

Chapter 12

SECTION 504

What This Chapter Is About

Services, supports, and accommodations are also available to students under Section 504 of the Rehabilitation Act. There are specific steps involved in obtaining services under Section 504. First, identify the school's 504 coordinator and turn in a written request for evaluations. A team will be convened to determine if the student qualifies as a student with a disability under Section 504, and, if so, a Section 504 Plan may be written. The 504 Plan must include accommodations, including special education and related services, if necessary, to meet the individual needs of the student. Services and supports must be provided in the least restrictive environment. Section 504 also provides the student with some due process protections in discipline. Each school must set up a process for addressing disputes, including a mechanism for a parent to have access to an impartial hearing. Parents can also address Section 504 violations directly with the United States Department of Education, Office for Civil Rights, rather than the district's internal dispute resolution process.

Section 504 can be helpful in serving students who do not qualify for special education, and can also be used to provide supports and accommodations while students are being evaluated for special education. Section 504 also provides protections that may be used to enhance the rights of students who do qualify for special education.

Advocacy Hints in Chapter 12

- ◆ Look beyond special education programs to see if your school district receives federal funds, giving it responsibility under Section 504 (Page 2).
- ◆ Look to both Section 504 and special education if your child is having problems (Page 3).
- ◆ Since special education students are also covered under Section 504, they receive extra protections (such as requiring an evaluation before a change in placement) (Page 3).
- ◆ Use Section 504 to cover students who need only a plan of individualized supports and accommodations to fully access all school programs and activities (Page 4).
- ◆ Use the special education eligibility evaluation process, including the REED, to also evaluate for eligibility under Section 504 (Page 5).
- ◆ Include Section 504 accommodations in your child's IEP (Page 6).
- ◆ Put your child's 504 Plan in writing to avoid later disagreements (Page 7).
- ◆ Use Section 504 dispute resolution to address issues that cannot be addressed under the IDEA (Page 8).

Section 504

Section 504 of the Rehabilitation Act of 1973 prohibits discrimination against people with disabilities in any program that receives federal financial assistance. Section 504 states:

No otherwise qualified individual with a disability in the United States...shall, solely by reason of his disability, be excluded from participation in, be denied benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance... **29 USC 794.**

► **Advocacy Hint: Any federal program will do.** The issue of federal financial assistance means participation in any federally sponsored program. This includes such things as federal food and nutrition programs (school lunch program), financial aid to students, and the use of federal grants for building or training, in addition to federal funding for special education.

The Rehabilitation Act requires any agency that receives federal money to provide an opportunity for people with disabilities to participate and benefit from the programs they offer. Agencies like schools that receive federal money must provide reasonable accommodations and other services for students with disabilities, as defined by the Rehabilitation Act, so that those students can participate in, and benefit from general education and extracurricular programs and services. Students with disabilities should also have the opportunity to participate with non-disabled students (to the maximum extent appropriate for the student with disabilities) in nonacademic settings, such as recess and lunch.

Eligibility under Section 504

The definition of a person with a disability is broader under Section 504 than under The Individuals with Disabilities Act (IDEA). IDEA applies only to students with specified impairments who require special programs and services to benefit from education. **34 CFR 300.8.** Section 504 provides a general definition of a person with a disability as any person who:

- a) has a physical or mental impairment that substantially limits one or more major life activity;
- b) has a record of such an impairment; or
- c) is regarded as having such an impairment. **34 CFR 104.3(j).**

A person can have a disability and be entitled to the civil rights protections of Section 504 without being eligible for special education. Some conditions that have been found to be protected under Section 504, even if a child does not need special education include AIDS, ADHD, diabetes, dyslexia, mental illness, allergies (such as nut allergies) and seizure disorders. (In some cases, of course, those conditions may also meet IDEA criteria. For example, a student with ADHD might be characterized as "Other Health Impaired" and thus eligible for special education.) Also, "an impairment that is episodic or in remission is a disability if it would substantially limit a major life

activity when active." **42 USC 12102(4)(D)**. This may be particularly helpful in addressing some mental health disorders which produce symptoms that vary in severity over time.

