

SECTION 504/TITLE II COMPLIANCE MANUAL (Students)

General Information
Procedures

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An Excellence in Education for All Students

Modified from the original “Addressing Student Disabilities Under Section 504: Section 504 Procedures Manual and Forms” by Teri Goldman, Esq., IDEAs in Education LLC, in accordance with licensing agreement.

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Contents

INTRODUCTION.....	4
DEFINITIONS AND TERMINOLOGY	6
SECTION 504 PROCEDURES FOR COLUMBIA PUBLIC SCHOOLS.....	8
Child Find and Evaluation:	10
Re-Evaluation	13
Provision of FAPE and Educational Placement:	13
Private School Placement of Disabled Students by Parents:	14
Extracurricular and Nonacademic Activities and Services:	15
Summer School	15
Student Discipline under Section 504:.....	16
Student Use of Illegal Drugs.....	16
504 PROCEDURES	17
Parent Referrals	17
Staff Referrals:	18
Procedures When Disability is Suspected	19
Provision of FAPE Procedures:	20
Transfer Procedures.....	22
Removal of Eligibility:.....	23
Reevaluation Procedures:	23
Discipline Procedures:.....	23
STORAGE OF SECTION 504 RECORDS.....	24
eSchool (Student Information System)	24
TEXT OF THE AMERICANS WITH DISABILITIES ACT AMENDMENTS ACT OF 2008	26
PERTINENT SECTION 504 FEDERAL REGULATIONS	33

INTRODUCTION

Section 504 of the Rehabilitation Act of 1973 (“Section 504”) is a federal law that is designed to eliminate discrimination on the basis of disability in any program or activity receiving federal financial assistance from the United States Department of Education. The Americans with Disabilities Act (“ADA”), passed by Congress in 1990, serves the similar purpose of eliminating discrimination on the basis of disability. The ADA applies to employers who employ fifteen or more persons.

According to Section 504 and the ADA, a person with a disability is defined as a person with a mental or physical impairment that substantially limits one or more major life activities. Under these two laws, the definition of a person with a disability also includes (a) a person who has a record of a physical or mental impairment that substantially limits a major life activity, and (b) a person who is regarded as having a physical or mental impairment that substantially limits a major life activity. Because the definition of disability has been virtually identical under these two federal laws, the courts consistently have analyzed cases under one of the laws by looking to cases interpreting the other.

In 2008, Congress amended the ADA and Section 504. This amending legislation, known as the Americans with Disabilities Act Amendments Act (“ADAAA”), was signed into law by President George W. Bush on September 25, 2008. The amended law became effective January 1, 2009. A copy of the 2008 ADAAA is included in the Appendix to this publication.

In enacting the ADAAA, Congress explicitly sought to overturn prior court interpretation, including interpretation by the United States Supreme Court that “narrowed the broad scope of protection intended to be afforded by the ADA.” More specifically, Congress rejected the Supreme Court’s interpretation of the term “disability” in the cases of *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), and *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002). In rejecting the holdings and rationale of those cases, Congress noted that “lower courts have incorrectly found in individual cases that people with a range of substantially limiting impairments are not people with disabilities.” Accordingly, Congress’ stated purpose in enacting the 2008 amendments was to expand the class of individuals who are entitled to protection under the ADA and Section 504 and “[t]o restore the intent and protections of the Americans with Disabilities Act of 1990.” As noted by Congress, the definition of disability “shall be construed . . . in favor of broad coverage of individuals . . . to the maximum extent permitted by the terms of this Act.”

Although Congress did not modify the definition of disability in the ADAAA, it modified past interpretations of that definition in several ways. First, in the ADAAA, Congress explicitly rejected the Supreme Court’s prior *Sutton* holding that “whether an impairment substantially limits a major life activity is to be determined with reference to the ameliorative effects of mitigating measures.” Second, Congress

stated that the Supreme Court, in the Williams case, required a higher degree of limitation than Congress intended when passing the 1990 ADA. Although Congress did not provide a definition of “substantially limits” in the 2008 amendments, it rejected the definition of “significantly restricted” as previously applied by the Equal Employment Opportunity Commission. In summary, the ADAAA specifically provides that, when determining whether an impaired individual is substantially limited, the ameliorative (improving) effects of mitigating measures may not be considered and that the standard for “substantially limits” is less than “significantly restricted.” In the ADAAA, Congress also provided a definition of mitigating measures as well as a non-exclusive list of mitigating measures.

In addition and third, Congress rejected the Williams Court’s analysis that the term “major” as used in the definition of disability must be interpreted strictly so as to create a demanding standard for disability. In relation to the phrase “major life activities,” Congress extensively expanded the prior non-exclusive list of what constitutes a major life activity and further provided that an impairment that substantially limits one major life activity need not limit other major life activities.

Another significant change resulting from the ADAAA is a provision that states that an impairment that is episodic or in remission constitutes a disability if, when active, the impairment substantially limits a major life activity.

Section 504 of the Rehabilitation Act is enforced by the Office for Civil Rights (“OCR”) within the United States Department of Education. In March 2009 and in response to the ADAAA, the OCR published “Frequently Asked Questions About Section 504 and the Education of Children with Disabilities.”¹ As noted by OCR in the FAQ, “[t]he Amendments Act does not require ED to amend its Section 504 regulations. ED’s Section 504 regulations as currently written are valid and OCR is enforcing them consistent with the Amendments Act. In addition, OCR is currently evaluating the impact of the Amendments Act on OCR’s enforcement responsibilities under Section 504 and Title II of the ADA, including whether any changes in regulations, guidance or other publications are appropriate.”

