Understanding the McKinney-Vento Homeless Act and Section 504

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A Word of Caution

No two cases are exactly alike. This material is designed to provide administrators with a broad understanding of certain aspects of the McKinney-Vento Homeless Assistance Act as amended by the No Child Left Behind Act of 2001, and reauthorized in January 2002 and Section 504 of the Rehabilitation Act of 1973. This material does not include every aspect of the law. You are strongly encouraged to seek a legal opinion from your school district's legal counsel regarding any specific case.

I. Overview

The purpose of this material is to provide administrators with a better understanding of the McKinney-Vento Homeless Assistance Act as amended by the No Child Left Behind Act of 2001, and reauthorized in January 2002 and Section 504 of the Rehabilitation Act of 1973 (Section 504). This material is not intended to substitute for legal counsel, nor is it intended to provide an exhaustive statement of the law.

II. The McKinney-Vento Homeless Assistance Act

The McKinney-Vento Homeless Assistance Act which first passed in 1987 exists to provide a federal response to the national problem of homelessness. The Act contains education provisions which were most recently reauthorized in 2002 to ensure educational rights and protections for children and youths experiencing homelessness.[1] See 42 U.S.C. §11431-11434(a). Sections 11431 through 11434(a), collectively, are referred to as "Subtitle B - Education for Homeless Children and Youths."

A. Statement of Policy

Congress has articulated a four-part policy with regard to the provision of an education for homeless children and youths. The four parts are as follows:

1. Each SEA shall ensure that each child of a homeless individual and each homeless youth has equal access to the same Free Appropriate Public Education, including a public preschool education, as provided to other children and youths.

2. States with a compulsory residency requirement as a component to their attendance laws and similar regulatory requirements must review and revise their laws to ensure that homeless children and youths are afforded the same Free Appropriate Public Education as provided to other children and youths.

3. Homelessness alone is not a sufficient reason to separate students from the mainstream.

4. Homeless children and youths should have access to the education and other services that such children and youths need to ensure that they will have an opportunity to meet the same challenging state student academic achievement standards to which all students are held.

42 U.S.C. § 11431.

[1] The free, appropriate public education provisions of the McKinney-Vento Homeless Act apply only to states that file plans agreeing to comply with such provisions. See 42 U.S.C. § 11432(a), (b), (g)(1), (3).

B. Defining the Homeless Child and Youth: The Federal Definition

If the goal of this law is to ensure FAPE to homeless children and youth, the question then becomes, who is a homeless child or youths? Section 725 defines the term "Homeless Children and Youth" as:

"Individuals who lack a fixed, regular, and adequate nighttime residence."

Which includes

- Children and youths who are:
    - sharing the housing of other persons due to:
        - loss of housing;
        - economic hardship; or
        - a similar reason;
    - living in motels, hotels, trailer parks or camping grounds due to lack of alternative adequate accommodations;
    - living in emergency or transitional shelters;
    - abandoned in hospitals; or
    - awaiting foster care placement.
- Children and youths who have a primary nighttime residence that is a public or private place, not designed for or ordinarily used as a regular sleeping accommodation for human beings.
- Children and youths who are living in cars, parks, public spaces, abandoned buildings, substandard housing, bus or train stations, or similar settings; and
- migratory children (as such term is defined in Section 1309 of the ESEA of 1965) who qualify as homeless because they are living in the circumstances described above.

42 U.S.C. § 11434a.

The first difficult challenge is to determine whether or not a child or youth falls in the category of being homeless. Simply put, the determination whether a particular child or youth fits within the definition of homeless must be made a case-by-case process. The first, and sometimes most difficult, question to answer is whether or not the nighttime residence is "fixed, regular and adequate." The second particularly

difficult challenge is the child who falls within the category of "awaiting foster care placement."

C. Defining the Homeless Child and Youth: The State Definition

New Hampshire has a compulsory residency requirement as a component of the state's compulsory school attendance laws. See N.H. R.S.A. 193:1. N.H. R.S.A. 193:12 provides in relevant part that, "Notwithstanding any other provision of law, no person shall attend school, or send a pupil to the school in any district, of which the pupil is not a legal resident, without consent of the district or of the school board except as otherwise provided in this section." See N.H. R.S.A. 193:12, I. As a result, New Hampshire clearly had a compulsory residency requirement which presented a potential barrier to the enrollment of homeless children and youth.

N.H. R.S.A. 193:12 was amended (effective August 30, 2003) to incorporate the McKinney-Vento definition of homeless children and youth. The federal definition is incorporated into this statutory section verbatim. See N.H. R.S.A. 193:12, IV.

While New Hampshire has successfully defined the "homeless child and youth" in accord with McKinney-Vento, it is apparent that New Hampshire's statutory law stopped short of clearly spelling out the details found in the McKinney-Vento Act. Most importantly, New Hampshire stops at the threshold of a right of enrollment and attendance, but does not direct the reader to the additional provisions and consequences of the McKinney-Vento Act.

Regrettably, the State statute does not overtly address the tension between R.S.A. 193:12's residency requirement and the homeless child's right to enroll and attend a given school. Instead, the statute authorizes the Commissioner of the Department of Education, or designee, to decide residency issues for all pupils, except those disputes involving homeless children and youths. N.H. R.S.A. 193:12, VI(a).

The New Hampshire Department of Education has adopted a dispute resolution process pertaining to homeless students.[2] See McKinney-Vento School Enrollment Requirements and New Hampshire Department of Education Homeless Education Dispute Resolution Process, available at: http://www.education.nh.gov/instruction/integrated/documents/homeless_dispute_process.pdf, Revised December 2011 (accessed Sept. 10, 2013).

The DOE has adopted a three-step process:

- **Step One: School Enrollment**. School enrollment of a homeless child or youth shall be determined by the parent, guardian, student of lawful age, or unaccompanied youth. To the extent feasible, the

[2] This process was last revised in December 2011; this version predates the revisions to RSA 193:12, IV(a).

student will be enrolled in the school of origin. The school of origin is defined as: The school last attended by the child or youth when permanently housed or the last school in which the child or youth was enrolled. If placement in the school of origin is not feasible, or is against the wishes of the parent, guardian, student of lawful age, or unaccompanied youth, the student will be enrolled in the school serving the community where the child or youth temporarily resides.

- **Step Two: Enrollment Dispute.** Each District shall have a policy for the resolution of disputes pertaining to homeless children and youths. If an enrollment dispute develops regarding the enrollment options available under the McKinney-Vento Act, the child or youth shall be immediately admitted to the school in which enrollment is sought, pending resolution of the dispute.

    - Resolution of the dispute shall be facilitated by the Superintendent or designee as expeditiously as possible in accord with the McKinney-Vento requirements and the district's dispute policy.

    - If more than one school district is involved, the Superintendents shall jointly make the decision.

    - A written explanation of the decision regarding school enrollment shall be provided to the parent, guardian, student of lawful age, or unaccompanied youth, including a statement regarding the right to appeal the decision to the New Hampshire Department of Education.

- **Step Three: Appeal Process**. When an agreement cannot be reached, the aggrieved party shall submit a written request for dispute resolution to the New Hampshire Department of Education. The Commissioner of the Department of Education, or designee, shall make a temporary order within 14 days of the notice of the residency dispute. Such determination shall remain in effect pending the determination of the State Board of Education.

D. Federal Granting under the McKinney-Vento Act

Formula grants are made to the 50 states, the District of Columbia and Puerto Rico based on each state's share of Title I funds. State education agencies then provide competitive subgrants to local school districts. States must make subgrants to districts to facilitate the enrollment, attendance and success in school of homeless children and youths. The focus of the subgrants may address problems caused by:

- Transportation issues;
- Immunization requirements;
- Residency requirements;
- Lack of birth certificates;
- Lack of school records; and
- Guardianship issues.

Some of the more particular examples of the use of subgrant funds include the following:

- Coordination and collaboration with other local agencies to provide comprehensive services to homeless children and youths and their families;
- Expedited evaluations of homeless children's educational needs to help facilitate enrollment, attendance and success in school;
- Tutoring, supplemental instruction and enriched educational services;
- Professional development designed to raise awareness of the needs of homeless children and youths;
- Referral of health services to homeless children and youths;
- Payment of the excess costs of transportation for homeless children and youths to attend their selected schools (that is not provided through other sources); and
- Developmentally appropriate preschool programs.

E. LEA Enrollment and Attendance Requirements

1. "Best interest" determination.

Section 722 poses an obligation on the state education agency to ensure that each LEA serve homeless children and youths in accord with a "best interest," standard. N.H. R.S.A. 193:12 is devoid of any statement with regard to the best interest of homeless children and youths. Using the "best interest" standard means that the LEA must:

a) continue the child or youth's education in the school of origin for the duration of homelessness when a family becomes homeless between academic years or during an academic year; or for the remainder of the academic year if the child or youth becomes permanently housed during an academic year; or

b) enroll the child or youth in any public school that non-homeless students who live in the attendance area in which the child or youth is actually living are eligible to attend.

42 U.S.C. § 11432(g)(3)(A).

There is a presumption that in determining a child or youth's best interest an LEA must, to the extent feasible, keep a homeless child or youth in the "school of origin," unless doing so is contrary to the wishes of the child or youth's parent or guardian. If an LEA wishes to send a homeless child or youth to a school other than the school of origin or a school requested by the parent or guardian, the LEA must provide a written explanation of its decision to the parent or guardian together with a statement regarding the right to appeal the placement decision. 42 U.S.C. § 11432(g)(3)(B).

