § 104.35 (a) & (c)



## Reevaluations

Section 504 requires “periodic” reevaluations. Unlike the IDEA, Section 504 contains no specified time frame. However, school districts will be in compliance if they utilize reevaluation procedures “consistent with the IDEA”, although this is not required.<sup>51</sup> Additionally, Section 504 requires a reevaluation before any significant change in placement.<sup>52</sup>

Although the term is not defined in the Section 504 regulations, OCR has defined “significant change in placement” as a substantial and fundamental change in a student’s educational program.<sup>53</sup> While a change from a mainstream classroom to a restrictive resource room for a majority of the school day would clearly constitute a significant change,<sup>54</sup> a change in instructional methods not specified in a Section 504 plan would not.<sup>55</sup> As a general rule, a student

who will receive the same services in a new environment will not experience a significant change in placement.<sup>56</sup>

One change of placement that does not require the re-evaluation of a 504 student is graduation from high school. The requirement that a special education re-evaluation take place prior to the graduation of a special education student was removed from the IDEA and its regulations in 1997 and 1999 respectively. Prior to 1997, OCR had said that while it considered it “advisable” that a “formal” determination of eligibility for graduation be made by a Section 504 student’s “evaluation team,” it acknowledged that this was not a requirement of Section 504.<sup>57</sup>

## Least Restrictive Environment

In order to remove a child with a disability from the regular educational environment, a district must demonstrate that education of the student in the regular environment with the use of supplementary aids and services cannot be achieved satisfactorily.<sup>58</sup> When a student is educated in a self-contained environment with other disabled students, consideration must be given to providing extracurricular activities and services, including meals and recess, in a mainstream setting.<sup>59</sup> Again, the decision to remove a student from the mainstream setting must be based on an analysis of the individual student’s needs.<sup>60</sup>

## Stay Put

The Vermont State Board of Education Manual of Rules and Practices includes a rule governing the due process hearing procedures under Section 504. *See* p. 18. Parents or guardians must be notified of the right to request a hearing regarding the identification, evaluation, or educational placement of students with disabilities. Unlike the IDEA, Section 504 does not have an explicit “stay put” provision. “Stay put” operates in the special education context to require that a student

<sup>51</sup> 34 C.F.R. § 104.35 (d)

<sup>52</sup> 34 C.F.R. § 104.35 (a)

<sup>53</sup> *Harlowton (MT) Public Schools*, 26 IDELR 1156 (OCR 1997)

<sup>54</sup> *See e.g., Fairbanks (AK) North Star Borough Sch. Dist.*, 22 IDELR 856 (OCR 1994)

<sup>55</sup> *See e.g., Montebello (CA) Unified Sch. Dist.*, 20 IDELR 388 (OCR 1993).

<sup>56</sup> 34 C.F.R. Part 104, Appendix A, § 25.

<sup>57</sup> *Letter to Runkel*, 25 IDELR 387 (OCR 1996)

<sup>58</sup> 34 C.F.R. § 104.34 (a)

<sup>59</sup> 34 C.F.R. § 104.34 (b)

<sup>60</sup> *See e.g., Montgomery County (MD) Public Sch.*, 19 IDELR (OCR 1992)

be maintained in his or her current educational placement when his or her parent contests a proposed change of placement by filing a request for a due process hearing.

Although the Section 504 regulations do not contain a similar requirement, OCR has advised

that, in its view, “stay put” is inherent to the procedural safeguards requirements of Section 504. In a 1995 response to an inquiry on this point, OCR observed that, “(A)lthough the Section 504 regulation contains no specific ‘stay put’ requirement, the Section 504 regulation does require school districts to provide procedural safeguards to students and their parents or guardians regarding the identification, evaluation and placement of students with disabilities.” From this requirement, concluded OCR, follows an implied “stay put” requirement. “To say that a school district can go ahead and implement a change of placement, even though the parent has a right to challenge the change, seems to undermine the rights given by due process.”<sup>61</sup> Thus, OCR

believes that a fair due process system would encompass the school district waiting for the results of the process before making the change.

### Discipline

Unlike federal special education regulations, the federal regulations for 504 students do not specify any particular requirements for disciplinary actions.<sup>62</sup> However, the general procedural safeguards requirements under Section 504 (notice, an opportunity for the parents or guardian of the child to examine relevant records, an opportunity for an impartial hearing with representation by counsel and a review procedure) apply to a change in educational placement.<sup>63</sup> **Whenever a Section 504 student is suspended for more than 10 consecutive days, or more than 10 cumulative days in a school year that constitute a pattern, it is a significant change in placement.** A “suspension” is a removal from a child’s current educational placement to a setting where the child is no longer able to benefit from the accommodations provided under his or her Section 504 plan and make reasonable progress in the general curriculum. An “in school suspension” may or may not be a change in placement. It most likely will be considered a significant change in placement when the setting of the suspension deprives a child of access to the general curriculum, or does not allow participation with peers in nonacademic settings, such as the school lunchroom. It is important to note that a suspension for part of a day counts toward the 10-day limit.

If students who are not disabled are subjected to suspensions for particular violations of school rules, disabled students may also be suspended for the same violations, for up to 10 days in a school year.

The Vermont State Board of Education has adopted rules governing disciplinary procedures for all students and for students who are not eligible for special education but who are, or may be, qualified individuals with disabilities under Section 504.

SBEM Rule 4311.1, applicable to all students, concerns short-term suspensions from school which are generally regarded as 10 days or less. In such instances the student and his/her parent or guardian must be given the opportunity for an informal hearing before an appropriately

<sup>61</sup> *Letter to Zirkel*, 22 IDELR 667 (OCR 1995).

<sup>62</sup> 34 C.F.R., Part 104

<sup>63</sup> 34 C.F. R. § 104.36

designated school official. This is an opportunity for the student and parent/s to be informed of the charges and the evidence against the student and for the student to tell his/her side of the story. A written decision regarding the disciplinary outcome must then be provided to the student's parent/s or guardian/s.

SBEM Rule 4311.2, applicable to all students, concerns long term suspensions or expulsions. In these instances the student and his/her parents or guardians must be given an opportunity for a formal evidentiary hearing before the school board. Parents/guardians have the right to advance notice of the charges, they may have an attorney present to represent the student and they have the opportunity to present evidence and cross examine witnesses. Such hearings are held in executive session.<sup>64</sup>

A Vermont statute, 16 V.S.A. § 1162 (a), concerning discipline generally allows for the immediate removal of a student from school when the student is a “continuing danger to persons or property or an ongoing threat of disrupting the academic process of the school.” In addition, if a student brings a firearm (as that term is defined in the federal Gun-Free School Act) to school, a Vermont statute, 16 V.S.A. § 1166, requires the school district to report the student to a law enforcement agency and expel the student for not less than one calendar year. The statute allows the school board, in its discretion, to modify the expulsion, on a case by case basis. One of the stated circumstances which might warrant modification would be that the student is disabled and the misconduct is related to the disability.<sup>65</sup>

Vermont statutes on student discipline **must** be read in conjunction with the Vermont State Board of Education rules, SBEM Rule 4312, concerning students who are receiving or may be eligible for 504 services.

**Before a currently eligible student who is receiving 504 educational services can be removed from his/her educational placement for disciplinary reasons for more than 10 consecutive days in a school year the school district must conduct a reevaluation. Before a student who may be eligible for 504 educational services can be removed from his/her educational placement the district must conduct an initial 504 evaluation** to determine eligibility for 504 educational services. The same process must be used for removal from an educational placement for 10 cumulative days in a school year when the removals constitute a change in placement.

**For all eligible students there must be a determination by the student's 504 team as to whether specific misconduct is caused by the child's disability.** The manifestation determination may not be made until an initial evaluation or re-evaluation is completed. The team applies the same criteria to make this “manifestation determination” as would be applied in the case of a student eligible for special education. OCR has outlined the process that it expects to find if it is asked to investigate a complaint related to student discipline as follows:

- “The group (making the determination) must be knowledgeable about the student and the meaning of evaluation data.

<sup>64</sup> 1 V.S.A. § 313 (a)(7)

<sup>65</sup> 16 V.S.A. § 1166 (b)(2)(C) Other circumstances which might warrant modification of a mandatory expulsion are that the student was unaware that s/he brought or possessed a firearm at school, the student did not intend to use the firearm to threaten or endanger others or the student does not present a threat to others and a lengthy expulsion would not best serve the interests of the student.

- The group must also have available to it information that competent professionals would require, such as psychological evaluation data related to behavior.
- The relevant information must be recent enough to afford an understanding of the student's current behavior.<sup>66</sup>

**If it is determined that the misconduct is caused by the disability, the Section 504 team must consider alterations to the child's Section 504 plan,** and may change the student's educational placement if a change is found by the team to be appropriate. The team may also consider the implementation and enforcement of a behavior management plan as part of the student's overall Section 504 plan.

Students who are not qualified students with disabilities under 504 or who meet Section 504 eligibility requirements but the misconduct is not a manifestation of their disability may be suspended or expelled for misconduct on the same basis as non-disabled students. Under these circumstances, the school district is not required to continue educational services during the period of suspension or expulsion but may do so in their discretion. In contrast, after 10 consecutive days of removal (or cumulative days that constitute a pattern), IDEA eligible students are entitled to continued educational services during periods of suspension or expulsion.

### **Weapons:**

If a 504 student possesses or carries a weapon to school or at a school function, the student may be placed in an interim alternative educational setting ( IAES) for up to 45 days, determined by the 504 team.<sup>67</sup> The team shall also determine the services to be provided in this setting.<sup>68</sup> If the parent disagrees with the disciplinary action taken by the school they may request a due process hearing or, in lieu of such hearing, they may file a complaint with OCR .<sup>69</sup> A hearing officer, in an expedited due process hearing may order a change in placement to an appropriate interim alternative setting for not more than 45 calendar days if the hearing officer finds by a preponderance of the evidence that:

1. Maintaining the student in his or her current placement is substantially likely to result in injury to the child or others and;
2. The proposed IAES will enable the student to progress in the general curriculum. The services and modifications made for the student in the interim alternative placement must be designed to address and prevent the students offending behavior.<sup>70</sup> The 504 team must meet prior to the end of the 45 day interim placement to determine the student's ultimate placement.

### **Drugs/Alcohol:**

Possession of illegal drugs or alcohol at school functions may remove an otherwise eligible

<sup>66</sup> See e.g. *Bryon County GA) Sch. Dist.*, 20 IDELR 930 (OCR 1993).

<sup>67</sup> In the event of an emergency requiring an immediate removal of the student an administrator may suspend the student for not more than ten days while this process is occurring.

<sup>68</sup> SBEM Rule 4312 (7)

<sup>69</sup> SBEM Rule 4312 (8)

<sup>70</sup> SBEM Rule 4312 (9)

student from the disciplinary protections of Section 504. This will be true if the student is being disciplined on the same basis as students without disabilities for violating school rules against drugs and alcohol, and the student is a current user of illegal drugs or alcohol.<sup>71</sup> The disciplinary protections of Section 504 **do not** apply a student is being disciplined for use or possession of illegal drugs or alcohol at school or at a school function **and** the student is a current user of illegal drugs or alcohol.

The IDEA imposes two other requirements on the discipline of special education students that do not apply to Section 504 students who are subjected to disciplinary action: functional behavioral assessments and behavior intervention plans, required by the IDEA and federal and state special education regulations, are not explicitly required for a Section 504 student. However, OCR has said that under some circumstances providing a FAPE to a child under Section 504 might require a “behavior management plan,” the purpose of which would be to address “. . . repeated or serious misconduct such that modifying the child’s negative behavior becomes a significant component of what actually takes place in the child’s educational program.”<sup>72</sup>

The State Board rule governing discipline procedures for Section 504 students provides for due process hearings to resolve disagreements between parents and school districts over discipline. Parents may also seek redress through the OCR complaint process.<sup>73</sup>

### **Procedural Protections and Appeal Rights**

Unlike the federal regulations promulgated under the IDEA, the federal regulations for 504 do not establish specific procedures for particular events. Rather, the 504 regulations require recipients to establish and implement:

- *a system regarding the identification, evaluation and placement of students who are believed to need special instruction or related services that includes notice, an opportunity for the parents or guardians to examine relevant records, an impartial hearing with opportunity for participation by the student’s parents or guardian and representation by counsel and a review procedure.*<sup>74</sup>

Vermont’s current special education regulation, SBEM Rule 1253, states that conflicts and alleged violations under Section 504 may be resolved through a due process hearing in the same manner as for a special education due process hearing. The procedures set forth in SBEM Rule 2365.1.6.1 and the time limits set forth in 16 V.S.A § 2957 apply to 504 hearings. Hearing

Officers may award declaratory and injunctive relief but not money damages, costs or attorneys fees.

### **DISCRIMINATION UNDER SECTION 504**

Discrimination under Section 504 occurs when a recipient:

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<sup>71</sup> *Protecting Students With Disabilities*, OCR Guidance 2005 as revised after 2008 Amendments Nos. 16 & 17; SBE Rule 4312 (10).

<sup>72</sup> See e.g. *Elk Grove Unified School Dist.*, 25 IDELR 759 (OCR 1997).

<sup>73</sup> SBEM Rule 4312 (8)

<sup>74</sup> 34 C.F.R. § 104.36

- **Denies a qualified person with a disability the opportunity to participate in or benefit from an aid, benefit or service that is afforded non-disabled students.**<sup>75</sup> For example, students with disabilities may not be denied credit on the basis of poor attendance when their absences are caused by their disability. Nor may a school expel or impose a long-term suspension on a student for misconduct that is a manifestation of the student's disability unless this a consequence of the possession/use of alcohol or illegal drugs at school or at a school function. *See* p. 18

One area of frequent concern is how to include students with disabilities in academic recognition programs. In 1996, OCR clarified its position on issues related to grading and awarding academic honors to students with disabilities. In general, OCR states that school districts should recognize academic accomplishments by students with disabilities. OCR does not require, however, that, in doing so, districts significantly alter their standards for receiving honor roll or class rank distinctions.<sup>76</sup> Eligibility for honor roll and academic awards cannot be denied automatically on the basis of disability status under IDEA or Section 504.<sup>77</sup>

The use of eligibility standards for class ranking or honor roll designation is permitted, but the standards must be objective, and must not arbitrarily exclude disabled students.

For example, grades may be weighted for certain advanced classes, but students with disabilities may not be arbitrarily excluded from those classes.<sup>78</sup>

Report cards may contain information about student disabilities, special education services and modified course content as these are provided to parents so that they can monitor a child's progress or level of achievement. Therefore there is an expectation of confidentiality. Transcripts are intended to inform post secondary institutions or prospective employers of a student's academic credentials and achievements. Therefore, transcripts may not contain information about student disabilities or special education services. Transcripts may indicate classes with modified or alternate curricula by the use of a symbol such as an asterix as long as this does not specifically indicate a disability. A school may disclose the fact that a student has taken special education classes to a post-

secondary institution where the parent/ student have knowledge of what information is on the transcript and have given written consent<sup>79</sup>

- **Failing to afford a qualified person with a disability an opportunity to participate in or benefit from an aid, benefit, or service that is equal to that afforded others.**<sup>80</sup> For example, Section 504 requires that disabled students be provided an equal opportunity to

<sup>75</sup> 34 C.F.R. § 104 (b)(1)(i) & (ii)

<sup>76</sup> *See e.g. Perry (OH) Public Sch. Dist.*, 41 IDELR 72 (OCR 2003) (Student's lack of participation in extracurricular activities was not related to her disability and school was not required to alter this participation standard for purposes of admission to Honor Society.)

<sup>77</sup> *See e.g. Hornstein v. Moorestown Board of Education*, 263 F. Supp 2d 887 (D.N.J. 2003) (Restraining order issued against school district preventing it from changing policies on determining who would be valedictorian to prevent student with chronic fatigue syndrome from becoming valedictorian.)

<sup>78</sup> *Letter to Runkel*, 25 IDELR 387 (OCR 1996)

<sup>79</sup> *Questions and Answers on Report Cards and Transcripts for Students with Disabilities Attending Public Elementary and Secondary Schools* (OCR 2008)

<sup>80</sup> 34 C.F.R. § 104.4 (b)(1)(ii)

participate in extracurricular activities. Providing an equal opportunity does not mean that the standards of participation must be altered for students with disabilities. It means that disabled students must be given an equal opportunity to meet the participation requirements of athletic or other extracurricular activities. If an accommodation will allow a disabled student to participate in an activity, it may be required, although, unlike accommodations to academic programs required to provide a FAPE, there is a limit to the extent to which a school must alter its non-academic program through an accommodation. The general rule is that a school need not “fundamentally alter the nature of a program” in order to allow the participation of a student with a disability.<sup>81</sup>

Some examples of OCR decisions concerning discrimination in extracurricular activities are as follows:

- *Clovis ( CA) Unified School District*, 52 IDELR, 109 LRP 31672 (OCR 2009)-OCR determined that the school district discriminated against a student with diabetes by requiring both parents to attend a multi-day outdoor field trip at their own expense as a condition of the medical support for the student’s participation. In addition the district required the parents to agree to have another parent act as the medical support person. The imposition of additional expenses, time commitments and risk served to unnecessarily burden, deny or limit equal educational opportunity and participation of students with disabilities.
- *Chattahooche County (GA) School District*, 108 LRP 57787 (OCR 2008)-OCR determined that the school district discriminated against a child with cerebral palsy when it informed the grandmother that she would have to hire a one-on-one aide at her own expense as a condition for the student’s participation in an after-school program. There was no evidence that hiring the one-on-one aide was an undue burden on the school district.
- *Baldwin County (AL) School District*, 51 IDELR 141, 108 LRP 68126 (OCR 2008)-School District’s selective enforcement of “outside date” policy for homecoming discriminated against student with a mobility impairment who invited a girl with cerebral palsy to the homecoming dance.
- **Failing to provide aids, benefits, or services to a qualified person with a disability that are as effective as those provided to non-disabled persons.**<sup>82</sup> “Effective” means equivalent as opposed to identical. Moreover, to be effective, an aid, benefit or service need not produce equal results; it must merely afford an equal opportunity to achieve equal results. This is referred to by OCR as the “commensurate opportunity standard,” and it is applied to both services and facilities<sup>83</sup>

<sup>81</sup> OCR has stated that “providing extra supervision to a handicapped child ordinarily will not change the fundamental nature of the program or unduly burden a recipient.” At the same time OCR acknowledges that “considerable discretion” should be given to “recipients in determining what supplemental services are necessary in a particular case, since the 504 regulations provide no specific guidance.” See *OCR Senior Staff Memoranda, Guidance on the Application of Section 504 to Noneducational Programs of Recipients of Federal Financial Assistance*, 17 EHLR 1233 (OCR 1990).