The purpose of this manual is to promote effective compliance with Section 504 as amended by the ADAAA, and as defined by the current 504 federal regulations, informal guidance issued by the OCR and new cases as they are decided. Due to the recent enactment of the ADAAA and because, at this time, little judicial or agency guidance is available to provide further meaning to the amendments, the procedures and forms included within this manual are intended to satisfy compliance with Section 504 as it is known as of July 2009. As additional court interpretation or agency guidance becomes known, this manual, procedures and forms may be revised.

¹ The OCR’s March 2009 FAQ is available at www.ed.gov/print/about/offices/list/ocr/504faq.html.

DEFINITIONS AND TERMINOLOGY

Free appropriate public education (FAPE): a term used in the elementary and secondary context. For purposes of 504, refers to the provision of regular or special education and related aids and services that are designed to meet individual educational needs of students with disabilities as adequately as the needs of students without disabilities are met and is based on adherence to procedures that satisfy the Section 504 requirements pertaining to educational setting, evaluation and placement, and procedural safeguards. (Source: March 2009 OCR FAQ and 34 C.F.R. § 104.33).²

Placement: a term used in the elementary and secondary school context. Refers to the regular and/or special educational program in which a student receives educational and/or related services. (Source: March 2009 OCR FAQ).

Qualified Disabled Person: with respect to public preschool, elementary, secondary or adult educational services, a qualified disabled person is an individual (i) of an age during which nondisabled persons are provided such services, (ii) of an age during which it is mandatory under state law to provide such services to disabled persons, or (iii) to whom a state is required to provide a free appropriate public education. (Source: 34 C.F.R. § 104.3(l)(2)).

Physical or mental impairment: means (A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory; including speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine; or (B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. (Source: 34 C.F.R. § 104.3).

Reasonable accommodation: a term used in the employment context that employers make with respect to employees or prospective employees. According to the OCR, “this term is sometimes used incorrectly to refer to related aids and services in the elementary and secondary school context or to refer to academic adjustments, reasonable modifications, and auxiliary aids and services in the postsecondary school context.” (Source: March 2009 OCR FAQ).

Record of impairment: means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities. (Source: 34 C.F.R. § 104.3).

² A copy of pertinent current 504 federal regulations is included in the Appendix to this publication.

Regarded as having an impairment: means (A) has a physical or mental impairment that does not substantially limit major life activities but is treated as a recipient as constituting such a limitation; (B) has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or (C) has none of the impairments defined in the regulations but is treated by a recipient as having such impairment. (Source: 34 C.F.R. § 104.3).

Related services: a term used in the elementary and secondary school context to refer to developmental, corrective, and other supportive services, including psychological, counseling and medical diagnostic services and transportation. (Source: March 2009 OCR FAQ).

Special Education: this term is not defined by the OCR or in the 504 federal regulations. In Letter to McKethan (OCR Jan. 4, 1995), the OCR stated that “[w]hat constitutes ‘special education’ under the civil rights statutes and regulations is a decision for the local education agency to make in conformance with whatever other local, state, and Federal laws apply (such as the IDEA).” In that same letter, the OCR also stated that “Students may have a disability that in no way affects their ability to learn, yet they may need extra help of some kind from the system to access learning. For instance, a child may have very severe asthma (affecting the major life activity of breathing) that requires regular medication and regular use of an inhaler while in school. Without regulation administration of the medication and inhaler, the child cannot remain in school. Whether that help is called special education, or related services, or supplementary services is irrelevant under Section 504 and Title II.”

SECTION 504 PROCEDURES FOR COLUMBIA PUBLIC SCHOOLS

Section 504 of the Rehabilitation Act of 1973 is a federal law that prohibits discrimination against persons with disabilities in any program or activity that receives federal financial assistance from the United States Department of Education. The Columbia Missouri Public School District is a recipient of federal financial assistance from the United States Department of Education and, therefore, is covered by Section 504.

Which students are covered?

Under 504, a person with a disability is defined as an individual who:

1. Has a mental or physical impairment that substantially limits one or more major life activities;
2. Has a record of such an impairment; or
3. Is regarded as having such an impairment.

Students who satisfy the first definition above are entitled to a free appropriate public education ("FAPE") in the least restrictive environment. FAPE, under Section 504, is defined as the provision of regular or special education and related services that are designed to meet the individual educational needs of the disabled student as adequately as the needs of nondisabled students.

Students who satisfy only the second and third definitions are not entitled to FAPE, but are entitled to be free from discrimination.

Mental or physical impairments are broadly defined and include any physiological disorder or condition or any mental or psychological disorder, whether formally diagnosed or not.

However, an impairment, alone, is insufficient to qualify a student as Section 504 disabled. In addition, a medical diagnosis or the fact that a student takes medication is not controlling in determining whether that student has a 504 disability. The Office for Civil Rights, which is charged with the responsibility to enforce 504, has stated that finding a student 504 eligible solely on the basis of a diagnosis generally violates Section 504.

A student's eligibility under Section 504 is not determined by a doctor or psychologist but by a multidisciplinary team convened by the District. That team must include persons who are knowledgeable about the student, the evaluation data to be considered, the placement options and Section 504 requirements.

Major life activities, as defined by Section 504 and the 2008 ADAAA, include – but are not limited to – activities such as walking, seeing, hearing, speaking, breathing, learning, working, caring for one's self, bending, standing, learning, thinking, concentrating, reading, eating, sleeping, communicating and performing manual

tasks. Pursuant to the 2008 ADAAA, major life activities also include the operation of a major bodily function, including, but not limited to, the immune system, normal cell growth, digestive functions, bowel functions, bladder functions, neurological functions, brain functions, the respiratory system, the reproductive system, the circulatory system and the endocrine system.

