



**OBLIGATIONS OF SCHOOL DISTRICTS UNDER SECTION 504  
OF THE REHABILITATION ACT OF 1973 WITH UPDATES ON THE ADA AMENDMENTS ACT  
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**A. Introduction**

Section 504 was included in the Rehabilitation Act of 1973. The major thrust of the Rehabilitation Act of 1973 was to provide federal funding and a mandate for vocational rehabilitation services for people with disabilities. Section 504,<sup>1</sup> however, which prohibits discrimination on the basis of disability,<sup>2</sup> was modeled after the Civil Rights Act of 1964. Section 504 also served as the foundation for the Americans with Disabilities Act (ADA).<sup>3</sup>

Section 504 is a very broad statute. It prohibits discrimination in any program or activity receiving federal financial assistance. It also applies to any programs run by the U.S. government. The relevant part of the law is:

No otherwise qualified individual with a disability in the United States, as defined in section 706(8) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by [the U.S. government].<sup>4</sup>

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<sup>1</sup>29 U.S.C. § 794; 34 C.F.R. Part 104.

<sup>2</sup>See *Peoria (AZ) Unified School District*, 50 IDELR 113 (OCR 10/16/07) (School district discriminated on the basis of disability when it relocated the special education students to another school to make room for a larger number of regular education students but did not relocate any regular education students).

<sup>3</sup>42 U.S.C. §§ 12101 *et seq.*

<sup>4</sup>29 U.S.C. § 794(a).

The ADA basically extends the provisions of section 504 to other entities that do not receive federal funds. The ADA has five titles, two of which specifically apply to the rights of children with disabilities who are in school. Title II prohibits discrimination on the basis of disability by state and local governmental services, which includes public schools.<sup>5</sup> Title III prohibits discrimination on the basis of disability by places of public accommodation.<sup>6</sup> Private schools are specifically covered by Title III.<sup>7</sup> But, private schools run by religious organizations are exempt.<sup>8</sup>

The U.S. Department of Education's Office for Civil Rights (OCR) enforces both Section 504 and the ADA. OCR will apply the Section 504 standard to ADA complaints as well. This is because the ADA is not intended to apply a lesser standard than Section 504.<sup>9</sup> Accordingly, OCR interprets the Title II regulation "to require school districts to provide a FAPE to the same extent required under the Section 504 regulation."<sup>10</sup>

## **B. Covered Entities**

Since, virtually all, if not all public school districts receive federal funds, they are covered by Section 504. However, there is no separate funding available under Section 504 to assist schools in meeting their responsibilities under section 504. By receiving federal money for other programs, such as IDEA, they are required to comply with Section 504.

Additionally, any private schools which receive federal funds, including those run by religious organizations, are also covered, even if they receive the money indirectly.<sup>11</sup> Many private schools may receive federal funds from the local school district in which they are located in the form of textbook aid, or aid for school breakfast or lunch and, therefore, are covered by Section 504. However, private schools are only obligated to provide reasonable accommodations.<sup>12</sup>

Section 504 also applies to a public online high school operated statewide by a public

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<sup>5</sup>42 §§ 12131-12165.

<sup>6</sup>*Id.* §§ 12181-12189.

<sup>7</sup>*Id.* § 12181(7)(J).

<sup>8</sup>*Id.* § 12187.

<sup>9</sup>*Policy Letter to Zirkel*, 20 IDELR 134 (OCR 8/23/93).

<sup>10</sup>*Saddleback Valley (CA) Unified Sch. Dist.*, 27 IDELR 376 (OCR 5/5/97).

<sup>11</sup>34 C.F.R. § 104.3(f).

<sup>12</sup>34 C.F.R. § 104.39.

school district via contract with a private entity.<sup>13</sup> The online school was owned and operated by a private entity under a “management services agreement” with the school district. Even though the agreement said the private company was responsible for complying with all applicable laws, the school district violated Section 504 by not ensuring that the online school operated in compliance with Section 504. The program discriminated in admissions decisions. First, it refused to admit students needing certain accommodations or services, including modified curriculum, behavioral goals requiring counseling or therapy, translator support, para-educator support, more than 40 minutes per week of special education instruction, certain AT, extended time to complete course, or tutoring. Second, it refused to admit students who could not complete work independently or who had a reading/writing ability below 6th/7th grade.

Finally, a school district may not provide significant assistance to an outside entity that discriminates against persons with disabilities even if that outside entity is not covered by Section 504 or the ADA. Significant assistance need not be in the form of financial assistance. OCR found that a school district violated Section 504 by providing significant assistance to a YMCA that operated before and after school programs at many of the districts schools. The assistance took the form of reduced rent, assistance in distributing information about the program, and promoting it to parents.<sup>14</sup> The YMCA discriminated against students with disabilities by categorically refusing to provide one-on-one aides, diapering services or the administration of insulin instead of individually determining whether an accommodation request would fundamentally alter the program or constitute an undue burden.<sup>15</sup>

### **C. Eligibility**

To be eligible for services under the IDEA, a student's disability must meet the definition of one of several listed disabilities and, as a result, the student must require special education services. The definition of disability under section 504 is much broader. The statute defines an "individual with a disability" as:

[A]ny person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.<sup>16</sup>

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<sup>13</sup>*Quillayute Valley (WA) School District*, 49 IDELR 293 (OCR 11/26/07); *see also Elkhart (KS) Unified School District 218*, 51 IDELR 51 (OCR 3/26/08) (Online school operated by school district and available to students across the country required to inform students of the procedures to request accommodations and should be able to provide, at a minimum, modifications to the regular education program including test taking and assignment deadlines).

<sup>14</sup>*Capistrano (CA) Unified School District*, 108 LRP 17704 (OCR 10/10/07).

<sup>15</sup>*Id.*

<sup>16</sup>29 U.S.C. § 706(8)(b).