Section 504 requires the school to conduct an evaluation, prior to taking any action that is related to the placement of the student --or a change of the student's placement-- in regular or special education. The evaluation requirements under Section 504 are far less specific than those used to qualify a child under IDEA, allowing school districts to establish their own standards and procedures for evaluation. The law does provide some guidance about evaluation procedures, however. Districts must ensure that the tests are valid and administered correctly. They may not rely on a single general intelligence test, and must ensure that the tests are designed to accurately measure whatever information the test is intended to capture. In both evaluating the student and making decisions about placement, the district is required to use information from a variety of sources, and make sure that the evaluation procedures include a process for documenting and carefully considering the information. Finally, the determinations made under Section 504 must be made by a group of people who know the child.

► **Advocacy Hint: Consider both special education and Section 504.** A parent whose child is experiencing significant problems in school may submit a written request that the district evaluate the child both under the IDEA and Section 504. Students who do not qualify for special education, but do need services, supports, and/or accommodations to address their disability-related needs, may find a Section 504 Plan provides adequate support. By considering both Section 504 and the IDEA from the outset, the student may benefit from the introduction of supports under a Section 504 Plan while further evaluations to determine eligibility under IDEA are conducted.

Some students are eligible as a student with a disability under the Rehabilitation Act definitions, but do not qualify for special education under the standards of IDEA and the Michigan Special Education Rules. Like the IDEA, Section 504 requires the school to provide a Free and Appropriate Public Education, which may include both regular or special education services, and related aids and services for these students, in addition to students that qualify for special education.

► **Advocacy Hint: All IDEA children are 504 children too.** Virtually all students who qualify for special education will also meet the definition of “disabled” in the Rehabilitation Act. The interplay between these two Acts provides significant protections for students, and some thought should be given to the similarities and the differences between the two acts, especially when eligibility under both acts provides extra protection. For example, while IDEA does not require an evaluation before a significant change in placement, Section 504 does. Because a special education student is almost certainly eligible under both Acts, this means that the student must be evaluated before a significant change in placement— even though IDEA does not require this. The parent will likely need to bring this up, however, since the staff charged with oversight of the IDEA may not be familiar with the rights conferred under Section 504.

► **Advocacy Hint: 504 may be just right.** There are several reasons why a student with a disability might not qualify for special education. Because special education eligibility is tied to specific categories which describe how a student may qualify, the standard for eligibility differs from that of Section 504. Section 504 is different from IDEA, but it is neither better nor worse than IDEA. If a student does not require anything more than the supports and accommodations that a Section 504 plan can provide, there is no reason to insist that the student must have an Individualized Education Program (IEP). For example, a student with diabetes may only need a Section 504 plan to ensure that blood sugars are well controlled, in order to have equal access to all school programs and activities, including physical education and field trips. If the Section 504 Plan is sufficient to meet those needs, Section 504 may be the most appropriate avenue of support.

The determination regarding whether a person has a disability varies, depending on what federal and/or state law applies to the specific set of circumstances. So, for example, different definitions of "disability" are used for Social Security determinations than are used for Special Education eligibility; similarly, eligibility under Section 504 differs from that under the IDEA. For more information about eligibility, see Chapter 3, "Referral and Eligibility."

How to Apply for and Get Section 504 Services

Federal law requires that the school take appropriate measures to identify and locate every qualified person who has a disability and is not receiving an appropriate public education. **34 CFR 104.32(a); 34 CFR 300.111.**

1. If possible, identify the Section 504 Coordinator.

The first step in the process of determining whether a student qualifies for 504 is to find the person on the school staff who is responsible for the 504 process. This person is responsible for assuring that the district complies with Section 504, and must provide a grievance procedure for parents and students. In general, school staff may be less familiar with Section 504 processes and personnel than they are with the special education process. In some school districts there will be a 504 coordinator at the district level. Some districts have building staff assigned to act as 504 Coordinators. Occasionally the 504 coordinator will also be the special education director. Call your local school district's administrative offices to locate this person and to request a copy of your school district's 504 policy, which may also be available on the school's website. If you are unable to identify the Section 504 Coordinator, notify the building administrator and superintendent (in writing) of your difficulties, and ask them about how to proceed.

2. Request Necessary Evaluations.

Federal law requires that evaluation and placement procedures be adopted to insure that appropriate identification and placement are made. **34 CFR 104.35(b); 34 CFR 300.301-300.306.**

The school must develop some process to determine whether the student is a person with a disability under the Rehabilitation Act. This can be the same evaluation used in the special

education process or may follow some other process which meets the requirements for evaluation outlined in Section 504. **34 CFR 104.35.**

► **Advocacy Hint: Use the IDEA evaluation process for 504 information.** The evaluation process used to determine eligibility for special education can be part of a determination of eligibility under Section 504. A written request for evaluations under both special education and Section 504 will prompt a review of existing evaluation data, often called a REED. The data already in the student's record (including the information brought in by the parent) may provide enough information to determine eligibility under Section 504, as well as to identify some basic support needs. Then the additional information that is gathered through special education evaluations can provide further information about the need for special education and/or additional Section 504 accommodations, supports and services.