<sup>82</sup> 34 C.F.R. § 104.4 (b)(1)(iii)

<sup>83</sup> 34 C.F.R. § 104.4 (b)(1)(ii)

- **Providing different or separate aids, benefits or services unless such action is necessary to be as effective as the aids, benefits or services provided to non-disabled students.**<sup>84</sup> Although separate or different aids, benefits or services are not necessarily unlawful, a school district will generally have to justify such non-uniform treatment if OCR is asked to investigate a complaint on these grounds.
- **Aiding or perpetuating discrimination by providing significant assistance to an agency, organization or person that discriminates on the basis of disability.**<sup>85</sup> For example, a school would violate this standard if it sponsored student organizations that exclude persons with disabilities.

OCR found a violation of this standard when it reviewed the Milwaukee, Wisconsin school choice program in 1990. Although many of the schools involved in that program were private parochial schools that received no federal funds directly, OCR found them to be subject to Section 504 because the choice program itself was subsidized by a covered entity-the state.

Since the Section 504 regulations do not allow a covered entity to contract or “enter into arrangement” with any other entity that discriminates against qualified individuals with

disabilities, the state was obligated to ensure that all schools participating in the choice program complied with Section 504 requirements.<sup>86</sup>

- **Denying a person with disabilities the opportunity to participate as a member of a planning or advisory board strictly because of his/her disability.**<sup>87</sup> This provision was placed in the Section 504 regulations in order to ensure that qualified persons with disabilities have opportunities to serve on planning and advisory boards responsible for guiding federally funded programs or activities.<sup>88</sup>
- **Otherwise limiting the enjoyment of any right, privilege, advantage or opportunity enjoyed by others.**<sup>89</sup>
- **In determining the site or location of a facility makes selections which effectively exclude persons with disabilities, denies them the benefits of, or otherwise subjects them to discrimination.**<sup>90</sup> This provision would be violated if a school district placed students with disabilities in inferior facilities, or unnecessarily restrictive classrooms due to a lack of classroom space.

The Section 504 regulations include a “comparable facilities” requirement that is specific to educational settings. The first rule stated by the regulations is that a student with a disability must be educated “with persons who are not (disabled) to the maximum extent

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<sup>84</sup> 34 C.F.R. § 104.4 (b)(1)(iv)

<sup>85</sup> 34 C.F.R. § 104.4 (b)(1)(v)

<sup>86</sup> *OCR Staff Memorandum*, 22 IDELR 669 (OCR 1990).

<sup>87</sup> 34 C.F.R. § 104.4 (b)(1)(vi).

<sup>88</sup> See 34 C.F.R. Part 104, Appendix A

<sup>89</sup> 34 C.F.R. § 104.4 (b)(1)(vii)

<sup>90</sup> 34 C.F.R. § 104.4 (b)(5)



appropriate to the needs of the (disabled) person.”<sup>91</sup> Only when it is demonstrated by the recipient that the education of the person in the regular environment with the use of supplementary aids and services cannot be achieved satisfactorily may the recipient choose a setting other than the regular education environment.<sup>92</sup> If separate facilities are provided for disabled students because they are necessary to provide an appropriate education, the regulations require that the separate facilities and the services and activities provided therein be comparable to the other facilities, services and activities of the recipient.<sup>93</sup>

- **Failing to adequately respond to allegations that a disabled student has been harassed on the basis of his or her disability.**<sup>94</sup> Harassment of students based on disability, or failure to respond to allegations of disability-based harassment, are also potential violations of the ADA and Vermont law.<sup>95</sup>

The nondiscrimination requirements apply to students who, although not currently disabled, are believed to be disabled and are denied benefits as a result. They also apply to students who were disabled in the past and denied benefits as a result of their past disability. It would be unlawful discrimination, for example, to deny a student who had recovered from a disabling condition the opportunity to participate on an equal basis with other students in a school’s athletic activities.<sup>96</sup>

Parents and family members who meet the definition of qualified persons with disabilities are also protected by Section 504 and the ADA and have a right to accommodations and services that will allow them to have an equal opportunity to participate in school and school sponsored programs and activities.

## Independent Schools

- The Section 504 regulations limit the obligation to alter programs in independent schools by requiring that independent school programs must be available to qualified individuals with disabilities so long as only “minor adjustments” are needed to make the program or activity accessible.<sup>97</sup>

## 504 AND ACCESSIBILITY

The accessibility requirement of 504 is as follows:

- *No qualified handicapped person shall, because a recipient’s facilities are inaccessible to or unusable by handicapped persons, be denied the benefits of, be excluded from participation in, or otherwise be subjected to discrimination under any program or activity.*<sup>98</sup>

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<sup>91</sup> 34 C.F.R. § 104.34 (a)

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at § 104.34 (c)

<sup>94</sup> See e.g. *Nordinia Hill (OH) City School District*, 25 IDELR 233 (OCR 1996); *Willamina (OR) School District 30J*, 27 IDELR 221 (OCR 1997)

<sup>95</sup> Vermont school districts and independent schools are required to have policies prohibiting harassment. 16 V.S.A. §§ 166 (e) & 565. Harassment is a form of unlawful discrimination against a member of a protected category, such as a person with a disability. See 16 V.S.A. §11(a)(26) (definition of harassment).

<sup>96</sup> See *OCR Senior Staff Memorandum*, 19 IDELR (OCR 1992)

<sup>97</sup> 34 C.F.R. § 104.39 (b)

<sup>98</sup> 34 C.F.R. § 104.21

Section 504 defines the term “facility” rather broadly to include all or any portion of buildings, structures, equipment, roads, walks, parking lots, or other real or personal property or interest in such property.<sup>99</sup> However, the age of a facility will determine the extent to which alterations will be required to make it fully accessible.

504 regulations apply different accessibility requirements depending on whether a building constitutes an “existing facility” or “new construction.” Buildings for which construction commenced prior to June 3, 1977 are existing facilities.<sup>100</sup>

**Facilities constructed prior to June 3, 1977<sup>101</sup>** need not necessarily be made accessible so long

as the program or activity, considered overall, is readily accessible to persons with disabilities. A public school district or recipient independent school with existing facilities is not required to make each existing facility or every part of an existing facility accessible or usable by individuals with disabilities. It would not be necessary to make every school in a district accessible. Rather programs and activities must be operated so that when viewed in their entirety they are readily accessible. Structural changes to existing facilities are not required if other methods are effective in achieving accessibility. For example, the accessibility requirements for existing facilities may be met by redesigning equipment, and reassigning classes, services or programs to accessible buildings.<sup>102</sup> So long as there are other methods that are as effective in achieving ready access, a district need not undertake structural changes to a building.<sup>103</sup> A determination of whether or not facilities are accessible must take into account the particular limitations imposed by the disability/ disabilities.

All students must be afforded an equal opportunity to enjoy the full range of services offered by the district. If a district runs one school with a specialized program, students may not be denied access to the program merely because of accessibility problems. For example, if a school district’s orchestra /band has its weekly rehearsals at a particular school location, that location must be accessible.

**Buildings or additions constructed after June 3, 1977** must be designed and constructed to allow persons with disabilities to access and use them readily.<sup>104</sup> For example, multilevel buildings should have ramps or elevators, accessible bathrooms, and doorways constructed wide enough for wheelchairs. Contractors should be familiar with accessibility requirements.

To the maximum extent feasible, **all facilities altered after June 3, 1977**, must be altered to allow accessibility and usability by persons with disabilities.<sup>105</sup> For example, if a school district adds on a wing to a building, the wing must be made accessible. Or, if a storage room is modified into a classroom, modifications, such as widening the doorway, must be made.

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<sup>99</sup> 34 C.F.R. § 104.3(i)

<sup>100</sup> 34 C.F.R. § 104.22

<sup>101</sup> This is the effective date of the 504 regulations.

<sup>102</sup> 34 C.F.R. § 104.22 (b)

<sup>103</sup> 34 C.F.R. § 104.22 (b).

<sup>104</sup> 34 C.F.R. § 104.23 (a)

<sup>105</sup> 34 C.F.R. § 104.23 (b)

This provision covers the occasional instance where the nature of an existing facility is such as to make it impractical or prohibitively expensive to renovate in a manner that results in its being entirely accessible. However, in all of these instances, the alteration should provide the maximum amount of physical accessibility that is feasible.<sup>106</sup>

Federal regulations require that public school districts and recipient independent schools with existing facilities adopt and implement procedures to inform interested persons, including persons with impaired vision and hearing, about how they can obtain information regarding the existence or location of services, activities and facilities that are accessible and useable by individuals with disabilities.<sup>107</sup>

Some examples of OCR decisions on accessibility are as follows:

*James A. Garfield (OH) Local School District* (OCR 2009), 52 IDELR 142, 109 LRP 27771- OCR found numerous violations of the accessibility requirement as applied to a mobility impaired student. These violations included: the lack of accessible parking; a path to the only accessible entry that not usable for someone in a wheelchair in that it was gravel and the slope was too steep; doorknobs that required tight grasping; a table in the entryway that limited clear space for a wheelchair; no elevator or wheelchair lift even though classes were held on all four floors; restrooms that were only accessible by stairs and; water fountains that were too high.

*Los Angeles (CA) Unified School District* (OCR 2009), 109 LRP 5471 - Although a California School District had a process in place to provide program accessibility (at another site) to students at a school that was physically inaccessible to persons with mobility impairments, the school district violated 504 requirements when it failed to provide the public with notice of this process.

*Kansas City (MO) School District* (OCR 2009), 52 IDELR, 109 LRP 31145- A lack of wheelchair seating for basketball fans in a school gymnasium violated 504 and ADA requirements. The gymnasium's seating capacity was 1, 2000 people but it only had three wheelchair seats. OCR concluded that the program when viewed in its entirety was not readily accessible and usable to spectators with mobility impairments; given the overall seating capacity the gymnasium it should have had 13 wheelchair seats.

For further technical assistance on the facilities requirements of Section 504, contact the Office of Civil Rights. See Appendix

## PROCEDURAL REQUIREMENTS OF SECTION 504

To be in compliance with Section 504, school districts **must** do the following:

- Provide written assurance of nondiscrimination whenever the district applies for federal financial assistance for a program subject to Section 504.<sup>108</sup>

<sup>106</sup> *Id.*

<sup>107</sup> 34 C.F.R. § 104.22 (f).

<sup>108</sup> 34 C.F.R. § 104.5 (a)

- Designate an employee to coordinate compliance with Section 504.<sup>109</sup> It is not necessary to appoint a coordinator for each school building in a district that operates more than one school, but the district must identify a coordinator, and must provide that person's name and telephone number on notices of nondiscrimination discussed in paragraph (4) below.
- Provide grievance procedures to resolve complaints of discrimination.<sup>110</sup> Grievance procedures must "incorporate due process standards and provide for the prompt and
- equitable resolution of complaints."<sup>111</sup> OCR has ruled in complaint investigations that procedures that include reasonable time frames, an opportunity to present evidence, notification of the final decision and an appeal process are sufficient to comply with this regulatory requirement.<sup>112</sup>

A grievance procedure like that afforded to parents under the Family Education Rights and Privacy Act (FERPA) for resolving disputes about student records would suffice. Such a procedure could lead to an impartial hearing provided by the school district.

- Provide notice to students, parents, employees, unions, and professional organizations that the school district does not discriminate in admission or access to, or treatment or employment in, its programs or activities. Notice must also name the school district's Section 504 coordinator. This notice must be included in "materials or publications containing general information (made) available to participants, applicants, or employees."<sup>113</sup> For example, notice complying with this requirement should be included in any handbooks distributed to students, parents, or employees.
- At least annually undertake to identify and locate all Section 504 qualified disabled children in the district's geographic area who are not receiving a public education and take appropriate steps to notify disabled persons and their parents of the school district's obligations under Section 504.<sup>114</sup> This requirement is similar to, and may be met in conjunction with, the "child find" requirements of the IDEA. The Section 504 regulations do not specify the manner in which a district must conduct child find activities with regard to students not enrolled in its schools. Many districts comply by placing notices in newspapers and in area independent schools.
- Provide parents and guardians with the following:
  - **Notice of their rights**, including their due process rights. *See* p.18
  - **An opportunity to review relevant records.**<sup>115</sup> OCR has generally held that "relevant records" are any records subject to the Family Education Rights to Privacy Act (FERPA). In two instances, however, OCR has expanded the meaning of "relevant records" to include test protocols and notes taken by

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<sup>109</sup> 34 C.F.R. § 104.7 (a)

<sup>110</sup> 34 C.F.R. § 104.7 (b)

<sup>111</sup> *Id.*

<sup>112</sup> *See e.g. Hayward (CA) Unified School District*, 23 IDELR 107 (OCR 1995).

<sup>113</sup> 34 C.F.R. § 104.8 (a)

<sup>114</sup> 34 C.F.R. § 104.32

<sup>115</sup> 34 C.F.R. § 104.36

examiners and used to evaluate and determine placement for students who are, or are believed to be, disabled.<sup>116</sup>

- **An Impartial hearing.** Parents or guardians have the right to request a hearing regarding the identification, evaluation, or educational placement of students with disabilities. These hearings are governed by the rules adopted by the Vermont State Board of Education. *See* p.18
- Program Accessibility. Section 504 makes the exclusion of individuals with disabilities a form of unlawful discrimination when the exclusion is due to inaccessible facilities.<sup>117</sup>

## STUDENTS ADDICTED TO OR CURRENTLY USING ILLEGAL DRUGS OR ALCOHOL

A student who is an active alcoholic may be a person with a disability for purposes of Section 504 if his or her impairment substantially limits one or more major life activities. A school district therefore has an obligation to provide an appropriate education to that student, including accommodations made necessary by the disability.<sup>118</sup>

If a district suspects that a student's alcohol problem may be substantially limiting the major life activity (for example learning or concentrating) , the district must seek an evaluation at district expense. OCR has stated that parental consent must be obtained prior to conducting an initial student evaluation.<sup>119</sup> If consent is withheld the school may use the due process hearing procedures to override the parents denial of consent. If the evaluation verifies the existence of a disabling condition (alcoholism) which substantially limits a major life activity, the student is considered disabled under Section 504.

The district must then follow the rest of the evaluative and planning procedures of Section 504. While counseling may be a component of a plan under the IDEA or Section 504, school districts are not required to pay for medical treatment programs for alcohol or drug abuse. However, while a student is hospitalized for such a treatment, the school district may be required to continue the student's educational program.

**Students who are current users of illegal drugs are ineligible for Section 504 protections** when a school district acts on the basis of such use. This exclusion does not apply to students who are addicted to illegal drugs but are not current users of illegal drugs. For example, it does not apply to students who are participating in drug rehabilitation programs and are not currently using illegal drugs.<sup>120</sup>

It is also important to recognize that the exclusion applies only when the district is acting on the basis of the student's use of illegal drugs. An "illegal drug" is any controlled substance included in the Controlled Substances Act.<sup>121</sup> Marijuana is a controlled substance under the Act.

<sup>116</sup> *See Allegheny (PA) Intermediate Unit*, 20 IDELR 563 ( OCR 1993); *St Charles (IL) Community School District # 303*, 17 EHLR 18 (OCR 1990)

<sup>117</sup> 34 C.F.R. § 104.22 (b)

<sup>118</sup> *Protecting Students With Disabilities*, OCR Guidance 2005 as revised after 2008 Amendments, No. 17

<sup>119</sup> *Letter to Durham*, 27 IDELR 380 (OCR 1997)

<sup>120</sup> *Protecting Students With Disabilities*, OCR Guidance 2005 as revised after 2008 Amendments, No. 16

<sup>121</sup> 21 U.S.C. § 812

A school district is entitled to enforce its rules prohibiting the use, sale or possession of drugs or alcohol by drug or alcohol-addicted students, provided that the rules are enforced evenly with respect to all students.

School districts may take the same disciplinary action related to the use or possession of drugs or alcohol against Section 504 students who currently use illegal drugs or alcohol as they take against non-disabled students. The due process procedures that apply to students with disabilities do not apply to such disciplinary actions. See p. 18

### **CONTAGIOUS DISEASES: AIDS/HIV**

Students with Acquired Immune Deficiency Syndrome (AIDS), AIDS-Related Complex (ARC) or otherwise infected with Human Immunodeficiency Virus (HIV) are individuals with disabilities under Section 504. They either qualify as actually having a physical impairment which substantially limits a major life activity or may be “regarded” as having such a disability.

In a 1990 Staff Memorandum,<sup>122</sup> OCR made the following policy conclusions about the applicability of Section 504 to students with AIDS/HIV:

- The regulatory definition of a person with a disability will be applied to children with AIDS, who are regarded as having a disability within the meaning of this definition.
- Children with a sole diagnosis of AIDS are “qualified” if they meet the age-related regulatory definition.<sup>123</sup>
- Unless currently presenting a risk of contagion, a child with AIDS should remain in the regular classroom.
- A full evaluation is not required when neither recipients nor parents believe that a child is in need of special education or related services.
- In all other respects, school districts should apply the process and procedures required by the Section 504 regulations. Placement decisions must be made drawing on all relevant sources mentioned in the regulation, including the latest medical information on AIDS.<sup>124</sup> The group of persons making the placement decision must include persons knowledgeable about the meaning of that information.
- All procedural safeguards required in Subpart D of the regulation apply to children who are disabled solely by reason of AIDS.
- Children with AIDS may not be subjected to different treatment with respect to confidentiality.

OCR considers AIDS to be like other potentially contagious diseases or conditions, such as tuberculosis or Hepatitis B. The decision-making process regarding the placement of a student

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<sup>122</sup> *OCR Memorandum*, 16 EHLR 712 (OCR 1990)

<sup>123</sup> *See* 34 C.F.R. § 104.3 (l) (2)

<sup>124</sup> *See* 34 C.F.R. § 104.35 (c)(3)

with a contagious condition is outlined in court decisions referred to in the 1990 OCR memorandum. The appropriate process includes the following three steps:

1. Decide what an appropriate placement would be were it not for the contagious nature of the student's disease.
2. Decide if reasonable medical judgment and the state of medical knowledge indicate a significant risk of contagion by assessing the nature of the risk (how the disease is transmitted); the duration of the risk; the severity of the harm; and the probability of transmission which will cause varying degrees of harm.
3. Determine if accommodations will reduce the risk to a medically acceptable level, bearing in mind the least restrictive environment requirement of the law.<sup>125</sup>

### **ATTENTION DEFICIT DISORDER/ATTENTION DEFICIT HYPERACTIVITY DISORDER (ADD/ADHD)**

In September, 1991, three federal civil rights and education agencies issued a Joint Policy Memorandum clarifying that, even if a student's ADD/ADHD did not qualify him or her for special education, it could be a recognized disability for Section 504 purposes.<sup>126</sup> A student with ADD/ADHD would qualify for Section 504 accommodations if it is determined that the condition substantially limits a major life activity (for example learning, concentrating, thinking, or communicating).

An individual with ADD/ADHD is generally characterized as having difficulty staying on task, focusing attention, completing work, or engaging in age-appropriate behavior. In addition he or she may be easily distracted, produce sloppy, inconsistent work and appear to be not listening or not hearing what is being said.

The Joint Memorandum provides the following non-exclusive list of accommodations and classroom adaptations that might be useful for ADD/ADHD students.