Additionally, under section 504, students with disabilities are eligible even if they do not need any special education services. A student would be eligible if the only services received were modifications in the regular education program.<sup>17</sup> Therefore, students whose disabilities do not meet the criteria for special education, but who still need some specialized assistance, including assistive technology, may be covered by Section 504.<sup>18</sup>

Furthermore, if a school determines that a student with a disability is not eligible for services under the IDEA, it must have a process in place to determine whether the student is covered by section 504.<sup>19</sup> The district is required to do an evaluation of any person who because of disability needs, or the district believes to need, regular or special education and related services. If the district does not believe the student has a disability and refuses to evaluate the child it must give the parents notice of their due process rights.<sup>20</sup>

### **1. Other Health Impaired example**

The eligibility criteria for both the IDEA and Section 504 can be better understood by looking at an example under the category of other health impaired (OHI). Under the IDEA, OHI is defined as:

Other health impairment means having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that—

(i) Is due to chronic or acute health problems such as asthma, attention deficit disorder or attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, sickle cell anemia, and Tourette syndrome; and

(ii) Adversely affects a child's educational performance.<sup>21</sup>

Applying this definition to a student with Rheumatoid Arthritis, the mere fact that Rheumatoid Arthritis is not explicitly mentioned in the definition does not preclude coverage. The list is not exhaustive. Next, what does the term "educational performance" mean. This is

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<sup>17</sup>34 C.F.R. § 104.33(b)(1).

<sup>18</sup>*U.S. Dept. of Ed., Joint Policy Memorandum*, 18 IDELR 116 (9/16/91); *OSEP Policy Letter to Teague*, 20 IDELR 1462 (2/15/94).

<sup>19</sup>*See Maine (ME) School Administrative District #70*, 51 IDELR 83 (OCR 3/24/08).

<sup>20</sup>*Letter to Veir*, 20 IDELR 864 (OCR 12/1/93).

<sup>21</sup>34 C.F.R. § 300.8(c)(9).

a broader term than “academic” performance. So, just because the student may be doing well academically or on standardized testing is not enough to rule out eligibility under the IDEA. However, to be eligible under the IDEA, the student needs must be such as to require special education. If the student needs to be exempted from the district’s attendance policy, an extra set of books at home for when she has unexpected flare ups, and provisions for a regular education tutor when her condition requires that she be out of school for more than a few days, these are not special education services. Therefore, she would not be eligible under the IDEA.

Under Section 504, the analysis would be different. The first question to consider is whether there is a substantial limitation of a major life activity. In this case there is, because she is missing extended periods of school as a result of her disability and, presumably, there are other substantial limitations on other major life activities as well. Next, although she does not need special education services, she does need modifications to the delivery of regular education to her. This would qualify her under Section 504.

## **2. Student with peanut and treenut allergies (PTAs) example<sup>22</sup>**

OCR will not question the substance of a district’s decision except in extraordinary circumstances. In this case, the evidence from the student’s doctor that her allergies were life-threatening warranted a finding of an extraordinary circumstance. OCR indicated concerns with the district’s decision to find the student ineligible under Section 504, especially in light of her doctor’s opinion and the lack of evidence to the contrary or the failure to consult anyone with nearly the qualifications of her doctor. The District agreed to reconsider her eligibility, and, if eligible, to develop a Section 504 plan meeting Section 504 requirements, which will be discussed below.

## **3. Application of the ADA Amendments Act of 2008 (ADAAA) to Section 504 in schools<sup>23</sup>**

The ADAAA was signed into law on September 25, 2008, and went in to effect on January 1, 2009.<sup>24</sup> It is intended to overturn several Supreme Court cases placing an overly narrow interpretation on eligibility under the ADA. The cases arose in the employment context, but because the eligibility definitions apply to all three titles, these cases technically applied to schools as well. The intent of the ADAAA was to make it easier to meet the eligibility definition. Because Section 504 has the same definition of disability as the ADA, the ADAAA explicitly applies to Section 504.<sup>25</sup>

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<sup>22</sup>*Gloucester County (VA) Public Schools*, 49 IDELR 21 (OCR 1/28/07).

<sup>23</sup>*Protecting Students With Disabilities, Frequently Asked Questions About Section 504 and the Education of Children with Disabilities*. <http://www.ed.gov/about/offices/list/ocr/504faq.html>.

<sup>24</sup>Cong. Rec.-House, daily edition, H8286, Sept. 17, 2008, Sec. 8.

<sup>25</sup>*Id.* Sec. 7.

Specifically, the ADA AAA emphasizes that the definition of disability should be interpreted broadly. It adds several examples to the list of “major life activities” such as walking, reading, bending and communicating. It states that other than ordinary eye glasses or contact lenses, “mitigating measures” will not be considered when determining whether a person has a disability.<sup>26</sup>

OCR revised its question and answer memo on Section 504 in light of the ADA AAA. OCR indicated that it did not need to amend its regulations and that it is interpreting Section 504 consistent with the ADA AAA.<sup>27</sup> OCR noted that its definition of major life activities is not exhaustive. Therefore, additional examples in the ADA AAA do not need to be formally included in amended regulations.<sup>28</sup>

Moreover, in light of the ADA AAA, other than ordinary eye glasses or contact lenses, school districts may no longer consider the effects of mitigating measures when determining eligibility.<sup>29</sup> OCR then quotes the list of examples of mitigating measures from the ADA AAA, which can include such things as medication, medical supplies, assistive technology, and “learned behavioral or adaptive neurological adaptations.”<sup>30</sup>

Eligibility based on temporary impairments are to be considered on a case-by-case basis, considering the expected duration of the impairment and the extent to which it actually limits a major life activity.<sup>31</sup> Moreover, persons are not to be “regarded as” having a disability if the impairment is transitory and minor. A transitory impairment is one with an expected duration of 6 months or less.<sup>32</sup>

#### **D. Program Access**

In order to prevent discrimination under Section 504, schools must take all reasonable steps to ensure that students with disabilities have access to the full range of programs and activities offered by the school.<sup>33</sup> A school district is not required to make every part of every

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<sup>26</sup>*Id.* Sec. 3.