An impairment that substantially limits one major life activity does not need to limit other major life activities for the student to be considered disabled.

To be disabled under Section 504, the student's mental or physical impairment must substantially limit one or more major life activities. Minor or moderate limitations are not sufficient for a student to be eligible under 504. An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

Substantial limitation is not defined in Section 504 or the 2008 ADAAA. In the 2008 ADAAA, Congress stated that the phrase "substantially limits" must be interpreted consistently with the findings and purposes of the 2008 Amendments. However, pursuant to the 2008 ADAAA, substantial limitation means less than "significantly restricted." The determination of whether an impairment substantially limits a major life activity must be made without regard to the ameliorative³ effects of mitigating measures⁴ such as the following: medication; medical supplies, equipment, or appliances; low-vision devices (which do not include ordinary eye-glasses or contact lenses); prosthetics, including limbs and devices; hearing aids and cochlear implants or other implantable hearing devices; mobility devices; oxygen therapy equipment and supplies; the use of assistive technology; reasonable accommodations; auxiliary aids or services;⁵ learned behavioral or adaptive neurological modifications; the acquisition or modification of equipment or devices; and other similar services and actions. The ameliorative effects of ordinary eyeglasses or contact lenses can be considered in determining whether an impairment substantially limits a major life activity.

In determining whether a student's impairment substantially limits a major life activity, the District must conduct an evaluation and, based on that evaluation, compare the student to his or her average peer in the population. Students, therefore, are measured by reference to the performance of children at the same age or grade level. Under Section 504, the student is not compared to his or her own potential.

³ Ameliorative is defined as "to make or become better, more bearable, or more satisfactory; improve; meliorate."

⁴ A mitigating measure is a device or practice that a person uses to correct for or reduce the effects of the mental or physical impairment.

⁵ Auxiliary aids and services include (a) qualifying interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments; and (b) qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments.

When determining eligibility under Section 504, the District also is required to determine if environmental, cultural, or economic disadvantage are the primary reason for any limitations that the student may exhibit.

Temporary impairments may be covered by 504 if the impairment is substantially limiting and if it is of sufficient duration. A transitory and minor impairment, however, is not a disability. A transitory impairment is one with an actual or expected duration of six months or less. The District can voluntarily accommodate a student's transitory and minor impairment without violating the "regarded as" definition of disability.

Procedural Safeguards and Grievance Procedures

Public and secondary schools that receive federal financial assistance must establish and implement, with respect to actions regarding the identification, evaluation, or educational placement of students who, because of disability, need or are believed to need special instruction, related services, a system of procedural safeguards that include notice, an opportunity for the parents/guardian of the student to examine relevant records, an impartial hearing with opportunity for participation by the person's parents/guardians and representation by counsel, and a review procedure. 34 C.F.R. 104.36.

A copy of the District's Section 504/Title II procedural safeguards will be given to the parents/guardian only one time a year, except that a copy shall also be given to the parents/guardian –

- Upon initial parent or staff referral or parental request for evaluation
- Upon the first occurrence of the filing of a Section 504/Title II due process complaint as specified in the procedural safeguards
- Upon notification to the parent/guardian of a significant change of placement as a result of disciplinary measures
- Upon request by the parent/guardian

A recipient that operates a public elementary or secondary education program must also adopt a grievance procedure for the prompt and equitable resolution of claims of discrimination. 34 C.F.R. 104.7(b). A copy of the District's required grievance procedures for the resolution of claims of discrimination may be found in the Board of Education's Policies and Regulations at:

<http://www.cpsk12.org/cms/lib8/M001909752/Centricity/domain/78/Policies/A-C-C.pdf>

Child Find, Referral and Evaluation:

School districts that receive federal financial assistance have the affirmative responsibility to annually undertake to locate and identify all students with

disabilities located in the District's jurisdiction. The District will satisfy this obligation, known as "child find," by publishing notices in newspapers and other media outlets and in student and teacher handbooks.

Students who are suspected of having a 504 disability can be referred for evaluation by parents/guardians, certified teachers and staff members. A copy of the 504 referral form can be obtained from the school's School Psychologist, Counselor, Administrator or Section 504 Coordinator or by contacting the District 504 Coordinator.

Before identifying a student as 504 disabled, the District is required to conduct an initial or pre-placement evaluation of that student to determine if he/she has a mental or physical impairment that substantially limits a major life activity before taking any action with respect to the initial placement of the student under 504. That evaluation can consist of a review of existing data, an observation, a request for medical, psychological and/or other outside information with proper authorization and/or formal assessment.

A formal medical or psychological diagnosis, standing alone, is insufficient to qualify a student as 504 disabled. Any outside information obtained from the student's outside diagnosing or treating medical or psychological professionals must be considered by the members of the 504 team convened to consider eligibility. However, outside information from medical professionals is not to be used alone to determine whether a student is disabled.

Districts are required to establish standards and procedures for the evaluation and placement of students who, because of disability, need or are believed to need services in accordance with Section 504. This section of the procedures manual describes those standards and procedures. As part of these standards and procedures, the District ensures that (1) tests and other evaluation materials have been validated for the specific purpose for which they are used and will be 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).

As part of the District's standards and procedures, the District also ensures that, in interpreting evaluation data, the student's team will (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 and (2) establish procedures to ensure that information obtained from all such sources is documented and carefully considered.

