
New York State Education Dept., Albany.

49p.; Appendix contains filled print.

Guidelines — Non-Classroom Use (055) — Legal/Legislative/Regulatory Materials (090)

This memorandum to school administrators and other program directors in New York State summarizes guidelines regarding the rights of students with disabilities under Section 504 of the Rehabilitation Act of 1973 and its relation to Article 89 of New York's Education Law and the federal Individuals with Disabilities Education Act (IDEA). Specific issues addressed include: provisions of Section 504 relating to elementary, middle, and secondary education; school board policies and procedures pursuant to Section 504; comparison of Section 504 and IDEA; Section 504 and the right to free appropriate public education (FAPE); establishing policies to address mandates under all three of these laws pertaining to FAPE for students with disabilities; procedures for children under Section 504 who do not require special education or related services; assessment teams; accommodation plans; due process; discipline of children with disabilities covered by Section 504; and access to nonacademic and extracurricular services. An addendum notes implications of the Americans with Disabilities Act (ADA) for school districts. An appendix includes: (1) the regulations for relevant provisions of Section 504; (2) a memo regarding students with attention deficit disorder; (3) a chart comparing IDEA, Section 504, and ADA in relation to FAPE; and (4) specific forms for complying with Section 504.
November, 1993

TO:
District Superintendents
Presidents of Boards of Education
Superintendents of Schools
Superintendents of State-Operated and State-Supported Schools
Executive Directors of Approved Private Schools
Nonpublic School Administrators and Educators
New York City Board of Education
State and Local Teacher Associations
Principals of Public Schools
Directors of Pupil Personnel Services
Directors of Special Education
Chairpersons of Committees on Special Education
Chairpersons of Committees on Preschool Special Education
School Social Workers and School Psychologists
Colleges with Special Education Teacher Training
Commissioner's Advisory Panel for Special Education Services
Preschool Special Education Advisory Committee
Impartial Hearing Officers
SETRC Project Directors and Training Specialists
Early Childhood Direction Centers
Directors of Approved Preschool Programs and Preschool Educators
Head Start Directors
Chief Elected Officials of the Counties
Independent Living Centers
Student and Parent Advocacy Networks
Team Leaders and Managers with Comparable Responsibilities

FROM:  Kathy A. Hearn, Lawrence A. Gloeckler & Arthur L. Walton

SUBJECT: Guidelines for School Districts regarding the rights of students under §504 of the Rehabilitation Act of 1973

This memorandum has been prepared in response to inquiries regarding the application of §504 of the Rehabilitation Act of 1973 (§504) to local school districts and its relationship to Article 89 of the Education Law and the federal Individuals with Disabilities Education Act (IDEA). To assist local school districts in developing
comprehensive §504 policies, this memorandum offers guidelines that integrate procedures under the IDEA and Article 89 of the Education Law as well as model §504 forms.

Summary of the Provisions of §504 of the Rehabilitation Act Relating to Elementary, Middle and Secondary Education

In essence, §504 provides that:

"No otherwise qualified individual with handicaps in the United States, shall, solely by reason of her or his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance..."

The definition of a "handicapped person" under §504 is broader than the definition of "a child with a disability" under IDEA and Article 89 of the Education Law. Under the Rehabilitation Act a handicapped person includes anyone who:

(i) has a physical or mental impairment which substantially limits one or more major life activities,
(ii) has a record of such an impairment, or
(iii) is regarded as having such an impairment (34 CFR 104.3(k)(2))

In contrast, under the IDEA, children with disabilities include "children with mental retardation, hearing impairments including deafness, speech or language impairments, visual impairments including blindness, serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and who, by reason thereof need special education and related services (20 USC 1401(a)(1); emphasis added). Under Article 89 of the Education Law, children with disabilities include those who, because of mental, physical or emotional reasons can only receive appropriate educational opportunities from a program of special education (Educ. Law §4401[1]).

1Throughout this memorandum, the term "handicapped child under §504" is referred to interchangeably as "a child with a disability under §504."

2A copy of relevant portions of the §504 regulations cited throughout this document, are attached.
Unlike §504, under IDEA and Article 89, a child must first be identified as a student with a disability under one of thirteen disabilities enumerated in Commissioner's regulations (See 8 NYCRR 200.1(mm)). Consistent with the general scheme, children with disabilities under §504 who require special education or related services to benefit from instruction should be classified as a child with a disability under IDEA and Article 89 of the Education Law while those students who are protected under §504 who do not require such services are, nonetheless, entitled to those accommodations deemed necessary to ensure access to all public school programs and activities. In summary, although every child who is a student with a disability under IDEA is also protected under §504, all children covered under §504 are not necessarily students with a disability under IDEA.

School Board Policies and Procedures Pursuant to §504

As a general matter, §504 requires that all school districts provide written assurances of nondiscrimination in any application for federally funded programs (34 CFR 104.5(a)). School districts with fifteen or more employees are also required to designate an employee to coordinate §504 compliance and adopt grievance procedures to resolve §504 complaints (34 CFR 104.7[a]). In addition, such districts must provide notice of nondiscrimination to participants, beneficiaries, applicants and employees, including those with impaired vision or hearing, and to unions or professional organizations holding collective bargaining or professional agreements with the recipients (34 CFR 104.8). Districts must also provide annual notice of the school board's responsibilities under §504 to students with disabilities and their parents (34 CFR 104.32(b)). Therefore, to ensure compliance with federal regulations promulgated pursuant to §504, all school districts should adopt comprehensive §504 policies.

Comparing §504 of the Rehabilitation Act and the Individuals with Disabilities Education Act

The IDEA is a federal statute that allocates federal funds to states and local school districts that ensure the right to a free appropriate public education to infants, toddlers and children with disabilities in a manner consistent with federal mandates. Unlike IDEA, §504 of the Rehabilitation Act is a federal civil rights statute that provides no additional funding but prohibits discrimination against qualified individuals with disabilities of all ages by any "program or activity receiving federal funds" (29 USC §794). As a further distinction, §504 protections extend not only


3A copy of a model student §504 policy is attached in the Appendix.

4For example, in Rothschild v. Grottenhaler, 907 F2d 286 (2nd Cir. 1990), the United States Court of Appeals held that §504 requires school districts to provide
to students, but to job applicants, employees and all individuals, otherwise eligible, to participate in school sponsored programs or activities. For example, §504 mandates that all programs and activities receiving federal funds provide full access to protected individuals and requires all school buildings constructed or altered after June 3, 1977 to provide physical access to persons with physical disabilities (34 CFR 104.21-23). Thus, while the IDEA imposes affirmative duties on state and local educational agencies to provide an appropriate education to students with disabilities as a condition for receiving federal funds, §504 forbids the exclusion of protected individuals from their programs or activities solely on the basis of a disability.