<sup>27</sup>*Protecting Students.*

<sup>28</sup>*Id.* Quest. 12.

<sup>29</sup>*Id.* Quest. 21.

<sup>30</sup>*Id.*

<sup>31</sup>*Id.* Quest. 34.

<sup>32</sup>*Id.*

<sup>33</sup>34 C.F.R. §§ 104.4, 104.21, 104.22, 104.34, 104.37. *See Eldon (MO) R-I School District,*

building it owns fully accessible. However, it is responsible for ensuring that all of its programs are accessible to students with disabilities.<sup>34</sup> In meeting this program accessibility mandate, a school does not need to make structural changes to existing facilities if other effective methods are available. However, the school must give priority to those methods which enable students with disabilities to participate "in the most integrated setting appropriate."<sup>35</sup>

There is a higher standard of accessibility for "new construction." Under Title II, new construction is any building where construction commenced prior to January 26, 1992. Under section 504, new construction is any building where construction commenced after June 3, 1977. New construction must, to the maximum extent feasible, be readily accessible to and usable by persons with disabilities.<sup>36</sup>

Section 504 applies not just to students with disabilities, but also to parents with disabilities. In one case, a district was charged with violating section 504 because it failed to provide to the parents of a student with a disability important educational records and notices in an alternative format (Braille), thereby "denying the Parents the opportunity to effectively participate in the Student's education." To resolve the complaint, the district agreed to obtain its own Braille embosser, scanner, and related software to format material in Braille. The district agreed to provide the parents with Braille copies of all IEPs, records, evaluations, notices and correspondence.<sup>37</sup> In another case, the Second Circuit ruled that parents who are deaf are entitled to a sign-language interpreter for school-initiated conferences incident to their child's academic or disciplinary progress.<sup>38</sup>

Over the years, OCR has issued a number of decisions concerning the accessibility of schools. What follows is an illustrative list of a number of those decisions:

1. District found to be in compliance because students with physical disabilities were participating in regular physical education and occupational/vocational education programs that were adapted to their

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EHLR 352:145 (OCR, 1/16/86); *Beaver Dam (WI) Unified Sch. Dist.*, 26 IDELR 761 (OCR, 2/27/97)(Access to chorus room and auditorium); *Saddleback Valley (CA) Unified Sch. Dist.*, 27 IDELR 376 (OCR, 5/5/97).

<sup>34</sup>34 C.F.R. § 104.21.

<sup>35</sup>*Id.* § 104.22(b).

<sup>36</sup>*DuPage (IL) High Sch. Dist.*, 42 IDELR 12 (OCR 2/25/04) (ramp to one entrance was too steep, no signage for accessible doors for another entrance, inaccessible restrooms).

<sup>37</sup>*Ann Arbor (MI) Public Schools*, 37 IDELR 44 (OCR 4/29/02).

<sup>38</sup>*Rothschild v. Grottenthaler*, 907 F.2d 286 (2d Cir. 1990).

needs.<sup>39</sup>

2. District needed to ensure the following were accessible: parking spaces, restrooms, water fountains, locker and shower facilities, classroom space, gym class, cafeteria, band room, and administrative offices.<sup>40</sup>
3. Chorus room and auditorium must be accessible.<sup>41</sup>
4. District required to ensure the equipment needs and facility modifications to address needs of students with severe physical disabilities were provided.<sup>42</sup>
5. None of the district's middle schools or high schools were accessible to students with mobility impairments and district entered into a settlement agreement.<sup>43</sup> The district would complete an accessibility evaluation of all of its schools. The district would then complete an action plan for completing required accessibility modifications, including those meeting the "new construction" criteria (buildings or renovations begun after June 3, 1977). Students would be offered opportunity to attend schools that are accessible or programs will be moved to accessible parts of buildings. And, carrying was not an acceptable way to provide access.
6. School playgrounds must have an accessible route, an accessible surface beneath the equipment—firm stable and slip resistant, and a reasonable number of accessible play equipment, but at least one.<sup>44</sup>
7. District was required to provide a sign language interpreter for a school play open to the public after school hours to a student with hearing impairment who used a sign language interpreter for most of his communication. The district's offer to allow him to watch it during the day with elementary students or to watch a professional production of the play did not provide an effective means of communication for him to watch the play. Doing so would not fundamentally alter the nature of the

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<sup>39</sup>*School District of Pittsburgh (PA)*, EHLR 257:492 (OCR 2/27/84).

<sup>40</sup>*Eldon (MO) R-I School District*, EHLR 352:145 (OCR, 1/16/86).

<sup>41</sup>*Beaver Dam (WI) Unified Sch. Dist.*, 26 IDELR 761 (OCR, 2/27/97).

<sup>42</sup>*Saddleback Valley (CA) Unified Sch. Dist.*, 27 IDELR 376 (OCR, 5/5/97).

<sup>43</sup>*Puerto Rico (PR) Department of Education*, 38 IDELR 103 (OCR 9/30/02).