Periodic evaluations and meetings to update and adjust the student's plan are required. **34 CFR 104.35(d).** Evaluation prior to a significant change in placement is also required by Section 504. **34 CFR 104.35(a).**

3. Convene the 504 Team Meeting.

The 504 Coordinator is responsible for setting up a meeting with a group of people who are knowledgeable about the student to determine the student's eligibility and develop the student's Section 504 plan, if one is needed. A student may be eligible as a person with a disability under Section 504, because he or she has a physical impairment that substantially limits one or more major life activities, but not need any supports, services or accommodations in order to have equal access to school. In that case, the group may determine that no plan is needed.

While IDEA ensures that parents are an integral part of every phase of the special education process, 504 does not require the attendance of the student's parent at the meeting. Good professional practice would, however, require the school to include the parent and the student as appropriate. Parents must, in any case, be notified of the process and have the right to a hearing if they disagree with the school on any issue related to eligibility or the plan.

4. Write the 504 Plan.

Once eligibility has been determined, the school (with the parent) will look specifically at the kind of difficulty the student is having in school and at the best way to provide effective services, supports and accommodations. A Section 504 Plan must be individualized and must meet the student's needs as adequately as the needs of nondisabled peers are met. **34 CFR 104.33(b).** Once the plan is written it must be followed by all the student's teachers and other school staff.

The plan must include regular and special education and related aids and services to ensure that a free appropriate public education is available to all students with disabilities regardless of the nature or severity of the disability. **34 CFR 104.33(a) and (c).**

Because all public (and many private) schools in Michigan receive federal money, they must comply with Section 504. Subpart D of the Section 504 regulations (**34 CFR 104.31-104.39.**) gives the requirements for preschool, elementary, and secondary education.

► **Advocacy Hint: Include accommodations in the IEP.** In the process of complying with IDEA schools also comply with Section 504. The IEP team can include a list of appropriate accommodations in the student's IEP. This is usually included in the Supplementary Aids and Services section of the form, but can be recorded anywhere on the form.

Problem-Solving

Complaints: The school district must have a procedure for investigating complaints. Complaints may be useful to address issues such as the school's failure to follow the plan, or the school's failure to provide the student with equal access to specific program or services. Parents and students are not limited to using the school's internal complaint process. The U.S. Department of Education, Office for Civil Rights (USDOE-OCR) is responsible for enforcing rights under the Rehabilitation Act. A complaint can be made to USDOE-OCR at any time by mail, fax machine, email or online. It is not necessary to have completed the school's internal complaint process before contacting USDOE-OCR. It is important to avoid delay in contacting USDOE-OCR, because they will only investigate problems which occurred within 180 days prior to filing the complaint. More information about the USDOE-OCR complaint process is available by going to <http://www.ed.gov/about/offices/list/ocr/complaintintro.html>. An online form that may be used in filing a complaint with USDOE-OCR is available at <http://www.ed.gov/about/offices/list/ocr/complaintintro.html>. A written complaint pertaining to a Michigan school which is submitted via mail should be sent to: USDOE-OCR, 1350 Euclid Ave., Suite 325, Cleveland, OH 44115.

Hearings: School districts must provide an impartial hearing process for disputes related to the identification, evaluation, and placement of a student. The school district is responsible for the selection of a hearing officer. In similar processes, ensuring impartiality has meant the person in charge of the process is not employed by or under contract with the district in any capacity.