Complaints for alleged violations of §504 may be filed with the United States Office for Civil Rights (OCR) and a finding of continuing noncompliance may result in the loss of all federal funds where voluntary compliance cannot be obtained. In addition, parents may request under §504 an impartial hearing to challenge a district's determination concerning their children. Similarly, under IDEA and Article 89 of the Education Law, parents may request an impartial hearing to challenge any matter pertaining to the identification, evaluation or placement of their child. In addition, they may file a written complaint with the State Education Department pertaining to alleged systemic or procedural violations under IDEA that are not a subject of pending litigation.

§504 and the Right to Free Appropriate Public Education

Federal regulations implementing §504 define the obligations of elementary and secondary education programs and activities to provide a free appropriate public education (FAPE) to all children with disabilities protected by the Act and require public schools to establish standards and procedures for the evaluation and placement
deaf parents of nonhearing-impaired students with sign language interpreters for school initiated conferences incident to disciplinary/academic aspects of their children's education. See also 8 NYCRR 100.2(aa) (copy attached).

Although an LEA must ensure that its programs and activities are readily accessible to individuals with disabilities, §504 does not require the district "to make each of its existing facilities or every part of a facility accessible to and usable by handicapped persons." Even though the regulation does not require the LEA to make structural changes in existing facilities where other methods are effective in providing program access, "a recipient must give priority to those methods that offer programs and activities to handicapped persons in the most integrated setting appropriate" (34 CFR 104.22) (Similar regulatory language governing program accessibility has been adopted under the ADA (28 CFR 35.149-151).

The term "parent" used throughout this memorandum includes "persons in parental relationship" to the child.
of persons, who because of disability, need or are believed to need special education or related services (34 CFR 104.31-39).7

Under §504, a FAPE is defined as "... the provision of regular or special education and related aids and services that... is designed to meet the individual educational needs of handicapped persons as adequately as the needs of non-handicapped persons are met..." (29 CFR 104.33, emphasis added). Under IDEA, however, FAPE is defined as "special education and related services ... provided in conformity with an individualized education program ..." (34 CFR 300.8) in a manner "reasonably calculated to enable the child to receive educational benefit..." (Board of Education v. Rowley, 458 U.S. 176, 207).

Section 504 regulations governing the provision of FAPE generally mirror the regulations promulgated under the IDEA. In fact, §504 regulations indicate that following IDEA procedures is one way to meet the requirements of §504 (34 CFR 104.36). Notably, however, the §504 regulations do not extend to parents the right to an independent evaluation at public expense, specifically require a reevaluation before a school district initiates "a significant change in a student's placement," and has no provision that automatically requires a school district to maintain a student in his/her current educational placement pending due process.

Consistent with §504, children with disabilities who do not require special education or related services (and are, therefore, not classified under IDEA or Article 89) are, nonetheless, entitled to accommodations and services in the regular school setting that are necessary to enable them to benefit from all programs and activities available to non-disabled children. Similar to IDEA, regulations implementing §504 require the evaluation of any child, who because of a disability "needs or is believed to need special education or related services" prior to an initial placement and any subsequent "significant change of placement" as well as periodic reevaluations of students who are receiving special education and related services (34

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7For purposes of preschool, elementary and secondary education, a "qualified" student with a disability under §504 is defined as a person with a disability who is:

(i) of an age during which non-handicapped persons are provided such services,

(ii) of an age during which it is mandatory under state law to provide such services to handicapped persons, or

(iii) to whom a state is required to provide a free appropriate public education... (under the IDEA).

Since preschool children with disabilities are entitled to FAPE, their rights are protected by IDEA and §504.
CFR 104.35(b)). In addition, all decisions involving placements of children protected under §504 must be made by a group of individuals, including persons knowledgeable about the child, the meaning of the evaluation data and the placement options (34 CFR 104.35(c)(3)). While not required, the §504 regulations recognize that implementing an IEP under the IDEA is one way to meet its standards for providing FAPE (34 CFR 104.33(b)(2)). Those regulations also require notice to parents of any proposed actions relating to the provision of a free appropriate public education (FAPE) and ensure parents the right to an impartial hearing to challenge any actions regarding the identification, evaluation or educational placement of a child who, because of a disability, needs or is believed to need special instruction or related services (34 CFR 104.36).

Establishing Policies and Procedures to Address Mandates under §504, the IDEA and Article 89 of the Education Law Pertaining to the Provision of a Free Appropriate Public Education for School Age Students with Disabilities

Under State law, any student suspected of having a disability under §504 who may require special education or related services must be afforded all the protections of Article 89 of the Education Law. For example, under State law any student suspected of having a disability requiring special education or related services must be referred to the committee on special education (CSE) for evaluation (Education Law §4402[b][2]; 8 NYCRR 200.4[a]). Following an evaluation, where the CSE determines that a student with a disability under §504 requires special education or related services, the child is, by definition, a student with a disability under Article 89.

Where the CSE determines that a student does not need special education or related services, Commissioner’s regulations require the committee to provide the student’s building administrator with a copy of its recommendations and the appropriate evaluation information (8 NYCRR 200.4(c)(1)(i)). In addition, for students not classified by the CSE, the Commissioner’s regulations require the building administrator to determine which educationally related support services may be appropriate to provide to the student to the extent that the services are available (8 NYCRR 200.4(c)(1)(i)). Since §504 regulations specifically recognize that following the IDEA procedures (and, therefore, Article 89) meet §504 mandates, a

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8According to the Office for Civil Rights, a school district is not required to automatically conduct an evaluation under §504 upon a parent’s request. However, when the LEA has reason to believe the child needs special education or related services, the LEA must evaluate the child to determine whether he or she is disabled as defined in §504. However, where the district refuses to evaluate a student upon a parent’s request, the LEA must notify the parents of their right to due process (Memorandum, United States Department of Education, To Regional Civil Rights Directors, From Jeanette Lim, April 29, 1993).
board of education may want to use its CSE to also recommend to the building administrator any adaptations it deems necessary to enable a student who is disabled under §504 to benefit from the regular school program. In that way, a board of education can meet its §504 obligations using the existing state regulatory scheme for those children who, although, referred to the CSE for special education or related services are found not to need them, yet require certain accommodations as a protected student under §504. Although use of the CSE process is one way for a BOE to meet its §504 responsibilities to this group of students, this should not be read as transforming those additional CSE functions into special education duties under Article 89.