Query: Does the LEA even have this option under R.S.A. 193:12?

There are a number of factors that should be weighed in determining whether or not it is feasible to educate a homeless child or youth in his or her "school of origin." According to the non-regulatory guidance issued by the U.S. Department of Education:

"The placement determination should be a student-centered, individualized determination. The factors that an LEA may consider include:

- The age of the child or youth;
- The distance of a commute and the impact it may have on the student's education;
- Personal safety issues;
- A student's need for special instruction (e.g., special education and related services);
- The length of anticipated stay in temporary shelter or other temporary locations; and
- The time remaining in the school year."

See Education for Homeless Children and Youth Programs, Title VII-B of the McKinney-Vento Homeless Assistance Act, as amended by the No Child Left Behind Act of 2011, Non-Regulatory Guidance. U.S. Department of Education, July 2004 at 14, available at: http://www2.ed.gov/programs/homeless/guidance.pdf (accessed Sept. 10, 2013).

2. The duty of immediate enrollment.

Once the best interest determination has been made, the school has a duty to immediately enroll the homeless child or youth even if the child or youth is unable to produce the records normally required for enrollment. The enrolling school also has a duty to immediately contact the school last attended by the child or youth to obtain relevant academic or other records.

F. Record Keeping Requirements

Any record ordinarily kept by a school, including immunization or medical records, academic records, birth certificates, guardianship records, and evaluations for special services or programs, regarding each homeless child or youth shall be maintained:

1. So that the records are available, in a timely fashion, when a child or youth enters a new school or school district; and

2. In a manner consistent with Section 444 of the General Education Provisions Act (20 U.S.C. §1232(g)) [the Family Educational Rights and Privacy Act].

42 U.S.C. § 11432(g)(3)(D).

G. School Placement Choice

McKinney-Vento requires that "the choice regarding placement shall be made regardless of whether the child or youth lives with homeless parents or has temporarily been placed elsewhere." 42 U.S.C. § 11432(g)(3)(F). The pragmatic implications of this decision are significant. For example, the child who is temporarily removed from the district to live with relatives, may still have an entitlement to attend the school of origin. The law explicitly defines the term "school of origin" as "the school that the child or youth attended when permanently housed or the school in which the child or youth was last enrolled." 42 U.S.C. § 11432(g)(3)(G).

H. The Comparable Service Requirement

The district has the duty to ensure that each homeless child or youth eligible under McKinney-Vento is provided services comparable to services offered to other

students in the school selected to have been in the best interest of the child. These include the following:

- Transportation services;
- Educational services for which the child or youth meets eligibility criteria, such as services provided under Title I for similar state or local programs, educational programs for children with disabilities, and educational programs for student with limited English proficiency;
- Programs of vocational and technical education;
- Programs for gifted and talented students; and
- School nutrition programs.

See Education for Homeless Children and Youth Programs, Title VII-B of the McKinney-Vento Homeless Assistance Act, as amended by the No Child Left Behind Act of 2011, Non-Regulatory Guidance. U.S. Department of Education, July 2004 at 22, available at: http://www2.ed.gov/programs/homeless/guidance.pdf (accessed Sept. 10, 2013).

I. The Local Educational Agency Liaison

The local school district is required to identify a liaison for homeless children and youths. The New Hampshire Department of Education has posted the designated liaison for each school district on its web site. The tasks of the liaison include ensuring that:

1. Homeless children and youths are identified by school personnel through coordination activities with other entities and agencies;
2. Homeless children and youths are enrolled in and have a full and equal opportunity to succeed in the schools of the LEA;
3. Homeless families' children and youths receive educational services for which the families' children and youths are eligible;
4. The parents or guardians of homeless children and youths are informed of the educational related opportunities available to their children and "provided with meaningful opportunities to participate in the education of their children;"
5. Public notice of the educational rights of homeless children and youths are disseminated where such children and youths receive services under the Act;

6. Enrollment disputes are mediated in accord with McKinney-Vento; and

7. The parent or guardian of a homeless child or youth and any unaccompanied youth is fully informed of all transportation services including transportation to the school of origin and is assisted in accessing transportation to the school.

J. Transportation Challenges

At a parent or guardian's request, homeless students must be provided with transportation to and from their school of origin. Interestingly enough, N.H. R.S.A. 193:12, VII provides that "nothing in this section shall require a district to provide transportation for a student beyond the geographical limits of that district." In the case of homeless children, this limitation is trumped by McKinney-Vento's transportation requirement. For "unaccompanied youth," that is, children who do not have parents or guardians in proximity, the transportation to and from the school of origin must be provided by the district at the liaison's request.

The following rules apply to transportation:

1) If the temporary residence and the school of origin are in the same district, the LEA must provide transportation to and from the "school of origin."

2) If the student is residing in a district outside the school of origin's district, the LEA of origin and the LEA in which the child lives, must determine how to apportion the responsibility and cost of providing transportation.

3) If the LEA's cannot agree, the costs for transportation must be shared equally.

42 U.S.C. § 11432(g)(3)(J).

Recently, the Office of Special Education Programs ("OSEP") opined that if a homeless child has a disability under the IDEA, and requires transportation as a related service, than IDEA funds can be utilized to provide transportation to that child. See Letter to Bowman, 61 IDELR 233 (OSEP Aug. 5, 2013). OSEP also opined that homeless students – without disabilities – could be transported on "special education" buses, provided that there is sufficient space on the buses, and that the buses are not purchased with the intent to provide transportation to non-special education students. OSEP stated "[u]nder circumstances in which buses are purchased exclusively to transport children with disabilities but are not full and are able to pick up nondisabled homeless children along the usual bus routes, and no additional IDEA funds would need to be expended to transport those nondisabled children, buses purchased with IDEA funds may be used to transport nondisabled homeless children under the permissive

use of funds provision because the use of IDEA Part B funds in this situation would confer an incidental benefit on the nondisabled homeless children."

K. Confidentiality

A district is required to preserve a student's status of "homeless" as confidential. If a parent or unaccompanied youth does not want to be identified as homeless, and therefore, does not wish to receive services available under McKinney-Vento, the district must honor the wishes of the homeless individuals who desire their status to be kept confidential and who choose not to participate in the district's homeless services.

L. The Possible Duty to Report

Districts should be mindful that the identification of an "unaccompanied youth," that is a "youth not in the physical custody of a parent or guardian," may trigger a reporting requirement under the abuse and neglect statutes. A youth under 18 years of age is considered a minor. Therefore, district homeless liaisons and other school staff will need to keep this mandatory reporting requirement in mind while working with unaccompanied youths.

M. Interaction with IDEA

The thrust behind McKinney-Vento of immediate enrollment and comparable service means that districts are essentially required to adopt an accelerated record acquisition and evaluation process. If the student services director is not the LEA liaison, the LEA liaison and director need to develop a pre-screening process and accelerated admission process which quickly triggers a determination as to whether or not the student is eligible for IDEA services. However, the comparable services standard also should and can be reasonably interpreted to require that the district also give full faith and credit to the evaluations and IEP's developed by other districts. It may very well be a high risk practice to suggest that the homeless child be subjected to another battery of assessments or evaluations if the parents represent that evaluations have already been done and are available. This may be a circumstance under which districts find themselves having to provide interim services without the benefit of an IEP if they fail to promptly obtain records.

N. Interrelationship with No Child Left Behind

It is clear from No Child Left Behind that homeless children and youths are required to participate in all standardized assessments. In fact, it is unlikely a district will be able to excuse a child from a standardized assessment if the child lacks an IEP which excepts the child from participation. Therefore, the presumption is that homeless children will participate in NCLB driven assessments.

O. Sending/Receiving District Liability and McKinney-Vento

In some respects, McKinney-Vento is inconsistent with the model used in New Hampshire for sending/receiving district liability. For example, a child can relocate to another district, but if falling within the category of homeless, the district with the "school of origin," may find itself in a transportation sharing arrangement. The district with the school of origin and not the "receiving district" may remain liable for program since McKinney-Vento returns the child to the district.

Similarly, the child designated under McKinney-Vento as "awaiting foster placement" and thus, homeless, may not necessarily fully become the liability of the district into which the child is temporarily located. Suffice it to say, judgments made as to the interrelationship between McKinney-Vento and New Hampshire's sending/receiving district paradigm will often be fact-specific and require the assistance of legal counsel.

III. Brief Overview of Section 504

Section 504 applies to the recipients of grants from the federal government. Essentially, all public school districts are covered by Section 504 because they receive some form of federal financial assistance. See Marshall v. Sisters of the Holy Family of Nazareth, 44 IDELR 190 (E.D. Pa. 2005) (Section 504 does not apply to a private religious school that receives no federal funding).

Fundamentally, Section 504 is an anti-discrimination statute. In the educational system, it prohibits districts from discriminating against qualified students with disabilities on the basis of disability. Public schools are required to provide students with disabilities with a free, appropriate education at public expense. 34 C.F.R. § 104.33(a). Schools are also required to provide students with disabilities with an "equal opportunity for participation" in "non-academic and extracurricular services and activities." 34 C.F.R. § 104.37(a).