If the District's team believes that a current medical or psychological assessment or evaluation of the student is necessary to determine the existence of an impairment or as part of the evaluation to determine 504 eligibility that assessment must be provided at no cost to the parent. Information on how to obtain such an assessment is available by contacting the District's Section 504 Coordinator.

If the team determines that a formalized initial assessment is necessary to determine whether the student has a 504 disability, informed and written parental consent must be obtained. No consent is necessary to conduct a review of existing data or to conduct school-based or other observations.

The parent of a student who is seeking 504 eligibility must provide written consent for evaluation with assessment if the student's team has determined that such assessments are necessary to determine if the student has a disability. If the parent refuses to provide such consent, the student will not be considered to be disabled and will remain a regular education student. The District has the right to use the due process procedures identified in the 504 procedural safeguards if the parent refuses to consent to a 504 evaluation, but the District is not required to do so.

As part of the District's initial evaluation, the student's parent and/or legal guardian may be asked to provide a written release or authorization to obtain further information from diagnosing or treating physicians, psychologists or other professionals. If the District's team concludes that such information is a necessary part of the initial evaluation and the parent refuses to provide the requested written authorization to obtain it, the District will treat such refusal as a refusal to consent to the initial evaluation. In that event, the student will not be considered to be disabled and will remain a regular education student. The District has the right to use the due process procedures identified in the 504 procedural safeguards if the parent refuses to consent to a 504 evaluation, but the District is not required to do so.

A District is not required to evaluate or identify a student as 504 disabled simply at a parent's request if the District does not have reason to suspect that the student has a 504 disability. If a parent initiates a 504 referral and/or requests a 504 evaluation and the District refuses that request because it has no reason to suspect a disability, the District will provide the parent with a written notice of action to document the refusal and a copy of the District's 504 procedural safeguards. There is no automatic obligation to evaluate students for 504 eligibility after a determination that a student is not eligible under the Individuals with Disabilities Education Act (i.e., Special Education).

Re-Evaluation

Students deemed eligible under 504 must also be periodically re-evaluated. The Columbia Public School District has determined that the need for *periodic re-evaluations* will be assessed every three-years. If the family and 504 team agree that there is no reason to suspect a change in eligibility, the re-evaluation may be waived. Aside from the standard three year cycle, a parent and/or school team may request re-evaluation at any time. Re-evaluation is required prior to any significant change in placement. OCR has stated that a significant change in placement occurs when, for a period of more than 10 days, there is a significant change in the type or amount of regular education or specialized educational services or related aids or services provided to a disabled student, such as adding or eliminating a program or service or where there is a substantial increase or decrease in the amount of time a program or service is provided. A significant change of placement may also occur when a student is subject to a series of short term suspensions that, together, create a pattern of exclusion.

Re-evaluations can consist of a review of existing data, an observation, a request for medical, psychological or other outside information (with proper authorization) and/or a formal assessment. Parents must be notified by the District of an intent to re-evaluate under 504 and must be invited to attend the meeting in which this action is to be discussed, but neither parental attendance nor consent is necessary for periodic re-evaluations. The District must re-evaluate students before any significant change of placement including, but not limited to, the proposed discontinuation of a student's eligibility under Section 504, graduation with a regular diploma, or a disciplinary change of placement. That re-evaluation can consist of a review of existing data, observation, a request for medical, psychological or other outside information with proper authorization and/or a formal assessment.

Section 504 does not provide for a right to independent educational evaluations. However, in interpreting data and making placement decisions, the District will consider any independent or outside evaluations presented by the student's parent or guardian.

Provision of FAPE and Educational Placement:

After a team determines that a student is 504 disabled, a 504 team (that may be the same or a different group of persons) will convene, within a reasonable time (generally within 10 school days), to develop an individualized 504 Non-Discrimination Plan for the student in order to provide FAPE. The 504 team will include persons knowledgeable about the student, the evaluation data and the placement options. The student's parents are not required participants in that process, but the District will extend an invitation to the parent to participate and will attempt to schedule such meetings at a mutually convenient time. The team can meet without the parent's participation. If parents have been notified and do not

attend, teams may proceed with the meeting without an additional attempt to gain parent participation.

In making placement decisions, the 504 team will (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) 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 student, the meaning of the evaluation data, and the placement options, and (4) ensure that the placement decision is one in which the student will be educated with students who are not disabled to the maximum extent appropriate to the needs of the disabled student. In making placement decisions, the team will place the disabled student in the regular educational environment unless the team concludes that the education of the student in the regular education environment with the use of supplementary aids and services cannot be achieved satisfactorily.

If the team places a student in a setting other than the regular educational environment, the team will take into account the proximity of the alternate setting to the student's home.

In making a placement decision, a team may place the disabled student or refer the student for aids, benefits, or services other than those operated or provided for by the District. If the team decides the student needs such aids, benefits or services, the District will ensure that the 504 requirements outlined in this manual are met with respect to the student so placed or referred.

If the team places a disabled student or refers a disabled student for aids, benefits, or services not operated or provided for by the District, the team will 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 student were placed in the aid, benefits, or services operated by the District.

If a student's team determines that a public or private residential placement is necessary to provide the student with a FAPE because of that student's disability, the placement, including non-medical care and room and board, shall be provided at no cost to the student or his or her parents or guardian.

Private School Placement of Disabled Students by Parents:

If the District has made available, in conformance with the 504 regulations and this procedures manual, a free appropriate public education to a disabled student and the student's parents or guardian choose to place the person in a private school, the District is not required to pay for the student's education in the private school. Disagreements between a parent or guardian and the District regarding whether the

District has made FAPE available or otherwise regarding the question of financial responsibility are subject to the due process procedures outlined in the District's 504 procedural safeguards.