To comply with §504, local policies should also include safeguards to ensure that students who are disabled under §504 are not categorically excluded from the process of referral, evaluation, classification or placement under Article 89 on the basis of a medical diagnosis not included among the classifications enumerated in Part 200 of the Commissioner’s regulations (i.e., ADD, AIDS, etc.). Regardless of the medical diagnosis, when the CSE determines that such a student needs special education or related services to benefit from instruction, in most cases, the child should be classified under Part 200 of the Commissioner’s regulations as a student with a disability. For example, a child diagnosed ADD who needs special education or related services may be classified, as appropriate, under IDEA and Article 89, learning disabled, other health impaired or emotionally disturbed. Perhaps the only exception to classifying a student under Article 89 who requires special education or related services applies to children with "temporary disabilities" who need special education, related services, or adaptive physical education as a temporary measure under §504.

Where the CSE determines that a student who is disabled under §504 does not require special education or related services and is, therefore, not a student with a disability under Article 89 of the Education Law, the parent has the right to challenge that determination at an impartial hearing (8 NYCRR 200.5(c)). If the parent disagrees with the CSE’s evaluation, the parent also has a right to obtain an independent evaluation, which must be provided at public expense unless the district establishes the adequacy of its evaluation at an impartial hearing (8 NYCRR 200.5(a)(1)(vi)(a)).

In summary, students believed to require special education or related services to benefit from instruction who are protected under §504 must be evaluated, identified and placed in an appropriate program/placement in accordance with Part 200 of the Commissioner’s regulations.
Procedures for Children with Disabilities under §504 who do not Require Special Education or Related Services

For children protected under §504, who are referred to the CSE and determined not to require special education or related services (who are, therefore, not disabled under Article 89), a board policy could delegate to the building administrator the obligation to implement the CSE’s recommendations for alternatives to special education.

Assessment Teams

For children who are disabled under §504 who do not appear in need of special education or related services, a board could establish procedures to refer the child directly to a building level team for assessment to meet §504 standards. Consistent with the regulations promulgated under §504, a BOE may elect to use either its CSE or a building level team comprised of individuals knowledgeable about the child, the evaluations and the program options to make decisions relating to FAPE upon its assessment of the child’s disability and his/her need for services (34 CFR 104.35).

Accommodation Plans

In most cases, the use of appropriate adaptations and interventions in regular classes will enable school districts to effectively address the instructional needs of children with disabilities protected by §504, without the need for special education or related services. Such adaptations may include, for example:

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

Other provisions range from... classroom aides and notetakers;... [to] possible modification of nonacademic times such as lunchroom, recess, and physical education."

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9A model form is attached in the Appendix.
(See SED Memorandum on "Update on Students with Attention Deficit Disorders," dated May 1992. A copy is attached in the Appendix.)

To assure students with disabilities under §504 access to regular school programs and activities, appropriate services might also include, for example, educationally related support services, classroom aides, or speech and language improvement services. In addition, a child protected under §504 who is not eligible for special education under Article 89 of the Education Law may receive services in a resource room in accordance with the Part 200 regulations (See 8 NYCRR 200.6[f]). For children previously classified under Article 89, who no longer require special education or related services, declassification support services may offer an appropriate accommodation.

Due Process

Under §504, parents of students with disabilities not classified under Article 89, are entitled to notice regarding actions affecting the identification, evaluation or educational placement of their children and may request an impartial hearing if they disagree with a determination regarding FAPE (34 CFR 104.36). Although a district may elect to use impartial hearing officers certified by the Department pursuant to Part 200 of the regulations to decide §504 disputes, neither state law nor §504 mandates that only state certified hearing officers can serve. In any case, to meet minimum impartiality requirements, any person who participated in any manner in the formulation of the decision to be reviewed may not serve as the hearing officer (34 CFR 104.36).

In summary, by ensuring that every student suspected of having a disability who requires special education or related services is referred to the CSE in accordance with Part 200 of the Commissioner’s regulations, a board of education will meet the requirements for evaluation and placement of such children under §504 as well. To comply with §504 for children who do not require special education or related services, however, a school based team may conduct or review an assessment of the child’s needs in order to recommend and provide the necessary adaptations to the regular school program.

Discipline of Children with Disabilities Covered by §504 of the Rehabilitation Act

According to OCR, a student suspension of more than ten days is a "significant change of placement" under §504 regulations. As noted earlier, the Rehabilitation Act requires a school district to conduct an evaluation and review of the student’s placement prior to any significant change of placement (34 CFR §104.35[b]).

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10 A copy of the notice is attached in the Appendix.
Therefore, local policies must also include procedures to govern the discipline of students protected under §504 (as well as children covered under IDEA) to ensure that the necessary evaluations and placement reviews are conducted prior to any out-of-school suspension for more than ten days.

According to OCR, a significant change of placement includes suspensions of more than ten consecutive school days or, as determined on a case-by-case basis, short-term suspensions that create a pattern of exclusions equivalent to ten consecutive days or more. As the OCR memorandum advises, whether a series of short-term suspensions constitutes a "significant change in placement" depends on the length of each suspension, the proximity of the suspensions to each other, and the overall time of the suspensions (see, EHLR 307:05[1988]). Therefore, student discipline and §504 policies should include procedures to trigger automatic reviews of cumulative suspensions approaching ten days for students with disabilities to determine whether such suspensions constitute a significant change in placement.

According to OCR, whenever a suspension constitutes a "significant change of placement", a student with disabilities under §504 must be evaluated by the multidisciplinary team to determine whether the misconduct is related to the child's disability. Where the team concludes that a link exists between the child's disability and the behavior leading to the discipline, the team must conduct further evaluation to determine whether the student's current educational placement is appropriate. However, in those cases where the team concludes that the misbehavior is not related to the disability or the student is suspended for behavior related to the use of illegal drugs or alcohol, a board of education may discipline the student to the same extent it disciplines its non-disabled student population (29 USC §706[c][iv]). If the parent challenges the team's determination on whether the misbehavior was related to the student's disability, the parent has the right to request an impartial hearing.

Access to Non-academic and Extracurricular Services

Similar to provisions protecting students under the IDEA, §504 also requires local school districts to offer protected students equal opportunities to participate in nonacademic and extracurricular services and activities (34 CFR 104.37). In

11 Unlike students protected solely under §504, students classified under Article 89 (and IDEA), may not be suspended for more than ten days (nor may the district, otherwise, change the student's placement without the parents' consent) during the pendency of appeals except pursuant to court order (see Honig v. Doe, 108 S. Ct. 592 (1988)).
particular, the §504 regulations require that students with disabilities be afforded full
access to any counseling service offered by the district and prohibits districts from
counseling such students toward more restricted career objectives than their
nondisabled peers with similar interests or activities (34 CFR 104.37[b]).