Procedural Safeguards: Federal law requires that the school district must have procedural safeguards in place when there is a dispute between parents and the school. Those safeguards include the parent's right to notice, an opportunity to examine relevant records, the right to be represented by an attorney, and a review procedure. The law also allows parents and guardians an opportunity to influence and contest decisions regarding evaluation and placement by taking the dispute to federal court. **34 CFR 104.36.**

► **Advocacy Hint: Get a written 504 plan.** Occasionally a school district will claim to be providing accommodation for a student with disabilities, and may in fact be doing so, without going through a determination of eligibility and the development of a plan. While there is nothing in Section 504 that requires written notice, and this informal approach sometimes works well, there are several disadvantages to such an approach:

- ◆ It is difficult to ensure that all school staff understand and consistently implement a plan, if it is not written.
- ◆ Parents and the student may not have any effective way of communicating information about the specific accommodations that the student needs to staff who will work with the child in the future.
- ◆ Without a determination that the student is a disabled person — and, is therefore entitled to protections and accommodations under the Rehabilitation Act — the student may be denied due process protections.
- ◆ If the school inconsistently provides the accommodations, or refuses to provide specific accommodations or services, there is no right to a hearing or to file complaints unless the student has been formally identified as qualified under Section 504 and the plan is in writing.

Similarities to IDEA

There are several similarities between Section 504 and IDEA. Both laws require:

- ◆ that students with disabilities be educated with students who do not have disabilities to the maximum extent appropriate to the needs of students who have disabilities, **34 CFR 104.34(a); 34 CFR 300.114;**
- ◆ that the school provide nonacademic and extracurricular services and activities in such a manner as is necessary to afford students with disabilities an equal opportunity for participation in those services and activities. These services may include counseling, athletics, transportation, health services, recreational activities, special interest groups or clubs, referrals to agencies that provide assistance, employment of students by the school and assistance in making outside employment available, **34 CFR 104.37(a)(1),(2); 34 CFR 300.117.**
- ◆ that the school provide supplementary aids and services necessary to enable a student to participate in and benefit from regular education, **34 CFR 104.34(a); 34 CFR 300.42.**

Differences between Section 504 and IDEA

Section 504 provides some rights not specifically given in IDEA. For example, program accessibility, discrimination, and retaliation are not specifically addressed by IDEA, but can be addressed under Section 504.

Section 504 requires that programs that receive federal money must be readily accessible to people — including parents — with disabilities. One part of program accessibility requires public buildings to be barrier free. Section 504 gives specific time lines for conversion of buildings to barrier-free status and includes specific standards for building accommodations. (The Americans with Disabilities Act (ADA) may establish parallel requirements for all public and nonsectarian private schools.)

Section 504 prohibits discrimination based on disability. Schools are required to provide students with disabilities opportunities to participate in and benefit from programs that are equal to that afforded students who do not have disabilities. This broad language may go beyond the "appropriate" standard of the IDEA. **34 CFR 104.4.**

Section 504 also prohibits retaliation. For example, if a person has engaged in a protected activity, such as filing a complaint against the school, and the school then takes actions intended to intimidate, threaten, coerce, or otherwise retaliate against the parent because of the complaint, Section 504 provides an avenue to address that illegal action. **34 CFR 104.61.** The Office for Civil Rights issued a "Dear Colleague" letter (April 24, 2013) affirming the rights of individuals to be free from the fear of retaliation, stating, "Discriminatory practices are often only raised and remedied when students, parents, teachers, coaches, and others can report such practices to school administrators without the fear of retaliation. Individuals should be commended when they raise concerns about compliance with the Federal civil rights laws, not punished for doing so." The letter goes on to address steps USDOE-OCR may take, if they find retaliation has occurred. Those steps include both remediating the injury to the individual who was the subject of retaliation, and ensuring that retaliatory actions do not occur in the future.

► **Advocacy Hint:** Use the protections available under Section 504 to address discrimination or retaliation when it involves students with disabilities. The United States Department of Education, Office for Civil Rights is responsible for enforcing these rights, whether the student with a disability is eligible under Section 504 or the IDEA.

Section 504 does not provide for a school-funded independent educational evaluation (IEE).

Section 504 does not explicitly provide for stay put when a hearing request is filed, although the Office for Civil Rights has issued guidance suggesting that there is an implied right to stay put: "To say that a school district can go ahead and implement a change of placement, even though the parent has a right to challenge the change, seems to undermine the rights given by due process. Thus, OCR believes that a fair due process system would encompass the school district waiting for the results of the process before making the change." (Letter to Zirkel, May 15, 1995.)

Section 504 does not include a right to post-expulsion FAPE during long term disciplinary removal.