<sup>44</sup>*Hinds County (MS) School District*, 49 IDELR 111 (OCR 3/19/07).



play or place an undue administrative or financial burden on the district.<sup>45</sup>

8. Carrying, which does not allow for independent access, was not an acceptable means for a wheelchair user to access transportation or a gym. "Carrying is also inconsistent with Section 504's critical objective of encouraging individuals with disabilities to participate in programs and activities."<sup>46</sup>

## **E. Free Appropriate Public Education (FAPE)**

As with the IDEA, Section 504 guarantees that students with disabilities receive a FAPE. However, Section 504 defines FAPE a little differently. Under Section 504, it is defined as *regular* or special education and related aids and services that are designed to meet individual educational needs of students with disabilities as adequately as the needs of nondisabled students are met.<sup>47</sup> All services are to be without cost to the students or their parents, except for those fees that are imposed on nondisabled students or their parents.<sup>48</sup> Furthermore, School districts must ensure that students are able to attend school the entire day, unless based on the nature of their disability they are not able to do so.<sup>49</sup>

### **1. Available Services**

Although generally speaking a defense to a request for an accommodation under Section 504 is that it is not "reasonable, there is no reasonable accommodation limitation to the FAPE requirement.<sup>50</sup> The U.S. Department of Education, in a policy memorandum about attention deficit disorders (ADD),<sup>51</sup> indicated that the following services are available under

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<sup>45</sup>*Bellwood-Antis (PA) School District*, 50 IDELR 81 (OCR 9/21/07).

<sup>46</sup>*Fletcher (OK) Public Schools*, 52 IDELR 50 (OCR 7/11/08) (case also addresses inaccessible routes of travel, signage, restrooms, parking and playground).

<sup>47</sup>34 C.F.R. § 104.33(b)(1).

<sup>48</sup>*Id.* § 104.33(c)(1).

<sup>49</sup>See *Eldon (MO) R-I School District*, EHLR 352:145 (OCR, 1/16/86).

<sup>50</sup>*Policy Letter to Zirkel*, 20 IDELR 134 (OCR 8/23/93) (The key question in your letter is whether OCR reads into that Section 504 regulatory requirement for a free appropriate public education (FAPE) a "reasonable accommodation" standard, or other similar limitation. The clear and unequivocal answer to that is no.).

<sup>51</sup>Note that virtually all students with disabilities being educated under IDEA are also covered by Section 504, so these comments would apply to students classified under IDEA as well. Also, although the policy memo is explicitly discussing students with ADD, there is no reason that these services could not be made available, as appropriate, to a student with any other disability.

Section 504:<sup>52</sup>

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

- a. Providing a structured learning environment
- b. Repeating and simplifying instructions about in-class and homework assignments
- c. Supplementing verbal instructions with visual instructions
- d. Using behavioral management techniques
- e. Adjusting class schedules and modifying test delivery
- f. Using tape recorders, computer-aided instruction, and other audio-visual equipment
- g. Selecting modified textbooks or workbooks
- h. Tailoring homework assignments.

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

OCR has also ruled that it is a violation of Section 504 to automatically exclude students from honors classes because of the need for accommodations. Therefore, if a qualified student with a disability requires related aids and services to participate in an honors program "such as extended time on tests or the use of computer to take notes" then the district cannot deny them to the student.<sup>53</sup>

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<sup>52</sup>*U.S. Dept. of Ed., Joint Policy Memorandum*, 18 IDELR 116 at 118 (9/16/91).

<sup>53</sup>*Wilson County (TN) School District*, 50 IDELR 230 (OCR 1/29/08).

## **2. Application of right to FAPE to students with allergies**

OCR has indicated that the right to a FAPE includes accommodating the needs of students with peanut and tree nut allergies (PTAs).<sup>54</sup> First, OCR enunciated the general standard—school districts must meet needs of students with allergies as adequately as it meets needs of students who do not have disabilities by adequately addressing student’s PTA-related needs and ensuring a medically safe environment.

OCR then reviewed the elements of an appropriate plan: (1) Adequate policies on PTA risk management in each school program or activity, including classroom, common use rooms (gym, lunch, labs, art and music), recess, bus transportation, field trips, extracurricular. (2) Sufficient emergency response policies covering all school programs, including proper administration of epinephrine and identifying responsible staff. (3) Comprehensive training for all responsible staff, including substitutes, on PTAs and implementation of a student’s plan. (4) At least one PTA-trained staff must be at the school and at all school-related activities who can administer epinephrine. (5) A process for communicating with other parents and students their PTA-related responsibilities. While OCR acknowledged that a district cannot effectuate a total ban on others bringing in PTAs, it must provide notice that includes that a student has PTAs, the nature of PTAs, the potential harm, the steps district is taking, and what it is asking of parents. (6) Identify the sanctions applicable to persons who harass students with PTAs. (7) Establish a ban on district sale or serving of PTAs anywhere on school premises or at any school functions, including those off-site.

## **3. Application of right to FAPE for students with diabetes**

Similarly, OCR has indicated that FAPE applies to meeting the needs of students with diabetes. It has set forth a number of guidelines in a policy letter.<sup>55</sup> Unlike medicine, which the school is not required to provide for any student, if the school provides food to students generally, it would also have to provide an appropriate lunch to students with disabilities who have special dietary needs on the same basis that food is provided to students without disabilities, and may need to provide special foods to meet the individual needs of a student with a disability.

OCR has also ruled on the adequacy of school district plans for meeting the needs of students with diabetes. In one case OCR found that the district met the needs of a student with insulin-dependent diabetes, who also had an intellectual disability, by conducting in-service diabetes training to all staff who had contact with him, hiring an aide to assist the student with his snack schedule and monitoring his diabetes, and implementing the snack

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<sup>54</sup>*Saluda (SC) School District One*, 47 IDELR 22 (OCR 8/4/06).

<sup>55</sup>*Letter to Veir*, 20 IDELR 864 (OCR 12/1/93).