Regarding athletic activities and physical education, §504 and IDEA require
local school districts to ensure equal opportunities for the participation of all students
with disabilities and require that students with disabilities participate with non-
disabled students to the maximum extent appropriate to their needs (34 CFR
104.34(b)). For children who require adaptive physical education, Commissioner's
regulations require adaptations for those students unable to participate in the regular
program of physical education (8 NYCRR 135.4(c)(1)(iv)). For students with
disabilities, separate physical education programs or athletic activities are permissible
under §504 only to the extent necessary to meet their needs. In any case, such
students may not be denied opportunities to compete for teams or participate in the
same courses as students who are not disabled (34 CFR 104.37(c)).
Addendum - The Americans with Disabilities Act Implications for School Districts Pertaining to Students with Disabilities

In 1990, Congress passed the Americans with Disabilities Act (ADA). The law provides comprehensive civil rights protections to individuals with disabilities in employment, public accommodations, state and local government services and telecommunications. Regarding state and local government services, Title II of the ADA (42 USC 12134 et seq) extends §504 protections, already applicable to school districts by virtue of their receipt of federal funds, to all local and state entities. Since all school districts are subject to §504, full compliance with the §504 regulations should assure compliance with the ADA as it relates to the provision of a free appropriate public education. It should be noted, however, that under the ADA all local and state government entities, including school districts, were required to conduct "self-evaluations" by January 26, 1993, that affords individuals with disabilities or organizations representing individuals with disabilities opportunities for participation to assure compliance with ADA mandates (28 CFR 35.105). For districts that have already conducted self-evaluations under §504, the ADA limits the self-evaluation process to a review of those policies and practices not included in the §504 self-evaluation. In any case, districts that have not completed the self-evaluation process, should proceed to do so immediately.

To answer any questions pertaining to the materials presented in this memorandum, you may wish to contact a member of your Regional Field Services Team.
APPENDIX

A. Relevant Provisions of §504 Regulations

B. Memo dated 5/92 from Thomas Nevelbine Regarding Students with Attention Deficit Disorder (ADD)

C. Chart: Comparison of IDEA, §504 and ADA in Relation to the Provision of a Free Appropriate Public Education

D. Forms:   §504 Policy Regarding Students with Disabilities
                      §504 Notice of Meeting
                      Notice of Determination After Meeting
                      §504 Accommodation Plan
§ 104.21 Discrimination prohibited.
No qualified handicapped person shall, because a recipient's facilities are inaccessible to or unusable by handicapped persons, be denied the benefits of, or be excluded from participation in, or be denied the services of, a program or activity which this part applies.

§ 104.22 Existing facilities.
(a) Program accessibility. A recipient shall operate each program or activity to which this part applies so that the program or activity, when viewed in its entirety, is readily accessible to and usable by handicapped persons.
(b) Methods. A recipient may comply with the requirements of paragraphs (a) of this section through such means as redesign of equipment, reassignment of classes or other services to accessible buildings, assignment of beneficiaries to a part of a facility accessible to and usable by handicapped persons.

§ 104.23 New construction.
(a) Design and construction. Each facility or part of a facility constructed on or after the effective date of this part, a transition plan setting forth the steps necessary to make the facility readily accessible to and usable by handicapped persons.
(b) Alteration. Each facility or part of a facility which is altered by, on behalf of, or for the use of a recipient after the effective date of this part, to the maximum extent feasible, be altered in such manner that the facility or part of the facility is readily accessible to and usable by handicapped persons.

d) Transition plan. In the event that structural changes to facilities are necessary to meet the requirement of paragraph (b) of this section, a transition plan shall be developed with the assistance of interested persons, including handicapped persons, organizations representing handicapped persons, or organizations representing beneficiaries. A copy of the transition plan shall be made available for public inspection.

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period of the transition plan is longer than one year, identify the steps of that period that shall be taken during each year of the transition period. (c) Notice. The recipient shall adopt and implement procedures to ensure that interested persons, including persons with impaired vision or hearing, can obtain information as to the existence and location of services, activities, and facilities that are accessible to and usable by handicapped persons.

Subpart D—Preschool, Elementary, and Secondary Education
§ 104.31 Application of this subpart.
Subpart D applies to preschool, elementary, and secondary education programs and activities that receive or benefit from Federal financial assistance and to recipients that operate, or that receive or benefit from 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 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 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) Free appropriate education. (1) For the purpose of this section, the term "free appropriate education" means regular education and related services that are designed to meet individual educational needs of handicapped children at no cost to parents.

(c) Transition plan. (1) A transition plan shall be developed by the recipient in consultation with the handicapped person and the handicapped person's parents or guardian(s) as appropriate, including a statement of the handicapped person's status at the beginning of the transition plan, the handicapped person's needs and objectives for regular education and related services, the services and supports that are necessary to support the handicapped person during the transition to regular education and related services, and the date and time of transition to regular education and related services.

(d) Notice. The recipient shall adopt and implement procedures to ensure that interested persons, including persons with impaired vision or hearing, can obtain information as to the existence and location of services, activities, and facilities that are accessible to and usable by handicapped persons.
34 CFR Ch. 1 (7-1-92 Edition)

§ 104.36

(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 discrimination 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 not be a condition of the provision of free services or, if a recipient places a handicapped person in or refers such person to a program other than the one that it operates 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.

(2) Transportation. If a recipient places a handicapped person in or refers such person to a program other than the one that it operates as its means of carrying out the requirements of this subpart, of payment for the costs of the program, or is not able to meet the costs of the program, 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.

§ 104.37

(a) Preplacement evaluation. A recipient that operates a public elementary or secondary education program shall conduct an evaluation in accordance with the requirements of paragraph (b) of this section before taking any action with respect to the initial placement of a 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 a person who, because of handicap, needs or is believed to need special education or related services. Where appropriate, the initial evaluation shall be conducted by persons who are knowledgeable about the child, the services, or the resources available to provide or pay for the education and related services provided to a handicapped person.

(1) Tests and other evaluation materials. Each evaluation conducted or required by this section shall be achieved satisfactorily. Whenever no re-
§ 104.37 Preschool and adult education programs.

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

§ 104.39 Private education programs.

(a) A recipient that operates a private elementary or secondary education program or activity may not, on the basis of handicap, exclude qualified handicapped persons from such program if the person can, with minor adjustments, be provided an appropriate education or a handicap-free program. Any written questionnaire used for the purpose or makes clear orally in writing that the information is being requested on a voluntary basis, that it will be kept confidential, that refusal to provide it will not subject the applicant to any adverse action or result in the applicant's denial of admission or the institution's denial of admission or recruitment by a recipient to which this subpart applies.

(b) Counseling services. A recipient to which this subpart applies that operates a private elementary or secondary education program or activity shall ensure that counseling services, including academic counseling, guidance, or placement services to its students shall provide these services without discrimination on the basis of handicap. The recipient's counseling services, including academic counseling, guidance, or placement services to its students shall provide these services without discrimination on the basis of handicap. The recipient's counseling services, including academic counseling, guidance, or placement services to its students shall provide these services without discrimination on the basis of handicap. The recipient's counseling services, including academic counseling, guidance, or placement services to its students shall provide these services without discrimination on the basis of handicap.