Extracurricular and Nonacademic Activities and Services:

The District ensures that it will take steps to provide non-academic and extracurricular services and activities in such a manner as is necessary to afford disabled students an equal opportunity for participation in such services and activities. To avoid discrimination on the basis of disability, the District must make reasonable modifications to its policies, practices or procedures when the modifications are necessary to allow for such equal opportunity unless the District can demonstrate that making the modifications would fundamentally alter the nature of the service, program or activity.

In general, the FAPE obligation does not extend to extracurricular and nonacademic services unless a student's 504 team determines, as part of the team process, that the individual student requires participation in those activities or services to receive FAPE.

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 District, referrals to agencies which provide assistance to disabled students, and employment of student, including both employment by the District and assistance in making available outside employment.

If a student's 504 team decides that a student requires participation in a particular extracurricular or nonacademic activity to receive FAPE, that determination must be documented in the student's 504 Non-Discrimination Plan. If a student's team decides that the student does not require such participation, the team may still engage in discussion regarding a disabled student's right to have an equal opportunity to participate in extracurricular and nonacademic activities and may choose to document any supports or services the student will need for such participation in the student's 504 Non-Discrimination Plan, even though those supports or services will not constitute part of the offer of FAPE to that student.

Summer School

For disabled students who do not qualify for extended school year services pursuant to the IDEA or Section 504, the District will ensure that qualified students with disabilities will have an equal opportunity to participate in the District's summer school programs, if offered.

For a particular student, the District may need to provide reasonable accommodations and modifications to the District's summer programs to give students with disabilities access unless those accommodations and modifications would fundamentally alter the nature of the summer programs.

Prior to the beginning of summer school, the District ensures that information regarding the educational needs of students with disabilities is provided to the relevant building administrator(s), summer school teacher(s), and/or other relevant summer school staff. The District further ensures that persons knowledgeable about the students' disabilities will determine whether qualified students with disabilities who plan to attend the District's summer school program need program modifications or accommodations in order to have an equal opportunity to participate in and benefit from the summer school programs.

Student Discipline under Section 504:

Under Section 504, a disciplinary removal from a student's placement for more than 10 consecutive days constitutes a change of placement and requires that certain procedures be followed. When a student is suspended, out of school, for more than 10 consecutive days or when a student's short-term removals constitute a pattern of exclusion as currently defined by the Individuals with Disabilities Education Act ("IDEA"), the District will, within 10 days of the date of the decision to change the student's placement, convene a multidisciplinary team to determine if the student's act of misconduct is related to or a manifestation of his or her disability. The multidisciplinary team will apply the IDEA manifestation standard that is in place at that time. The parent will be invited to attend but is not a required participant.

If the team concludes that the student's misconduct is related to his or her disability, the District will not impose a long-term suspension or removal (over 10 school days) and/or will not impose additional days of suspension or removal beyond the time when a pattern is or was created.

If the team concludes that the student's misconduct is unrelated to his or her disability, the District's administrators will determine the appropriate discipline including, but not limited to, a long-term suspension or expulsion, based on the District's Code of Conduct. During the period of disciplinary removal, the District will not provide any educational services to the student unless it provides such services to its regular education students in similar circumstances.

Student Use of Illegal Drugs

A student is not considered to be disabled if he or she is currently engaged in the illegal use of drugs when the District is acting on the basis of that use. Therefore, when a 504 eligible student is being disciplined for the current illegal use of drugs (including alcohol), that student will lose his or her 504 protection and will be

disciplined as if he or she was a regular education student and no manifestation determination will be held.

For purposes of summer school discipline, the District may need to make program modifications or accommodations to its summer school discipline policy or practices to ensure that qualified disabled students have an equal opportunity to participate in such programs. Where the student's enrollment in summer school is voluntary and not part of the student's educational placement, suspension or dismissal from the program is not considered a change of placement and does not require a manifestation determination.

504 PROCEDURES

Students may be referred by parent/guardian, teachers and other certificated staff members. The District will accept verbal or written referrals from parents/guardians. Staff members submit referrals on the district's staff referral form.

Parent Referrals

On the date the parent/guardian makes a verbal or written request for an educational evaluation to a certificated staff member due to suspicion of disability, this becomes the referral date. The Special Department Chair receives the referral, confers with the 504 Coordinator, nurse, counselor, administrator, and/or School Psychologist, as appropriate, to determine if disability is suspected under Special Education or Section 504. At that point a 504 or Special Education casemanager is assigned. The case manager completes Parent Referral Documentation form (top section only) with parent.

Within 5 calendar days of a parent/guardian verbal or written referral, the District will provide a copy of the Section 504 Procedural Safeguards.

Within 30 days of the parent/guardian's completion of the parent referral form, the District will administratively decide whether, based on the completed referral form and other available existing information, there is reason to suspect that the student may have a 504 disability. This decision is made by a team of individuals such 504 Coordinator, nurse, counselor, administrator, the student's teacher and/or School Psychologist, as appropriate to the referral question.

If the District administratively determines that there is no reason to suspect that the student may have a 504 disability and that an initial evaluation is not warranted, the District will provide the parent/legal guardian with a Notice of Action refusing the requested evaluation as well as an additional copy of the 504 procedural safeguards.

If the District administratively determines that there is reason to suspect that the student may have a 504 disability and that an initial evaluation is warranted, please proceed to section below titled “Procedures When Disability is Suspected.”

If the District administratively determines that there is reason to suspect that the student may have an IDEA disability, the casemanager will provide the relevant information to the building’s Special Education Department chairperson.