The Office for Civil Rights (OCR) enforces several federal civil rights laws, including Section 504 of The Rehabilitation Act of 1973 and Title II of the Americans with Disabilities Act of 1990. The primary vehicle for OCR enforcement is through the process of complaint investigation and resolution.

The determinations of OCR, and to some extent case law, provide guidance to school districts on how to handle the two pronged legal requirements of Section 504 in the area of non-academic and extracurricular services and activities for students with disabilities. It is only through an awareness of OCR and court decisions that an educator can effectively discern the scope of their obligation to provide these opportunities "to the maximum extent appropriate," in a manner that affords "an equal opportunity."

IV. The ADA Amendments Act of 2008

The ADA Amendments Act of 2008 was signed by President Bush on September 25, 2008; it took effect on January 1, 2009.

A. Findings and Purposes

1. Congressional Findings (Section 2)

The findings section of the ADA Amendments Act of 2008 provides a window into the Congressional intent in amending the ADA. The Congressional findings in the ADA Amendments Act of 2008 are:

- 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;

- 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;

- 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 [sic] individual under the Rehabilitation Act of 1973, that expectation has not been fulfilled;

- The holdings of the Supreme Court in Sutten 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;

- 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;

- 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;

- 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

- 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.

2. Statement of Purpose

The statement of purpose provides assistance with regard to understanding the district's obligations under the ADA (and Section 504). The stated purposes are:

- 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;

- To **reject the requirement** enunciated by the Supreme Court in Sutten 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 ameliorative effects of mitigating measures**;

- 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 [disability]** under the Rehabilitation Act of 1973;

- 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'**;

- 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

- 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.

(emphasis added).

B. Amendments to the Rehabilitation Act of 1973 (Section 7)

Section seven of the ADA Amendments Act of 2008 amends two definitions in the Rehabilitation Act of 1973. The amendments are:

- The definition of disability (29 U.S.C. 705(9)(B)) was amended to have "the meaning given it in section 3 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12102)"

- The term "individual with a disability" (29 U.S.C. 705(20)(B)) was amended to state "any person who has a disability as defined in section 3 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12102)."

Thus, as of January 1, 2009, for purposes of defining the terms "disability" and "individual with a disability" under the Rehabilitation Act, it became necessary to look to the ADA.

C. Amended Definitions (Section 3)

Section 3 of the ADA Amendments Act of 2008 contains the following definitions:

- "The term 'disability' means, with respect to an individual

- A physical or mental impairment that substantially limits one or more major life activities of such individual;

- A record of such an impairment; or

- Being regarded as having such an impairment (as [defined] in paragraph (3)).”

The following terms, relating to the definition of disability, have also been amended:

- Major Life Activities, means:

  - “For purposes of [the definition of disability], 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.

  - . . . for purposes of [the definition of disability], 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.”

- Regarded as having such an impairment:

  - “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**.”

  - For the purposes of defining the term “disability,” an individual is **not “regarded as having such an impairment” if the impairment is “. . . transitory and minor**. A transitory impairment is an impairment with an actual or expected **duration of 6 months or less**.”

(emphasis added).

In addition, the ADA Amendments Act contains the following "Rules of Construction Regarding the Definition of Disability," and states that the definition of disability . . . shall be construed in accordance with the following:

- 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.

- The term '**substantially limits**' shall be **interpreted consistently with the findings and purposes** of the ADA Amendments Act of 2008.

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

- An impairment that is **episodic or in remission is a disability if** it would **substantially limit a major life activity when active**.

- 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 –

    - **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;

    - use of assistive technology;

    - reasonable accommodations or auxiliary aids or services; or

    - learned behavioral or adaptive neurological modifications.

    - The regulations recently promulgated by the Equal Employment Opportunity Commission list "psychotherapy, behavioral therapy, or physical therapy" as additional examples of mitigating measures. See 29 CFR 1630.2(j)(5).

- 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.

- The term "'ordinary eyeglasses or contact lenses' means lenses that are intended to fully correct visual acuity or eliminate refractive error; and

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

(emphasis added).

The Act also defines the term "auxiliary aids and services," as "including:

- 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; and

- other similar services and actions.

D. Impact on School Districts and Children

The revisions to the definitions, which are explicitly made applicable to the Rehabilitation Act, will likely have an impact on disability determinations. The determination of whether a student has a disability under Section 504 will involve still the following inquiries:

- Does the student have:

  - A physical or mental impairment that substantially limits one or more major life activities of such individual; or

  - A record of such an impairment; or

- Has the student been regarded as having such an impairment.

However, the nuances of those inquiries expanded as of January 1, 2009. For example, the definition of major life activities now includes (among other items): eating, sleeping, standing, lifting, bending, reading, concentrating, thinking, and communicating.

Although the term "substantially limits" is not defined, we do know that Congress intended for it to be interpreted without regard to the impact of mitigating measures (except for eyeglasses and contact lenses) and that Congress rejected the interpretation

that a substantial limitation must "preven[t] or severely restrict[t] [an] individual from" performing a major life activity. Thus, a child with a visual impairment that substantially limits the child's ability to read may be a child with a disability under Section 504 and the ADA, regardless of whether low vision devices ameliorate the impact of the child's impairment.

Although not set forth in the Act, low vision devices include: magnifying devices, closed circuit television, large print items, instruments that provide voice instruction or information (computers, clocks, timers, calculators, scales, key chains), and larger, illuminated watches and clocks, writing guides. See American Optometric Association, http://www.aoa.org/x5247.xml (accessed Nov. 28, 2011).

OCR is in the process of reviewing the impact of the ADA Amendments to determine whether amendments to the federal regulations are appropriate. In re: Americans with Disabilities Act Amendments of 2008, 51 IDELR 80 (OCR, Oct. 18, 2008). In the meantime, the plain text of the ADA Amendments Act of 2008 does not impact the substantive portions of the Rehabilitation Act, such as the duty to provide qualified students with disabilities with an equal opportunity to participate in a Free Appropriate Public Education, inclusion in extra-curricular activities, the provisions pertaining to discipline, and procedural safeguards. The remainder of this material provides an overview of those requirements.

V. FAPE: The Regulatory Framework

School districts "that operat[e] a public elementary or secondary education program or activity shall provide a free appropriate public education [("FAPE")] to each qualified handicapped person who is in the recipient's [school district's] jurisdiction, regardless of the nature or severity of the person's handicap [sic]." 34 CFR 104.33(a).

A. Defining FAPE

1. An 'Appropriate Education'

Section 504 defines an "appropriate education" as "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 non-handicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of Sections 104.34, 104.35 and 104.36." 34 CFR 104.33(b)(1).

2. A 'Free Education'

An appropriate education must be provided without cost to the qualified student or to his parents or guardian, "except for those fees that are imposed on non-handicapped persons or their parents or guardian." 34 CFR 104.33(c)(1). A FAPE may consist either of the provision of free services, or if a recipient places a person with a disability in or

refers such person to a program not operated by the recipient as its means of carrying out the requirements of this subpart of payment for the cost of the program. Funds available from any public or private agency may be used to meet the requirement of a free education. The free education requirement shall not be construed to relieve and insure or a similar third party from an otherwise valid obligation to provide or pay for services provided to a person with a disability.

If the provision of an appropriate education requires aids, benefits or services "not operated by the" school district, then adequate transportation to and from the aid, benefits, or services must be 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." 34 CFR 104.33(c)(2). Similarly, if a student requires a residential placement, then it must be provided without cost. 34 CFR 104.33(c)(3). However, as with the IDEA, districts who offer a FAPE are not required to pay for unilateral private placements. 34 CFR 104.33(c)(4).

B. IDEA Compliance and Section 504

As a starting point to our analysis, it is important to note that the definition of FAPE under Section 504 is broader than under the Individuals with Disabilities Education Act. While the IDEA defines FAPE to include the provision of special education and related services, the Section 504 definition includes the provision of regular or special education and related aids and services. However, the implementation of an IEP developed in accord with the IDEA is one means of meeting the "appropriate education" standard. 34 CFR 104.33(b)(2). Thus, as a general premise, a district can assume that meeting its obligations under the IDEA to an identified child will constitute compliance with Section 504's FAPE requirement.

C. The Least Restrictive Environment

34 CFR 104.34(a) provides that the district shall educate, or shall provide for the education of, each qualified person with a disability in its jurisdiction with persons who are not disabled to the maximum extent appropriate to the needs of the person with the disability. A district shall place a person with a disability in the regular educational environment operated by the district unless it is demonstrated by the district that the education of the person in a regular environment with the use of supplementary aids and services cannot be achieved satisfactorily. Whenever a district 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. The following terms warrant notice:

- "The maximum extent appropriate;"
- The "regular educational environment;" and
- "The proximity of the alternate setting."

The implication of this section is that most Section 504 student accommodations will occur within the regular classroom.

VI. Evaluation Procedures

Districts are required to evaluate "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." 34 C.F.R 104.35(a). Districts must establish standards and procedures for the evaluation and placement of persons who, because of disability, need or are believed to need special education or related services. 34 C.F.R. 104.35(b). Those standards and procedures must ensure that:

a. 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;

b. 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

c. 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).