(c) Physical education and athletics. (1) In providing physical education courses and athletics and similar programs and courses 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 and athletics and similar programs and courses and sponsors interscholastic, club, or intramural athletics shall provide to qualified handicapped students an equal opportunity for participation in these activities.

(2) A recipient may offer to handicapped students physical education and athletic activities that are separate or different from those offered to nonhandicapped students only if separation or differentiation is consistent with the requirements of §§ 104.34 and 104.37. If no qualified handicapped student is denied the opportunity to compete for teams or to participate in courses that are not separate or different.

§ 104.40 Application of this subpart.

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

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§ 104.42 Admissions and recruitment.

(a) General. Qualified handicapped persons may not, on the basis of handicap, be denied admission or be subjected to any adverse action or result in the recipient's denial of admission or recruitment by a recipient to which this subpart applies.

(b) Admissions. In administering its admission process to which this subpart applies:

(1) May not apply limitations upon the number or proportion of handicapped persons who may be admitted;

(2) May not make use of any test or criterion for admission that has a disproportionate, adverse effect on handicapped persons or any class of handicapped persons; and

(3) Shall assure itself that (i) the test or criterion being validated for success in the education program or activity in question and (ii) alternate tests or criteria that have a less disproportionate, adverse effect are not shown by the Assistant Secretary to be available.

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

§ 104.43 Treatment of students; general.

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

(b) A recipient to which this subpart applies that considers participation by students in education programs or activities.
(aa) Interpretation services for parents and persons in parental relationship who are hearing impaired.

(1) Definitions. For purposes of this subdivision:

(1) Hearing impaired shall include any hearing impairment, whether permanent or fluctuating, the result of which prevents a meaningful participation in school district meetings or activities.

(II) Meeting or activity shall mean those school-initiated meetings or activities attended by parents or persons in parental relationship who are hearing impaired, which are specific to the academic and/or disciplinary aspects of their child's educational program, including, but not limited to, parent-teacher conferences; child study or building level team meetings; planning meetings with school counselors regarding educational progress and career planning; suspension hearings or any conference with school officials relating to disciplinary actions.

(2) School district meetings and activities. At any meeting or activity which is conducted by the board of education, trustees, school district or a district school and attended by parents or persons in parental relationship who are hearing impaired, such board of education or trustees shall provide interpreter services at no charge to such parents or persons in parental relationship, provided that a written request therefore is made to the school district within the time limitation established by such board of education or trustees pursuant to paragraph (3) of this subdivision.

(I) In the event interpreter services are requested, the school district shall appoint an interpreter of the deaf to interpret during the meeting or activity.

(II) In the event that an interpreter of the deaf is unavailable, the school district shall make other reasonable accommodations which are satisfactory to the parents or guardians.

(3) Each board of education or trustees shall adopt a policy which shall establish a reasonable time limitation for requesting interpreter services, examples of what constitutes reasonable accommodations pursuant to subparagraph (2)(II) of this subdivision and how the provisions of this subdivision shall be implemented by such board of education or trustees.

Historical Note
TO: District Superintendents  
Presidents of Boards of Education  
Superintendents of Schools  
Directors of Special Education  
Directors of Pupil Personnel Services  
Directors of Approved Preschool Programs  
Executive Directors of Approved Private Schools  
Principals of Public Schools  
Chairpersons of Committees on Special Education  
Chairpersons of Committees on Preschool Special Education  
School Psychologists  
OSES Commissioner's Advisory Panel  
Impartial Hearing Officers  
SETRC Project Directors and Training Specialists  
ECDC Project Directors and Coordinators  
Student and Parent Advocacy Networks

FROM: Thomas B. Neveldine

SUBJECT: Update on Students with Attention Deficit Disorder (ADD)

The United States Department of Education (Office for Civil Rights, Office of Special Education and Rehabilitative Services, and Office of Elementary and Secondary Education) issued a "clarification of policy" memorandum regarding the needs of children with ADD (DPS Memorandum 92-013). As the memo indicates, ADD has not been added as a separate disability category in the Individuals with Disabilities Education Act (IDEA). A copy of that memo is attached for your information.

It is important to note that this federal memo does not signify a change in policy or a new regulation, but simply clarifies existing procedures. This does not mean that school districts need to establish separate classrooms for students with attention deficit disorders. On the contrary, it is the position of the New York State Education Department that most students with ADD should not require special education or related services and can be served in regular classrooms with appropriate modifications, accommodations and support. Key points of the United States Department of Education's "clarification of policy" memo...
regarding the needs of children with ADD are summarized below.

- Students with ADD may be eligible for services under IDEA if they meet the eligibility criteria applicable under the disability categories of the Act. These may include "Other Health Impaired," "Seriously Emotionally Disturbed" or "Specific Learning Disability."

- Students who do not meet the eligibility requirements under the IDEA may, nonetheless, be "handicapped" under Section 504 of the Rehabilitation Act of 1973. The definition of "handicapped persons" in Section 504 is "... any person who has a physical or mental impairment which substantially limits a major life activity...." Depending on the severity of the ADD, a student may be covered under Section 504.

- School districts are responsible for evaluating all children who may need special education and related services, including students with a medical diagnosis of ADD. A district cannot refuse to evaluate a child.

- If a child with ADD is determined eligible for services under the IDEA, an individualized education program (IEP) as prescribed in the IDEA, must be developed and a full continuum of placement alternatives, including the regular classroom, must be available for providing special education and related services as specified in the IEP.

- If there is a disagreement over a child's eligibility for special education, the parent may request a due process hearing, pursuant to the IDEA.

- If a child is handicapped as defined by Section 504, he or she must be provided with an "individualized education program." Section 504 indicates that an "IEP" as specified in IDEA is "one means of meeting the free appropriate public education requirements under Section 504." Another way is to document the specific accommodations which the district will provide to the child in the regular classroom which must be maintained in the child's cumulative file.

In summary, students who are referred to the CSE because of a suspected disability must receive a nondiscriminatory, multidisciplinary evaluation to determine eligibility for special education services as prescribed in current federal and State laws and regulations. A student determined eligible for special education programs or services, must be identified as "a child with a handicapping condition" under Article 89 of the Education Law with all the rights thereunder.

If you have any questions, please contact the nearest regional office of the Division of Program Monitoring or the Division of Program Development and Support Services at (518) 474-8917.