#### **ADAPTATIONS:**

1. A structured learning environment;
2. Repeating and simplifying instructions;
3. Supplementing verbal instructions with visual instructions;
4. Behavior management techniques;
5. Adjusting class schedules;
6. Modifying testing conditions;
7. Use of audio recorders, computers & other audio-visual equipment;
8. Selecting modified textbooks or workbooks; and
9. Tailoring homework assignments.

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<sup>125</sup> See *e.g. Martinez v. School Board*, 861 F.2d 1502 (CA 11 1988).

<sup>126</sup> 18 IDELR 116 (1991).

## OTHER ACCOMMODATIONS:

1. Consultation services;
2. Using special resources like audio recorders;
3. Reducing class size;
4. One-on-one tutorials;
5. Classroom aides and note takers;
6. Involving a service coordinator; and
7. Modifying nonacademic times, such as lunch and recess.

## **ALLERGIES**

Vermont schools are required annually to inform parents of students with life threatening allergies or chronic illnesses such as asthma of the applicable provisions of Section 504. Prior to entry into school or immediately after the diagnosis of a life threatening allergic condition, the 504 coordinator should be notified of the need to determine whether the student has a qualifying disability. Regardless of whether the student meets the qualifications for a 504 plan, the school nurse should meet with the parent/guardian to develop an Individualized Health Care Plan to create strategies for managing the student's medical condition.<sup>127</sup>

Life threatening allergic reactions may be triggered by exposure to certain foods, either through ingestion or touch ( especially peanuts, tree nuts, milk, eggs, wheat, fish and shellfish), insect bites (such as bees, wasps, hornets and yellow jackets) and exposure to latex products ( such as balloons, rubber bands, rubber gloves, rubber balls and band aids).<sup>128</sup>

Management of an individual student's health needs will frequently require a multidisciplinary team approach. Schools can be high risk settings for students with life threatening allergies due to the potential for cross contamination, the variety of settings that the student will encounter and the potential for substitutes (teaching staff, food service personnel, and bus drivers) as well as volunteers who may be unaware of the student's condition. The department has published a manual, *Managing Life Threatening Allergic Conditions in School* (2008) that provides guidance on best practices for working with students with life-threatening allergies. In addition, the Vermont Department of Health has *Standards of Practice for School Nurses* concerning life-threatening allergies. In accordance with these standards all schools should have trained personnel able to respond to a student having a severe allergic reaction. Schools should also have written emergency health protocols that are readily available and reviewed annually.<sup>129</sup>

Some examples of OCR decisions concerning schools compliance with 504 requirements as related to students with food allergies are as follows:

*Henry County (MO) R-I School District*, 52 IDELR 233, 109 LRP 31648 (2009)-The school district discriminated against a kindergartner with celiac disease by failing to implement key provisions of her 504 plan stating that she was not to have food containing gluten. Despite her 504 plan, food service workers gave the student food containing gluten twice and a teacher allegedly gave her candy without checking to see if it was gluten free. The student became

<sup>127</sup> *Managing Life-Threatening Allergic Conditions in Schools*, Vt. Dept of Education (2008) pp. 4-5.

<sup>128</sup> *Id.* at p. 4.

<sup>129</sup> *Vermont Standards of Practice: School Health Services, Allergies* (December 2009)



seriously ill. The student's teacher admitted that she did not routinely inform substitutes of the 504 plan because the gluten free provisions of the plan appeared in the student's file. The school district failed to provide the student's mother with breakfast and lunch menus on a regular basis and food service workers gave the child a pre-packaged frozen lunch that contained gluten.

*North Royalton (OH) City School District*, 52 IDELR 203, 109 LRP 32541

(2009)-The school district failed to comply with Section 504 when it found a student with an anxiety disorder and life threatening nut allergy ineligible for a 504 plan because in light of his individual health plan (IHP) he was doing well academically. The district unlawfully limited its assessment to whether the student's disabilities impaired his learning; nothing in Section 504 limits eligibility to those students who suffer academically. In addition, consistent with the 2008 Amendments the district should not have taken the student's IHP into account as a mitigating measure.

*Saluda (SC) School District One*, 47 IDELR 22, 106 LRP 60925 (2006) - The school district failed to develop an appropriate 504 plan for a student with a peanut/tree allergy when it did not specifically identify the safety procedures implemented to protect the student from accidental exposure, the persons responsible for emergency responses or the training to be provided to staff members.

## SELF ADMINISTRATION OF EMERGENCY MEDICATION

Vermont law (Act 158), allows students with life-threatening allergies or with asthma who are attending public schools or approved recognized schools to possess and self-administer emergency medication at school, on school grounds, at school sponsored or school related activities and on school provided transportation when the student has a self-medication action plan.<sup>130</sup> To enable the school to develop such a plan the parents/ legal guardians must provide the school with:

1. Written authorization by the parents/ legal guardians, on a form provided by the school, for the student to possess and self-administer the medication and;
2. Written documentation from the student's physician stating that the student has life-threatening allergies, asthma or both, providing the name of the medication, dosage and times and circumstances for administering the medication and affirming that the student is capable of administering the medication, understands its side affects and knows how to access emergency services.

After such documentation is provided, the parent/guardian develops the plan in consultation with the school nurse or designated health care staff. The plan will specify who will be notified of the plan and may include a requirement that the student notify a school employee after self-administering the medication.

The parent/legal guardian must sign a statement, on a form provided by the school, releasing school employees and agents from liability resulting from any injury caused by the student's self-administration of the medication. The release would not include injuries resulting from

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<sup>130</sup> 16 V.S.A. § 1387. Pursuant to this statute schools may also have their own policies for the self-administration of emergency medication for medical conditions other than asthma and life threatening allergies.

gross negligence, recklessness of intentional misconduct.

Vermont's law on the self administration of medication was not intended to abrogate schools responsibilities for determining whether students are eligible for 504 plans. As noted above, OCR has held that an individualized health plan is not a substitute for a 504 plan. *See North Royalton (OH) City School District*, 52 IDELR 203, 109 LRP 3254 (2009).

## SERVICE ANIMALS

OCR has cautioned that an absolute prohibition against the use of service animals in the classroom that effectively denies a student with disabilities an equal opportunity to participate in, or benefit from, an educational program violates 34 C.F.R. § 104.4 (a).<sup>131</sup> The requirement for an individual analysis of a student's need for a service animal was underscored in the following cases:

*Bakersfield (CA) City School District*, 50 IDELR 169, 108 LRP 41456 (OCR 2008)- The school district violated Section 504 by excluding a service dog from school without reviewing the dog's training, function or impact on the student's education. Instead the district had unilaterally determined that the dog posed a health and safety risk to students and staff. The district should have conducted an inquiry as to whether the dog was an appropriately trained service animal or whether the dog's function addressed the student's disability related needs.

*Cave v. East Meadow Free School District*, 514 F. 3d 240, 229 Ed. Law Rep. 349 (CA 2 2008) - The parents of a hearing impaired student appealed a decision of the US District Court denying their request for a preliminary injunction under the ADA and Section 504 requiring the school to allow the student to bring his service dog to school. The dog was trained to alert the student to certain sounds and the parents believed the dog would increase the student's social skills as well as his independence. School officials thought the presence of the dog would be disruptive and could interfere with the students overall special education program; the need to avoid the exposure to allergic students and teachers would potentially disrupt his mainstream program. In addition the school believed that the student was functioning satisfactorily under his IEP. The

District Court denied the injunction, in part, because the student had failed to exhaust his administrative remedies under the IDEA. The Second Circuit Court of Appeals held that the student was required to exhaust his administrative remedies under the IDEA as the issues in the case implicated his IEP. Thus the Circuit Court agreed with district court that the plaintiffs were "at least in part challenging the adequacy of [the student's] IEP because it did not include a service dog."

## EDUCATIONAL SUPPORT SYSTEMS UNDER VERMONT LAW AND SECTION 504

It is the general policy of the state of Vermont that each local school district must develop and maintain a comprehensive system of educational supports that will, to the extent appropriate, allow all students to succeed in the general education environment. This policy does not replace or expand entitlements under federal law.<sup>132</sup> Educational support teams (ESTs) are part of this

<sup>131</sup> *Letter to Goodin*, 17 EHLR 1027 (OCR March 14, 1991)

<sup>132</sup> 16 V.S.A. § 2901

comprehensive system and are intended to serve students who require additional assistance in order to succeed or be challenged in the general educational environment.<sup>133</sup>

The EST is responsible for:

- Determining which students require additional assistance to be successful in school or complete secondary school with particular attention to times of academic or personal transition;
- Identifying classroom accommodations, remedial services and other supports that have been provided to the identified student;
- Assisting teachers to plan for and provide services or accommodations to students in need of classroom supports or enrichment activities;
- Developing an individualized strategy, in collaboration with the student's parents or legal guardian whenever possible, to assist the identified student to succeed in school or complete his/her education.<sup>134</sup>

A Section 504 evaluation could be conducted by an EST or qualified team, rather than be referred by the EST to an outside entity. This could be accomplished by building into EST procedures a time for the local team to ask the question, "Does the team have reason to believe that the student has a disability within the meaning of Section 504?" If the answer is "yes," the EST should follow local Section 504 procedures to complete Section 504 evaluation, planning and placement process. If the answer to the "disability" question is "no," the EST process should move forward, the school district having made the appropriate inquiry.<sup>135</sup> If an EST has reason to believe that a student has a disability and may be in need of special education, a special education evaluation referral must be made.<sup>136</sup>

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<sup>133</sup> 16 V.S. A. § 2902 (a).

<sup>134</sup> 16 V.S.A. § 2902 (c)

<sup>135</sup> This assumes that the parent/s or legal guardians have not requested a 504 evaluation.

<sup>136</sup> SBEM Rules 2194; 2120.8.1.3.1

# APPENDIXES

2008 | Americans with Disabilities Act

Amendments to the Americans with Disabilities Act (ADA) signed into law on September 25, 2008, clarify and reiterate who is covered by the law's civil rights protections. The "ADA Amendments Act of 2008" revises the definition of "disability" to more broadly encompass impairments that substantially limit a major life activity. The amended language also states that mitigating measures, including assistive devices, auxiliary aids, accommodations, medical therapies and supplies (other than eyeglasses and contact lenses) have no bearing in determining whether a disability qualifies under the law. Changes also clarify coverage of impairments that are episodic or in remission that substantially limit a major life activity when active, such as epilepsy or post traumatic stress disorder. The amendments took effect January 1, 2009.

The text of the amendments is provided below. A complete copy of the ADA, as amended, is also available.

**ADA Amendments Act of 2008**

PUBLIC LAW 110-325

SEPTEMBER 25, 2008

An Act.

To restore the intent and protections of the Americans with Disabilities Act of 1990.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

**SECTION 1. SHORT TITLE.**

This Act may be cited as the "ADA Amendments Act of 2008".

**SEC. 2. FINDINGS AND PURPOSES.**

(a) Findings.--Congress finds that--

(1) in enacting the Americans with Disabilities Act of 1990 (ADA), Congress intended that the Act "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities" and provide broad coverage;

(2) in enacting the ADA, Congress recognized that physical and mental disabilities in no way diminish a person's right to fully participate in all aspects of society, but that people with physical or mental disabilities are frequently precluded from doing so because of prejudice, antiquated attitudes, or the failure to remove societal and institutional barriers;

(3) while Congress expected that the definition of disability under the ADA

would be interpreted consistently with how courts had applied the definition of a handicapped individual under the Rehabilitation Act of 1973, that expectation has not been fulfilled;

(4) the holdings of the Supreme Court in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) and its companion cases have narrowed the broad scope of protection intended to be afforded by the ADA, thus eliminating protection for many individuals whom Congress intended to protect;

(5) the holding of the Supreme Court in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002) further narrowed the broad scope of protection intended to be afforded by the ADA;

(6) as a result of these Supreme Court cases, lower courts have incorrectly found in individual cases that people with a range of substantially limiting impairments are not people with disabilities;

(7) in particular, the Supreme Court, in the case of *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002), interpreted the term "substantially limits" to require a greater degree of limitation than was intended by Congress; and

(8) Congress finds that the current Equal Employment Opportunity Commission ADA regulations defining the term "substantially limits" as "significantly restricted" are inconsistent with congressional intent, by expressing too high a standard.

(b) Purposes.--The purposes of this Act are--

(1) to carry out the ADA's objectives of providing "a clear and comprehensive national mandate for the elimination of discrimination" and "clear, strong, consistent, enforceable standards addressing discrimination" by reinstating a broad scope of protection to be available under the ADA;

(2) to reject the requirement enunciated by the Supreme Court in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) and its companion cases that whether an impairment substantially limits a major life activity is to be determined with reference to the ameliorative effects of mitigating measures;

(3) to reject the Supreme Court's reasoning in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) with regard to coverage under the third prong of the definition of disability and to reinstate the reasoning of the Supreme Court in *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987) which set forth a broad view of the third prong of the definition of handicap under the Rehabilitation Act of 1973;

(4) to reject the standards enunciated by the Supreme Court in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002), that the terms "substantially" and "major" in the definition of disability under the ADA "need to be interpreted strictly to create a demanding standard for qualifying as disabled," and that to be substantially limited in performing a major life activity under the ADA "an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives";

(5) to convey congressional intent that the standard created by the Supreme Court in the case of *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002) for "substantially limits", and applied by lower courts in numerous decisions, has created an inappropriately high level of limitation necessary to obtain coverage under the ADA, to convey that it is the intent of Congress that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations, and to convey that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis; and

(6) to express Congress' expectation that the Equal Employment Opportunity Commission will revise that portion of its current regulations that defines the term "substantially limits" as "significantly restricted" to be consistent with this Act, including the amendments made by this Act.

### SEC. 3. CODIFIED FINDINGS.

Section 2(a) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12101) is amended-

(1) by amending paragraph (1) to read as follows:

"(1) physical or mental disabilities in no way diminish a person's right to fully participate in all aspects of society, yet many people with physical or mental disabilities have been precluded from doing so because of discrimination; others who have a record of a disability or are regarded as having a disability also have been subjected to discrimination;"

(2) by striking paragraph (7); and

(3) by redesignating paragraphs (8) and (9) as paragraphs (7) and (8), respectively.

### SEC. 4. DISABILITY DEFINED AND RULES OF CONSTRUCTION.

(a) Definition of Disability.--Section 3 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12102) is amended to read as follows:

"SEC. 3. DEFINITION OF DISABILITY. "As used in this Act:

"(1) Disability.--The term 'disability' means, with respect to an individual--

"(A) a physical or mental impairment that substantially limits one or more major life activities of such individual;

"(B) a record of such an impairment; or

"(C) being regarded as having such an impairment (as described in paragraph (3)).

"(2) Major life activities.--

"(A) In general.--For purposes of paragraph (1), major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.

"(B) Major bodily functions.--For purposes of paragraph (1), a major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

"(3) Regarded as having such an impairment.--For purposes of paragraph (1) (C):

"(A) An individual meets the requirement of 'being regarded as having such an impairment' if the individual establishes that he or she has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.

"(B) Paragraph (1)(C) shall not apply to impairments that are transitory and minor. A transitory impairment is an impairment with an actual or expected duration of 6 months or less.

"(4) Rules of construction regarding the definition of disability.--The definition of 'disability' in paragraph (1) shall be construed in accordance with the following:

"(A) The definition of disability in this Act shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act.

"(B) The term 'substantially limits' shall be interpreted consistently with the findings and purposes of the ADA Amendments Act of 2008.

"(C) An impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability.

"(D) An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

"(E)(i) The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures such as--

"(I) medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing



devices, mobility devices, or oxygen therapy equipment and supplies;

"(II) use of assistive technology;

"(III) reasonable accommodations or auxiliary aids or services; or

"(IV) learned behavioral or adaptive neurological modifications.

"(ii) The ameliorative effects of the mitigating measures of ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment substantially limits a major life activity.

"(iii) As used in this subparagraph--

"(I) the term 'ordinary eyeglasses or contact lenses' means lenses that are intended to fully correct visual acuity or eliminate refractive error; and

"(II) the term 'low-vision devices' means devices that magnify, enhance, or otherwise augment a visual image."

(b) Conforming Amendment.--The Americans with Disabilities Act of 1990 (42 U.S.C. 12101 et seq.) is further amended by adding after section 3 the following:

"SEC. 4. ADDITIONAL DEFINITIONS. "As used in this Act:

"(1) Auxiliary aids and services.--The term 'auxiliary aids and services' includes--

"(A) qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments;

"(B) qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments;

"(C) acquisition or modification of equipment or devices; and

"(D) other similar services and actions.

"(2) State.--The term 'State' means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands of the United States, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Mariana Islands."

(c) Amendment to the Table of Contents.--The table of contents contained in section 1(b) of the Americans with Disabilities Act of 1990 is amended by striking the item relating to section 3 and inserting the following items:

"Sec. 3. Definition of disability.

"Sec. 4. Additional definitions."

## SEC. 5. DISCRIMINATION ON THE BASIS OF DISABILITY.

(a) On the Basis of Disability.--Section 102 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12112) is amended--

(1) in subsection (a), by striking "with a disability because of the disability of such individual" and inserting "on the basis of disability"; and

(2) in subsection (b) in the matter preceding paragraph (1), by striking "discriminate" and inserting "discriminate against a qualified individual on the basis of disability".

(b) Qualification Standards and Tests Related to Uncorrected Vision.--Section 103 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12113) is amended by redesignating subsections (c) and (d) as subsections (d) and (e), respectively, and inserting after subsection (b) the following new subsection:

"(c) Qualification Standards and Tests Related to Uncorrected Vision.--Notwithstanding section 3(4)(E)(ii), a covered entity shall not use qualification standards, employment tests, or other selection criteria based on an individual's uncorrected vision unless the standard, test, or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and consistent with business necessity."

(c) Conforming Amendments.--

(1) Section 101(8) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111(8)) is amended--

(A) in the paragraph heading, by striking "with a disability"; and

(B) by striking "with a disability" after "individual" both places it appears.

(2) Section 104(a) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12114(a)) is amended by striking "the term 'qualified individual with a disability' shall" and inserting "a qualified individual with a disability shall".

## SEC. 6. RULES OF CONSTRUCTION.

(a) Title V of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201 et seq.) is amended--

(1) by adding at the end of section 501 the following:

"(e) Benefits Under State Worker's Compensation Laws.--Nothing in this Act alters the standards for determining eligibility for benefits under State worker's compensation laws or under State and Federal disability benefit programs.

"(f) Fundamental Alteration.--Nothing in this Act alters the provision of section 302(b)(2)(A)(ii), specifying that reasonable modifications in policies, practices, or procedures shall be required, unless an entity can demonstrate that making such modifications in policies, practices, or procedures, including academic requirements in postsecondary education, would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations involved.

"(g) Claims of No Disability.--Nothing in this Act shall provide the basis for a claim by an individual without a disability that the individual was subject to discrimination because of the individual's lack of disability.