Staff Referrals:

If a District certificated personnel is the referring party, the staff person will complete the district request for consideration of evaluation form and submit this to the Special Education Department chairperson.

Within 5 days of the staff member’s completion of the referral form, the District will administratively determine whether, based on the referral form and other available existing information, there is reason to suspect that the student may have a 504 disability.

If the District administratively determines that there is no reason to suspect that the student may have a 504 disability, the District will document that decision on the referral form, inform the staff member of that decision, but no further action will be necessary. This decision is made by a team of individuals such 504 Coordinator, nurse, counselor, administrator and/or School Psychologist, as appropriate to the referral question. The District can utilize general education interventions to address any needs that the student may have.

If the District administratively determines that there is reason to suspect that the student may have a 504 disability and that an initial evaluation is warranted, as outlined in the next section.

Students with Individual Health Plans

A district referral should be initiated for all students with an Individual Health Plan (IHP) if student has not previously been evaluated for 504 eligibility regarding the health concern for which the IHP is written. Within 10 days of the referral, the nurse or other knowledgeable party will consult with relevant parties to determine if a disability is suspected and an evaluation is warranted. Parents will be notified of and invited to be part of the decision making process.

If it is determined that there is no reason to suspect that the student may have a 504 disability, the District will document that decision on the referral form and provide a copy of the referral form to the parent, but no further action will be necessary. This decision is made by a team of individuals such 504 Coordinator, parent, nurse, counselor, administrator and/or School Psychologist, as appropriate to the referral

question. The District can utilize general education interventions to address any needs that the student may have.

If it is determined that there is reason to suspect that the student may have a 504 disability and that an initial evaluation is warranted, such process is outlined in the next section.

Procedures When Disability is Suspected

If a parent or staff referral results in an administrative determination that there is reason to suspect a 504 disability, the District will convene a team within 30 days of that administrative determination to conduct a Review of Existing Data on the student. The team will be comprised of persons knowledgeable about the student and the existing data such as the school counselor, nurse, a general education teacher who works with the student or has knowledge of the curriculum, the building 504 coordinator and others as appropriate. The parents are not mandatory participants, but should be invited to the meeting. The 504 Meeting Notification form should be used to invite the parent and other participants.

At this meeting, the team should review all existing relevant data and information, including data and information provided by the parent, and determine whether the existing data is sufficient to support the existence of a 504 disability and/or whether an evaluation is needed. The team should complete the 504 Review of Existing Data form and Evaluation Plan to document the review of existing data pros and the team conclusions.

If the team determines that existing data alone is sufficient to support the existence of a 504 disability and to make relevant programming decisions, the team should complete the Team Conclusions and Decisions page of the 504 Review of Existing Data to indicate that decision. The Section 504 Evaluation and Eligibility Determination report will also be completed by the team to document the student's eligibility. A copy of these completed forms (Review of Existing Data and the Eligibility Determination Report) will be provided to the parent along with a second copy of the District's 504 procedural safeguards within 5 school days of the completion of the meeting. The District also should provide the parent or guardian with a Notice of Action describing the team's decisions.

If, after the review of existing data, the team determines that existing data demonstrates that the student does not have a 504 disability, the team should complete the 504 Eligibility Determination Form and will provide the parent or guardian with a Notice of Action describing the team's decisions. Completed copies of those forms should be provided to the parents, along with a copy of the 504 procedural safeguards, within a reasonable time after the meeting, but in no event more than 15 school days after the meeting.

If the team determines that additional information including, but not limited to, formal assessment or observation is necessary to determine whether the student has a 504 disability and/or appropriate programming, the team should indicate on the Review of Existing Data form what additional information or assessments are needed for the student's initial evaluation.

After the team decides that an initial evaluation is necessary, the District should provide the parent/guardian with a copy of the completed Review of Existing Data, a Notice of Action proposing an initial evaluation and seeking the parent/guardian's informed written consent to the initial evaluation.

If the District has conducted an initial evaluation, staff will complete the initial evaluation and convene the team to determine whether the student has a 504 disability eligibility within 60 calendar days of receiving the parent's written consent to evaluate. At that meeting, the team will review and consider all existing data information, including data and information received from the parent and from the initial evaluation, and will, on the basis of that data and information, determine whether the student has a mental or physical impairment that substantially limits a major life activity. The team will complete the Eligibility Determination Documentation form to document the results of the team's decision. The District will provide the parent/guardian with completed copies of those forms within a reasonable time after the meeting, but in no event more than 15 school days after the meeting. The District also should provide the parent or guardian with a Notice of Action documenting the team's decisions.

Provision of FAPE Procedures:

If the student is determined to have a 504 disability, within 10 school days of that decision, the District will convene a 504 team to prepare an individualized 504 Non-Discrimination Plan for the student. The 504 team will be comprised of persons knowledgeable about the student, the evaluation data and the placement options. The team may include such persons as the building 504 coordinator, the student's teacher(s), the school nurse, the building counselor and/or others. The parents are not mandatory participants, but should be invited to the meeting. If appropriate, the student may also be invited. A 504 Meeting Notification form should be used to invite the parent and other participants.

At the meeting, the team should review the 504 Non-Discrimination Plan and determine what, if any, programs, aids, services, supports, interventions, or accommodations the student needs to receive a FAPE. For a particular student, the team may also need to consider whether the student requires related services to receive FAPE. If so, those related services, including the frequency and duration, should also be written into the Plan. The team should determine which District employee is responsible for monitoring implementation of the Plan (i.e. the student's 504 casemanager).