34 C.F.R. 104.35(b).

When interpreting the evaluative data, districts are required to:

a. Draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior;

b. Establish procedures to ensure that information obtained from all such sources is documented and carefully considered;

c. 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

d. Ensure that the placement decision is made in accord with the "least restrictive environment" provisions of Section 504.

34 C.F.R. 104.35(c).

VII. Section 504 Accommodation Plan

The Section 504 Accommodation Plan is the tool whereby the district meets it obligation to provide FAPE to the qualified person with a disability. While there is no explicit requirement that a Section 504 Plan be documented in writing, the purpose of doing such is to provide a summary of accommodations that the student will need in order to have equal access to the learning process, as well as the district's other programs, activities and services.

If the goal of Section 504 is to provide equality and opportunity, then the hallmark of Section 504 is **accommodation**. The Section 504 Plan seeks to offer accommodations in order to provide equality and opportunity. Section 504 does not require that an educational institution lower its educational standards. But it does require an effort on the part of the district to accommodate the student's disability so they have access to the same level of education offered to the non-disabled student.

A. Accommodation Defined

The term "accommodation" was left undefined by Section 504. However, New Hampshire's Rules for the Education of Children with Disabilities define 'accommodation' as "any change in instruction or evaluation determined necessary by the IEP team that **does not impact** the rigor and/or validity of the subject matter being taught or assessed." Ed 1102.01(b) (emphasis added).

In other words, accommodations are "outside the body," that is, physical or environmental changes around the student. Teachers usually refer to accommodations as good teaching strategies. See To *Accommodate,* To *Modify*, and to Know the Difference: Determining Placement of a Child in Special Education or 504, Hayes, Nakonia, http://education.jhu.edu/PD/newhorizons/Exceptional%20Learners/Law/hayes.htm (accessed Sept. 10., 2013).

B. Modification Defined

A modification is "any change in instruction or evaluation determined necessary by the IEP team that impacts the rigor and validity or rigor or validity, of the subject matter being taught or assessed." Ed 1102.03(v) (emphasis added).

C. The Realm of Accommodation

Accommodation takes place in three areas. They are as follows:

- Physical accommodations;
- Instructional accommodations; and
- Behavioral accommodations.

Examples of accommodations include the following:

- **Pacing**: extending/adjusting time; allowing frequent breaks; varying activity often; omitting assignments that require timed situations.

- **Environment**: leaving class for academic assistance; preferential seating; altering physical room arrangement; defining limits (physical/behavioral); reducing/minimizing distractions (visual, auditory, both); cooling off period; sign language interpreter.

- **Presentation of Material**: emphasizing teaching approach (visual, auditory, tactile, multi); individual/small group instruction; taping lectures for replay; demonstrating/modeling; using manipulatives/hands-on activities; pre-teaching vocabulary; utilizing advance organizers; providing visual cues.

- **Materials and Equipment/Assistive Technology**: taping texts; highlighting material; supplementing material/laminating material; note taking assistance/copies from others; typing teacher's material rather than using handwriting on board; color overlays; using calculator, computer, word processor; using Braille text; using large print books; using decoder for television and film; having access to any special equipment.

- **Grading**: giving credit for projects; giving credit for class participation.

- **Assignments**: giving directions in small, distinct steps; allowing copying from paper/book; using written back-up for oral directions; adjusting length of assignment; changing format of assignment (matching, multiple choice, fill-in-blank, etc.); breaking assignment into series of smaller assignments; reducing paper/pencil tasks; reading directions/assignments to students; giving oral/visual cues or prompts; allowing recording/dictated/typed answers; maintaining assignment notebook; avoiding penalizing for spelling errors on every paper.

- **Reinforcement and Follow-Through**: using positive reinforcement; using concrete reinforcement; checking often for

understanding/review; providing peer tutoring; requesting parent reinforcement; having student repeat/explain the directions; making/using vocabulary files; teaching study skills; using study sheets/guides; reinforcing long-term assignment timelines; repeating review/drill; using behavioral contracts/check cards; giving weekly progress reports; providing before and/or after school tutoring; conferring with student (daily, bi-weekly, weekly, etc.).

- **Testing Adaptations**: reading tests verbatim to the student (in person or recorded); shortening length of test; changing test format (essay vs. fill-in blank vs. multiple choice, etc.); adjusting time for test completion; permitting oral answers; scribing test answers for student; permitting open book/notes exams; permitting testing in isolated/different location.

To *Accommodate,* To *Modify*, and to Know the Difference: Determining Placement of a Child in Special Education or 504, Hayes, Nakonia, http://education.jhu.edu/PD/newhorizons/Exceptional%20Learners/Law/hayes.htm (accessed Sept. 10, 2013).

When determining what accommodations are necessary for a child with a disability, it is important to remember that the purpose of Section 504 is to provide students with an equal opportunity to access an education. Thus, accommodations should stem from what a child needs to benefit from the school's program or activities.

VIII. Distinctions by Educational Level

The meaning of the phrase "qualified student with a disability" differs on the basis of a student's educational level. In addition, the nature of services to which a student is entitled under Section 504 differs by educational level as well.

A. The Elementary and Secondary Educational Level

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 whom the state is required to provide a FAPE under the IDEA.

Elementary and secondary school districts are required to provide FAPE to qualified students with disabilities. As mentioned previously, this FAPE is defined as regular or special education and related aids and services designed to meet the individual educational needs of students with disabilities as adequately as the students without disabilities are met.

B. The Post-Secondary Level

At the post-secondary 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. The post-secondary institution 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. Post-secondary educational institutions 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.

C. The Distinction Between Regular Education Intervention Plans and a Section 504 Plan

A regular education intervention plan is appropriate for the student without a disability. A student who is not suspected of having a disability may nevertheless qualify for a regular education intervention plan.

IX. Implementing the 504 Plan

The implementation of the 504 plan is key to ensuring a student receives FAPE. The failure on the part of a district to implement its own plan will be construed as a denial of FAPE. For example, in the case of Arlington, Texas Independent School District, 31 IDELR 87 (OCR Feb. 9, 1999), a student with ADD was the subject of a Section 504 plan. The parents complained to the Office for Civil Rights that a classroom teacher had failed to implement the student's Section 504 plan because they did not provide all of the accommodations described in the plan. The Office for Civil Rights ruled that the computer course teacher had failed to comply with the requirements of Section 504 because she did not provide all of the accommodations in the 504 accommodation plan. The Office concluded the plan had not been properly implemented despite the teacher's testimony that she "accepted late assignments, gave the student special instructions, and extended deadlines beyond what was allowed for other students."

Districts also need to be careful that the Section 504 plan follows the child. In the case of Banning Unified School District, 40 IDELR 77 (OCR May 21, 2003), the district failed to ensure that its high school was informed that a student transitioning from middle school had a Section 504 plan. For several months the student was educated without his

504 plan. Section 504 requires that districts take measures to ensure that each school is made aware of a student's Section 504 plan in advance so that it can be promptly implemented. Failure to do such will be construed by OCR as a violation of Section 504 and a denial of FAPE.

A. The Enforcement Role of the Office for Civil Rights

OCR, a component of the US Department of Education, enforces Section 504, and the ADA which extends the prohibition against discrimination to the full range of state or local government services (including public schools), programs, or activities regardless of whether they receive any federal funding. The standards adopted by the ADA were designed not to restrict the rights or remedies available under 504. However, the Title II regulations applicable to Free and Appropriate Public Education issues do not provide greater protection than that available under the Section 504 regulations.

OCR becomes involved in disability issues within a school district when it receives complaints from parents, students or advocates. In addition, OCR provides technical assistance to school districts, parents and students on request. As a general rule, OCR does not review the result of an individual placement or other educational decisions, so long as the school district has complied with the procedural requirements of Section 504 relating to identification and location of students with disabilities, evaluation of those students and due process. It is rare that OCR will evaluate the contents of a Section 504 plan or an IEP in light of the fact that any disagreement can be resolved through a due process hearing.

OCR does examine the procedures by which school districts identify, evaluate and place students with disabilities and the procedural safeguards which those school districts provide students. OCR will also examine incidents in which students with disabilities are allegedly subjected to treatment which is different from the treatment to which similarly situated students without disabilities are subjected. For example, OCR will be concerned about the unwarranted exclusion of disabled students from educational programs and services.

The case of Whittier City (CA) Elementary School District, 50 IDELR 109 (OCR Oct. 30, 2007) illustrates the scope of an OCR investigation. In that case, parents filed a complaint, alleging that the District discriminated against their daughter based on her disability, by failing to timely assess her for a disability under Section 504. Parents alleged that the District was aware that the student had a disability (asthma) and that she had numerous disability-related absences. In addition, parents alleged that the District failed to develop a Section 504 plan in a manner that was consistent with the Section 504 procedural requirements.

OCR found that the parents requested an evaluation in May 2006, but that the parents and the District agreed to postpone the assessment until the fall of 2006.

Despite that agreement, the District failed to assess the student in the fall, and did not convene a meeting with the parents until December 2006.

OCR also found that there was confusion with regard to whether the District had agreed to contact the parent in the fall of 2006, or whether the parent had expressly waived the request for the assessment. However, the District was aware that the student had a disability and that the student was frequently absent due to that disability (during the 2005-06 school year, the student had 16 excused absences and 10 unexcused absences, and she continued to have frequent disability-related absences during the 2006-07 school year). OCR determined that there was insufficient evidence to establish that District violated Section 504 by failing to assess the student, noting that "[b]ecause the Student's teacher made classroom accommodations that enabled the Student to make up any missed work due to her absences, the Student suffered no educational harm." (emphasis added).