"(h) Reasonable Accommodations and Modifications.--A covered entity under title I, a public entity under title II, and any person who owns, leases (or leases to), or operates a place of public accommodation under title III, need not provide a reasonable accommodation or a reasonable modification to policies, practices, or procedures to an individual who meets the definition of disability in section 3(1) solely under subparagraph (C) of such section.";

(2) by redesignating section 506 through 514 as sections 507 through 515, respectively, and adding after section 505 the following:

"SEC. 506. RULE OF CONSTRUCTION REGARDING REGULATORY AUTHORITY. "The authority to issue regulations granted to the Equal Employment Opportunity Commission, the Attorney General, and the Secretary of Transportation under this Act includes the authority to issue regulations implementing the definitions of disability in section 3 (including rules of construction) and the definitions in section 4, consistent with the ADA Amendments Act of 2008."; and

(3) in section 511 (as redesignated by paragraph (2)) (42 U.S.C. 12211), in subsection (c), by striking "511(b)(3)" and inserting "512(b)(3)".

(b) The table of contents contained in section 1(b) of the Americans with Disabilities Act of 1990 is amended by redesignating the items relating to sections 506 through 514 as the items relating to sections 507 through 515, respectively, and by inserting after the item relating to section 505 the following new item:

"Sec. 506. Rule of construction regarding regulatory authority.".

## SEC. 7. CONFORMING AMENDMENTS.

Section 7 of the Rehabilitation Act of 1973 (29 U.S.C. 705) is amended--

(1) in paragraph (9)(B), by striking "a physical" and all that follows through "major life activities", and inserting "the meaning given it in section 3 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12102)"; and

(2) in paragraph (20)(B), by striking "any person who" and all that follows through the period at the end, and inserting "any person who has a disability

as defined in section 3 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12102).". SEC. 8. EFFECTIVE DATE. This Act and the amendments made by this Act shall become effective on January 1, 2009.

Approved September 25, 2008





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[Notice to Readers]

TITLE 34 EDUCATION

SUBTITLE B REGULATIONS OF THE OFFICES OF THE DEPARTMENT OF EDUCATION

CHAPTER I -- OFFICE FOR CIVIL RIGHTS, DEPARTMENT OF EDUCATION

**PART 104 -- NONDISCRIMINATION ON THE BASIS OF HANDICAP IN PROGRAMS OR  
ACTIVITIES RECEIVING FEDERAL FINANCIAL ASSISTANCE**

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## **APPENDIX A TO PART 104 ANALYSIS OF FINAL REGULATION**

## **APPENDIX B TO PART 104 GUIDELINES FOR ELIMINATING DISCRIMINATION AND DENIAL OF SERVICES ON THE BASIS OF RACE, COLOR, NATIONAL ORIGIN, SEX, AND HANDICAP IN VOCATIONAL EDUCATION PROGRAMS [NOTE]**

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

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

## **Subpart A -- General Provisions**

### **104.1 Purpose.**

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

### **104.2 Application.**

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

### **104.3 Definitions.**

As used in this part, the term:

(a) *The Act* means the Rehabilitation Act of 1973, Pub. L. 93-112, as amended by the Rehabilitation Act Amendments of 1974, Pub. L. 93-516, 29 U.S.C. 794.

(b) *Section 504* means section 504 of the Act.

(c) *Education of the Handicapped Act* means that statute as amended by the Education for all Handicapped Children Act of 1975, Pub. L. 94-142, 20 U.S.C. 1401 et seq.

(d) *Department* means the Department of Education.

(e) *Assistant Secretary* means the Assistant Secretary for Civil Rights of the Department of Education.

(f) *Recipient* means any state or its political subdivision, any instrumentality of a state or its political subdivision, any public or private agency, institution, organization, or other entity, or any person to which Federal financial assistance is extended directly or through another recipient, including any



successor, assignee, or transferee of a recipient, but excluding the ultimate beneficiary of the assistance.

(g) *Applicant for assistance* means one who submits an application, request, or plan required to be approved by a Department official or by a recipient as a condition to becoming a recipient.

(h) *Federal financial assistance* means any grant, loan, contract (other than a procurement contract or a contract of insurance or guaranty), or any other arrangement by which the Department provides or otherwise makes available assistance in the form of:

(1) Funds;

(2) Services of Federal personnel; or

(3) Real and personal property or any interest in or use of such property, including:

(i) Transfers or leases of such property for less than fair market value or for reduced consideration; and

(ii) Proceeds from a subsequent transfer or lease of such property if the Federal share of its fair market value is not returned to the Federal Government.

(i) *Facility* means all or any portion of buildings, structures, equipment, roads, walks, parking lots, or other real or personal property or interest in such property.

(j) *Handicapped person* -- (1) *Handicapped persons* means any person who (i) has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.

(2) As used in paragraph (j)(1) of this section, the phrase:

(i) *Physical or mental impairment* means (A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine; or (B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(ii) *Major life activities* means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(iii) *Has a record of such an impairment* means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(iv) *Is regarded as having an impairment* means (A) has a physical or mental impairment that does not substantially limit major life activities but that is treated by a recipient as constituting such a limitation; (B) has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or (C) has none of the impairments defined in paragraph (j)(2)(i) of this section but is treated by a recipient as having such an impairment.

(k) *Program or activity* means all of the operations of--

- (1)(i) A department, agency, special purpose district, or other instrumentality of a State or of a local government; or
- (ii) The entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;
- (2)(i) A college, university, or other postsecondary institution, or a public system of higher education; or
- (ii) A local educational agency (as defined in 20 U.S.C. 8801), system of vocational education, or other school system;
- (3)(i) An entire corporation, partnership, or other private organization, or an entire sole proprietorship--
  - (A) If assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or
  - (B) Which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or
- (ii) The entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or
- (4) Any other entity which is established by two or more of the entities described in paragraph (k)(1), (2), or (3) of this section; any part of which is extended Federal financial assistance.

(Authority: 29 U.S.C. 794(b))

(l) *Qualified handicapped person* means:

- (1) With respect to employment, a handicapped person who, with reasonable accommodation, can perform the essential functions of the job in question;
- (2) With respect to public preschool elementary, secondary, or adult educational services, a handicapped person (i) of an age during which nonhandicapped persons are provided such services, (ii) of any age during which it is mandatory under state law to provide such services to handicapped persons, or (iii) to whom a state is required to provide a free appropriate public education under section 612 of the Education of the Handicapped Act; and
- (3) With respect to postsecondary and vocational education services, a handicapped person who meets the academic and technical standards requisite to admission or participation in the recipient's education program or activity;
- (4) With respect to other services, a handicapped person who meets the essential eligibility requirements for the receipt of such services.

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

**104.4 Discrimination prohibited.**

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

(b) *Discriminatory actions prohibited.* (1) A recipient, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of handicap:

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

(ii) Afford a qualified handicapped person an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;

(iii) Provide a qualified handicapped person with an aid, benefit, or service that is not as effective as that provided to others;

(iv) Provide different or separate aid, benefits, or services to handicapped persons or to any class of handicapped persons unless such action is necessary to provide qualified handicapped persons with aid, benefits, or services that are as effective as those provided to others;

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

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

(vii) Otherwise limit a qualified handicapped person in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving an aid, benefit, or service.

(2) For purposes of this part, aids, benefits, and services, to be equally effective, are not required to produce the identical result or level of achievement for handicapped and nonhandicapped persons, but must afford handicapped persons equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement, in the most integrated setting appropriate to the person's needs.

(3) Despite the existence of separate or different aid, benefits, or services provided in accordance with this part, a recipient may not deny a qualified handicapped person the opportunity to participate in such aid, benefits, or services that are not separate or different.

(4) A recipient may not, directly or through contractual or other arrangements, utilize criteria or methods of administration (i) that have the effect of subjecting qualified handicapped persons to discrimination on the basis of handicap, (ii) that have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the recipient's program or activity with respect to handicapped persons, or (iii) that perpetuate the discrimination of another recipient if both recipients are subject to common administrative control or are agencies of the same State.

(5) In determining the site or location of a facility, an applicant for assistance or a recipient may not

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

(6) As used in this section, the aid, benefit, or service provided under a program or activity receiving Federal financial assistance includes any aid, benefit, or service provided in or through a facility that has been constructed, expanded, altered, leased or rented, or otherwise acquired, in whole or in part, with Federal financial assistance.

(c) *Aid, benefits or services limited by Federal law.* The exclusion of nonhandicapped persons from aid, benefits, or services limited by Federal statute or executive order to handicapped persons or the exclusion of a specific class of handicapped persons from aid, benefits, or services limited by Federal statute or executive order to a different class of handicapped persons is not prohibited by this part.

#### **104.5 Assurances required.**

(a) *Assurances.* An applicant for Federal financial assistance to which this part applies shall submit an assurance, on a form specified by the Assistant Secretary, that the program or activity will be operated in compliance with this part. An applicant may incorporate these assurances by reference in subsequent applications to the Department.

(b) *Duration of obligation.* (1) In the case of Federal financial assistance extended in the form of real property or to provide real property or structures on the property, the assurance will obligate the recipient or, in the case of a subsequent transfer, the transferee, for the period during which the real property or structures are used for the purpose for which Federal financial assistance is extended or for another purpose involving the provision of similar services or benefits.

(2) In the case of Federal financial assistance extended to provide personal property, the assurance will obligate the recipient for the period during which it retains ownership or possession of the property.

(3) In all other cases the assurance will obligate the recipient for the period during which Federal financial assistance is extended.

(c) *Covenants.* (1) Where Federal financial assistance is provided in the form of real property or interest in the property from the Department, the instrument effecting or recording this transfer shall contain a covenant running with the land to assure nondiscrimination for the period during which the real property is used for a purpose for which the Federal financial assistance is extended or for another purpose involving the provision of similar services or benefits.

(2) Where no transfer of property is involved but property is purchased or improved with Federal financial assistance, the recipient shall agree to include the covenant described in paragraph (b)(2) of this section in the instrument effecting or recording any subsequent transfer of the property.

(3) Where Federal financial assistance is provided in the form of real property or interest in the property from the Department, the covenant shall also include a condition coupled with a right to be reserved by the Department to revert title to the property in the event of a breach of the covenant. If a transferee of real property proposes to mortgage or otherwise encumber the real property as security for financing construction of new, or improvement of existing, facilities on the property for the purposes for which the property was transferred, the Assistant Secretary may, upon request of the transferee and if necessary to

accomplish such financing and upon such conditions as he or she deems appropriate, agree to forbear the exercise of such right to revert title for so long as the lien of such mortgage or other encumbrance remains effective.

#### **104.6 Remedial action, voluntary action, and self-evaluation.**

(a) *Remedial action.* (1) If the Assistant Secretary finds that a recipient has discriminated against persons on the basis of handicap in violation of section 504 or this part, the recipient shall take such remedial action as the Assistant Secretary deems necessary to overcome the effects of the discrimination.

(2) Where a recipient is found to have discriminated against persons on the basis of handicap in violation of section 504 or this part and where another recipient exercises control over the recipient that has discriminated, the Assistant Secretary, where appropriate, may require either or both recipients to take remedial action.

(3) The Assistant Secretary may, where necessary to overcome the effects of discrimination in violation of section 504 or this part, require a recipient to take remedial action (i) with respect to handicapped persons who are no longer participants in the recipient's program or activity but who were participants in the program or activity when such discrimination occurred or (ii) with respect to handicapped persons who would have been participants in the program or activity had the discrimination not occurred.

(b) *Voluntary action.* A recipient may take steps, in addition to any action that is required by this part, to overcome the effects of conditions that resulted in limited participation in the recipient's program or activity by qualified handicapped persons.

(c) *Self-evaluation.* (1) A recipient shall, within one year of the effective date of this part:

(i) Evaluate, with the assistance of interested persons, including handicapped persons or organizations representing handicapped persons, its current policies and practices and the effects thereof that do not or may not meet the requirements of this part;

(ii) Modify, after consultation with interested persons, including handicapped persons or organizations representing handicapped persons, any policies and practices that do not meet the requirements of this part; and

(iii) Take, after consultation with interested persons, including handicapped persons or organizations representing handicapped persons, appropriate remedial steps to eliminate the effects of any discrimination that resulted from adherence to these policies and practices.

(2) A recipient that employs fifteen or more persons shall, for at least three years following completion of the evaluation required under paragraph (c)(1) of this section, maintain on file, make available for public inspection, and provide to the Assistant Secretary upon request:

(i) A list of the interested persons consulted,

(ii) A description of areas examined and any problems identified, and

(iii) A description of any modifications made and of any remedial steps taken.

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

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

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

#### **104.8 Notice.**

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

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

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

The Assistant Secretary may require any recipient with fewer than fifteen employees, or any class of such recipients, to comply with 104.7 and 104.8, in whole or in part, when the Assistant Secretary finds a violation of this part or finds that such compliance will not significantly impair the ability of the recipient or class of recipients to provide benefits or services.

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

(a) The obligation to comply with this part is not obviated or alleviated by the existence of any state or local law or other requirement that, on the basis of handicap, imposes prohibitions or limits upon the eligibility of qualified handicapped persons to receive services or to practice any occupation or profession.

(b) The obligation to comply with this part is not obviated or alleviated because employment opportunities in any occupation or profession are or may be more limited for handicapped persons than for nonhandicapped persons.

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

#### **104.11 Discrimination prohibited.**

(a) *General.* (1) No qualified handicapped person shall, on the basis of handicap, be subjected to discrimination in employment under any program or activity to which this part applies.

(2) A recipient that receives assistance under the Education of the Handicapped Act shall take positive steps to employ and advance in employment qualified handicapped persons in programs or activities assisted under that Act.

(3) A recipient shall make all decisions concerning employment under any program or activity to which this part applies in a manner which ensures that discrimination on the basis of handicap does not occur and may not limit, segregate, or classify applicants or employees in any way that adversely affects their opportunities or status because of handicap.

(4) A recipient may not participate in a contractual or other relationship that has the effect of subjecting qualified handicapped applicants or employees to discrimination prohibited by this subpart. The relationships referred to in this paragraph include relationships with employment and referral agencies, with labor unions, with organizations providing or administering fringe benefits to employees of the recipient, and with organizations providing training and apprenticeships.

(b) *Specific activities.* The provisions of this subpart apply to:

(1) Recruitment, advertising, and the processing of applications for employment;

(2) Hiring, upgrading, promotion, award of tenure, demotion, transfer, layoff, termination, right of return from layoff and rehiring;

(3) Rates of pay or any other form of compensation and changes in compensation;

(4) Job assignments, job classifications, organizational structures, position descriptions, lines of progression, and seniority lists;

(5) Leaves of absence, sick leave, or any other leave;

(6) Fringe benefits available by virtue of employment, whether or not administered by the recipient;

(7) Selection and financial support for training, including apprenticeship, professional meetings, conferences, and other related activities, and selection for leaves of absence to pursue training;

(8) Employer sponsored activities, including those that are social or recreational; and

(9) Any other term, condition, or privilege of employment.

(c) A recipient's obligation to comply with this subpart is not affected by any inconsistent term of any collective bargaining agreement to which it is a party.

#### **104.12 Reasonable accommodation.**

(a) A recipient shall make reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its program or activity.

(b) Reasonable accommodation may include:

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

#### **104.13 Employment criteria.**

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

#### **104.14 Preemployment inquiries.**

- (a) Except as provided in paragraphs (b) and (c) of this section, a recipient may not conduct a preemployment medical examination or may not make preemployment inquiry of an applicant as to whether the applicant is a handicapped person or as to the nature or severity of a handicap. A recipient may, however, make preemployment inquiry into an applicant's ability to perform job-related functions.
- (b) When a recipient is taking remedial action to correct the effects of past discrimination pursuant to 104.6 (a), when a recipient is taking voluntary action to overcome the effects of conditions that resulted in limited participation in its federally assisted program or activity pursuant to 104.6(b), or when a



recipient is taking affirmative action pursuant to section 503 of the Act, the recipient may invite applicants for employment to indicate whether and to what extent they are handicapped, *Provided, That:*

(1) The recipient states clearly on any written questionnaire used for this purpose or makes clear orally if no written questionnaire is used that the information requested is intended for use solely in connection with its remedial action obligations or its voluntary or affirmative action efforts; and

(2) The recipient states clearly that the information is being requested on a voluntary basis, that it will be kept confidential as provided in paragraph (d) of this section, that refusal to provide it will not subject the applicant or employee to any adverse treatment, and that it will be used only in accordance with this part.

(c) Nothing in this section shall prohibit a recipient from conditioning an offer of employment on the results of a medical examination conducted prior to the employee's entrance on duty, *Provided, That:*

(1) All entering employees are subjected to such an examination regardless of handicap, and

(2) The results of such an examination are used only in accordance with the requirements of this part.

(d) Information obtained in accordance with this section as to the medical condition or history of the applicant shall be collected and maintained on separate forms that shall be accorded confidentiality as medical records, except that:

(1) Supervisors and managers may be informed regarding restrictions on the work or duties of handicapped persons and regarding necessary accommodations;

(2) First aid and safety personnel may be informed, where appropriate, if the condition might require emergency treatment; and

(3) Government officials investigating compliance with the Act shall be provided relevant information upon request.

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

#### **104.21 Discrimination prohibited.**

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

#### **104.22 Existing facilities.**

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

(b) *Methods.* A recipient may comply with the requirements of paragraph (a) of this section through such means as redesign of equipment, reassignment of classes or other services to accessible buildings, assignment of aides to beneficiaries, home visits, delivery of health, welfare, or other social services at

alternate accessible sites, alteration of existing facilities and construction of new facilities in conformance with the requirements of 104.23, or any other methods that result in making its program or activity accessible to handicapped persons. A recipient is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with paragraph (a) of this section. In choosing among available methods for meeting the requirement of paragraph (a) of this section, a recipient shall give priority to those methods that serve handicapped persons in the most integrated setting appropriate.

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

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

(e) *Transition plan.* In the event that structural changes to facilities are necessary to meet the requirement of paragraph (a) of this section, a recipient shall develop, within six months of the effective date of this part, a transition plan setting forth the steps necessary to complete such changes. The plan shall be developed with the assistance of interested persons, including handicapped persons or organizations representing handicapped persons. A copy of the transition plan shall be made available for public inspection. The plan shall, at a minimum:

(1) Identify physical obstacles in the recipient's facilities that limit the accessibility of its program or activity to handicapped persons;

(2) Describe in detail the methods that will be used to make the facilities accessible;

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

(4) Indicate the person responsible for implementation of the plan.

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

#### **104.23 New construction.**

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

(b) *Alteration.* Each facility or part of a facility which is altered by, on behalf of, or for the use of a recipient after the effective date of this part in a manner that affects or could affect the usability of the

facility or part of the facility shall, to the maximum extent feasible, be altered in such manner that the altered portion of the facility is readily accessible to and usable by handicapped persons.

(c) *Conformance with Uniform Federal Accessibility Standards.* (1) Effective as of January 18, 1991, design, construction, or alteration of buildings in conformance with sections 3-8 of the Uniform Federal Accessibility Standards (UFAS) (Appendix A to 41 CFR subpart 101-19.6) shall be deemed to comply with the requirements of this section with respect to those buildings. Departures from particular technical and scoping requirements of UFAS by the use of other methods are permitted where substantially equivalent or greater access to and usability of the building is provided.