Transportation may need to be considered, particularly if the team places the student in a program not operated by the District. In those situations, the District must ensure that adequate transportation to and from those services is provided at no greater cost than would be incurred by parents or guardian if the student was placed in the District's programs.

If related services are considered necessary for the student to have access to education (i.e., transportation, homebound teaching, district consultants for students with visual or hearing impairments, OT/PT or APE services, etc.) the casemanager will contact the District Section 504 Coordinator for the appropriate processes and considerations to obtain services.

If the parent/guardian makes a request from the team that the team or District refuses with respect to the provision of FAPE, the District should provide the parent/guardian with a Notice of Action refusing the request and providing the reason for that refusal. The District should provide any relevant Notices of Action proposed or refused resulting from the 504 Plan meeting to the parent/guardian within a reasonable time, but in no event more than 10 school days after the meeting.

Copies of or access to the completed 504 Non-Discrimination Plan should be provided to all teachers and/or staff with implementation responsibilities and their acknowledgement of receipt should be documented. The District should also provide a copy of the plan to the parent within a reasonable time, but in no event more than 5 days after the meeting. The case manager is responsible for informing each staff member of his or her implementation responsibilities and completing the staff documentation form.

504 Plan Reviews will be required **one year after the initial placement and during years of transition** (5th, 6th, 8th, 9th, and 12th grades).

Additional scenarios may trigger a 504 Review and are listed below:

- Student transfers into your building (either from inside or outside of the district)
- Student is being considered for retention
- Student is at risk of being dropped for attendance
- Long term suspension is being considered (as part of the Manifestation Determination process)
- **When a parent or teacher requests a review**

Annual Responsibilities:

Parents will receive Procedural safeguards annually with a letter reminding them of who to contact if they would like to request additional reviews of the 504 Plan.

Each 504 student will have a designated case manager in the building or program he/she attends who will have the responsibility to ensure the completion and appropriate submission and electronic storage of all necessary paperwork and who will serve as the primary contact person with the parent and student. The case manager also will be responsible to convene the team whenever necessary, to extend invitations to the parent to attend such meetings, and to determine when a reevaluation is necessary.

Students with disabilities are entitled to an equal opportunity to participate in nonacademic and extracurricular services. However, the Office of Civil Rights has stated that such opportunities are not included within the definition of FAPE but instead are included with the law's discrimination prohibition.

Transfer Procedures

Out-of-District transfers: Students with an existing 504 plan who transfer to the Columbia MO Public School District from another school district are considered out of district transfer students. Within 5 days of enrollment, the District will request records from the sending school district, including copies of any 504 evaluations, eligibility determinations and accommodation plans. The building 504 coordinator, upon receipt of such records, will determine whether to accept the evaluation and 504 status and accommodation plan and will follow the procedures outlined in the Section 504 Transfer Student Documentation for note all decisions relating to transfers.

If the building 504 coordinator determines that the eligibility determination might be incorrect, the coordinator will convene a 504 team to discuss a reevaluation of the student. If the building 504 coordinator determines that the accommodation plan needs to be reviewed, the coordinator also will reconvene a 504 team for that student. The parents will be invited to attend any such meetings, but are not required participants.

Building-to-Building Transfers: If a student transfers within level (e.g., from one CPS elementary school to another), the casemanager/building 504 coordinator will electronically and by school mail, transfer the student's information to the receiving school. Email or phone communication between schools regarding the student's needs is highly recommended.

Before the end of the school year, each building 504 coordinator is responsible to contact the 504 building coordinators of other buildings and to discuss those students with 504 disabilities who will be transferring within the District and to determine whether a reevaluation is necessary and/or whether the student's 504 Plan needs to be revised to address the changing educational environment. If so, the student's 504 team should be convened to address reevaluation and/or a revised plan before the start of the next school year, in order to have a current plan in place as

the student attends the new school. The parents will be invited to any such meetings but are not required participants.

Casmanager/504 coordinator will electronically and by school mail, transfer the student's information to the receiving school before the start of the next school year.

Removal of Eligibility:

When a student's team suspects that a 504 disabled student may no longer have a mental or physical impairment that substantially limits a major life activity, the case manager is responsible for convening the team to discuss a review of existing data/reevaluation to determine if the student continues to be disabled and entitled to FAPE. The parent will be invited to such meetings but is not a required participant. If the team concludes, after a review of existing data or reevaluation with assessment, that the student no longer is disabled, the team will prepare an evaluation and eligibility report that reflects that decision and will provide the parent with a properly completed Notice of Action and a copy of the 504 procedural safeguards.

Re-evaluation Procedures:

Section 504 requires "periodic re-evaluations" of students and also requires a re-evaluation prior to any significant change of placement. The Columbia Public School District has determined that the need for *periodic re-evaluations* will be assessed every three-years. If the family and 504 team agree that there is no reason to suspect a change in eligibility, the re-evaluation may be waived. Aside from the standard three year cycle, a parent and/or school team may request re-evaluation at any time. A significant change of placement may occur when a student receives a long-term suspension or removal, when a student is subject to a series of short-term suspensions that, together, create a pattern of exclusion or when removal of a student's status as a disabled is being proposed.

When a re-evaluation is necessary, the multidisciplinary team will convene to discuss and complete the Review of Existing Data and Evaluation Plan within 60 days of the re-evaluation request and/or due date (the team should follow the procedures specified above relating to initial evaluations). Parent written consent is not required for periodic or other reevaluations.