Finally, OCR determined that the District did not violate Section 504 when it developed the Section 504 plan. The final plan contained the accommodations that the parents had requested and that the District had agreed to implement. The cover letter to the parents that accompanied the plan stated that two of the parents' requested accommodations would be implemented: 1) the student could carry her inhaler, and 2) the student's absences would not be reported to the School Attendance Review Board. The plan stated that the student could carry her inhaler and that she "would not be penalized for absences related to her disability in any way." OCR stated that the plan could have been consistent with the cover letter, but that the accommodations set forth in the plan were sufficient. Thus, the difference was not sufficient to rise to the level of a Section 504 violation.

OCR also investigates complaints of retaliation. The Section 504 Regulations (found at 34 C.F.R. § 104.61) and the ADA incorporate by reference the procedural provisions contained in 34 C.F.R. § 100.7(e) of the Regulations implementing Title VI of the Civil Rights Act of 1964. These provisions prohibit recipients or other persons (including districts) from intimidating, threatening, coercing or discriminating against any individual for the purpose of interfering with any right or privilege secured by Section 504 and/or the ADA or because the individual has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under Section 504 and/or the ADA or the Regulations.

B. OCR and Investigations of Retaliation

Parents have frequently complained that school personnel have taken adverse action against a student in response to a parent's decision to assert his or her rights under Section 504. This concept has become known as "retaliation" in the case law. While it would be a rare case for an educator to intentionally take adverse action against a student in retaliation for assertion of his or her legal rights, the focus is not simply the educator's intent, but rather, how the educator's action is perceived in hindsight. OCR

has developed a five-part test to determine whether a district has engaged in prohibited retaliation. It may be useful for you to consider the steps of this test before taking action with respect to a student who is involved in due process proceedings or whose parents have filed a complaint with OCR.

The five questions you should consider are:

(1) Has the parent/student engaged in a protected activity?

Examples of protected activities include:

- initiating due process proceedings,
- filing suit in court,
- filing a complaint with OCR
- filing a complaint with the District

(2) Is the district or its agents aware of the protected activity?

- How and when did district receive notice of the activity?
- Is there a rumor or verified action?

(3) Was the parent/student subjected to an adverse action?

- Did the action significantly disadvantage the complainant as to her/her status or ability to access the benefits of the program?
- Did the action reasonably act as a deterrent to further protected activity or preclude the individual from pursuing discrimination claims?

Examples of adverse action may include:

- Suspension/Expulsion from school or athletics/extra-curricular activities
- Preventing parents from entering school grounds

(4) Will a neutral third-party decide there is a causal relationship or connection between the protected activity and the adverse action?

- Will the adverse action against the student occur prior to, at the same time as, or after the parent/student engaged in the protected activity?
- Is there sufficient evidence to raise an inference that the protected activity was likely the reason for the adverse action?

(5) Can the district offer legitimate, nondiscriminatory reasons for the adverse action, which a neutral third-party will not consider to be pretextual?

Superintendent of Public Schools (NY), 104 LRP 11453 (OCR April 30, 2003); Shelby County (AL) School District, 37 IDELR 41 (OCR March 12, 2002).

X. Review and Reevaluation

A Section 504 plan should be reviewed by the 504 Team on an annual basis and if needed, more frequently. The primary purpose of the review is to add, subtract or modify student accommodations in response to any change in the student's disabling condition or their program.

Reevaluation should occur on a triennial basis. Before a 504 plan can be terminated, the 504 eligibility team must review the current student need and make an affirmative determination that the plan is no longer needed to provide the student equal access. If there is any question, the team should conduct an evaluation which is, at least, as thorough as the evaluation used for identifying Section 504 eligibility.

The fact that a student is receiving good grades will not always excuse the failure to implement a Section 504 plan. In Livingston Township Board of Education, 40 IDELR 111 (NJ SEA, 2003), a 16 year old student who had limited use of his arms and upper body was denied consistent note taking accommodations and CD versions of his text books. Parents requested due process when the District refused to provide the student with note taking accommodations. The district pointed to the student's B+ average as evidence that the 504 plan was appropriate, but the administrative law judge disagreed, stating: "While grades are certainly one measure of the appropriateness of the Section 504 plan or an IEP, they are not the only measure. If an individual has the potential to do much better with reasonable accommodations, then grades alone should not be the dispositive issue." (Emphasis added). This case points out the potential distinction between the "adequacy," standard in the IDEA and the "reasonable accommodation," standard in Section 504.

XI. The Scope of a Plan

There is no preset scope for a 504 plan. For example, a student diagnosed with a medical condition may have a Section 504 plan which is no broader in scope than the student's medical protocol. The measuring stick for the scope of a plan is simply that amount of accommodation necessary to provide the student with equal opportunity and equal access.

XII. Assessment

Just as the IDEA and No Child Left Behind indicate that accommodations should be identified when implemented for state and district assessments, a Section 504 plan should also specify those accommodations necessary to enable the student participate in state or district-wide assessments. The educator should anticipate that if a student requires an accommodation for classroom testing, they will require the same accommodation for the state or district-wide assessment.

XIII. Practice Pointers

There are a number of practice pointers in the context of designing and implementing Section 504 plans. The following rules are worth noting:

1. All teachers and service providers must be involved in 504 plan implementation;

2. All teachers and service providers must understand the manner in which an accommodation is implemented;

3. If a plan truly provides equal opportunity, then grading should not be an issue;

4. Accommodations should be designed to deliver equal opportunity;

5. Section 504 plans should be designed with input from regular educators;

6. The Section 504 referral, evaluation and plan design process should occur at the building level.

XIV. Inclusion in Extracurricular Activities and Non-Academic Programs

Section 504 does not explicitly mention athletics, extracurricular programs or other school sponsored non-academic activities. However, the language of Section 504 is unquestionably broad, providing that "[n]o otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her/his disability, be excluded from participation in, be denied the benefits, or be subjected to discrimination under any program or activity receiving federal financial assistance." 29 U.S.C. 794.

The Section 504 Regulations make it clear that Section 504 extends two legal principles to non-academic programming: participation "to the maximum extent appropriate" and "an equal opportunity" for participation. The definition of these two terms has been left to the courts.

A. Participation to the "Maximum Extent Appropriate"

Pursuant to 34 CFR 104.34(b), when providing or arranging for the provision of non-academic and extracurricular services and activities, including meals, recess periods, and the services and activities set forth in 104.37(a)(2), school districts must ensure that qualified students with disabilities participate with non-disabled students in such activities and services to the maximum extent appropriate to the needs of the student with the disability.

B. "Equal Opportunity for Participation"

34 CFR Section 104.37(a) articulates a general "equal opportunity," standard. It states that a school "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." 34 CFR 104.37(a).

1. Defining "non-academic and extracurricular services and activities"

Nonacademic and extracurricular services and activities 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 persons with disabilities
- Employment of students, including employment by the school and assistance in making available outside employment.

34 CFR 104.37(a)(2).

2. Regulation of "counseling services"

34 CFR 104.37(b) injects a non-discrimination standard into counseling services. It indicates that a school which provides personal counseling, academic counseling, vocational counseling, guidance counseling, or placement services shall provide the services without discrimination on the basis of disability.

There is a specific requirement that the school district ensure that qualified students with disabilities are not counseled toward more restrictive career objectives than are non-disabled students with similar interests and abilities. Id.

3. Opportunity to access physical education and athletics

Pursuant to 34 CFR 104.37(c)(1), when providing physical education courses, athletics, and similar aids, benefits or services to any students, a school may not discriminate on the basis of disability. Schools that offer physical education courses or that operate or sponsor interscholastic clubs, or intramural athletics shall provide qualified students with disabilities with an equal opportunity for participation.

Practice Pointer: There is no specific requirement under Section 504 that a district provide services such as occupational or physical therapy services. However, such services may come into play as compensatory services for missed access or to compensate for lack of equal opportunity. See Franklin City Public Schools (VA), 38 IDELR 46 (OCR Sept. 10, 2002).

a. Separate or different programs

A school may offer physical education and athletic activities to students with disabilities that are separate or different from those offered to non-disabled students only if separation or differentiation is consistent with the requirements of 34 CFR 104.34 and only if no qualified student with a disability is denied the opportunity to compete for a team, or to participate in courses that are not separate or different. 34 CFR 104.37(c)(2).

C. Extracurricular Activities: Case Studies

The following cases provide examples of the application of Section 504 to Extracurricular Activities and Nonacademic Programs. This is not an exhaustive list.

1. Tryouts

A mother filed a complaint with OCR alleging that the school district discriminated against her daughter on the basis of disability by failing to afford her an equal opportunity to participate in the tryouts for the cheerleading squad. The mother indicated that the school district had refused her request to videotape the cheerleading practice. Most likely the district's refusal had been based on the privacy interest of other students. Nevertheless, the district and the Office for Civil Rights (OCR) entered into a resolution agreement where the district agreed to take the following actions:

1. The district will develop a procedure to ensure that qualified students with disabilities are afforded an equal opportunity to participate in the district's extracurricular activities and interscholastic athletic programs. The procedure will specify that students with disabilities are entitled to necessary related aids and services and/or program modification in order to accomplish the objective of equal opportunity to participate in extracurricular and interscholastic programs. The procedure will also ensure that the

necessary related aids and services and/or program modifications are determined on an individual basis.