Attachment
MEMORANDUM

DATE: SEP 6 1991

TO: Chief State School Officers

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

Michael L. Williams
Assistant Secretary
Office for Civil Rights

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

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

I. Introduction

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

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

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

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

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

A. Description of Part B

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

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

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

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

c. Eligibility for Part B Services under Other Disability Categories

Children with ADD are also eligible for services under Part B if the children satisfy the criteria applicable to other disability categories. For example, children with ADD are also eligible for services under the "specific learning disability" category of

1 The Part B regulations define 11 specified disabilities. 34 CFR §300.5(1)-(11). The Education of the Handicapped Act Amendments of 1990 amended the Individuals with Disabilities Education Act (formerly the Education of the Handicapped Act) to specify that autism and traumatic brain injury are separate disability categories. See section 602(a)(1) of the Act, to be codified at 20 U.S.C. 1401(a)(1).
Part B if they meet the criteria stated in §§300.5(b)(9) and 300.341 or under the "seriously emotionally disturbed" category of Part B if they meet the criteria stated in §300.5(b)(8).

III. Evaluations under Part B

A. Requirements

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

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

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

B. Disagreements over Evaluations

Any proposal or refusal of an agency to initiate or change the identification, evaluation, or educational placement of the child, or the provision of FAPE to the child is subject to the
written prior notice requirements of 34 CFR §§300.504-300.505.1 If a parent disagrees with the LEA's refusal to evaluate a child or the LEA's evaluation and determination that a child does not have a disability for which the child is eligible for services under Part B, the parent may request a due process hearing pursuant to 34 CFR §§300.506-300.513 of the Part B regulations.

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

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

A. Definition

Section 504 requires every recipient that operates a public elementary or secondary education program to address the needs of children who are considered "handicapped persons" under Section 504.

Section 504 of the Part B regulations sets out the elements that must be contained in the prior written notice to parents:

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

34 CFR §300.505(a)(1)-(4).
504 as adequately as the needs of nonhandicapped persons are met. "Handicapped person" is defined in the Section 504 regulation as any person who has a physical or mental impairment which substantially limits a major life activity (e.g., learning). 34 CFR §104.3(j). Thus, depending on the severity of their condition, children with ADD may fit within that definition.

B. Programs and Services Under Section 504

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

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

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

Many LEAs use the same process for determining the needs of students under Section 504 that they use for implementing Part B.
Regular classroom teachers are important in identifying the appropriate educational adaptations and interventions for many children with ADD.

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

- Providing a structured learning environment;
- Repeating and simplifying instructions about in-class and homework assignments;
- Supplementing verbal instructions with visual instructions;
- Using behavioral management techniques;
- Adjusting class schedules;
- Modifying test delivery;
- Using tape recorders, computer-aided instruction, and other audiovisual equipment;
- Selecting modified textbooks or workbooks;
- Adjusting 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.

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

C. Procedural Safeguards Under Section 504

Procedural safeguards under the Section 504 regulation are stated more generally than in Part B. The Section 504 regulation requires the LEA to make available a system of procedural safeguards that permits parents to challenge actions regarding the identification, evaluation, or educational placement of their handicapped child whom they believe needs special education or related services. 34 CFR §304.36. The Section 504 regulation requires that the system of procedural safeguards include notice, an opportunity for the parents or guardian to examine relevant records, an impartial hearing with opportunity for participation by the parents or guardian and representation by counsel, and a
review procedure. Compliance with procedural safeguards of Part B is one means of fulfilling the Section 504 requirement. However, in an impartial due process hearing raising issues under the Section 504 regulation, the impartial hearing officer must make a determination based up on that regulation.

V. Conclusion

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

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

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

It is our hope that the above information will be of assistance to your State as you plan for the needs of children with ADD who require special education and related services under Part B, as well as for the needs of the broader group of children with ADD.

Again, many LEAs and some SEAs are conserving time and resources by using the same due process procedures for resolving disputes under both laws.
who do not qualify for special education and related services under Part B, but for whom special education or adaptations in regular education programs are needed. If you any questions, please contact Jean Peelen, Office for Civil Rights; (Phone: 202/732-1635), Judy Schrag, Office of Special Education Programs (Phone: 202/732-1007); or Dan Bonner, Office of Elementary and Secondary Education (Phone: 202/401-0984).
Comparison of IDEA, §504 and ADA in Relation to the Provision of a Free Appropriate Public Education

<table>
<thead>
<tr>
<th>IDEA and Article 89</th>
<th>Section 504 of the Rehabilitation Act (§504)</th>
<th>The Americans with Disabilities Act (ADA)</th>
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<td>YEAR ENACTED</td>
<td>1975</td>
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<td>LEGAL CITATION</td>
<td>20 USC 1400 et seq.</td>
<td>29 USC 794</td>
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<td>34 CFR Part 300</td>
<td>34 CFR Part 104</td>
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<td>RELEVANT STATE LAW</td>
<td>Education Law, Article 89 [§4401 - 4410(a)]</td>
<td>8 NYCRR § 100.2 (k)</td>
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<td></td>
<td>8 NYCRR Part 200</td>
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<tr>
<td>WHAT IS FAPE</td>
<td>The provision of special education and related services...provided at public expense in conformity with an IEP in a manner reasonably calculated to enable the child to receive educational benefit</td>
<td>The provision of regular or special education and related aids and services designed to meet the individual educational needs of disabled persons as adequately as the needs of non-disabled persons are met</td>
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<td>LRE</td>
<td>The placement of students with disabilities in special classes, separate schools or other removal from the regular educational environment occurs only when the nature or severity of the disability is such that even with the use of supplementary aids and services, education cannot be satisfactorily achieved. In addition, the placement must provide the special education needed by the student, provide for education, to the maximum extent appropriate to the needs of the student with other students who do not have a disability and be as close as possible to the student’s home. 8 NYCRR 100.2(s) requires that instruction be modified to the extent appropriate to provide opportunities to meet diploma requirements</td>
<td>The student shall be placed in the regular educational environment unless the child’s education cannot be achieved satisfactorily even with the use of supplementary aids and services</td>
</tr>
<tr>
<td><strong>TYPE OF STATUTE</strong></td>
<td><strong>IDEA and Article 89</strong></td>
<td><strong>Section 504</strong></td>
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<tr>
<td>Federal funding statute providing federal aid to states that ensure the provision of free appropriate public education (FAPE) to children with disabilities</td>
<td>Civil rights statute protecting individuals with disabilities* from discrimination in programs and activities receiving federal funds</td>
<td>Broader civil rights statute than §504 extending protections to individuals with disabilities in private industry employing more than 15 individuals, public entities, public accommodations, telecommunications and private nonsectarian schools. (See New York State Human Rights Law - Executive Law §290 et. seq.)</td>
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<tr>
<th><strong>WHO IS COVERED</strong></th>
<th><strong>IDEA and Article 89</strong></th>
<th><strong>Section 504</strong></th>
<th><strong>ADA</strong></th>
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</thead>
<tbody>
<tr>
<td>Infants and toddlers with disabilities 0 - 2; children 3 to 21 who meet the definition of a preschool child with a disability or one of thirteen categories of disabilities applicable to school age children</td>
<td>Any person with a physical/mental impairment which substantially limits one or more major life activities (self care, manual tasks, walking, seeing, hearing, breathing, learning/working), who has a record of such an impairment, or is regarded as having such an impairment</td>
<td>Any person with a physical/mental impairment which substantially limits one or more major life activity (self care, manual tasks, walking, seeing, hearing, breathing, learning/working), has a record of such an impairment, or is regarded as having such an impairment</td>
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<tr>
<th><strong>MAJOR PROVISIONS</strong></th>
<th><strong>IDEA and Article 89</strong></th>
<th><strong>Section 504</strong></th>
<th><strong>ADA</strong></th>
</tr>
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<tbody>
<tr>
<td>Ensures procedural safeguards and the right to free appropriate public education in the least restrictive environment in accordance with the IDEA</td>
<td>No otherwise qualified individual** with disabilities shall solely by reason of her or his disability be: - excluded from participation in - denied the benefits of - or be subjected to discrimination under any program or activity receiving federal financial assistance</td>
<td>No otherwise qualified individual with disabilities shall by reason of her or his disability be: - excluded from participation in - denied the benefits of - subject to discrimination by any services, programs or activities of a public entity</td>
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</table>