Appendix 12-1

Section 504 Regulations Related to Education for Children with Disabilities

Subpart D -- Preschool, Elementary, and Secondary Education

104.31 Application of this subpart.

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

104.32 Location and notification.

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

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

104.33 Free appropriate public education.

- A. *General* A recipient that operates a public elementary or secondary education program or activity shall provide a free appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction, regardless of the nature or severity of the person's handicap.
- B. *Appropriate education*
 - 1) For the purpose of this subpart, the provision of an appropriate education is the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of 104.34, 104.35, and 104.36.
 - 2) Implementation of an Individualized Education Program developed in accordance with the Education of the Handicapped Act is one means of meeting the standard established in paragraph (b)(1)(i) of this section.
 - 3) A recipient may place a handicapped person or refer such a person for aid, benefits, or services other than those that it operates or provides as its means of carrying out the requirements of this subpart. If so, the recipient remains responsible for ensuring that the requirements of this subpart are met with respect to any handicapped person so placed or referred.

C. *Free education*

- 1) *General* For the purpose of this section, the provision of a free education is the provision of educational and related services without cost to the handicapped person or to his or her parents or guardian, except for those fees that are imposed on non-handicapped persons or their parents or guardian. It may consist either of the provision of free services or, if a recipient places a handicapped person or refers such person for aid, benefits, or services not operated or provided by the recipient as its means of carrying out the requirements of this subpart, of payment for the costs of the aid, benefits, or services. Funds available from any public or private agency may be used to meet the requirements of this subpart. Nothing in this section shall be construed to relieve an insurer or similar third party from an otherwise valid obligation to provide or pay for services provided to a handicapped person.
- 2) *Transportation* If a recipient places a handicapped person or refers such person for aid, benefits, or services not operated or provided by the recipient as its means of carrying out the requirements of this subpart, the recipient shall ensure that adequate transportation to and from the aid, benefits, or services is provided at no greater cost than would be incurred by the person or his or her parents or guardian if the person were placed in the aid, benefits, or services operated by the recipient.
- 3) *Residential placement* If a public or private residential placement is necessary to provide a free appropriate public education to a handicapped person because of his or her handicap, the placement, including non-medical care and room and board, shall be provided at no cost to the person or his or her parents or guardian.
- 4) *Placement of handicapped persons by parents* If a recipient has made available, in conformance with the requirements of this section and 104.34, a free appropriate public education to a handicapped person and the person's parents or guardian choose to place the person in a private school, the recipient is not required to pay for the person's education in the private school. Disagreements between a parent or guardian and a recipient regarding whether the recipient has made a free appropriate public education available or otherwise regarding the question of financial responsibility are subject to the due process procedures of 104.36.

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

104.34 Educational setting.

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

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

- B. *Nonacademic settings* In providing or arranging for the provision of nonacademic and extracurricular services and activities, including meals, recess periods, and the services and activities set forth in 104.37(a)(2), a recipient shall ensure that handicapped persons participate with non-handicapped persons in such activities and services to the maximum extent appropriate to the needs of the handicapped person in question.
- C. *Comparable facilities* If a recipient, in compliance with paragraph (A) of this section, operates a facility that is identifiable as being for handicapped persons, the recipient shall ensure that the facility and the services and activities provided therein are comparable to the other facilities, services, and activities of the recipient.

104.35 Evaluation and placement.

- A. *Pre-placement evaluation* A recipient that operates a public elementary or secondary education program or activity shall conduct an evaluation in accordance with the requirements of paragraph (B) of this section of any person who, because of handicap, needs or is believed to need special education or related services before taking any action with respect to the initial placement of the person in regular or special education and any subsequent significant change in placement.
- B. *Evaluation procedures* A recipient to which this subpart applies shall establish standards and procedures for the evaluation and placement of persons who, because of handicap, need or are believed to need special education or related services which ensure that:
 - 1) Tests and other evaluation materials have been validated for the specific purpose for which they are used and are administered by trained personnel in conformance with the instructions provided by their producer;
 - 2) Tests and other evaluation materials include those tailored to assess specific areas of educational need and not merely those which are designed to provide a single general intelligence quotient; and
 - 3) Tests are selected and administered so as best to ensure that, when a test is administered to a student with impaired sensory, manual, or speaking skills, the test results accurately reflect the student's aptitude or achievement level or whatever other factor the test purports to measure, rather than reflecting the student's impaired sensory, manual, or speaking skills (except where those skills are the factors that the test purports to measure).