2. The district will conduct training on the new procedure with the appropriate staff and district officials.

3. The district will ensure that if the student tries out for the cheerleading squad, the district will provide the student with effective accommodations, including but not limited to, the opportunity to videotape the cheerleading sponsor's instructions and demonstrations.[1]

Practice Pointer: 34 CFR 104.37(a)(1) does not require that districts adopt a written policy with regard to equal opportunity for participation in non-academic and extracurricular services and activities. However, the effective result of this resolution was that the district was required to adopt a procedure to ensure that equal opportunity was afforded to students with disabilities. The other lesson from this resolution agreement is that districts, when faced with competing interests, such as privacy interests and access issues should seek in the first instance to broach a balanced compromise. OCR frequently uses the complaint resolution process as an opportunity to see that district staff receive further training on Section 504. See Marion County School District (FL), 37 IDELR 13 (OCR Nov. 21, 2001). For a similar result see Moses Lake School District No. 161, 36 IDELR 218 (OCR Feb. 7, 2002).

2. Dismissal for unexcused absences.

In Shelby County (AL) School District, 37 IDELR 41 (OCR 2002), a parent filed a complaint with OCR alleging that the school district discriminated against her daughter on the basis of her disability ("Bipolar Rapid Recycler Depression" and ADHD) by not allowing her to participate on the high school volleyball team. The mother specifically alleged:

- That the district did not follow her daughter's IEP amendment which called for participation in athletics until after the district filed an eligibility form for the student;

- That the district dismissed the student from the team for unexcused absences that were due to her disability, and for unexcused absences that occurred during the time frame when she was ineligible for the team;

[1]Note the right to videotape did not extend beyond the cheerleading sponsor's instructions and demonstrations, perhaps addressing the district's concern as to privacy.

- That the varsity volleyball coach retaliated against the student because of a complaint that the parent had filed with the Alabama High School Athletic Association challenging its “no pass, no play” rule; and

- That the coach made embarrassing remarks about her daughter to the team and inquired about her attendance at school when she had an excused absence approved through the school office.

OCR found that the state code pertaining to athletics dictated the decision regarding a student with a disability’s participation in extracurricular activities and that all students who compete on an interscholastic sports team in Alabama must file an eligibility form five days prior to the competition. As to the unexcused absences, the OCR pointed to the fact that the team rules state that three unexcused absences from practices or meetings will result in dismissal from the team. OCR found that the student was suspended for three days for fighting, and that she missed three days of practice because of her suspension. As a result, the student was dismissed from the team. OCR also found that the team rule in regards to unexcused absences was applied uniformly and therefore, the district did not fail to provide the student with an equal opportunity for participation on the district's volleyball team and did not treat the student in a different manner than any other student in regards to this allegation.

OCR found that the filing of the complaint with the Athletic Association was a protected activity and that the district was aware of the complaint and thus, aware of the protected activity. OCR concluded that the alleged adverse actions, to wit the remarks about the student, even if true, did not constitute adverse actions. The actions did not result in any denial of benefits to the student in that they did not result in the student being dismissed from the team.

Practice Pointer: The lesson from this case is that school districts remain free to uniformly exercise and impose team rules in the context of athletics. The key point the district needs to demonstrate is that the team rules are uniformly applied and that they do not result in disparate treatment of the disabled student.

Practice Pointer: Team rules, if applied uniformly, will generally not be deemed discriminatory. See Little Axe (OK) Public Schools, 37 IDELR 103 (OCR 2002).

3. Attitude and teamwork requirements.

In Kaneland Community Unit School District No. 302 (IL), 37 IDELR 287 (OCR Aug. 15, 2002), the high school baseball coach cut a student from the varsity baseball team on the final day of tryouts. The coach cited the student's attitude and teamwork skills as the reason for his decision to cut the student. The student's mother filed a complaint with OCR alleging that the district discriminated against her son on the basis

of disability because her son was on the baseball team the previous year, was one of the best players on the team and his disciplinary record was no worse than some of the players who made the team. The district pointed to its extracurricular activities behavior code which governed student participation in any extracurricular activity. The code stated that "participation in these events at Kaneland is a privilege granted to students who can and do uphold the ideals of good citizenship, who abide by the rules and regulations of the school community and who commit themselves to academic success." Student participation in baseball was also governed by the baseball guidelines which established criteria necessary for participation in baseball. These criteria included attitude, ability, skills, teamwork and the ability to fit into the team's style and system. All students were provided a copy of those guidelines.

The district conceded that the student had the athletic ability and skills required to be a member of the team, but contended that he did not meet the other important criteria. For example, the student had a hot temper, a bad attitude and was not a team player. The coach denied the allegation that the student's disciplinary record was the factor in his decision to cut him from the team and further indicated that he was unaware at the time he made the decision to cut the student from the varsity team that the student had a disability or that he was a special education student. OCR specifically noted that the student's IEP did not preclude him from being subject to the same requirements for making the baseball team as other students. OCR observed that "He is subject to the district's established disciplinary policies and does not have a behavioral management plan that would preclude application of either the code or the guidelines." On that basis OCR determined the complaint to be unfounded.

Practice Pointer: The result might have been different if the student's IEP contained a behavioral intervention plan which was inconsistent with the district's athletic guidelines. This decision gives comfort to school districts that, absent IEP statements to the contrary, they may uniformly apply their team conduct codes to students and that this uniform application may include behavioral considerations.

4. Alcohol consumption at school events.

A student was disciplined for being under the influence of alcohol at a football game. OCR dispensed of the subsequent complaint noting that students without disabilities who committed the same offense were disciplined in the same manner. See El Paso Independent School District (TX), 35 IDELR 221 (OCR May 29, 2001).

Practice Pointer: Section 504 does not insulate students from disciplinary consequences when the discipline imposed does not constitute a significant change in placement. The review by OCR in such circumstances will be limited to whether or not the district acted in a non-discriminatory manner in disciplining the student.

5. Club sports

A disabled student was expelled from a school funded intramural hockey club. The student had a disability and a behavior management problem. The hockey club did not implement the behavior management program during his participation in the club sport. The Office for Civil Rights ruled that the district violated its obligation to ensure the ice hockey club to which it provided financial assistance complied with the requirements of Section 504 and the ADA. See Rosetree Media (PA) School District, 40 IDELR 188 (OCR Aug. 27, 2003).

6. Scholarships

It is important to remember that access and equal opportunity extend to guidance counseling services and post-secondary opportunity. Therefore, districts should review the manner in which they disseminate scholarship information in order to ensure that students with disabilities have equal access to scholarship information. See Garden Grove Unified School District (CA), 37 IDELR 43 (OCR April 30, 2002).

7. Field Trips

Section 504 clearly indicates that a student should not be excluded from attending a field trip on the basis of their disability. See Accomack County (VA) Pub. Schs., 49 IDELR 50 (OCR Jan. 22, 2007) (excluding a student from an assembly and a field trip did not violate Section 504 because the student was not eligible for participation in those activities – participation was limited to students in certain courses, which the complaining student did not participate in); Lucas Local Schools (OH), 37 IDELR 77 (OCR April 12, 2002) (no evidence that the student was prohibited from attending the field trip on the basis of his disability).

Similarly, a district cannot make the parents' presence mandatory at a field trip when a similar obligation is not imposed upon the parents of non-disabled students. Doing such discriminates on the basis of disability in violation of Section 504. See Rim of the World Unified School District (CA), 38 IDELR 101 (OCR Oct. 10, 2002); compare id. with Stanwood-Camano (WA) Sch. Dist. No. 401, 48 IDELR 261 (OCR Nov. 15, 2006) (no violation of Section 504 where “the district’s requirement that the student’s grandmother attend [a] field trip were based on concerns with the student’s health and safety during the trip in question [specifically, the inability of district staff to be able to adequately address the student’s behavior in a public setting and their belief that the grandmother would be able to address the behavior], and the trip was the only one identified by OCR during the period investigated”).

a. Limits on liability

A complaint to OCR alleged that a school district discriminated on the basis of disability by revoking permission for their son to go on a school sponsored European

trip. OCR concluded that the district had revoked permission because of concerns the student would violate trip rules rather than because of his ADHD. See Maine School Administrative District No. 1, 35 IDELR 166 (OCR March 23, 2001).

Practice Pointer: The district's liability for excluding a Section 504 student from a field trip is contingent upon not only a demonstration by the plaintiff of his exclusion from participation in services and that such treatment was by reason of disability, but that also the school officials showed gross misjudgment or bad faith. For a similar result see Miamisburg City Schools (OH), 36 IDELR 217 (OCR Feb. 11, 2002). While a district may use the student's health or safety as a reason for not participating in a field trip, the district has the burden of demonstrating that the exclusion is essential to that child's health or safety. During the time period that the child does not participate in the field trip, the district has a duty to provide educational services.

Practice Pointer: A district can refute a charge of disability-based discrimination by demonstrating a legitimate non-discriminatory reason for its actions.

8. Playgrounds

Playgrounds must be fully accessible to students with disabilities. For example, the playground surfaces and access ways leading to the playground must be maneuverable by students in wheelchairs.