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* Although §504 of the Rehabilitation Act continues to use the term "handicapped", this chart refers to students protected under §504 as "disabled".

** An "otherwise qualified individual" for purposes of eligibility for school programs is one who meets the age and residency requirements.
## PROGRAM ACCESS

Each public agency shall take steps to provide nonacademic services and activities in such a manner as is necessary to afford children with disabilities equal opportunity for participation in those services and activities [34 CFR 300.306]

8 NYCRR 200.2(b) - Each school board must have policies to ensure that students with disabilities residing in the district have the opportunity to participate in school district programs, to the maximum extent appropriate to the needs of the student including extracurricular programs and activities which are available to all other students enrolled in the public schools.

8 NYCRR 100.2(k) - No student shall be denied membership or participation on the basis of disability in any program of curricular and extracurricular activities provided that in the case of children with disabilities, such activities shall be appropriate to the student’s special educational needs as identified by the CSE.

## RULE

**IDEA and Article 89**

**Section 504**

**ADA**

**Rule:** No qualified individual with a disability shall, because a recipient's facilities are inaccessible or unusable by disabled individuals, be denied the benefits of, be excluded from participation in, or otherwise be subjected to discrimination under any program or activity.

Does not require recipients to make each of its existing facilities or every part of an existing facility accessible:

1. The program may redesign equipment.
2. Reassign classes to accessible buildings.
3. Assign an aid, etc.

With priority to those methods that offer programs and activities to disabled persons in the most integrated setting appropriate.

New construction or alterations after June 3, 1977 must be accessible.

**EXCEPT**

- Does not necessarily require a public entity to make each of its existing facilities accessible to individuals with disabilities.

Does not require the public entity to fundamentally alter the nature of the service, program or activity or incur an undue financial and administrative burden.

However, this does not relieve the public entity from providing access to individuals with disabilities through other means.

New construction or alterations after January 26, 1992 must be accessible.

## DEFINITION OF AUXILIARY AIDS AND SERVICES

**Taped texts, interpreters, readers, etc.** (as applied to post-secondary education)

**Services such as, but not limited to,** qualified interpreters, notetakers, transcription services, written materials, assistive listening devices, videotex displays, open and closed captions, etc.

**Qualified readers, taped text, audio recordings, braille, large print, etc.**

## COMPLIANCE / ENFORCEMENT

**Office of Special Education Programs (OSEP); SED**

- Non-compliance may result in loss of IDEA funds and state aid.

Administrative appeals and/or courts.

**Office for Civil Rights, United States Department of Education (OCR).**

- Non-compliance may result in loss of all federal funds.

Administrative appeals and/or courts.

**Office for Civil Rights (OCR) Department of Justice (DOJ).**

- Non-compliance may result in loss of all federal funds.