C. *Placement procedures* In interpreting evaluation data and in making placement decisions, a recipient shall:

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

D. *Reevaluation* A recipient to which this section applies shall establish procedures, in accordance with paragraph (B) of this section, for periodic reevaluation of students who have been provided special education and related services. A reevaluation procedure consistent with the Education for the Handicapped Act is one means of meeting this requirement.

104.36 Procedural safeguards.

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

104.37 Nonacademic services.

A. *General*

- 1) A recipient to which this subpart applies shall provide non-academic and extracurricular services and activities in such manner as is necessary to afford handicapped students an equal opportunity for participation in such services and activities.
- 2) Nonacademic and extracurricular services and activities may include counseling services, physical recreational athletics, transportation, health services, recreational activities, special interest groups or clubs sponsored by the recipients, referrals to agencies which provide assistance to handicapped persons, and employment of students, including both employment by the recipient and assistance in making available outside employment.

B. *Counseling services* A recipient to which this subpart applies that provides personal, academic or vocational counseling, guidance, or placement services to its students shall

provide these services without discrimination on the basis of handicap. The recipient shall ensure that qualified handicapped students are not counseled toward more restrictive career objectives than are non-handicapped students with similar interests and abilities.

C. *Physical education and athletics*

- 1) In providing physical education courses and athletics and similar aid, benefits, or services to any of its students, a recipient to which this subpart applies may not discriminate on the basis of handicap. A recipient that offers physical education courses or that operates or sponsors interscholastic, club, or intramural athletics shall provide to qualified handicapped students an equal opportunity for participation.
- 2) A recipient may offer to handicapped students physical education and athletic activities that are separate or different from those offered to non-handicapped students only if separation or differentiation is consistent with the requirements of 104.34 and only if no qualified handicapped student is denied the opportunity to compete for teams or to participate in courses that are not separate or different.

104.38 Preschool and adult education.

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

104.39 Private education.

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

Appendix 12-2

Frequently Asked Questions about Section 504 and Education

(Reprinted from <http://www.ed.gov/about/offices/list/ocr/qa-disability.html>, U.S. Department of Education, Office for Civil Rights, last visited 8/7/12.)

How do Section 504 and Title II differ?

The main difference between the two laws is that one applies to the recipients of grants from the federal government (Section 504) and the other applies only to public entities (Title II). A school or college may be both a recipient of Federal funds from the US Department of Education and also a public entity. In such cases, the institution is covered by both laws.

Are all school districts, colleges, and universities covered by these laws?

Virtually all public school districts are covered by Section 504 because they receive some federal financial assistance. Public colleges and universities generally receive federal financial assistance, and most private colleges and universities receive such assistance. There are some private colleges that do not receive any federal assistance, and Section 504 does not apply to them. Title II applies only to public institutions.

Are all programs in a school or college covered if it receives federal financial assistance?

Generally, all programs in a school or college are covered if the school or college receives federal financial assistance or is a public entity.

Do these laws cover just students?

No. The laws protect all participants in the program from discrimination, including parents, students, and employees.

Do these laws cover just education programs?

No. They cover all programs of a school or college, including academics, extracurricular, and athletics. Also, the laws apply to the activities of a school or college that occur off campus.

Do all buildings have to be made physically accessible?

No, not necessarily. While buildings constructed after the Section 504 regulation was issued (that is, those built since 1977) must be fully accessible, older buildings do not have to be made fully accessible. For older buildings, the law requires that the program or activity be made accessible. A common way this is done is to relocate the program to another building that is accessible.

What types of adjustments are required for students with disabilities in colleges and universities?

Colleges and universities are 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 the school's program. Examples of auxiliary aids that may be required are taped texts, note-takers, interpreters, readers, and specialized computer equipment.

Colleges and universities are not required to supply students with attendants, individually prescribed devices such as hearing aids and wheelchairs, readers for personal use or study, or other devices or services of a personal nature.

What types of services are required for students with disabilities in elementary and secondary schools?

School districts are required to provide a free appropriate education to students with disabilities based on their individualized educational needs. The services may include special education and related aids and services such as physical therapy, as well as modifications to the regular education program including adjustments in test taking procedures and adjustments to rules regarding absences when a student's absences are due to a disability.

Does OCR enforce laws that prohibit harassment of students or others because of a disability?

Yes. Both Section 504 and Title II of the Americans with Disabilities Act make it unlawful to harass people in covered entities because of their disabilities. OCR and the Office of Special Education and Rehabilitation Services have jointly issued guidance to school districts regarding harassment based on disability.