(2) For purposes of this section, section 4.1.6(1)(g) of UFAS shall be interpreted to exempt from the requirements of UFAS only mechanical rooms and other spaces that, because of their intended use, will not require accessibility to the public or beneficiaries or result in the employment or residence therein of persons with physical handicaps.

(3) This section does not require recipients to make building alterations that have little likelihood of being accomplished without removing or altering a load-bearing structural member.

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

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

### **104.31 Application of this subpart.**

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

### **104.32 Location and notification.**

A recipient that operates a public elementary or secondary education program or activity shall annually:

- (a) Undertake to identify and locate every qualified handicapped person residing in the recipient's jurisdiction who is not receiving a public education; and
- (b) Take appropriate steps to notify handicapped persons and their parents or guardians of the recipient's duty under this subpart.

### **104.33 Free appropriate public education.**

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

(b) *Appropriate education.* (1) For the purpose of this subpart, the provision of an appropriate education is the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of 104.34, 104.35, and 104.36.

(2) Implementation of an Individualized Education Program developed in accordance with the Education of the Handicapped Act is one means of meeting the standard established in paragraph (b)(1)(i) of this section.

(3) A recipient may place a handicapped person or refer such a person for aid, benefits, or services other than those that it operates or provides as its means of carrying out the requirements of this subpart. If so, the recipient remains responsible for ensuring that the requirements of this subpart are met with respect to any handicapped person so placed or referred.

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

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

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

(4) *Placement of handicapped persons by parents*. If a recipient has made available, in conformance with the requirements of this section and 104.34, a free appropriate public education to a handicapped person and the person's parents or guardian choose to place the person in a private school, the recipient is not required to pay for the person's education in the private school. Disagreements between a parent or guardian and a recipient regarding whether the recipient has made a free appropriate public education available or otherwise regarding the question of financial responsibility are subject to the due process procedures of 104.36.

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

#### **104.34 Educational setting.**

(a) *Academic setting*. A recipient to which this subpart applies shall educate, or shall provide for the education of, each qualified handicapped person in its jurisdiction with persons who are not handicapped to the maximum extent appropriate to the needs of the handicapped person. A recipient shall place a handicapped person in the regular educational environment operated by the recipient unless it is

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

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

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

### **104.35 Evaluation and placement.**

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

(b) *Evaluation procedures.* A recipient to which this subpart applies shall establish standards and procedures for the evaluation and placement of persons who, because of handicap, need or are believed to need special education or related services which ensure that:

- (1) Tests and other evaluation materials have been validated for the specific purpose for which they are used and are administered by trained personnel in conformance with the instructions provided by their producer;
- (2) Tests and other evaluation materials include those tailored to assess specific areas of educational need and not merely those which are designed to provide a single general intelligence quotient; and
- (3) Tests are selected and administered so as best to ensure that, when a test is administered to a student with impaired sensory, manual, or speaking skills, the test results accurately reflect the student's aptitude or achievement level or whatever other factor the test purports to measure, rather than reflecting the student's impaired sensory, manual, or speaking skills (except where those skills are the factors that the test purports to measure).

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

(d) *Reevaluation.* A recipient to which this section applies shall establish procedures, in accordance with

paragraph (b) of this section, for periodic reevaluation of students who have been provided special education and related services. A reevaluation procedure consistent with the Education for the Handicapped Act is one means of meeting this requirement.

#### **104.36 Procedural safeguards.**

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

#### **104.37 Nonacademic services.**

(a) *General.* (1) A recipient to which this subpart applies shall provide non-academic and extracurricular services and activities in such manner as is necessary to afford handicapped students an equal opportunity for participation in such services and activities.

(2) Nonacademic and extracurricular services and activities may include counseling services, physical recreational athletics, transportation, health services, recreational activities, special interest groups or clubs sponsored by the recipients, referrals to agencies which provide assistance to handicapped persons, and employment of students, including both employment by the recipient and assistance in making available outside employment.

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

(c) *Physical education and athletics.* (1) In providing physical education courses and athletics and similar aid, benefits, or services to any of its students, a recipient to which this subpart applies may not discriminate on the basis of handicap. A recipient that offers physical education courses or that operates or sponsors interscholastic, club, or intramural athletics shall provide to qualified handicapped students an equal opportunity for participation.

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

#### **104.38 Preschool and adult education.**

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

**104.39 Private education.**

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

**Subpart E -- Postsecondary Education****104.41 Application of this subpart.**

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

**104.42 Admissions and recruitment.**

- (a) *General.* Qualified handicapped persons may not, on the basis of handicap, be denied admission or be subjected to discrimination in admission or recruitment by a recipient to which this subpart applies.
- (b) *Admissions.* In administering its admission policies, a recipient to which this subpart applies:
- (1) May not apply limitations upon the number or proportion of handicapped persons who may be admitted;
  - (2) May not make use of any test or criterion for admission that has a disproportionate, adverse effect on handicapped persons or any class of handicapped persons unless (i) the test or criterion, as used by the recipient, has been validated as a predictor of success in the education program or activity in question and (ii) alternate tests or criteria that have a less disproportionate, adverse effect are not shown by the Assistant Secretary to be available.
  - (3) Shall assure itself that (i) admissions tests are selected and administered so as best to ensure that, when a test is administered to an applicant who has a handicap that impairs sensory, manual, or speaking skills, the test results accurately reflect the applicant's aptitude or achievement level or whatever other factor the test purports to measure, rather than reflecting the applicant's impaired sensory, manual, or speaking skills (except where those skills are the factors that the test purports to measure); (ii) admissions tests that are designed for persons with impaired sensory, manual, or speaking skills are offered as often and in as timely a manner as are other admissions tests; and (iii) admissions tests are administered in facilities that, on the whole, are accessible to handicapped persons; and
  - (4) Except as provided in paragraph (c) of this section, may not make preadmission inquiry as to whether an applicant for admission is a handicapped person but, after admission, may make inquiries on a confidential basis as to handicaps that may require accommodation.

(c) *Preadmission inquiry exception.* When a recipient is taking remedial action to correct the effects of past discrimination pursuant to 104.6(a) or when a recipient is taking voluntary action to overcome the effects of conditions that resulted in limited participation in its federally assisted program or activity pursuant to 104.6(b), the recipient may invite applicants for admission to indicate whether and to what extent they are handicapped, *Provided, That:*

(1) The recipient states clearly on any written questionnaire used for this purpose or makes clear orally if no written questionnaire is used that the information requested is intended for use solely in connection with its remedial action obligations or its voluntary action efforts; and

(2) The recipient states clearly that the information is being requested on a voluntary basis, that it will be kept confidential, that refusal to provide it will not subject the applicant to any adverse treatment, and that it will be used only in accordance with this part.

(d) *Validity studies.* For the purpose of paragraph (b)(2) of this section, a recipient may base prediction equations on first year grades, but shall conduct periodic validity studies against the criterion of overall success in the education program or activity in question in order to monitor the general validity of the test scores.

#### **104.43 Treatment of students; general.**

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

(b) A recipient to which this subpart applies that considers participation by students in education programs or activities not operated wholly by the recipient as part of, or equivalent to, and education program or activity operated by the recipient shall assure itself that the other education program or activity, as a whole, provides an equal opportunity for the participation of qualified handicapped persons.

(c) A recipient to which this subpart applies may not, on the basis of handicap, exclude any qualified handicapped student from any course, course of study, or other part of its education program or activity.

(d) A recipient to which this subpart applies shall operate its program or activity in the most integrated setting appropriate.

#### **104.44 Academic adjustments.**

(a) *Academic requirements.* A recipient to which this subpart applies shall make such modifications to its academic requirements as are necessary to ensure that such requirements do not discriminate or have the effect of discriminating, on the basis of handicap, against a qualified handicapped applicant or student. Academic requirements that the recipient can demonstrate are essential to the instruction being pursued by such student or to any directly related licensing requirement will not be regarded as discriminatory within the meaning of this section. Modifications may include changes in the length of time permitted for the completion of degree requirements, substitution of specific courses required for the completion of degree requirements, and adaptation of the manner in which specific courses are conducted.



(b) *Other rules.* A recipient to which this subpart applies may not impose upon handicapped students other rules, such as the prohibition of tape recorders in classrooms or of dog guides in campus buildings, that have the effect of limiting the participation of handicapped students in the recipient's education program or activity.

(c) *Course examinations.* In its course examinations or other procedures for evaluating students' academic achievement, a recipient to which this subpart applies shall provide such methods for evaluating the achievement of students who have a handicap that impairs sensory, manual, or speaking skills as will best ensure that the results of the evaluation represents the student's achievement in the course, rather than reflecting the student's impaired sensory, manual, or speaking skills (except where such skills are the factors that the test purports to measure).

(d) *Auxiliary aids.* (1) A recipient to which this subpart applies shall take such steps as are necessary to ensure that no handicapped student is denied the benefits of, excluded from participation in, or otherwise subjected to discrimination because of the absence of educational auxiliary aids for students with impaired sensory, manual, or speaking skills.

(2) Auxiliary aids may include taped texts, interpreters or other effective methods of making orally delivered materials available to students with hearing impairments, readers in libraries for students with visual impairments, classroom equipment adapted for use by students with manual impairments, and other similar services and actions. Recipients need not provide attendants, individually prescribed devices, readers for personal use or study, or other devices or services of a personal nature.

#### **104.45 Housing.**

(a) *Housing provided by the recipient.* A recipient that provides housing to its nonhandicapped students shall provide comparable, convenient, and accessible housing to handicapped students at the same cost as to others. At the end of the transition period provided for in subpart C, such housing shall be available in sufficient quantity and variety so that the scope of handicapped students' choice of living accommodations is, as a whole, comparable to that of nonhandicapped students.

(b) *Other housing.* A recipient that assists any agency, organization, or person in making housing available to any of its students shall take such action as may be necessary to assure itself that such housing is, as a whole, made available in a manner that does not result in discrimination on the basis of handicap.

#### **104.46 Financial and employment assistance to students.**

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

(i) On the basis of handicap, provide less assistance than is provided to nonhandicapped persons, limit eligibility for assistance, or otherwise discriminate or

(ii) Assist any entity or person that provides assistance to any of the recipient's students in a manner that discriminates against qualified handicapped persons on the basis of handicap.

(2) A recipient may administer or assist in the administration of scholarships, fellowships, or other forms of financial assistance established under wills, trusts, bequests, or similar legal instruments that require awards to be made on the basis of factors that discriminate or have the effect of discriminating on the

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

(b) *Assistance in making available outside employment.* A recipient that assists any agency, organization, or person in providing employment opportunities to any of its students shall assure itself that such employment opportunities, as a whole, are made available in a manner that would not violate subpart B if they were provided by the recipient.

(c) *Employment of students by recipients.* A recipient that employs any of its students may not do so in a manner that violates subpart B.

#### **104.47 Nonacademic services.**

(a) *Physical education and athletics.* (1) In providing physical education courses and athletics and similar aid, benefits, or services to any of its students, a recipient to which this subpart applies may not discriminate on the basis of handicap. A recipient that offers physical education courses or that operates or sponsors intercollegiate, club, or intramural athletics shall provide to qualified handicapped students an equal opportunity for participation in these activities.

(2) A recipient may offer to handicapped students physical education and athletic activities that are separate or different only if separation or differentiation is consistent with the requirements of 104.43(d) and only if no qualified handicapped student is denied the opportunity to compete for teams or to participate in courses that are not separate or different.

(b) *Counseling and placement services.* A recipient to which this subpart applies that provides personal, academic, or vocational counseling, guidance, or placement services to its students shall provide these services without discrimination on the basis of handicap. The recipient shall ensure that qualified handicapped students are not counseled toward more restrictive career objectives than are nonhandicapped students with similar interests and abilities. This requirement does not preclude a recipient from providing factual information about licensing and certification requirements that may present obstacles to handicapped persons in their pursuit of particular careers.

(c) *Social organizations.* A recipient that provides significant assistance to fraternities, sororities, or similar organizations shall assure itself that the membership practices of such organizations do not permit discrimination otherwise prohibited by this subpart.

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

##### **104.51 Application of this subpart.**

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

##### **104.52 Health, welfare, and other social services.**

(a) *General.* In providing health, welfare, or other social services or benefits, a recipient may not, on the basis of handicap:

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

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

(3) Provide a qualified handicapped person with benefits or services that are not as effective (as defined in 104.4(b)) as the benefits or services provided to others;

(4) Provide benefits or services in a manner that limits or has the effect of limiting the participation of qualified handicapped persons; or

(5) Provide different or separate benefits or services to handicapped persons except where necessary to provide qualified handicapped persons with benefits and services that are as effective as those provided to others.

(b) *Notice.* A recipient that provides notice concerning benefits or services or written material concerning waivers of rights or consent to treatment shall take such steps as are necessary to ensure that qualified handicapped persons, including those with impaired sensory or speaking skills, are not denied effective notice because of their handicap.

(c) *Emergency treatment for the hearing impaired.* A recipient hospital that provides health services or benefits shall establish a procedure for effective communication with persons with impaired hearing for the purpose of providing emergency health care.

(d) *Auxiliary aids.* (1) A recipient to which this subpart applies that employs fifteen or more persons shall provide appropriate auxiliary aids to persons with impaired sensory, manual, or speaking skills, where necessary to afford such persons an equal opportunity to benefit from the service in question.

(2) The Assistant Secretary may require recipients with fewer than fifteen employees to provide auxiliary aids where the provision of aids would not significantly impair the ability of the recipient to provide its benefits or services.

(3) For the purpose of this paragraph, auxiliary aids may include brailled and taped material, interpreters, and other aids for persons with impaired hearing or vision.

#### **104.53 Drug and alcohol addicts.**

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

#### **104.54 Education of institutionalized persons.**

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

### **Subpart G -- Procedures**

#### **104.61 Procedures.**

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





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Office for Civil Rights

[Home](#)[Programs/Initiatives](#)[Office Contacts](#)[Reports & Resources](#)[News](#)[About OCR](#)[Know Your Rights](#)[Prevention](#)[Reading Room](#)[Questions and Answers](#)**Protecting Students With Disabilities****Frequently Asked Questions About Section 504 and the Education of Children with Disabilities**

[Introduction](#) | [Interrelationship of IDEA and Section 504](#) | [Protected Student Evaluation](#) | [Placement](#) | [Procedural Safeguards](#) | [Terminology](#)

This document is a revised version of a document originally developed by the Chief of the Office for Civil Rights (OCR) in the U.S. Department of Education (ED) to clarify the requirements of Section 504 of the Rehabilitation Act of 1973, as amended (Section 504) in the area of public elementary and secondary education. The primary purpose of these revisions is to incorporate information about the Americans with Disabilities Act Amendments Act of 2008 (Amendments Act), effective January 1, 2009, which amended the Americans with Disabilities Act of 1990 (ADA) and included a conforming amendment to the Rehabilitation Act of 1973 that affects the meaning of disability in Section 504. The Amendments Act broadens the interpretation of disability in Section 504. The Amendments Act does not require ED to amend its Section 504 regulations. Section 504 regulations as currently written are valid and OCR is enforcing them consistent with the Amendments Act. In addition, OCR is currently evaluating the impact of the Amendments Act on OCR's enforcement responsibilities under Section 504. Title II of the ADA, including whether any changes in regulations, guidance, or other publications are appropriate. The revisions to this Frequently Asked Questions document do not address the effects, if any, on Section 504 and Title II of the amendments regulations implementing the Individuals with Disabilities Education Act (IDEA) that were published in the Federal Register at 73 Fed. Reg. 73006 (December 1, 2008).

[Top](#)**INTRODUCTION**


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An important responsibility of the Office for Civil Rights (OCR) is to eliminate

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discrimination on the basis of disability against students with disabilities. OCR receives numerous complaints and inquiries in the area of elementary and secondary education involving Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794 (Section 504). Most of these concern identification of students who are protected under Section 504 and the means to obtain an appropriate education for such students.

Section 504 is a federal law designed to protect the rights of individuals with disabilities in programs and activities that receive Federal financial assistance from the U.S. Department of Education (ED). Section 504 provides: "No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, 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."

OCR enforces Section 504 in programs and activities that receive Federal financial assistance from ED. Recipients of this Federal financial assistance include public school districts, institutions of higher education, and other state and local education agencies. The regulations implementing Section 504 in the context of educational institutions appear at 34 C.F.R. Part 104.

The Section 504 regulations require a school district to provide a "free appropriate education" (FAPE) to each qualified student with a disability who is in the school district's jurisdiction, regardless of the nature or severity of the disability. Under Section 504, FAPE consists of the provision of regular or special education and related aids and services designed to meet the student's individual educational needs as adequately as the needs of nondisabled students are met.

This resource document clarifies pertinent requirements of Section 504.

For additional information, please contact the [Office for Civil Rights](#).

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## INTERRELATIONSHIP OF IDEA AND SECTION 504

### **1. What is the jurisdiction of the Office for Civil Rights (OCR), the Office of Special Education and Rehabilitative Services (OSERS) and state departments of education/instruction regarding educational services to students with disabilities?**

OCR, a component of the U.S. Department of Education, enforces Section 504 of the Rehabilitation Act of 1973, as amended, (Section 504) a civil rights statute which prohibits discrimination against individuals with disabilities. OCR also enforces Title II of the Americans with Disabilities Act of 1990 (Title II), which extends this prohibition against discrimination to the full range of state and local government services, programs, and activities (including public schools) regardless of whether they receive any Federal financial assistance. The Americans with Disabilities Act Amendments Act of 2008 (Amendments Act), effective January 1, 2009, amended the Americans with Disabilities Act of 1990 (ADA) and included a conforming amendment to the Rehabilitation Act of 1973 (Rehabilitation Act) that affects the meaning of disability in Section 504. The standards adopted by the ADA were designed not to restrict the rights or remedies available under Section 504. The Title II regulations applicable to free appropriate education issues do not provide greater protection than applicable Section 504 regulations. This guidance focuses primarily on Section 504.

Section 504 prohibits discrimination on the basis of disability in programs or activities that receive Federal financial assistance from the U.S. Department of Education. It prohibits discrimination on the basis of disability by state and local governments. The Office of Special Education and Rehabilitative Services (OSERS), also a component of the U.S. Department of Education, administers the Individuals with Disabilities Education Act (IDEA), a statute which funds special education programs. Each state educational agency is responsible for administering IDEA within the state and distributing the

agency, is responsible for administering federal funds to the state and allocating the funds for special education programs. IDEA is a grant statute and attaches many specific conditions to the receipt of Federal IDEA funds. Section 504 and the ADA are antidiscrimination laws and do not provide any type of funding.

## **2. How does OCR get involved in disability issues within a school district?**

OCR receives complaints from parents, students or advocates, conducts agency or compliance reviews, and provides technical assistance to school districts, parents or advocates.

## **3. Where can a school district, parent, or student get information on Section 504 or find out information about OCR's interpretation of Section 504 and II?**

OCR provides technical assistance to school districts, parents, and students upon request. Additionally, regulations and publicly issued policy guidance is available on OCR's website, at <http://www.ed.gov/policy/rights/guid/ocr/disability.html>.