Practice Pointer: Districts need to be careful when confronted with volunteer playground construction efforts. These type of volunteer efforts can produce safety and access issues. A district should reference the Playground Standards promulgated by the United States Access Board. While these guidelines have not become law, they are considered advisory by OCR. See Shiloh Village School District (IL), 37 IDELR 188 (OCR July 3, 2002).

9. Graduation

Students with disabilities who meet graduation requirements should be allowed to attend or participate in the graduation ceremony. Failure to afford such an opportunity is usually considered a violation of Section 504.

Practice Pointer: Decisions to exclude a student from activities based on safety considerations must follow a process. In particular, the decisions must be based on current information and must be made by either an IEP team or a Section 504 team.

10. Choir and Band

As a general premise, students should have access to and equal opportunity to participate in choir and band programs. However, accessibility and equal opportunity

may be limited by legitimate safety concerns and ability concerns. See Grosse Pointe Public Schools (MI), 35 IDELR 225 (OCR May 7, 2001).

In addition, a student's lack of talent may be a legitimate non-discriminatory reason for his exclusion from the band. See Allegheny County (MD) Board of Education, 40 IDELR 220 (OCR Sept. 4, 2003).

D. Non-District Programs/Substantial Assistance

Section 504 prohibits school districts from providing substantial assistance to entities that discriminate on the basis of disability in providing any aid, benefit, or service to beneficiaries of the program or activity. 34 CFR 104.4(b)(1)(v); see also Rose Tree Media (PA) School District, 40 IDELR 188 (OCR 2003) (District that provides substantial assistance to a private club must either ensure that the club complies with Section 504 and the ADA, or sever its relationship with the club). The Office for Civil Rights recently issued two opinions in which it found that two districts had discriminated against qualified individuals with disabilities by "significantly assisting" after-school programs.

In the first case, Puyallup (WA) School District No. 3, the parent filed a complaint with OCR, alleging that the district discriminated against a student by refusing to provide the student with accommodations during an after-school program. 49 IDELR 20 (OCR March 23, 2007). The parents enrolled the student in an after-school program operated by a religious organization and requested that the district provide the student, who was deaf, with an interpreter. The district refused to provide the interpreter because the after-school program was a non-district private program, run by several community groups. The parent then requested that the after-school program provide an interpreter; it attempted to locate a volunteer, but was unsuccessful. As a result, the student was not able to participate in the after-school program.

OCR found that the after-school program was not a district-operated program or activity. Nevertheless, the assistance that the district provided to the groups was deemed to be "significant."

The district provided the groups with:

- Organization and coordination assistance;
- Publicity on its website;
- Free use of space in district facilities after regular school hours;
- Office space;
- Computer services;

- A small grant to assist with program implementation.

However, the district did not:

- Exercise control over the content of the program;
- Provide direct funding to the groups that operated the program;
- Control or provide the staff for the after-school program activities; or
- Determine what students attended the programs, or whether students participated in the programs.

Similarly, in Capistrano (CA) Unified School District, parents filed a complaint with OCR, alleging that the district violated Section 504 by providing significant assistance to an after-school program that discriminated against students with disabilities. 108 LRP 17704 (OCR Oct. 10, 2007). The program was operated by the YMCA as an independent contractor under a five-year contract. However, the district allowed the YMCA to rent one of its facilities at less than the market rate and promoted the programs by distributing literature to parents one time per year and by providing a link to the YMCA website. The district did not provide the YMCA with any direct financial support, staff materials or oversight. OCR found that the district significantly assisted the YMCA's program by permitting it to use district facilities at a discounted rate and by promoting the YMCA program to parents. Therefore, the district was obligated to end its relationship with the YMCA or to ensure that the YMCA did not discriminate.

In a recent case, Fairfax (CA) School District, 111 LRP 70094 (OCR Sept. 13, 2011), OCR investigated whether a district "failed to respond appropriately to an internal complaint from a parent, alleging that the Fairfax Junior Baseball Club," discriminates on the basis of disability. During a school board meeting, the parent complained that the baseball club discriminates on the basis of disability, and indicated that she believed the district should terminate its relationship with the club. The complaint was recorded in the board's meeting minutes. Following the meeting, the Superintendent spoke with the president of the baseball club, and was told that every player played a minimum of two innings, but that if the Student was not allowed to play two innings, it was because of safety concerns. The Superintendent relayed that conversation to the Board chair, but did not take any further action. Subsequently, the parent filed a complaint with OCR.

OCR investigated, and determined that the district was providing the baseball club with significant assistance. OCR found that the district and the baseball club had a "long-standing relationship of at least 17 years wherein the baseball club used facilities at the Fairfax Middle School without paying costs." As a result, the district was

responsible for ensuring that the baseball club did not unlawfully discriminate against participants.

OCR further found that the district failed to respond appropriately to the parent's complaint because it did not process the complaint according to its Uniform Complaint Procedures. In particular, the district did not obtain the answers from the baseball club that were responsive to the question as to whether the student had less playing time than other members of the club, and, if so, why the student had less playing time. The district did not document its conversation with the president of the baseball club, nor did it communicate its written findings and conclusions to the parent. Thus, the district's investigation failed to comply with the requirements of Section 504 (pertaining to grievance procedures). The district agreed to enter into a resolution session agreement, whereby it would provide training on its obligations with regard to organizations that receive significant assistance from the district, provide training about its complaint procedures, and conduct a complete investigation into the parent's allegation against the baseball club. If the investigation was substantiated, the district was further required to ensure that the club did not discriminate or terminate its contract with the club.

Key Points:

- Based on these opinions, it appears that OCR will find that a district has provided a private program with significant assistance when the district allows the organization to use its facilities without charge, or at a reduced rate, and when the district provides the program with publicity.

- It is important to remember that if your district provides substantial assistance to an organization, the district must ensure that the organization complies with Section 504 and the ADA. This includes conducting an investigation in accord with your district's grievance procedure, if a parent files a complaint against an organization that receives significant assistance from your district.

Another case was resolved without an OCR investigation when the District agreed to take voluntary action. School Union 49 (ME), 108 LRPP 63079 (OCR Aug. 15, 2008). In that case, the parents alleged that the District discriminated against their daughter on the basis of disability by denying or giving her limited access to the Lincoln Academy school building, because of icy sidewalk/pathway conditions leading from the parking lot to the school. At the outset, OCR noted that the Academy was not subject to its jurisdiction under Section 504 or the ADA because it did not receive federal funds and was not a public entity. However, the District was subject to the provisions of Section 504 and the ADA, and the District had placed the student at the private school and was paying for her tuition. Thus, the District had an obligation to ensure that it was not perpetuating discrimination against the student by providing a significant aid, benefit, or service to an entity that discriminates on the basis of disability.

With regard to snow removal, the parents alleged that the Academy removed the snow before school, but did not address snowfall that occurred during the day. As a result, student occasionally missed classes in two school buildings because she was unable to navigate her wheelchair through the snow. The District entered into an agreement with the Academy whereby the Academy agreed to construct a wheelchair ramp, and agreed to have members of its maintenance department clear the walkway so that the student could transition from class to class.

Key Point:

- A private placement by a District may constitute "substantial assistance"

XV. Extended School Year Programming

Section 504 eligible students are entitled to the equal opportunity to access a school district's summer programming. A district may violate Section 504 if it fails to consider whether its Section 504 students are eligible for extended school year programming. See Boston (MA) Pub. Schs., 41 IDELR 137 (OCR Nov. 7, 2003).

Section 504 requires that students with disabilities are given an equal opportunity for participation in the non-academic services of a district. There are, however, limits on this access. For example, when teachers attempt to intervene to redirect a student's misbehavior and they are unable to accommodate the behavior without fundamentally altering the summer program, then the student's participation in the program may be limited. See Saint Paul Pub. Schs., 41 IDELR 37 (OCR Dec. 24, 2003).

XVI. Procedural Requirements Under Section 504

There are a number of procedural requirements which pertain to individuals protected by Section 504.

A. The Written Assurance of Non-Discrimination

34 CFR 104.5(a) requires that school districts provide the federal government with written assurance of non-discrimination and compliance with Section 504. Districts have been providing the government with this assurance since 1977.

B. Designated Section 504 Coordinator

34 CFR 104.7(a) requires that each school district designate a Section 504 coordinator. This individual is defined as the person responsible for coordinating the district's 504 efforts. Districts may designate more than one person as a Section 504 coordinator. Therefore, most school districts adopt building level coordinators, as well as an overall supervisory coordinator.

C. Grievance Procedures

34 CFR 104.7(b) requires that districts adopt grievance procedures to resolve complaints of discrimination. The procedures must "incorporate appropriate due process standards" and must "provide for the prompt and equitable resolution of complaints alleging" a violation of Section 504. Id. These procedures must be in writing and readily available to the public.

When determining whether a grievance procedure complies with Section 504, OCR considers a number of factors, including whether the procedures provide for:

- Notice of the procedures, including where complaints may be filed;
- Application of the procedure to complaints alleging discrimination carried out by employees, other students, or third parties;
- Adequate, reliable, and impartial investigation of complaints, including the opportunity to present witnesses and other evidence;
- Designated and reasonably prompt timeframes for the major stages of the complaint process;
- Notice to the parties of the outcome of the complaint; and
- An assurance that the school will take steps to prevent recurrence of any harassment and to correct discriminatory effects of the harassment on the complainant and others, if appropriate.