Administrative appeals and/or courts.
<table>
<thead>
<tr>
<th><strong>INTERNAL GRIEVANCE PROCEDURE</strong></th>
<th>State complaint procedure required (34 CFR 300.660)</th>
<th>Requires districts with 15 or more employees to designate a §504 compliance officer and a grievance procedure to investigate complaints alleging noncompliance with §504</th>
<th>Requires public entities with more than 50 employees to designate a compliance officer and a grievance procedure to investigate complaints alleging noncompliance with the ADA</th>
</tr>
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<tr>
<td><strong>PROTECTION AGAINST RETALIATION</strong></td>
<td>Incorporates prohibition against retaliation, intimidation, coercion, threats, and discrimination found in regulations under Title VI of the Civil Rights Act</td>
<td></td>
<td>Extends protections to nondisabled individuals who have testified or participated in any manner in an investigation, proceeding or hearing under the ADA</td>
</tr>
<tr>
<td><strong>SCHOOL BOARD POLICY</strong></td>
<td>8 NYCRR 200.2(b)</td>
<td>Requires written policies advising parents and their disabled students of the district’s responsibility to identify, evaluate and provide FAPE to children with disabilities</td>
<td></td>
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<tr>
<td>8 NYCRR 100.2(l)(1) discipline policy for children with disabilities</td>
<td>8 NYCRR 100.2(aa) Board policy governing requests by hearing impaired adults for interpreter services</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>SELF EVALUATION</strong></td>
<td>Requires recipients to conduct a self-evaluation to identify discriminatory policies and steps to modify any discriminatory policies and practices</td>
<td></td>
<td>By January 26, 1993, school districts were required to update its §504 self-evaluation to assure compliance with the ADA which must involve constituent groups</td>
</tr>
<tr>
<td><strong>PROCEDURAL SAFEGUARDS NOTICE</strong></td>
<td>Requires written notice in the parent’s dominant language prior to the initiation, change or refusal to change the identification, evaluation or educational placement of a child or the provision of FAPE</td>
<td>Although §504 regulations do not specifically require written notice of actions to identify, evaluate or place a child who may be disabled under §504, such notice should be provided in writing, it is advisable to follow IDEA procedures</td>
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<td>IDEA and Article 89</td>
<td>Section 504</td>
<td>ADA</td>
<td></td>
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<td><strong>COMPONENTS OF NOTICE TO PARENTS</strong></td>
<td>Right to review records</td>
<td>** COMPONENTS OF NOTICE TO PARENTS** 8 NYCRR 200.5(a) and 34 CFR 300.505</td>
<td>Notice of meetings</td>
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<td><strong>NOTICE OF THE RIGHT TO AN INDEPENDENT EVALUATION AND PENDENCY</strong></td>
<td>A parent who disagrees with the evaluation obtained by the school district has the right to an independent evaluation at public expense unless the district initiates an impartial hearing and the district’s evaluation is found to be appropriate.</td>
<td>The evaluation must draw on information from a variety of sources including aptitude and achievement tests, teacher recommendations, physical conditions, social or cultural background and adaptive behaviors, information must be documented</td>
<td>Right to remain in the “status quo” placement pending appeals</td>
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<td><strong>EVALUATIONS</strong></td>
<td>A comprehensive evaluation assessing all areas related to the child’s suspected disability, including, but not limited to, at a minimum, a physical, a social history, a classroom observation, a psychological evaluation as deemed necessary by a school psychologist and a vocational assessment for children over age 12</td>
<td></td>
<td>Evaluation must be conducted by a multi-disciplinary team and may not rely on one procedure as the sole criteria for determining FAPE</td>
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<td><strong>REEVALUATION</strong></td>
<td>Every three years or more frequently, as needed, or upon the request of the parent</td>
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<td>Required prior to any significant change of placement (i.e. suspension for more than 10 days).</td>
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<td><strong>REQUIRED</strong></td>
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<td>Periodic reevaluation</td>
<td>See §00.2(j)(1)(a) Requires guidance program to provide annual review of all student’s educational progress with such reviews to be conducted with each student individually or with small groups by qualified school counselors</td>
</tr>
</tbody>
</table>
| **CONSENT** | Parent must consent to the evaluation and placement of a student not previously identified with a disability or first recommended for twelve month services or programs  
*Consent is voluntary on the part of the parent and may be withdrawn at any time | Although not specifically required under §504, parental consent should be obtained prior to initial evaluation and accommodation plan |
| **MULTI-DISCIPLINARY TEAM** | Committee/Subcommittee on Special Education or Committee on Preschool Special Education, as applicable, develops the IEP | Group of individuals knowledgeable about the student, evaluations and placement options develop an “accommodation plan” |
| **DOCUMENTATION OF PLACEMENT** | Individualized Education Program (IEP) | Although not required, in writing, a written “Accommodation Plan” is recommended (Implementation of an IEP in accordance with the IDEA is one way to document an appropriate education) |
| **DUE PROCESS** | Right to an impartial hearing and review by the State review officer, including the right ‘to representation by counsel, to review any action involving the identification, evaluation, educational placement or the provision of FAPE to a child with a disability as defined under the IDEA | Right to an impartial hearing and a review procedure, including the right to representation by counsel, to challenge any action regarding the identification, evaluation and educational placement of persons who, because of a disability, need or are believed to need special instruction or related services under §504 |
| **DISCIPLINE** | General procedures governing all children including children with disabilities - see Education Law §3214 and 8 NYCRR 100.2(l)(4)  
Any suspension of 10 consecutive days or more is a significant change of placement triggering the procedural safeguards of IDEA including the right to remain in the current educational placement pending appeals  
Cumulative suspensions of more than 10 days within the school year may trigger the procedural safeguards under the IDEA  
Cannot terminate FAPE as a disciplinary measure  
§ NYCRR 100.2(l)(1) | - District must reevaluate the child prior to any suspension of 10 days or more  
- Is there a nexus between the child’s disability and the behavior complained of? If “Yes”, the child may not be suspended for more than 10 days unless the behavior is drug/alcohol related  
- No automatic right to remain in the current educational placement  
Amends 504 - to create exception for discipline of drug and alcohol related behavior |
Sample §504 Policy Regarding Students with Disabilities

Section 504 is a federal civil rights statute that prohibits discrimination against persons with disabilities in programs receiving federal financial assistance. The Act protects individuals with a disability who:

1. have a physical or mental impairment which substantially limits one or more major life activity (major life activities include activities such as caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working.

2. have a record of such impairment; or

3. are regarded as having such an impairment.

The _____________________________ School District does not discriminate against persons with disabilities and provides access to qualified disabled individuals to all of its activities and programs.

The Act also obligates school districts to identify, evaluate, and to extend to every qualified student with a disability residing in the district, a free appropriate public education, including modifications, accommodations, specialized instruction or related aids as deemed necessary to meet their educational needs as adequately as the needs of non-disabled students are met. If you believe your child may have a disability that requires modifications or accommodations to his or her educational program, please contact _____________________________
Dear Parent or Guardian:

Based on concerns regarding your child's academic performance, we would like to meet with you on ________________, at ______________________ to discuss the need to provide programmatic accommodations for your ________________. Given the importance of the meeting, we urge your participation.

If you have any questions, or the scheduled meeting time is not convenient for you, please call me by ________________ at ________________. In addition, if you wish to review your ________________ educational records, including any materials that will be discussed at the meeting, please call me to schedule a mutually convenient time for such review. If I do not hear from you, I will look forward to seeing you at our scheduled meeting.

Sincerely,

Name and Title

cc:  Student’s Cumulative File
Notice of Determination After Meeting

Dear

As you know, on __________________________, we met to discuss your child's academic progress. Based on the materials before us, we determined that:

1. Your child has a disability under §504 of the Rehabilitation Act that requires an accommodation plan to ensure his/her full access to all school activities. A copy of the plan is enclosed for your review.

2. Your child is not disabled and does not require an accommodation plan to address his/her educational deficiencies.

If you disagree with our determination, I would be happy to meet with you to discuss your concerns. If you wish, you also have the right to request an impartial hearing and to bring an attorney to represent you. If you wish to proceed to a formal hearing, please send a written request to __________________________ at __________________________. If you have any questions or would like to schedule a meeting, please do not hesitate to contact me at __________________________.

Sincerely,

cc: Student’s Cumulative File
§504 Accommodation Plan

<table>
<thead>
<tr>
<th>NAME</th>
<th>DATE OF BIRTH</th>
<th>GRADE</th>
<th>SCHOOL</th>
<th>DATE OF MEETING</th>
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</table>

1. Describe the nature of the problem: 

2. Evaluations completed - including dates of each evaluation: 

3. The basis for determining that the child has a disability (if any): 

4. Describe the nature of the child's disability: 

5. Does the disability affect a major life activity? If “Yes”, explain how: 

6. List the accommodations (i.e. specialized instruction or equipment, auxiliary aids or services, program modifications, etc.) the team recommends as necessary to ensure the child’s access to all district programs: 

Review/Reassessment Date: __________________________ (must be completed)
Participants (name and title)

cc: Student’s Cumulative File
Attachment: Information regarding §504 of the Rehabilitation Act of 1973
Due Process Notice