## **4. What services are available for students with disabilities under Section 504?**

Section 504 requires recipients to provide to students with disabilities appropriate educational services designed to meet the individual needs of such students to the extent as the needs of students without disabilities are met. An appropriate education for a student with a disability under the Section 504 regulations could consist of education in regular classrooms, education in regular classes with supplementary services, and special education and related services.

## **5. Does OCR examine individual placement or other educational decisions for students with disabilities?**

Except in extraordinary circumstances, OCR does not review the result of individual placement or other educational decisions so long as the school district complies with the procedural requirements of Section 504 relating to identification and location of students with disabilities, evaluation of such students, and due process. Accordingly, OCR generally will not evaluate the content of a Section 504 plan or of an individualized education program (IEP); rather, any disagreement can be resolved through a due process hearing. The hearing would be conducted under Section 504 or the IDEA, whichever is applicable.

OCR will examine procedures by which school districts identify and evaluate students with disabilities and the procedural safeguards which those school districts provide to students. OCR will also examine incidents in which students with disabilities are subjected to treatment which is different from the treatment to which similarly situated students without disabilities are subjected. Such incidents may involve the unwarranted exclusion of disabled students from educational programs and services.

## **6. What protections does OCR provide against retaliation?**

Retaliatory acts are prohibited. A recipient is prohibited from intimidating, threatening, coercing, or discriminating against any individual for the purpose of interfering with the exercise of rights or privileges secured by Section 504.

## **7. Does OCR mediate complaints?**

OCR does not engage in formal mediation. However, OCR may offer to facilitate mediation, referred to as "Early Complaint Resolution," to resolve a complaint filed under Section 504. This approach brings the parties together so that they may discuss possible resolution of the complaint immediately. If both parties are willing to utilize this approach, OCR will work with the parties to facilitate resolution by providing each party with an understanding of pertinent legal standards and possible remedies. An agreement reached between the parties is not monitored by OCR.



**8. What are the appeal rights with OCR?**

OCR is committed to a high quality resolution of every case. If a complainant has questions or concerns about an OCR determination, he or she may contact the OCR person whose name appears in the complaint resolution letter. The complainant should address his or her concerns with as much specificity as possible, focusing on factual and legal questions that would change the resolution of the case. Should a complainant continue to have questions or concerns, he or she is advised to send a request for reconsideration to the Director of the responsible OCR field office. The Director will review the appropriateness of the complaint resolution. If the complainant remains dissatisfied, he or she may submit an appeal in writing to the Deputy Assistant Secretary for Enforcement. The decision of the Deputy Assistant Secretary for Enforcement constitutes OCR's final decision.

**9. What does noncompliance with Section 504 mean?**

A school district is out of compliance when it is violating any provision of the Section 504 statute or regulations.

**10. What sanctions can OCR impose on a school district that is out of compliance?**

OCR initially attempts to bring the school district into voluntary compliance through negotiation of a corrective action agreement. If OCR is unable to achieve voluntary compliance, OCR will initiate enforcement action. OCR may: (1) initiate administrative proceedings to terminate Department of Education financial assistance to the recipient; or (2) refer the case to the Department of Justice for judicial proceedings.

**11. Who has ultimate authority to enforce Section 504?**

In the educational context, OCR has been given administrative authority to enforce Section 504. Section 504 is a Federal statute that may be enforced through the Department's administrative process or through the Federal court system. In addition, a person may at any time file a private lawsuit against a school district. The Section 504 regulations do not contain a requirement that a person file a complaint with OCR or exhaust his or her administrative remedies before filing a private lawsuit.

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**STUDENTS PROTECTED UNDER SECTION 504**

Section 504 covers qualified students with disabilities who attend schools receiving Federal financial assistance. To be protected under Section 504, a student must be determined to: (1) have a physical or mental impairment that substantially limits one or more major life activities; or (2) have a record of such an impairment; or (3) be regarded as having such an impairment. Section 504 requires that school districts provide a free appropriate public education (FAPE) to qualified students in their jurisdictions who have a physical or mental impairment that substantially limits one or more major life activities.

**12. What is a physical or mental impairment that substantially limits a major life activity?**

The determination of whether a student has a physical or mental impairment that substantially limits a major life activity must be made on the basis of an individual inquiry. The Section 504 regulatory provision at 34 C.F.R. 104.3(j)(2)(i) defines a physical or mental impairment as any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic.

skin; and endocrine; or any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. The regulatory provision does not set forth an exhaustive list of specific diseases and conditions that may constitute physical or mental impairments because of the difficulty of ensuring the comprehensiveness of such a list.

Major life activities, as defined in the Section 504 regulations at 34 C.F.R. 104.3(j) include functions such as caring for one's self, performing manual tasks, walking, hearing, speaking, breathing, learning, and working. This list is not exhaustive. Other functions can be major life activities for purposes of Section 504. In the Amendment Act (see FAQ 1), Congress provided additional examples of general activities that are major life activities, including eating, sleeping, standing, lifting, bending, reading, concentrating, thinking, and communicating. Congress also provided a non-exhaustive list of examples of "major bodily functions" that are major life activities, such as the functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions. The Section 504 regulatory provision, though not as comprehensive as the Amendment Act is still valid – the Section 504 regulatory provision's list of examples of major life activities is not exclusive, and an activity or function not specifically listed in the Section 504 regulatory provision can nonetheless be a major life activity.

**13. Does the meaning of the phrase "qualified student with a disability" change on the basis of a student's educational level, i.e., elementary and secondary versus postsecondary?**

Yes. At the elementary and secondary educational level, a "qualified student with a disability" is a student with a disability who is: of an age at which students without disabilities are provided elementary and secondary educational services; of an age at which it is mandatory under state law to provide elementary and secondary educational services to students with disabilities; or a student to whom a state is required to provide a free appropriate public education under the Individuals with Disabilities Education Act (IDEA).

At the postsecondary educational level, a qualified student with a disability is a student with a disability who meets the academic and technical standards requisite for admission or participation in the institution's educational program or activity.

**14. Does the nature of services to which a student is entitled under Section 504 differ by educational level?**

Yes. Public elementary and secondary recipients are required to provide a free appropriate public education to qualified students with disabilities. Such an education consists of regular or special education and related aids and services designed to meet the individual educational needs of students with disabilities as adequately as the needs of students without disabilities are met.

At the postsecondary level, the recipient is required to provide students with appropriate academic adjustments and auxiliary aids and services that are necessary to afford an individual with a disability an equal opportunity to participate in a school's program. Recipients are not required to make adjustments or provide aids or services that would result in a fundamental alteration of a recipient's program or impose an undue burden.

**15. Once a student is identified as eligible for services under Section 504, is that student always entitled to such services?**

Yes, as long as the student remains eligible. The protections of Section 504 extend to individuals who meet the regulatory definition of a person with a disability. If a recipient school district re-evaluates a student in accordance with the Section 504 regulatory provision at 34 C.F.R. 104.35 and determines that the student's mental or physical impairment no longer substantially limits his/her ability to learn or any other major life activity, the student is no longer eligible for services under Section 504.

**16. Are current illegal users of drugs excluded from protection under Section 504?**

**504?**

Generally, yes. Section 504 excludes from the definition of a student with a disability and from Section 504 protection, any student who is currently engaging in the illegal use of drugs when a covered entity acts on the basis of such use. (There are exceptions for persons in rehabilitation programs who are no longer engaging in the illegal use of drugs).

**17. Are current users of alcohol excluded from protection under Section 504?**

No. Section 504's definition of a student with a disability does not exclude users of alcohol. However, Section 504 allows schools to take disciplinary action against students with disabilities using drugs or alcohol to the same extent as students without disabilities.

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**EVALUATION**

At the elementary and secondary school level, determining whether a child is a qualified disabled student under Section 504 begins with the evaluation process. Section 504 requires the use of evaluation procedures that ensure that children are not misclassified, unnecessarily labeled as having a disability, or incorrectly placed, based on inappropriate selection, administration, or interpretation of evaluation materials.

**18. What is an appropriate evaluation under Section 504?**

Recipient school districts must establish standards and procedures for initial evaluation and periodic re-evaluations of students who need or are believed to need special education and/or related services because of disability. The Section 504 regulatory provision at 34 C.F.R. 104.35(b) requires school districts to individually evaluate a student before classifying the student as having a disability or providing the student with special education. Tests used for this purpose must be selected and administered in the best way to ensure that the test results accurately reflect the student's aptitude or achievement or other factor being measured rather than reflect the student's disability except where those are the factors being measured. Section 504 also requires that and other evaluation materials include those tailored to evaluate the specific areas of educational need and not merely those designed to provide a single intelligence quotient. The tests and other evaluation materials must be validated for the specific purposes for which they are used and appropriately administered by trained personnel.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

sources in interpreting evaluation data and making placement decisions.

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

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

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

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

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

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

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

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

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

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

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

Yes. Section 504 specifies that re-evaluations in accordance with the IDEA is one

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

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

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

**32. A student is receiving services that the school district maintains are necessary under Section 504 in order to provide the student with an appropriate education. The student's parent no longer wants the student receive those services. If the parent wishes to withdraw the student from Section 504 plan, what can the school district do to ensure continuation of services?**

The school district may initiate a Section 504 due process hearing to resolve the conflict if the district believes the student needs the services in order to receive an appropriate education.

**33. A student has a disability referenced in the IDEA, but does not require special education services. Is such a student eligible for services under Section 504?**

The student may be eligible for services under Section 504. The school district must determine whether the student has an impairment which substantially limits his or her ability to learn or another major life activity and, if so, make an individualized determination of the child's educational needs for regular or special education or related aids or services. For example, such a student may receive adjustments in the regular classroom.

**34. How should a recipient school district view a temporary impairment?**

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

In the Amendments Act (see FAQ 1), Congress clarified that an individual is not "regarded as" an individual with a disability if the impairment is transitory and minor. A transitory impairment is an impairment with an actual or expected duration of 6 months or less.

**35. Is an impairment that is episodic or in remission a disability under Section 504?**

Yes, under certain circumstances. In the Amendments Act (see FAQ 1), Congress clarified that an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active. A student with such an impairment is entitled to a free appropriate public education under Section 504.

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## PLACEMENT

Once a student is identified as being eligible for regular or special education and related aids or services, a decision must be made regarding the type of services the student needs.

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

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

### **37. Must a school district develop a Section 504 plan for a student who either "has a record of disability" or is "regarded as disabled"?**

No. In public elementary and secondary schools, unless a student actually has an impairment that substantially limits a major life activity, the mere fact that a student has a "record of" or is "regarded as" disabled is insufficient, in itself, to trigger those Section 504 protections that require the provision of a free appropriate public education (FAPSE). This is consistent with the Amendments Act (see FAQ 1), in which Congress clarified that an individual who meets the definition of disability solely by virtue of being "regarded as disabled" is not entitled to reasonable accommodations or the reasonable modification of policies, practices or procedures. The phrases "has a record of disability" and "is regarded as disabled" are meant to reach the situation in which a student either currently has or never had a disability, but is treated by others as such.

As noted in FAQ 34, in the Amendments Act (see FAQ 1), Congress clarified that an individual is not "regarded as" an individual with a disability if the impairment is transitory and minor. A transitory impairment is an impairment with an actual or expected duration of 6 months or less.

### **38. What is the receiving school district's responsibility under Section 504 toward a student with a Section 504 plan who transfers from another district?**

If a student with a disability transfers to a district from another school district with a Section 504 plan, the receiving district should review the plan and supporting documentation. If a group of persons at the receiving school district, including personnel knowledgeable about the meaning of the evaluation data and knowledgeable about placement options determines that the plan is appropriate, the district is required to implement the plan. If the district determines that the plan is inappropriate, the district is to evaluate the student consistent with the Section 504 procedures at 34 C.F.R. 104.35 and determine which educational program is appropriate for the student. There is no Section 504 bar to the receiving school district honoring the previous IEP during the interim period. Information about IDEA requirements when a student transfers is available from the Office of Special Education and Rehabilitative Services at <http://idea.ed.gov/explore/view/p/%2Croot%2Cdynamic%2CQaCorner%2C3%2C>

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

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

### **40. What is the difference between a regular education intervention plan and a Section 504 plan?**

A regular education intervention plan is appropriate for a student who does not have a disability or is not suspected of having a disability but may be facing challenges in school. School districts vary in how they address performance problems of regular education students. Some districts employ teams at individual schools, commonly referred to as "building teams." These teams are designed to provide regular education classroom teachers with instructional support and strategies for helping students in need of assistance. These teams are typically composed of regular and special education teachers who provide ideas to classroom teachers on methods for helping students experiencing academic or behavioral problems. The team usually records its ideas in a written regular education intervention plan. The team meets with an affected student's classroom teacher(s) and recommends strategies to address the student's problem within the regular education environment. The team then follows the responsible teacher(s) to determine whether the student's performance or behavior has improved. In addition to building teams, districts may utilize other regular education intervention methods, including before-school and after-school programs, tutoring programs, and mentoring programs.

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## **PROCEDURAL SAFEGUARDS**

Public elementary and secondary schools must employ procedural safeguards regarding the identification, evaluation, or educational placement of persons who, because of a disability, need or are believed to need special instruction or related services.

### **41. Must a recipient school district obtain parental consent prior to conducting an initial evaluation?**

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

### **42. If so, in what form is consent required?**

Section 504 is silent on the form of parental consent required. OCR has accepted verbal consent as compliance. IDEA as well as many state laws also require written consent prior to initiating an evaluation.

### **43. What can a recipient school district do if a parent withholds consent for an initial evaluation if a student is determined eligible for services?**

Section 504 neither prohibits nor requires a school district to initiate a due process hearing to override a parental refusal to consent with respect to the initial provision of special education and related services. Nonetheless, school districts should consider that IDEA no longer permits school districts to initiate a due process hearing to override a parental refusal to consent to the initial provision of services.

### **44. What procedural safeguards are required under Section 504?**

Recipient school districts are required to establish and implement procedural safeguards that include notice, an opportunity for parents to review relevant records, an impartial hearing with opportunity for participation by the student's parents or guardian, representation by counsel and a review procedure.

### **45. What is a recipient school district's responsibility under Section 504 to provide information to parents and students about its evaluation and placement process?**



Section 504 requires districts to provide notice to parents explaining any evaluation placement decisions affecting their children and explaining the parents' right to review educational records and appeal any decision regarding evaluation and placement to an impartial hearing.

#### 46. Is there a mediation requirement under Section 504?

No.

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### TERMINOLOGY

The following terms may be confusing and/or are frequently used incorrectly in the elementary and secondary school context.

**Equal access:** equal opportunity of a qualified person with a disability to participate or benefit from educational aid, benefits, or services

**Free appropriate public education (FAPE):** a term used in the elementary and secondary school context; for purposes of Section 504, refers to the provision of regular or special education and related aids and services that are designed to meet individual educational needs of students with disabilities as adequately as the needs of students without disabilities are met and is based upon adherence to procedures that satisfy Section 504 requirements pertaining to educational setting, evaluation and placement and procedural safeguards

**Placement:** a term used in the elementary and secondary school context; refers to regular and/or special educational program in which a student receives education and/or related services

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

**Reasonable modifications:** under a regulatory provision implementing Title II of the ADA, public entities are required to make reasonable modifications in policies, programs, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modification would fundamentally alter the nature of the service, program, or activity

**Related services:** a term used in the elementary and secondary school context to refer to developmental, corrective, and other supportive services, including psychological counseling and medical diagnostic services and transportation

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# OCR

Office for Civil Rights

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## Notice of Non-Discrimination

U.S. Department of Education  
Office for Civil Rights  
Washington, D.C. 20202-1100  
January 1999

## Introduction

The Department of Education's (ED) Office for Civil Rights (OCR) enforces several statutes that protect the rights of beneficiaries in programs or activities that receive financial assistance from ED. These laws prohibit discrimination on the basis of race, color, and national origin (Title VI of the Civil Rights Act of 1964), sex (Title IX of the Education Amendments of 1972), disability (Section 504 of the Rehabilitation Act of 1973), and age (Age Discrimination Act of 1975). OCR also has responsibilities under Title II of the Americans with Disabilities Act, which prohibits state and local governments from discriminating on the grounds of disability.

This fact sheet explains the requirements for schools, colleges, state and local governments that receive federal funds to issue notices of non-discrimination, clarifies the information that they should include in their non-discrimination notices, and provides a sample notice of non-discrimination. This fact sheet is designed to assist education institutions in establishing a notice of non-discrimination that meets the requirements of the applicable regulations.

## Notice of Non-discrimination Requirements

The regulations implementing Title VI, Title IX, Section 504, and the Age Discrimination Act contain requirements for recipients to issue notices of non-discrimination. (See 34 C.F.R. Sections 100.6(d), 106.9, 104.8, and 110.25, respectively.) The Title II regulation also contains a notice requirement that applies to all units of government, whether or not they receive federal aid. (See 28 C.F.R. Section 35.106.)

These regulations require that recipients notify students, parents and others that they do not discriminate on the basis of race, color, national origin, sex, disability, and age. However, these regulations contain minor differences relating to the required content of recipient notices of non-discrimination and the methods used to publish them.

The Title VI regulation requires schools and colleges to notify students and others of the regulatory provisions in a manner that a responsible ED official would find necessary to tell students of their protections against discrimination under the statute and regulation.

The Title IX and the Section 504 regulations both contain more detailed requirements that specify the information that must be included in a notice of non-discrimination. These regulations also

require recipients to designate at least one employee to coordinate efforts to comply with and carry out responsibilities.

The Title IX regulation requires schools and colleges to implement specific and continuing steps to inform students and others of the protections against discrimination on the basis of sex. The notification must state that the requirement of non-discrimination in educational programs and activities extends to employment and admission. It also must say that questions about Title IX may be referred to the employee designated to coordinate Title IX compliance or to the Assistant Secretary for Civil Rights. Schools are required to include the name, address, and telephone number of the designated coordinator in their notifications.

The Section 504 regulation requires that a school employing 15 or more persons must implement appropriate, continuing steps to notify students and others that the school does not discriminate on the basis of disability in violation of the statute and regulation. The notification must state, where appropriate, that the education institution does not discriminate in admission, treatment, or access to its programs or activities. The notification also must state that the institution does not discriminate in employment in its programs or activities. The employee designated to coordinate compliance with Section 504 regulations must be identified in the notification.

The Title II regulation requires that a public entity generally make information regarding the provisions of Title II available to applicants, participants and other interested persons.

The regulation implementing the Age Discrimination Act requires a school or college to notify its students and applicants of information regarding the provisions of the Act and the regulations applicability to specific programs. The notice must identify the compliance coordinator by name or title, address, and telephone number.

### **Methods of Notification**

In accordance with the Title IX and Section 504 regulations, notification may include posting information notices, publishing in local newspapers, and publishing in newspapers and magazines operated by the school or its students, publishing in alumnae or alumni newspapers or magazines, or distributing memoranda or other written communications to students and employees. In addition, recipients are required to include a statement of nondiscriminatory policy in any bulletins, announcements, publications, catalogs, application forms, or other recruitment materials that are made available to participants, students, applicants, or employees. As noted in the pertinent Section 504 regulation, schools may meet this requirement either by including appropriate inserts in existing materials and publications or by revising and reprinting the materials and publications.