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In another case, the district developed an accommodation plan that allowed the student to leave class to take snacks and additional food as needed and to monitor his blood sugar level, that notified his teachers of the plan, and included a quick reference sheet of symptoms to look for in the event an individual is hypoglycemic or hyperglycemic.<sup>57</sup> In a third case, the district agreed to designate a back-up person to the school nurse to administer glucagons and require the bus company to ensure the drivers allowed the student to take snacks while riding the bus.<sup>58</sup>

#### 4. Testing Accommodations

Generally, testing accommodations will be required. However, OCR allows districts and states to preclude the use of accommodations that will invalidate the test. This seems to be a misapplication of one of the evaluation protections in Section 504 that most appropriately applies to evaluations to determine eligibility and the needs of a student:

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).<sup>59</sup>

Applying this standard, OCR has held that a state may restrict the use of an AT device on a high stakes test, namely an Arkenstone scanner to read text during a state reading exam, in part based on a finding that such use would invalidate the test.<sup>60</sup>

OCR also upheld the position of the North Carolina Department of Public Instruction that students who had a scribe dictate answers on state writing tests would not be scored for "conventions"—grammar, punctuation, spelling—on the state's writing tests. There were a number of mitigating factors, however, which lessened the impact of the State's position. The students could still receive a passing score if they scored high enough on the content portion of the test, which was more heavily weighted than the conventions portion. Moreover, the state provided for an alternate assessment if the IEP Team determined the student was unable

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<sup>56</sup>*Renton (WA) Sch. Dist.*, 21 IDELR 859 (OCR 5/31/94).

<sup>57</sup>*Eureka (CA) City Sch.*, 23 IDELR 238 (OCR 6/12/95).

<sup>58</sup>*Jamestown Area (PA) School District*, 37 IDELR 260 (OCR 7/11/02).

<sup>59</sup>34 C.F.R. § 104.35(b)(3).

<sup>60</sup>*Alabama Dept. of Ed.*, 29 IDELR 249 (OCR 4/10/98).

to access the standard test even with accommodations. Finally, the test was not the sole factor in determining whether the student advanced to the next grade. OCR rested its decision upon the assertion by the state that the use of the scribe would invalidate the conventions portion of the test and that this portion of the writing skills test was an essential part of its educational program.<sup>61</sup>

On the other hand, OCR affirmed the use of extensive accommodations in another case where the state took the position that they were valid accommodations for the Maryland writing test. The accommodations included unlimited time over multiple sessions, the use of a Dyna Vox to spell and to access words and symbols, the use of a scribe to take dictation from the Dyna Vox, and the scribe would review the work for punctuation and capitalization and make changes as indicated by the student.<sup>62</sup>

## **5. Nonacademic settings**

School districts must provide nonacademic and extracurricular activities so as to afford students with disabilities an equal opportunity to participate with students who do not have disabilities to the maximum extent appropriate to the needs of the person with a disability.<sup>63</sup> Such activities may include "counseling services, physical recreational athletics, transportation, health services, recreational activities, special interest groups or clubs sponsored by the recipients, referrals to agencies which provide assistance to handicapped persons, and employment of students."<sup>64</sup>

OCR found that a school district violated these provisions when it refused to allow several students with disabilities to go on a field trip.<sup>65</sup> The decision was not based on any limitations identified in the students' IEPs, it was not made by the IEP Team, and the district did not consider whether the provision of aids or services could have addressed any safety or other special needs concerns. OCR also found that a school district violated Section 504 when it failed to ensure that a student's IEP was implemented while the student was on a field trip, failed to ensure the student's FM trainer was available for an orientation program, and when it failed to train the transportation providers.<sup>66</sup>

## **F. Least Restrictive Environment (LRE)**

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<sup>61</sup>*North Carolina Department of Public Instruction*, 43 IDELR 229 (OCR 3/14/05).

<sup>62</sup>*Prince George's County (MD) Pub. Schs.*, 33 IDELR 279 and 34 IDELR 95 (OCR 7/28/00).

<sup>63</sup>34 C.F.R. § 104.34(b) and 104.37(a)(1).

<sup>64</sup>34 C.F.R. 104.37(A)(2).

<sup>65</sup>*Salida (CA) Union School District*, 49 IDELR 166 (OCR 3/8/07).

<sup>66</sup>*Waterbury (CT) School District*, 51 IDELR 198(OCR 3/24/08).

As with the IDEA, section 504 requires that each student with a disability is to be educated with students who are not disabled, to the maximum extent appropriate. There is also a similar preference for educating students in the regular education setting. Students are to be placed in the regular educational environment *unless it is demonstrated* by the school that the education of the person in the regular environment with the use of supplementary aids and services cannot be achieved satisfactorily. For students placed in a setting other than the regular educational environment, the school shall take into account the proximity of the alternate setting to the person's home.<sup>67</sup>

LRE also applies to transportation. Transportation must be provided with students who do not have disabilities to the maximum extent appropriate. It is a violation to provide segregated transportation based on administrative convenience.<sup>68</sup>

## **G. Procedural Safeguards and Due Process**

Districts are required to develop a procedure to determine the student's needs. Each district has an independent duty "under Section 504 to identify, assess and provide an appropriate education to any student who is within its jurisdiction in need of special education or related services based on a disability." The district is responsible for gathering the necessary information and training the staff before enrolling the student. The failure of the student's group home to provide information to the district did not relieve the district of its obligation to identify needs and train staff.<sup>69</sup>

In developing their Section 504 procedures, districts may choose to simply use the IEP procedures under the IDEA to determine a student's needs under Section 504.<sup>70</sup> However, because most of the services under Section 504 will be provided by regular education staff within the school, many schools have set up building level teams to implement section 504. In such cases, the procedures developed must conform to section 504. Most of the requirements are similar but not identical to the IDEA's requirements.

### **1. "Child Find"**

Like the IDEA, Section 504 includes a child find requirement. Under the IDEA, the child find obligation is that all children, regardless of the severity of their disability, are identified,

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<sup>67</sup>34 C.F.R. § 104.34(a)(emphasis added).

<sup>68</sup>*Eldon (MO) R-I School District*, EHLR 352:145 (OCR, 1/16/86).