Akron (OH) Public Schools, 55 IDELR 146 (2010). In the Akron decision, OCR also noted that grievance procedures may include informal mechanisms for resolving complaints, but only if the parties agree. The procedures must indicate that the complainant may end the informal process at any time, and file a formal complaint. Id.

D. Notice

34 CFR 104.8 requires the district to provide notice to students, parents, employees, unions and professional organizations of non-discrimination in admission or access to or treatment or employment in its programs or activities. The notice must also specify the reasonable employee designated to coordinate compliance. It is prudent for every school district to have a 504 policy statement and the 504 policy statement is an appropriate location for identifying the designated coordinator.

The notice must also be given to individuals with vision and/or hearing impairments; therefore, it is important that the notice be available in alternate formats.

E. Annual Identification and Location

34 CFR 104.32(a) requires that districts annually identify and locate all Section 504 qualified children with disabilities in their geographic area who are not receiving a public education. This requirement is akin to the IDEA's Child Find requirement.

F. Annual Notification

34 CFR 104.32(b) requires that districts annual notify persons with disabilities or their parents or guardians of the districts' responsibilities under Section 504.

G. Consent

OCR has interpreted Section 504 to require districts to obtain parental permission for initial evaluations. Section 504 is silent on the form of parental consent required. Best practices warrant that the consent be in writing.

H. Procedural Safeguards Notice

Districts are required to provide parents or guardians with procedural safeguards giving them notice of their various rights under Section 504. There are several times during the planning process when parents/guardians should be provided their rights under Section 504. Those instances include:

- Eligibility determination
- When a plan is developed
- Before there is a significant change in the plan for services

Notification should include the following rights under Section 504:

- Right to file a grievance with the school district over an alleged violation of Section 504 regulations
- Right to an impartial hearing if there is a disagreement with the school district's proposed action
- Right to have an evaluation that draws on information from a variety of sources
- Right to be informed of any proposed actions related to eligibility and plan for services
- Right to examine all relevant records

- Right to receive all information in the parent/guardian's native language and primary mode of communication

- Right to periodic re-evaluations and an evaluation before any significant change in program/service modifications

- Right to be represented by counsel in the impartial hearing process

- Right to appeal the impartial hearing officer's decision.

The New Hampshire Department of Education has recently drafted a model guide for Section 504 Hearings. It is available at: http://www.education.nh.gov/legislation/hearings.htm (accessed Sept. 10, 2013).

Section 504 regulations do not:

- Establish timelines for submission of a hearing request.

- Define "impartial" (in similar processes, impartial has been defined as a person not employed by or under contract with the district in any capacity).

- Require that the selection of the hearing officer be a mutually agreed upon decision between the school district and the parents/guardians.

- Contain mediation or resolution session requirements.

The case of Schenectady (NY) City School District, 50 IDELR 110 (OCR Dec. 28, 2007), involved an allegation that the District failed to provide notice of procedural safeguards, including the right to request an impartial hearing. In that case, the parents filed a complaint with OCR, alleging that the district discriminated against her son on the basis of his disability by failing to provide her with notice of her right to request an impartial hearing under Section 504. OCRs investigation established that the district's guidance counselor had provided the parent with a proposed Section 504 plan, and that the parent requested additional services. Following that request, the student's team met on two occasions to review those requested services, but declined to provide the services requested by the parent. Parent alleged that the district did not inform her that she could contest their decision in a due process hearing.

The district provided OCR with a copy of its Section 504 procedures, which included a description of the parents' right to a hearing. However, OCR's investigation established that district staff were unclear as to who was responsible for providing the parent with notice of Section 504 procedural rights, and the district was not able to confirm that the complaining parents received notice of their Section 504 procedural

rights. In addition, district staff did not know whether the procedural rights were available on the district's website or if they were disseminated to parents with other publications.

OCR closed the investigation after the district agreed to implement a voluntary resolution plan, which provided that:

- The district would review its Section 504 procedures with all staff, and would provide OCR with documentation evidencing the same; and,

- The district would convene a meeting with the parents to determine whether the additional services requested by the parent were appropriate. If they are appropriate, the team will determine whether compensatory education services are necessary; if they are not appropriate, the district will inform the parent of her right to request a hearing. The district also agreed to provide OCR with documentation establishing that the meeting occurred, the team's decision, and either establishing that compensatory services were provided or that the parents received notice of their right to a request a hearing.

I. General Rights

Persons disagreeing with the identification, evaluation and placement of their children have several options available to them. Those options include the following**:**

- Filing a complaint or grievance through the district's Section 504 Grievance Procedure

- Parents/guardians may request a Section 504 Impartial Hearing

- Filing a complaint with the OCR; and

- Upon exhaustion of IDEIA remedies, filing suit in federal court.

XVII. Service Animals

Effective March 15, 2011, all public entities, including school districts, were required to develop or modify their policies, practices, and/or procedures, to permit the use of a service animal by an individual with a disability. A service animal is defined as:

> any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric intellectual, or other mental disability. Other species of animals, whether wild or domestic, trained or untrained, are not service animals for the purpose of this definition. The work or tasks performed by a service animal must be directly related to

> the handler's disability. Examples of work or tasks include, but are not limited to, assisting individuals who are blind or have low vision with navigation and other tasks, alerting individuals who are deaf or hard of hearing to the presence of people or sounds, providing non-violent protection or rescue work, pulling a wheelchair, assisting an individual during a seizure, alerting individuals to the presence of allergens, retrieving items such as medicine or the telephone, providing physical support and assistance with balance and stability to individuals with mobility disabilities, and helping persons with psychiatric and neurological disabilities by preventing or interrupting impulsive or destructive behaviors. The crime deterrent effects of an animal's presence and the provision of emotional support, well-being, comfort, or companionship do not constitute work or task for the purpose of this definition.

28 C.F.R. § 35.104 (defining "Service Animal")[3]; see also RSA 167-D:1, IV (defining service animal as "any dog individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability. Other species of animals, whether wild or domestic, trained or untrained, are not service animals for purposes of this definition"); RSA 167-D:2 (pertaining to duties of service animals).

The amended regulations also contain the following general rules for the use of service animals:

- Service animals must be under control of their handlers. A service animal shall have a harness, leash, or other tether, unless either the handler is unable because of a disability to use a harness, leash, or other tether, or the use of a harness, leash, or other tether would interfere with the service animal's safe, effective performance of work or tasks, in which case the service animal must be otherwise under the handler's control (e.g., voice control, signals, or other effective means).

[3] The regulations also require that public entities make reasonable modifications in policies, practices, or procedures to permit the use of a miniature horse by an individual with a disability if the miniature horse has been individually trained to do work or perform tasks for the benefit of the individual with a disability. In determining whether reasonable modifications to policies, practices, or procedures can be made to allow a miniature horse into a specific facility, a public entity shall consider:

- The type, size, and weight of the miniature horse and whether the facility can accommodate these features;
- Whether the handler has sufficient control of the miniature horse;
- Whether the miniature horse is housebroken; and
- Whether the miniature horse's presence in a specific facility compromises legitimate safety requirements that are necessary for safe operation.

28 C.F.R. § 35.136(I).

- Public entities are not responsible for the care or supervision of a service animal.

- Public entities shall not ask about the nature or extent of a person's disability, but may make **two** inquiries to determine whether an animal qualifies as a service animal. A public entity should not ask these questions if it is patently obvious as to the role of the service animal (such as the animal that is trained to serve as a guide dog for an individual who is blind). They are as follows:

    - A public entity may ask if the animal is required because of a disability; and

    - What work or task the animal has been trained to perform.

- Public entities shall not require documentation, such as proof that the animal has been certified, trained, or licensed as a service animal.

- A public entity may ask an individual with a disability to remove a service animal from the premises if:

    - The animal is out of control and the animal's handler does not take effective action to control it; or,

    - The animal is not housebroken.

- If an animal is properly removed from the premises, the public entity must give the individual with a disability the opportunity to participate in the service, program, or activity without having the service animal on the premises.

- Individuals with disabilities shall be permitted to be accompanied by their service animals in all areas of a public entity's facilities where members of the public, participants in services, programs, or invitees, as relevant, are allowed to go.

- Finally, public entities shall not ask or require an individual with a disability to pay a surcharge, even if people accompanied by pets are required to pay fees, or to comply with other requirements generally not applicable to people without pets. However, if a public entity normally charge individuals for the damage they cause, an individual with a disability may be charged for damage caused by his or her service animal.

See 28 C.F.R. § 35.136; see also RSA 167-D:4 (authorizing service animals to accompany their handlers or trainers into any place of public accommodation to which the general public is invited); RSA 167-D:1, III (defining place of public accommodation

to include “any kindergarten, primary and secondary school, . . . high school, . . . or any educational institution under the supervision of the state board of education, or the commissioner of education of the state of New Hampshire”).

A student with a disability may require a service animal in order to receive a FAPE, or as a “necessary aid or service under the IDEA.” Thus, even if the animal is not a “service animal,” under the ADA regulations, or State law, a student’s IEP Team may need to meet and determine whether the presence of the animal is necessary as a supplementary aid and service in order for the child to receive FAPE.

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