Neither the Title VI regulation, the Age Discrimination Act regulation, nor the Title II regulation specifies the methods to be used by recipients in publishing notices of non-discrimination.

### **Combined Requirements**

OCR recognizes the variations among the regulations governing notice requirements and understands that schools and colleges may wish to use one statement to comply with all requirements of the regulations implementing Title VI, Title IX, Section 504, and the Age Discrimination Act. Public institutions also may wish to include Title II of the ADA in their statement. OCR encourages one combined notice for the regulations.

A combined non-discrimination notice should contain two basic elements: (1) a statement of non-discrimination that specifies the basis for non-discrimination; and (2) identification by name or title, address, and telephone number of the employee or employees responsible for coordinating the compliance efforts.

The regulations do not require that a recipient identify the pertinent regulations by title. Please see the sample notice beginning on page 5.

The Title IX regulation requires a recipient to provide the name of the person responsible for its compliance effort in addition to the address and telephone number where that person may be contacted. However, because OCR recognizes that the inclusion of a person's name in a non-discrimination notice may result in an overly burdensome requirement to republish the notice if a person leaves the coordinator position, it is acceptable for a recipient to identify its coordinator only through a position title.

The Section 504 regulation does not require a recipient to include the address or telephone number of the responsible employee assigned to coordinate its compliance efforts. However, OCR considers that identifying the responsible employee without information on how to contact that person does not constitute an effective notice. An acceptable non-discrimination notice should provide information on how to contact the responsible employee.

Compliance with the notification requirements of Section 504 will also generally satisfy the notification requirements of Title II for state and local governments.

Although the Section 504 and Title IX regulations state that schools and colleges, where appropriate, shall specify non-discrimination in the areas of admission and employment, a general statement indicating non-discrimination in all programs is acceptable.

The Title IX regulation indicates that inquiries concerning the application of the Title IX regulations may be referred to the coordinator or to the Assistant Secretary for Civil Rights. An acceptable notice may include the names and titles of either one or both individuals. If a recipient designates two different people to coordinate compliance with Section 504 and Title IX, both names or titles should be included in the notice.

#### **Sample Notice of Non-discrimination**

The following sample notice of non-discrimination meets the minimum requirements of the regulations enforced by OCR:

\* The (Name of Recipient) does not discriminate on the basis of race, color, national origin, sex, disability, or age in its programs and activities. The following person has been designated to handle inquiries regarding the non-discrimination policies:

Name and/or Title  
Address  
Telephone No.

Name and/or Title  
Address  
Telephone No.

For further information on notice of non-discrimination, see list of [OCR enforcement offices](#) for the address and phone number of the office that serves your area, or call 1-(800)-421-3481

\* For use when more than one official has been designated to coordinate civil rights compliance.

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\* Please note: State law prohibits discrimination on the basis of sexual orientation, gender identity, marital status, and religion. Any notice of non-discrimination should include sexual orientation, gender identity, marital status, and religion classes.  
See 9 V.S.A. § 4502.



September 17, 2007

**4300 Disciplinary Action**

**4310 Statutory Authority** 16 VSA §1162

**4311 Procedures**

When a student is subject to disciplinary action, the school district shall afford the student due process procedures as follows:

4311.1 In all cases of short-term suspension from school, which is generally regarded as 10 days or less, the student and his or her parent/guardian shall be given an opportunity for an informal hearing before an appropriately designated school official. Except for cases set forth in paragraph 4311.3, the hearing must precede the suspension and the district shall provide:

- (1) notice of the charges;
- (2) explanation of the evidence against the student;
- (3) opportunity for the student to tell his or her side of the story; and
- (4) decision in writing to the parent/guardian.

4311.2 In cases of a long term suspension which is generally more than 10 days unless a school district establishes a shorter period, or an expulsion, the student and his or her parent/guardian shall be given an opportunity for a formal hearing before the school board and the district shall provide:

- (1) written notice of the following:
  - (a) nature of charges against the student;
  - (b) date, time and place of hearing;
  - (c) right to legal representation;
  - (d) possible penalties involved;
- (2) opportunity to present evidence;
- (3) opportunity to cross-examine witnesses; and
- (4) decision in writing to parent/guardian



- 4311.3 (1) When a student, because of his or her conduct or condition, is an immediate threat to himself or herself, others, property or educational environment, the school district may take whatever action is appropriate under the circumstances, including, but not limited to, immediate suspension pending a hearing as soon as possible thereafter. In addition, in cases where a student brings a weapon (as defined in the federal Gun-Free School Act) to school, the school district must refer the student to a law enforcement agency and expel the student for a period of not less than one calendar year unless such expulsion is modified in accordance with the provision of 16 VSA §1166(b)(2) in circumstances such as but not limited to:
- (a) the student is unaware that he or she has brought a weapon to school,
  - (b) the student did not intend to use the weapon to threaten or endanger others,
  - (c) the student is disabled and the misconduct is related to the disability,
  - (d) the student does not present an ongoing threat to others and a lengthy expulsion would not serve the best interest of the student.
- (2) In situations where a student with a disability brings a weapon to school, the provisions of regulation 4312(2) shall apply. In any such situation, an opportunity for a hearing prior to an expulsion must be provided prior to the expulsion, pursuant to 16 VSA §1166(b)(2)

**4312 Discipline Procedures for Students Who are Not Eligible for Special Education Services, but Who Are or May Be Qualified Individuals with Disabilities under Section 504 of The Rehabilitation Act of 1973 (29 U.S.C. § 794; 34 C.F.R. § 104 et seq.)**

In addition to the general disciplinary procedures found within Rule 4311, and in accordance with 34 C.F.R. §104.36, the following procedures apply to children who are qualified individuals with disabilities as defined by Section 504 of the Rehabilitation Act of 1973 (hereinafter Section 504).

- (1) A Section 504 student shall not be removed from his or her current educational placement for disciplinary reasons for more than 10 consecutive school days in a school year unless the following procedures have been completed:
- (a) A re-evaluation, as defined by 34 C.F.R. §104.35; and

- (b) A determination by the student's Section 504 team that the conduct is not a manifestation of his or her disability.
- (2) A Section 504 student shall not be removed from his or her current educational placement for disciplinary reasons for more than 10 cumulative days in a school year when the removals constitute a change in placement as defined in Rule 2360.2(d)(1) unless the following procedures have been completed:
  - (a) A re-evaluation, as defined by 34 C.F.R. §104.35; and
  - (b) A determination by the student's Section 504 team that the conduct is not a manifestation of his or her disability.
- (3) When it is determined by a student's 504 team that the conduct is not a manifestation of the student's qualifying disability, the student may be disciplined in the same manner, and subject to the same disciplinary consequences, as a non-disabled child, including suspension or expulsion without the provision of services.
- (4) When it is determined by a student's Section 504 team that the conduct is a manifestation of his or her qualifying disability, a change in program or placement may be implemented by the student's Section 504 team and the student's Section 504 team may respond to the conduct by designing, amending and/or enforcing a plan of behavior management.
- (5) If, at the time of the occurrence of conduct that gives rise to consideration of removal of a student from his or her current educational placement for more than 10 consecutive school days in a school year, the student is believed to be a qualified individual with a disability under Section 504, a Section 504 evaluation shall be completed prior to imposition of the removal.
  - (a) If the evaluation results in a determination that the student is a qualified individual with a disability under Section 504, the discipline procedures in this rule shall be followed.
  - (b) If the evaluation results in a determination that the student is not a qualified individual with a disability under Section 504, the discipline procedures in Rule 4311 shall be followed.
- (6) If, at the time of the occurrence of conduct that gives rise to consideration of removal of a student who is believed to be a qualified individual with a disability under Section 504 for more than 10 cumulative school days in a school year, and the removals constitute a change in placement as defined in Rule 2360.2(d)(1), a Section 504 evaluation shall be completed prior to imposition of the removal.
  - (a) If the evaluation results in a determination that the student is a qualified individual with a disability under Section 504, the discipline procedures in this rule shall be followed.
  - (b) If the evaluation results in a determination that the student is not a qualified individual with a disability under Section 504, the discipline procedures in Rule 4311 shall be followed.

- (7) If a child who is a qualified individual under Section 504 possesses or carries a weapon, as defined in Rule 4313.9(a), to school or at a school function, he or she may be placed in an interim alternative educational setting (IAES) in accordance with the procedures set forth in Rule 4313.9 and Rule 1253. The student's 504 team shall determine the IAES, and the services provided in the IAES, in accordance with the procedures set forth in Rule 4313.9. It is the intent of this section to discipline a child who is a qualified individual under Section 504 in the same manner as students who are eligible for special education when they possess weapons at school or at school functions.
- (8) When a parent disagrees with disciplinary action taken by a school district, the parent may request an impartial due process hearing, and the procedures in Rules 2365.1.6(c) through 2365.1.9 shall apply. In addition to or in lieu of a due process hearing a parent may file a complaint with the U.S. Department of Education Office for Civil Rights.
- (9) A hearing officer may order a change in the placement of a child who is a qualified individual under Section 504 to an appropriate IAES for not more than 45 calendar days, if the hearing officer, in an expedited due process hearing:
  - (a) Determines that the school district has demonstrated by substantial evidence, which for purposes of this section shall mean a preponderance of the evidence, that maintaining the current placement of the child is substantially likely to result in injury to the child or others;
  - (b) Considers the appropriateness of the child's current placement;
  - (c) Considers whether the school district has made reasonable efforts to minimize the risk of harm in the child's current placement, including the use of supplementary aids and services; and
  - (d) Determines that the IAES that is proposed by school personnel will enable the child to continue to progress in the general curriculum. The services provided to and modifications made for the child in the IAES shall be designed to address and prevent the child's offending behavior.
- (10) This Rule (4312) shall not apply when a responsible agency takes disciplinary action against a Section 504 student if:
  - (a) The misconduct for which the student is being disciplined pertains to the use or possession of illegal drugs or alcohol at school or at a school function; and
  - (b) The student is currently engaging in the use of alcohol or illegal drugs.

In this instance, the Section 504 student shall be disciplined in accordance with Rule 4311.

### **4313 Discipline Procedures for Students Eligible for Special Education Services**

In addition to the general disciplinary procedures found within Rule 4300, the following procedures apply to children eligible for special education services:

#### **4313.1 Authority of School Personnel.**

- (a) Case-by-case determination. School personnel may consider any unique circumstances on a case-by-case basis when determining whether a change in placement, consistent with the requirements of this section, is appropriate for a child with a disability who violates a code of student conduct.
- (b) General.
  - (1) Under this section, the school principal/designee, in consultation with the special education case manager may remove a child with a disability who violates a code of student conduct from their current placement to an appropriate interim alternative educational setting, another setting, or suspension, for not more than 10 consecutive school days (to the extent those alternatives are applied to children without disabilities), and for additional removals of not more than 10 consecutive school days in that same school year for separate incidents of misconduct (as long as those removals do not constitute a change of placement under Rule 4313.7).
  - (2) After a child with a disability has been removed from his or her current placement for 10 school days in the same school year, during any subsequent days of removal the school district must provide services to the extent required under paragraph (d) of this section.
- (c) Additional authority. For disciplinary changes in placement that would exceed 10 consecutive school days, if the behavior that gave rise to the violation of the school code is determined not to be a manifestation of the child's disability pursuant to paragraph (e) of this section, school personnel in consultation with the special education administrator may apply the relevant disciplinary procedures to children with disabilities in the same manner and for the same duration as the procedures would be applied to children without disabilities, except as provided in paragraph (d) of this section.
- (d) Services.
  - (1) Except as provided in paragraphs (d)(3) and (d)(4) of this section, a child with a disability who is removed from the child's current placement pursuant to paragraphs (b), (c), or (g) of this section must--
    - (i) Continue to receive educational services, so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP; and
    - (ii) Receive, as appropriate, a functional behavioral assessment, and behavioral intervention services and modifications, which are designed to address the behavior violation so that it does not recur.

- (2) The services required by paragraph (d)(1) of this section may be provided in an interim alternative educational setting.
  - (3) A school district need not provide services during periods of removal under paragraph (b) of this section to a child with a disability who has been removed from his or her current placement for 10 school days or less in that school year, if services are not provided to a child without disabilities who has been similarly removed.
  - (4) After a child with a disability has been removed from his or her current placement for 10 school days in the same school year, if the current removal is for not more than 10 consecutive school days and is not a change of placement under Rule 4313.7, school personnel, in consultation with the child's special education case manager, determine the extent to which services are needed under paragraph (d)(1) of this section, if any, and the location in which services, if any, will be provided.
  - (5) If the removal is for more than 10 consecutive school days or is a change of placement under Rule 4313.7, the child's IEP Team determines appropriate services under paragraph (d)(1) of this section and the location in which services will be provided.
- (e) Manifestation determination
- (1) Except for removals that will be for not more than 10 consecutive school days and will not constitute a change of placement under Rule 4313.7, within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the LEA, the parent, and relevant members of the child's IEP Team (as determined by the parent and the LEA) must review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine--
    - (i) If the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or
    - (ii) If the conduct in question was the direct result of the LEA's failure to implement the IEP.
  - (2) The conduct must be determined to be a manifestation of the child's disability if the LEA, the parent, and relevant members of the child's IEP Team determine that a condition in either paragraph (e)(1)(i) or (1)(ii) of this section was met.
- (f) Determination that behavior was a manifestation. If the LEA, the parent, and relevant members of the IEP Team make the determination that the conduct was a manifestation of the child's disability, the IEP Team must--
- (1) Either-
    - (i) Conduct a functional behavioral assessment, unless the LEA had conducted a functional behavioral assessment before the behavior that resulted in the change of placement occurred, and implement a behavioral intervention plan for the child; or

- (ii) If a behavioral intervention plan already has been developed, review the behavioral intervention plan, and modify it, as necessary, to address the behavior; and
- (2) Except as provided in paragraph (g) of this section, return the child to the placement from which the child was removed, unless the parent and the LEA agree to a change of placement as part of the modification of the behavioral intervention plan.
- (g) Special circumstances. School personnel may remove a student to an interim alternative educational setting for not more than 45 school days without regard to whether the behavior is determined to be a manifestation of the child's disability, if the child--
  - (1) Carries a weapon to or possesses a weapon at school, on school premises, or to or at a school function under the jurisdiction of an SEA or an LEA;
  - (2) Knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance, while at school, on school premises, or at a school function under the jurisdiction of an SEA or an LEA; or
  - (3) Has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function under the jurisdiction of an SEA or an LEA.
- (h) Notification. Not later than the date on which the decision to take disciplinary action is made, the LEA must notify the parents of that decision, and provide the parents a copy of their Parents' Rights in Special Education.
- (i) Definitions. For purposes of this section, the following definitions apply:
  - (1) Controlled substance means a drug or other substance identified under schedules I, II, III, IV, or V in section 202(c) of the Controlled Substances Act (21 U.S.C. 812(c), as amended).
  - (2) Illegal drug means a controlled substance; but does not include a controlled substance that is legally possessed or used under the supervision of a licensed health-care professional or that is legally possessed or used under any other authority under that Act or under any other provision of Federal law.
  - (3) Serious bodily injury has the meaning given the term "serious bodily injury" under Section 1365(h)(3)(A – D) of Title 18, United States Code, as amended.
  - (4) Weapon has the meaning given the term "dangerous weapon" under of Section 930(g)(2) of Title 18, United States Code, as amended.

#### **4313.2 Determination of Setting.**

The interim alternative educational setting referred to in Rule 4313.1(c) and (g) is determined by the IEP Team.

### **4313.3 Appeal.**

- (a) General. The parent of a child with a disability who disagrees with any decision regarding placement under Rules 4313.1 and 4313.2, or the manifestation determination under Rule 4313.1(e), or an LEA that believes that maintaining the current placement of the child is substantially likely to result in injury to the child or others, may request a hearing.
- (b) Authority of hearing officer.
  - (1) A hearing officer in an impartial due process hearing hears, and makes a determination regarding, an appeal requested under paragraph (a) of this section.
  - (2) In making the determination under paragraph (b)(1) of this section, the hearing officer may--
    - (i) Return the child with a disability to the placement from which the child was removed if the hearing officer determines that the removal was a violation of Rule 4313.1 or that the child's behavior was a manifestation of the child's disability; or
    - (ii) Order a change of placement of the child with a disability to an appropriate interim alternative educational setting for not more than 45 school days if the hearing officer determines that maintaining the current placement of the child is substantially likely to result in injury to the child or to others.
  - (3) The procedures under paragraphs (a) and (b)(1) and (2) of this section may be repeated, if the LEA believes the child would be dangerous if returned to the original placement.
- (c) Expedited hearing.
  - (1) Whenever a hearing is requested under paragraph (a) of this section, the procedures of Rule 2365.1.6.17 shall be followed and the parents and LEA involved in the dispute must have an opportunity for an impartial due process hearing consistent with the requirements of the rules relating to Resolution Sessions and Impartial Due Process Hearings, except as provided in paragraph (c)(2) through (5) of this section.
  - (2) The school district must arrange for an expedited hearing, which must occur within 20 school days of the date the hearing is requested and must result in a determination within 10 school days after the hearing.
  - (3) Except as provided in a written waiver of the resolution session or in an agreement to mediate
    - (i) A resolution session meeting must occur within seven days of the date the hearing is requested, and
    - (ii) The hearing may proceed unless the matter has been resolved to the satisfaction of both parties within 15 days of receipt of the hearing request.
  - (4) The decisions on expedited due process hearings are appealable consistent with those rules associated with due process hearing appeals.

disciplinary measures against the child, the child may be subjected to the disciplinary measures applied to children without disabilities who engaged in comparable behaviors consistent with paragraph (d)(2) of this section.

- (2) (i) If a request is made for an evaluation of a child during the time period in which the child is subjected to disciplinary measures under Rule 4313.1, the evaluation must be conducted in an expedited manner.
- (ii) Until the evaluation is completed, the child remains in the educational placement determined by school authorities, which can include suspension or expulsion without educational services.
- (iii) If the child is determined to be a child with a disability, taking into consideration information from the evaluation conducted by the agency and information provided by the parents, the agency must provide special education and related services in accordance with this part, including the requirements of Rules 4313.1 through 4313.7 and Section 1412(a)(1)(A) of the Individuals with Disabilities Education Improvement Act, as amended.

#### **4313.6 Referral to and Action by Law Enforcement and Judicial Authorities.**

- (a) Rule of construction. Nothing in this part prohibits an agency from reporting a crime committed by a child with a disability to appropriate authorities or prevents State law enforcement and judicial authorities from exercising their responsibilities with regard to the application of Federal and State law to crimes committed by a child with a disability.
- (b) Transmittal of records.
  - (1) An agency reporting a crime committed by a child with a disability must ensure that copies of the special education and disciplinary records of the child are transmitted for consideration by the appropriate authorities to whom the agency reports the crime.
  - (2) An agency reporting a crime under this section may transmit copies of the child's special education and disciplinary records only to the extent that the transmission is permitted by the Family Educational Rights and Privacy Act.