<sup>69</sup>*Saddleback Valley (CA) Unified Sch. Dist.*, 27 IDELR 376 (OCR 5/5/97).

<sup>70</sup>34 C.F.R. §§ 104.33(b)(2), 104.36.

located and evaluated.<sup>71</sup> Under Section 504, school districts must annually locate and identify every qualified person with a disability residing in [its] jurisdiction who is not receiving a public education.<sup>72</sup> Although this seems to be somewhat different than the IDEA standard and apply to students who are out of school, OCR has applied a more IDEA like child find requirement under Section 504 as well.<sup>73</sup>

Relying on the Appendix to Section 504, OCR determined that districts must "undertake to identify and locate all unserved" students with disabilities.<sup>74</sup> The facts of the case before it are not unlike situations we see all too often. The parent met with school district staff to discuss her concerns about her son's education and expressing her concern that he might have ADHD or a reading disability. She also asked about special education and Section 504, and about having her son "identified and served as a student with a disability." The district refused, stating that they did not suspect that he had a "qualifying disability" as his academic performance was above average and he was making "choices" about his behavior.

OCR found that the district (which eventually did identify the student) violated Section 504 by not evaluating the student "before taking any action with respect to the initial placement" of the student. OCR noted that Appendix A "specifies that 'any action' includes denials of placement." OCR also found that the district violated Section 504 by not giving the parent a notice of her procedural rights. The district's decision "to refuse to identify or evaluate the student triggered the parent's right to receive" her due process rights.

## **2. Procedures for developing the Section 504 plan**

Students who need or are believed to need special services because of a disability must be provided with a comprehensive, individualized evaluation of their needs.<sup>75</sup> However, there are no specifics in the regulations with regard to a timeline. OCR has determined the process must be completed "within a reasonable amount of time."<sup>76</sup> The need for an evaluation may be triggered by a parental request, teacher observations, or "may become apparent from the

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<sup>71</sup>34 C.F.R. 300.111(a).

<sup>72</sup>34 C.F.R. 104.32(a).

<sup>73</sup>*Weld County (CO) School District RE-5J*, 49 IDELR 81 (OCR 1/18/07); also see *New Orleans (LA) Public Schools*, 50 IDELR 260 (OCR 1/11/08).

<sup>74</sup>34 C.F.R. Part 104, Appendix A, Subpart D.

<sup>75</sup>34 C.F.R. § 104.35(a).

<sup>76</sup>*Yancey (NC) County Schools*, 51 IDELR 23 (OCR 5/6/08) (OCR found North Carolina's 90-day timeline to be reasonable).

circumstances.”<sup>77</sup>

Decisions about eligibility and the services a student will receive must be made by a group of people, knowledgeable about the child, the evaluation information and the placement options.<sup>78</sup> This group is often referred to as a multi-disciplinary team (MDT) or Section 504 Team. The parents should be involved in the process.<sup>79</sup> The student’s needs and the services to be provided must be specifically identified, in writing, but there is no requirement for an IEP.<sup>80</sup>

As with the IDEA, there must be regular reevaluations, although they need not be every three years.<sup>81</sup> Additionally, unlike the IDEA, reevaluations must also be provided “before a significant change in placement.”<sup>82</sup> OCR would “consider transferring a student from one type of program to another or terminating or significantly reducing a related service as a significant change in placement.”<sup>83</sup> The District is also required to hold a Section 504 Team meeting prior to a significant change in placement.<sup>84</sup>

Additionally, OCR considers a determination that a student is no longer eligible for Section 504 services to be a significant change in placement. Therefore, before removing a student from their Section 504 services, the school district must reevaluate the child and offer

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<sup>77</sup>*Id.* (Staff were aware the student was undergoing cancer treatment in January and would be out of school for several months).

<sup>78</sup>34 C.F.R. § 104.35(c).

<sup>79</sup>Technically, parents are not listed as members of the Section 504 Team, but since parents have the right to an impartial hearing if they disagree with the decision, they should be included. 34 C.F.R. § 104.36. Moreover, although OCR found that a district did not violate a child’s right to a FAPE when it did not allow a parent to attend a Section 504 Team meeting, the district had allowed the parent to attend all prior meetings, met with the parent for her input before and after the meeting and considered her requests at the meeting. *Escondido (CA) Union Elementary School District*, 109 LRP 24519 (OCR 1/6/09).

<sup>80</sup>*Senior Staff Memorandum*, EHLR 307:01 (OCR 10/24/88)(If the needed information does not appear in the IEP, “OCR must look beyond the IEP document to determine whether the school district has identified the child’s needs, *described* the necessary program somewhere and provided services in amounts that the district has determined are necessary” according to the Section 504 process)(emphasis added).

<sup>81</sup>34 C.F.R. § 104.35(d) 34 C.F.R. § 104.35(a).

<sup>82</sup>34 C.F.R. § 104.35(a).

<sup>83</sup>*Protecting Students*, Quest. 30.

<sup>84</sup>*Hillsborough County (FL) School District*, 45 IDELR 102 (OCR 4/1/05).



due process procedures, which are discussed below.<sup>85</sup>

### 3. Due Process Rights

Parents have due process rights if they disagree with district's recommendations under Section 504, including the right to an impartial hearing, representation by an attorney, and a review procedure.<sup>86</sup> The hearing officer cannot be an employee of the district, or have a personal or professional interest which would conflict with his or her objectivity.<sup>87</sup> Presumably this would also bar employees of other districts or the SEA from serving as hearing officers. The school may use the due process procedures under the IDEA to satisfy the Section 504 mandates, but is not required to do so.<sup>88</sup> Finally, although informal dispute resolution opportunities are encouraged, a district may not require a parent to pursue any alternative steps prior to filing for a due process hearing.<sup>89</sup>

The due process regulations under Section 504 do not specifically mention the right to an independent evaluation at school expense. However, OCR has indicated that parents have the right to request a hearing to challenge the district's evaluation (or refusal to conduct an evaluation).<sup>90</sup> OCR has also determined that an impartial hearing process must include "status quo," i.e., the right to continued services pending an appeal.<sup>91</sup>

#### H. Discipline Under Section 504

Like the IDEA, Section 504 includes protections for students with disabilities who may face disciplinary proceedings. In fact, in some respects it was Section 504 principles that lead to the adoption of the manifestation determination under the IDEA.<sup>92</sup> However, the principles governing discipline under Section 504 are found in OCR policy memoranda and decisions, not in the regulations.

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<sup>85</sup>*Glendora (CA) Unified School District*, 49 IDELR 263 (OCR 4/3/07).

<sup>86</sup>34 C.F.R. § 104.36.

<sup>87</sup>*Island Trees (NY) Union Free School District*, EHLR 257:290 (OCR 4/14/81); *Leon County (FL) School District*, 50 IDELR 172 (OCR 12/18/07).

<sup>88</sup>34 C.F.R. § 104.36.

<sup>89</sup>*Escondido (CA) Union Elementary School District*, 109 LRP 24519 (OCR 1/6/09).

<sup>90</sup>*Bradley County (TN) Sch. Dist.*, 34 IDELR 239 (OCR 12/15/00)(The district actually paid for an independent AT evaluation of the student).

<sup>91</sup>*Policy Letter to P. Zirkel*, 22 IDELR 667 (OCR 5/15/95).

<sup>92</sup>*See S-1 v. Turlington*, 635 F.2d 342 (5th Cir. 1981).

## 1. Prevention focus

The IDEA requires a school district to address problem behaviors in the IEP. Similarly, OCR faulted a school district under Section 504 for failing to consider, before the start of a summer school program, whether the student required program modifications due to his disability in order to participate in and benefit from the summer school program. The district also failed to consider possible accommodations that would have permitted the student to remain in the summer school program once he began exhibiting problematic behavior.<sup>93</sup>

## 2. Behavior Intervention Plan

OCR has also required a district to develop an individual behavior management plan where the student exhibited repeated or serious misconduct to the point that addressing the negative behavior became a significant component of his educational program.<sup>94</sup> If a student's behaviors are severe enough to require intensive management, disciplining the student the same as students that do not have a disability is not appropriate.<sup>95</sup>

## 3. Change of Placement Guidelines

As with the IDEA, Section 504 distinguishes between short term suspensions and long term suspensions. A short term suspension of less than 10 consecutive days is not a significant change of placement.<sup>96</sup> However, a series of short term suspensions that are each less than 10 days may create a pattern that constitutes a significant change of placement. Factors to consider are: (1) the length of each suspension, (2) the proximity of suspensions to each other, and (3) the total amount of time the student has been excluded from school.<sup>97</sup> These factors are slightly different from those under the IDEA, which also requires that the behaviors be substantially similar.<sup>98</sup>

Long term suspensions are considered a significant change in placement. They can be either a permanent expulsion, an indefinite suspension, or a suspension for more than 10

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<sup>93</sup>*Savannah (MO) School Dist.*, 50 IDELR 262 (OCR 12/6/07).

<sup>94</sup>*Elk Grove (CA) Unified School Dist.*, 25 IDELR 759 (OCR 1997).

<sup>95</sup>*Orange (CA) Unified School Dist.*, 20 IDELR 770 (OCR 1990).

<sup>96</sup>*Broward County (FL) School Dist.*, 36 IDELR 159 (OCR 2001).

<sup>97</sup>*Id.*; *Kalamazoo (MI) Public School District*, 50 IDELR 80 (OCR 9/21/07) (Student received 17 suspensions totaling 22 days of removal during a school year and this was considered a pattern of exclusion requiring a reevaluation and manifestation determination).

<sup>98</sup>34 C.F.R. § 536.

consecutive school days.<sup>99</sup> As with any significant change in placement under Section 504, a district must conduct a reevaluation before the change of placement.<sup>100</sup>

#### **4. Manifestation Determination**

In addition to the reevaluation, a school district must conduct a manifestation determination for any proposed significant change in placement based on behavior, whether it is because of a series of short term suspensions or a long term suspension.<sup>101</sup>

The 504 team must determine if there is a relationship between the student's disability and the alleged incident. If the team determines that there is a relationship, the school cannot change the student's placement through the discipline process, and should determine whether the student's program is appropriate. If the team determines that there is no relationship, the student may be treated like a regular education student with regard to punishment.<sup>102</sup>

#### **5. Provision of Services**

If the 504 team determines that the misconduct is a manifestation of the disability, the student may not be suspended beyond 10 school days. Any change of placement beyond that must be through the 504 team. If the misconduct is not a manifestation of the disability, the school is NOT required to provide educational services during the length of the removal. However, if students who do not have a disability are entitled to receive educational services during a suspension, then students with disabilities would also be entitled to services.<sup>103</sup>

##### **I. Assistive Technology**

If a student with a disability, who is not receiving special education services, needs an assistive technology device to fully participate in school activities, Section 504 may require that the school provide the device, as well as any training needed to effectively use the device.<sup>104</sup> Because services under Section 504 are to be provided for free, the school may also be

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<sup>99</sup>*Broward County (FL) School Dist.*, 36 IDELR 159 (OCR 2001); *Protecting Students*, Quest. 30.

<sup>100</sup>34 C.F.R. § 104.35(a); *Glendora (CA) Unified School District*, 49 IDELR 263 (OCR 4/3/07).

<sup>101</sup>*Glendora (CA) Unified School District*, 49 IDELR 263 (OCR 4/3/07).