#### **4313.7 Change of Placement because of Disciplinary Removals.**

For purposes of removals of a child with a disability from the child's current educational placement under Rules 4313.1 through 4313.4, a change of placement occurs if:

- (a) The removal is for more than 10 consecutive school days; or
- (b) The child has been subjected to a series of removals that constitute a pattern--
  - (1) Because the series of removals total more than 10 school days in a school year;
  - (2) Because the child's behavior is substantially similar to the child's behavior in the incidents that resulted in the series of removals, taken cumulatively, is determined, under Rule 4313.1(f), to have been a manifestation of the child's disability; and



- (3) Because of such additional factors as the length of each removal, the total amount of time the child has been removed, and the proximity of the removals to one another.



# Fact Sheet

## Highlights of the Final Rule to Amend the Department of Justice's Regulation Implementing Title III of the ADA

*The Department of Justice (the Department) has amended its regulation implementing title III of the Americans with Disabilities Act (ADA), which applies to public accommodations (private businesses that fall within one of twelve categories established by the statute) and commercial facilities. The ADA requires the Department to publish ADA design standards that are consistent with the guidelines published by the U.S. Architectural and Transportation Barriers Compliance Board (Access Board). Therefore, the title III rule adopts new Standards for Accessible Design that are consistent with the ADA/ABA Accessibility Guidelines developed by the Access Board. The final rule also amends the existing title III regulation to make it consistent with current policies and published guidance, to reflect the Department's experience since the regulation was first published in 1991, and to address and respond to comments received from the public in response to the Department's 2008 Notice of Proposed Rulemaking (NPRM).*

### SUMMARY OF CHANGES:

1. Adoption of the 2010 ADA Standards for Accessible Design. The Department has adopted revised ADA design standards that include the relevant chapters of the Access Board's 2004 ADA/ABA Accessibility Guidelines as modified by specific provisions of this rule. To minimize compliance burdens on entities subject to more than one legal standard, these design standards have been harmonized with the Federal standards implementing the Architectural Barriers Act and with the private sector model codes that are adopted by most States.
2. Effective Date. The rule will become effective six months after publication in the Federal Register. Eighteen months after publication, compliance with the 2010 Standards will be required for new construction and alterations and barrier removal. In the period between the effective date and the compliance date, covered entities may choose between the 1991 Standards and the 2010 Standards. Covered entities that should have complied with the 1991 Standards during any new construction or alteration of facilities or elements, but have not done so by 18 months after the date of publication of the final rule, must comply with the 2010 Standards.

3. Element by Element Safe Harbor. The rule includes a general "safe harbor" under which elements in covered facilities that were built or altered in compliance with the 1991 Standards would not be required to be brought into compliance with the 2010 Standards until the elements were subject to a planned alteration. A similar safe harbor applies to elements associated with the "path of travel" to an altered area.
4. Ticketing. The rule provides guidance on the sale of tickets for accessible seating, the sale of season tickets, the hold and release of accessible seating to persons other than those who need accessible seating, ticket pricing, prevention of the fraudulent purchase of accessible seating, and the ability to purchase multiple tickets when buying accessible seating. It requires a venue operator to accommodate an individual with a disability who acquired inaccessible seating on the secondary ticket market only when there is unsold accessible seating for that event.
5. Service Animals. The rule defines "service animal" as a dog that has been individually trained to do work or perform tasks for the benefit of an individual with a disability. The rule states that other animals, whether wild or domestic, do not qualify as service animals. Dogs that are not trained to perform tasks that mitigate the effects of a disability, including dogs that are used purely for emotional support, are not service animals. The final rule also clarifies that individuals with mental disabilities who use service animals that are trained to perform a specific task are protected by the ADA. The rule permits the use of trained miniature horses as alternatives to dogs, subject to certain limitations. To allow flexibility in situations where using a horse would not be appropriate, the final rule does not include miniature horses in the definition of "service animal."
6. Wheelchairs and Other Power-Driven Mobility Devices. The rule adopts a two-tiered approach to mobility devices, drawing distinctions between wheelchairs and "other power-driven mobility devices." "Other power-driven mobility devices" include a range of devices not designed for individuals with mobility impairments, such as the Segway® PT, but which are often used by individuals with disabilities as their mobility device of choice. Wheelchairs (and other devices designed for use by people with mobility impairments) must be permitted in all areas open to pedestrian use. "Other power-driven mobility devices" must be permitted to be used unless the covered entity can demonstrate that such use would fundamentally alter its programs, services, or activities, create a direct threat, or create a safety hazard. The rule also lists factors to consider in making this determination. This approach accommodates both the legitimate business interest in the safe operation of a facility and the growing use of the Segway® PT as a mobility device by returning veterans and others who are using the Segway® PT as their mobility aid of choice.
7. Effective Communication. The rule includes video remote interpreting (VRI) services as a kind of auxiliary aid that may be used to provide effective communication. VRI is an interpreting service that uses video conference

technology over dedicated lines or wireless technology offering a high-speed, wide-bandwidth video connection that delivers high-quality video images. To ensure that VRI is effective, the Department has established performance standards for VRI and requires training for users of the technology and other involved individuals so that they may quickly and efficiently set up and operate the VRI system.

8. Reservations Made by Places of Lodging. The rule establishes requirements for reservations made by places of lodging, including procedures that will allow individuals with disabilities to make reservations for accessible guest rooms during the same hours and in the same manner as other guests, and requirements that will require places of lodging to identify and describe accessible features of a guest room, to hold back the accessible guest rooms for people with disabilities until all other guest rooms of that type have been rented, and to ensure that a reserved accessible guest room is removed from all reservations systems so that it is not inadvertently released to someone other than the person who reserved the accessible room. The final rule limits the obligations of third-party reservation operators that do not themselves own and operate places of lodging. In addition, to allow the hospitality industry appropriate time to change reservation systems, the final rule gives places of lodging 18 months from the date of publication to come into compliance with these requirements.
9. Timeshares, Condominium Hotels, and Other Places of Lodging. The rule provides that timeshare and condominium properties that operate like hotels are subject to title III, providing guidance about the factors that must be present for a facility that is not an inn, motel, or hotel to qualify as a place of lodging. The final rule limits obligations for units that are not owned or substantially controlled by the public accommodation that operates the place of lodging. Such units are not subject to reservation requirements relating to the "holding back" of accessible units. They are also not subject to barrier removal and alterations requirements if the physical features of the guest room interiors are controlled by their individual owners rather than by a third party operator.

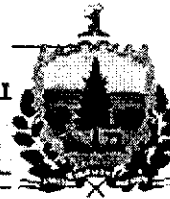
**For more information:** Copies of this rule, the 2010 Standards, and this Fact Sheet are available in an accessible electronic format on the Internet at <http://www.ada.gov/>. For additional information or to order copies of any documents, call the ADA Information Line (800) 514-0301 (voice) or (800) 514-0383 (TTY). Copies of this notice will be available in accessible formats.





THE STATE OF VERMONT

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**May 14, 2004** - The Civil Rights Unit of the Attorney General's office is an investigative and law enforcement agency. We conduct investigations into complaints of violation of Vermont law's laws prohibiting employment discrimination. Where we find that the law has been violated, we may go to court to ensure future compliance with the law, to assist an aggrieved person or persons in obtaining appropriate remedies, and to obtain appropriate civil penalties and awards of costs and fees. The Office of the Attorney General does not act as the attorney for persons aggrieved by violations of law.

When we receive a complaint (i.e., when a person contacts our office, either by phone or in person, believing that his/her rights have been violated), we engage in a screening process. Complaints that are not related to our statutory jurisdiction are referred to other agencies as appropriate.

Once we have determined that a caller has a complaint that relates to potential violation of employment law over which we have jurisdiction, we ask the complainant to complete a questionnaire outlining the basis for the claim and giving us basic information. This can be done over the phone, if needed, but typically we mail the questionnaire and the complainant completes it on his/her own.

When completed questionnaires are returned to our office, we review them, and if a "prima facie" case is stated, we then draft a charge outlining the basic factual elements stating a violation of law. This charge is forwarded to the charging party for his/her to review for accuracy, and if accurate and truthful, for him/her to sign before a notary and return to us. Sometimes we need more information than is provided in the questionnaire, and have to follow up with a phone call to the complainant. Sometimes it is clear, based on the questionnaire itself or on follow up information, that no prima facie case has been stated. In those

cases, we do not draft a charge, and we notify the complainant in writing of our decision not to pursue his/her claims.

Once the charge is signed by the complainant and returned to us, we open a case file, notify the EEOC of any aspects of the charge which could state a violation of federal law, and send copies of the charge and EEOC notification documents to the Respondent employer. The employer is asked to answer the charge, point-by-point, in writing. Both parties are notified that we have a mediation program at this point, and are asked to return a form stating whether or not they are interested in mediation.

On receipt of the Respondent's answer the file is reviewed by the staff attorney, and a decision is made regarding whether to proceed with further investigation. In most cases, the Respondent's answer is sent to the Complainant for review and written response. If both parties expressed interest in mediation, the case is usually referred to a mediator at this point.

After the Complainant's response to the Respondent's point-by-point answer is received, the Respondent is usually sent a request for additional documentation, including rosters of employees, personnel & time records, personnel evaluations, and the like. Sometimes several documentary requests are made during the investigation. If a Respondent does not cooperate, the Attorney General's office has authority to issue a Civil Investigative Demand for these materials, and if the Respondent still does not cooperate, the Attorney General can go to Superior Court for an order requiring Respondent to comply. Sometimes cases are closed after documentation is received from the Respondent, either because it becomes clear that no violation of law can be proven, or because the facts supporting a finding of violation of law are admitted.

If additional evidence is needed, a full investigation is conducted. Full investigation usually involves interviewing relevant witnesses, reviewing documents on-site as needed, and visiting the work-site. Sometimes parties may be asked to attend a fact-finding session at the office of the Attorney General.

The office is willing to engage in settlement discussions at any time in the investigative process. Prior to the issuance of a determination, the office usually attempts to reach a conciliated agreement when it appears that there is evidence of a violation of law. The office attempts to assist the parties in reaching agreement that is satisfactory to them, and seeks an agreement, on behalf of the public, that ensures adequate training and policy changes to avoid future violations of law, and that compensates the State of Vermont for the cost of the investigation.



## Attorney General

After the investigation is completed, if conciliation and other settlement efforts have failed, the office issues findings, stating the nature of the charge, the response, the evidence discovered during the investigation, and whether or not there was a violation of law. If no violation of law is found the file is closed at this point.

The Attorney General always asks the Respondent to engage in settlement discussions after a finding that there was a violation of law. Typically, efforts to resolve the case will continue for at least 30 days after the issuance of a cause finding.

After finding that there was probably a violation of law, the Attorney General may file a complaint against the Respondent in state court, or may seek to intervene in any private action which the Complainant has filed. In Court, the Attorney General may seek injunctive relief (i.e. reinstatement, training requirements, and so on), back pay awards, front pay awards and damages for the Complainant, civil penalties (if applicable), attorney's fees and costs. The Attorney General may seek criminal penalties under the Drug Testing and Polygraph Testing Acts.

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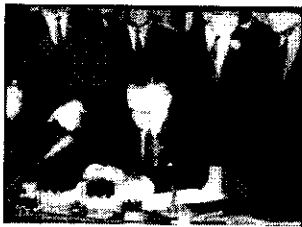
109 State Street, Montpelier VT 05609-1001  
Phone: (802) 828-3171

Website consulting provided by [The National Association of Attorneys General](#).



# Federal Equal Employment Opportunity (EEO) Laws

## Celebrating the Laws



Celebrating the 40th Anniversary of Title VII: 1964 - 2004

See also ...

The Equal Pay Act Turns 40: 1963 - 2003

The Americans with Disabilities Act (ADA): 1990 - 2002

The Federal laws prohibiting job discrimination are:

Title VII of the Civil Rights Act of 1964 (Title VII), which prohibits employment discrimination based on race, color, religion, sex, or national origin;

the Equal Pay Act of 1963 (EPA), which protects men and women who perform substantially equal work in the same establishment from sex-based wage discrimination;

the Age Discrimination in Employment Act of 1967 (ADEA), which protects individuals who are 40 years of age or older;

Title I and Title V of the Americans with Disabilities Act of 1990 (ADA), which prohibit employment discrimination against qualified individuals with disabilities in the private sector, and in state and local governments;

Sections 501 and 505 of the Rehabilitation Act of 1973, which prohibit discrimination against qualified individuals with disabilities who work in the federal government; and

the Civil Rights Act of 1991, which, among other things, provides monetary damages in cases of intentional employment discrimination.

The U.S. Equal Employment Opportunity Commission (EEOC) enforces all of these laws. EEOC also provides oversight and coordination of all federal equal employment opportunity regulations, practices, and policies.

Other federal laws, not enforced by EEOC, also prohibit discrimination and reprisal against federal employees and applicants. The Civil Service Reform Act of 1978 (CSRA) contains a number of prohibitions, known as prohibited personnel practices, which are designed to promote overall fairness in federal personnel actions. 5 U.S.C. 2302. The CSRA prohibits any employee who has authority to take certain personnel actions from discriminating for or against employees or applicants for employment on the bases of race, color, national origin, religion, sex, age or disability. It also provides that certain personnel actions can not be based on attributes or conduct that do not adversely affect employee performance, such as marital status and political affiliation. The Office of Personnel Management (OPM) has interpreted the prohibition of discrimination based on conduct to include discrimination based on sexual orientation. The CSRA also prohibits reprisal against federal employees or applicants for whistle-blowing, or for exercising an appeal, complaint, or grievance right. The CSRA is enforced by both the Office of Special Counsel (OSC) and the Merit Systems Protection Board (MSPB).

*Additional information about the enforcement of the CSRA may be found on the OPM web site at <http://www.opm.gov/er/address2/guide01.htm>; from OSC at (202) 653-7188 or at <http://www.osc.gov>; and from MSPB at (202) 653-6772 or at <http://www.mspb.gov> .*





Office for Civil Rights

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## How to File a Discrimination Complaint with the Office for Civil Rights

### Available in Other Languages

### Introduction

The Office for Civil Rights (OCR) enforces five federal civil rights laws that prohibit discrimination on the basis of race, color, national origin, sex, disability and age in programs or activities that receive federal financial assistance from the Department of Education (ED). Discrimination on the bases of race, color and national origin is prohibited by Title VI of the *Civil Rights Act of 1964*; sex discrimination is prohibited by Title IX of the Education Amendments of 1972; discrimination on the basis of disability is prohibited by Section 504 of the *Rehabilitation Act of 1973* and Title II of the *Americans with Disabilities Act of 1990* (Title II prohibits discrimination on the basis of disability by public entities, whether or not they receive federal financial assistance); and age discrimination is prohibited by the *Age Discrimination Act of 1975*.

These civil rights laws extend to all state education agencies, elementary and secondary school systems, colleges and universities, vocational schools, proprietary schools, state vocational rehabilitation agencies, libraries and museums that receive federal financial assistance from ED. Programs or activities that receive ED funds must provide aids, benefits or services in a nondiscriminatory manner. Such aids, benefits or services may include, but are not limited to, admissions, recruitment, financial aid, academic programs, student treatment and services, counseling and guidance, discipline, classroom assignment, grading, vocational education, recreation, physical education, athletics, housing and employment.

OCR also enforces the *Boy Scouts of America Equal Access Act*, part of the *No Child Left Behind Act of 2001*. Under the *Boy Scouts of America Equal Access Act*, no public elementary school, public secondary school, or state or local education agency that receives funds made available from the Department of Education and that provides an opportunity for one or more outside youth or community groups to meet on school premises or in school facilities before or after school hours shall deny equal access or a fair opportunity to meet to or discriminate against, any group officially affiliated with the Boy Scouts of America or any other youth group listed in Title 36 of the United States Code as a patriotic society.

### Who Can File a Discrimination Complaint

Anyone who believes that an education institution that receives federal financial assistance has discriminated against someone on the basis of race, color, national origin, sex, disability or age, or who believes that a public elementary or secondary school, or state or local education agency has

violated the Boy Scouts of America Equal Access Act, may file a complaint. The person or organization filing the complaint need not be a victim of the alleged discrimination but may complain on behalf of another person or group.

### **Timeliness**

A complaint must be filed within 180 calendar days of the date of the alleged discrimination, unless the time for filing is extended by OCR for good cause.

### **Institutional Grievance Procedures**

Prior to filing a complaint with OCR against an institution, a potential complainant may want to find out about the institution's grievance process and use that process to have the complaint resolved. However, a complainant is not required by law to use the institutional grievance process before filing a complaint with OCR. If a complainant uses an institutional grievance process and also chooses to file the complaint with OCR, the complaint must be filed with OCR within 60 days after the last act of the institutional grievance process.

### **How to File an Online Complaint**

Complainants wishing to file a complaint may do so by:

**Mail or Facsimile:** Complainants may mail or send by facsimile a letter or use the OCR's Discrimination Complaint Form available from one of OCR's enforcement offices (see the list of OCR's offices in this brochure). In your correspondence, please include:

- The complainant's name, address and, if possible (although not required), a telephone number where the complainant may be reached during business hours;
- Information about the person(s) or class of persons injured by the alleged discriminatory act(s) (names of the injured person(s) are not required);
- The name and location of the institution that committed the alleged discriminatory act(s); and
- A description of the alleged discriminatory act(s) in sufficient detail to enable OCR to understand what occurred, when it occurred, and the basis for the alleged discrimination (race, color, national origin, sex, disability, age or the Boy Scouts of America Equal Access Act).

**E-mail:** Complainants may file a complaint, using the following e-mail address: [ocr@ed.gov](mailto:ocr@ed.gov). (Use the same procedures as above.)

**Online:** Complainants may file a complaint with OCR using OCR's electronic complaint form at the following Web site: <http://www.ed.gov/about/offices/list/ocr/complaintintro.html>.

For those without current e-mail accounts, Internet access may be freely available from your local public library, and free e-mail accounts are available from several large providers.

## OCR

**Note:** A recipient of federal financial assistance may not retaliate against any person who has made a complaint, testified, assisted or participated in any manner in an investigation or proceeding under the laws listed on the first page of this brochure.

### **Where to Write (see Note)**

#### **Headquarters**

**Office for Civil Rights**  
**U.S. Department of Education**  
**400 Maryland Avenue, S.W.**  
**Washington, D.C. 20202-1100**  
**(202) 245-6800; 1-800-421-3481**  
**Facsimile: (202) 245-6840**  
**TDD: (877) 521-2172**  
**Email: OCR@ed.gov**  
**Web: <http://www.ed.gov/ocr>**

#### **Enforcement Offices**

**Connecticut, Maine, Massachusetts,**  
**New Hampshire,**  
**Rhode Island, Vermont**  
Office for Civil Rights/Boston  
U.S. Department of Education  
8th Floor  
5 Post Office Square  
Boston, MA 02109-3921  
Tel.: (617) 289-0111  
Fax: (617) 289-0150