<sup>102</sup>*Id.*

<sup>103</sup>*Id.*

<sup>104</sup>*U.S. Dept. of Ed., Joint Policy Memorandum*, 18 IDELR 116 at 118 (9/16/91); *Colton Joint (CA) Unified Sch. Dist.*, 22 IDELR 895 (OCR 4/7/95).

responsible for repairs and maintenance.

Over the years, OCR has issued a number of rulings concerning the use of AT. For example, OCR found a violation of Section 504 where the parent went out and purchased a computer for her son to use to take a computer course that was necessary for his education. (He was taking the course on a homebound basis.) He also needed a customized device to key in information with his head, based on his disability, which the mother was going to purchase. OCR found that the district failed to arrange for his use of equipment and related aids necessary for him to effectively participate in his computer course.<sup>105</sup>

In many of these cases, OCR found that there was no violation of section 504 because the school was providing the AT device in question. For example, OCR determined that there was no violation of Section 504 where the school purchased a MacIntosh computer for the student to use while in school. The student could use his IBM compatible computer at home for homework, store the work on disk, bring the disk in and have the work converted to MacIntosh format at school.<sup>106</sup> The following cases serve as an illustrative list of AT devices that have been funded by schools under Section 504:

1. Modification and adaptation of a computer to enable a student with quadriplegia to use the computer without assistance.<sup>107</sup>
2. Classroom hearing assistive device and reduction of noise levels for student with hearing impairment.<sup>108</sup>
3. Use of computer for student with mobility impairment to access library (district was not required to install an elevator to make the library accessible).<sup>109</sup>
4. Use of closed caption decoder for student with a hearing impairment while viewing videotapes.<sup>110</sup>
5. Use of tutorial software and laptop computer for student with

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<sup>105</sup>*Eldon (MO) R-I School District*, EHLR 352:145 (OCR 1/16/86).

<sup>106</sup>*Glendale (AZ) High Sch. Dist.*, 30 IDELR 62 (OCR 8/28/98).

<sup>107</sup>*Colton Joint (CA) Unified Sch. Dist.*, 22 IDELR 895 (OCR 4/7/95).

<sup>108</sup>*Cobb County (GA) Sch. Dist.*, 27 IDELR 229 (OCR 5/22/97).

<sup>109</sup>*Newton (MA) Pub. Schs.*, 27 IDELR 233 (OCR 5/30/97).

<sup>110</sup>*Chapel Hill-Carrboro (NC) City Schs.*, 27 IDELR 606 (OCR 1997).

narcolepsy.<sup>111</sup>

6. Use of Arkenstone scanner (the scanner takes a picture of the page and sends it to a reading machine or PC) to scan and read text for a learning disabled student.<sup>112</sup>
7. Use of a computer with a keyboarding program for written assignments for a student with ADHD.<sup>113</sup>
8. Use of an Alpha Smart (a very basic word processing laptop).<sup>114</sup>
9. Use of a Dyna Vox (a speech generating device), with pre-service and in-service staff training, pre-programming and re-programming of the device.<sup>115</sup>
10. Use of an FM system (FM--Frequency Modulated--systems, also called auditory trainers, transmit the teacher's voice directly to the student at a constant level) and school-issued hearing aids when delivery of the FM system was delayed.<sup>116</sup>
11. Use of a computer to take notes in an honors class.<sup>117</sup>

## **J. Complaints to the Office for Civil Rights**

The U.S. Department of Education's Office for Civil Rights (OCR) enforces Section 504. Complaints may be filed concerning individual students or groups of students. However, OCR will not investigate complaints that question the decision of the Section 504 Team on such matters as the accommodations or services to be provided. Those cases will need to go

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<sup>111</sup>*Bacon County (GA) Sch. Dist.*, 29 IDELR 78 (OCR 3/13/98).

<sup>112</sup>*Alabama Dept. of Ed.*, 29 IDELR 249 (OCR 4/10/98).

<sup>113</sup>*Kent (WA) Sch. Dist. No. 415*, 29 IDELR 978 (OCR 7/2/98).

<sup>114</sup>*Bradley County (TN) Sch. Dist.*, 34 IDELR 239 (OCR 12/15/00); *Fayette County (KY) School District*, 40 IDELR 130 (OCR 6/2/03).

<sup>115</sup>*Seminole County (FL) School District*, 46 IDELR 262 (OCR 6/1/06).

<sup>116</sup>*Wake County (NC) Public Schools*, 48 IDELR 52 (OCR 2/21/07) (10 week delay in making FM system operational did not result in a denial of a FAPE for this student, especially given the steps taken by district in the interim).

<sup>117</sup>*Wilson County (TN) School District*, 50 IDLER 230 (OCR 1/29/08).

through the impartial hearing process.<sup>118</sup>

OCR will accept complaints alleging procedural violations, lack of accessibility, failure to provide agreed upon services and claims of discriminatory treatment. Additionally, because virtually all students classified under the IDEA are also covered by Section 504, a failure to provide services identified in an IEP is also a violation of Section 504, which OCR will investigate.<sup>119</sup>

From the parents' perspective, one of the advantages of an OCR complaint is that OCR will conduct the investigation. On the other hand, as a result, the process is not within the parents' direct control. Of benefit to both parents and schools, OCR will attempt to resolve the complaint through early dispute resolution.

If someone files a complaint with OCR and they do not agree with OCR's decision, there is an appeals process within OCR. They may submit a written appeal to the Deputy Assistant Secretary for Enforcement within sixty days.<sup>120</sup>

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<sup>118</sup>*Beverly (MA) Pub. Schs.*, 29 IDELR 981 (OCR 7/20/98); *Glendale (AZ) High Sch. Dist.*, 30 IDELR 62 (OCR 8/28/98).

<sup>119</sup>*Policy Letter to Anonymous*, 18 IDELR 1037 (OSEP 4/6/92).

<sup>120</sup>*OCR Case Processing Manual, Section 306*,  
[http://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.html#III\\_6](http://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.html#III_6).