Discipline Procedures:

In general, most 504 students should be expected to follow the District's disciplinary policies, rules, regulations and procedures and this should be noted by the team, when applicable, in the student's 504 Non-Discrimination Plan. When determining whether a student has a 504 disability, the team should consider whether the impairment that is substantially limiting has a direct and substantial impact on a

student's behavior and, if so, the team may consider conducting a functional behavioral assessment as part of the student's evaluation. If the team concludes that the substantially limiting impairment has a direct and substantial relationship to the student's behavior, the team should address that related behavior in the 504 Plan and should consider whether a behavior plan is necessary for the student to receive FAPE.

For suspensions of greater than 10 consecutive days or those cumulative short-term suspensions that constitute a pattern of exclusion as defined by the most current version of the IDEA, the team will convene to conduct a manifestation determination within 10 days of the date of the decision to change the student's placement through a disciplinary removal. The parent will be invited to participate but is not a required participant. The team should follow the procedures outlined in and complete 504 Discipline and Manifestation Form.

If the team determines that there is no relationship between the disability and the behavior, the student will be treated the same as nondisabled students and can be suspended or expelled according to the District's Code of Conduct and the level of the offense. No services will be required or provided in this situation unless the District provides such services to its nondisabled students in the same or similar circumstances.

If the team determines that there is a relationship between the disability and the behavior, the student can be suspended for up through 10 consecutive days with no educational services or for any days that are less than a pattern of exclusion. If deemed necessary, the team may need to convene to determine if a change of educational placement may be needed or if the student should be referred under IDEA.

A student who is otherwise eligible under 504 but is currently engaged in the illegal use of drugs or alcohol and who is being discipline for such use will lose his or her protection as an eligible student and will not be entitled to a manifestation determination and will be disciplined as if he or she were a nondisabled student.

STORAGE OF SECTION 504 RECORDS

eSchool (Student Information System)

Student data will be entered into eSchool and any modifications to this student record-keeping system will be made by Special Services Department staff. Send an email to the Special Services office, in care of the office staff member designated to receive these messages (currently Doreen Grubicy), to indicate actions taken for a student, such as initial eligibility decisions, initial or re-evaluation plans or

dismissal. Special Services personnel will update eSchool, copy and store records upon notification of action.

Records (paper and electronic) will be stored in eschool and SpedTrack and all parent and agency requests for records should be referred to the Special Services Department.

APPENDIX

TEXT OF THE AMERICANS WITH DISABILITIES ACT AMENDMENTS ACT OF 2008

S. 3406

One Hundred Tenth Congress of the United States of America

AT THE SECOND SESSION

Begun and held at the City of Washington on Thursday, the third day of January, two thousand and eight

An Act

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

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

SECTION 1. SHORT TITLE.

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

SEC. 2. FINDINGS AND PURPOSES.

(a) FINDINGS.—Congress finds that—

- (1) in enacting the Americans with Disabilities Act of 1990 (ADA), Congress intended that the Act “provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities” and provide broad coverage;
- (2) in enacting the ADA, Congress recognized that physical and mental disabilities in no way diminish a person’s right to fully participate in all aspects of society, but that people with physical or mental disabilities are frequently precluded from doing so because of prejudice, antiquated attitudes, or the failure to remove societal and institutional barriers;
- (3) while Congress expected that the definition of disability under the ADA would be interpreted consistently with how courts had applied the definition of a handicapped individual under the Rehabilitation Act of 1973, that expectation has not been fulfilled;
- (4) the holdings of the Supreme Court in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) and its companion cases have narrowed the broad scope of protection intended to be afforded by the ADA, thus eliminating protection for many individuals whom Congress intended to protect;
- (5) the holding of the Supreme Court in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002) further narrowed the broad scope of protection intended to be afforded by the ADA;
- (6) as a result of these Supreme Court cases, lower courts have incorrectly found in individual cases that people with a range of substantially limiting impairments are not people with disabilities;
- (7) in particular, the Supreme Court, in the case of *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S.

184 (2002), interpreted the term “substantially limits” to require a greater degree of limitation than was intended by Congress; and S. 3406—2

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

(b) PURPOSES.—The purposes of this Act are—

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

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

(3) to reject the Supreme Court’s reasoning in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) with regard to coverage under the third prong of the definition of disability and to reinstate the reasoning of the Supreme Court in *School*

Board of Nassau County v. Arline, 480 U.S. 273 (1987) which set forth a broad view of the third prong of the definition of handicap under the Rehabilitation Act of 1973;

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

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

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

SEC. 3. CODIFIED FINDINGS.

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

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

“(1) physical or mental disabilities in no way diminish a person’s right to fully participate in all aspects of society,

S. 3406—3

yet many people with physical or mental disabilities have been precluded from doing so because of discrimination; others who have a record of a disability or are regarded as having a disability also have been subjected to discrimination;”;

(2) by striking paragraph (7); and

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

SEC. 4. DISABILITY DEFINED AND RULES OF CONSTRUCTION.

(a) DEFINITION OF DISABILITY.—Section 3 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12102) is amended to read as follows:

“SEC. 3. DEFINITION OF DISABILITY.

“As used in this Act:

“(1) DISABILITY.—The term ‘disability’ means, with respect to an individual—

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

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

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

“(2) MAJOR LIFE ACTIVITIES.—

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

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

“(3) REGARDED AS HAVING SUCH AN IMPAIRMENT.—For purposes of paragraph (1)(C):

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

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

“(4) RULES OF CONSTRUCTION REGARDING THE DEFINITION

OF DISABILITY.—The definition of ‘disability’ in paragraph (1) shall be construed in accordance with the following:

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

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

S. 3406—4

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

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

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

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

“(II) use of assistive technology;

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

“(IV) learned behavioral or adaptive neurological modifications.

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

“(iii) As used in this subparagraph—

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

“(II) the term ‘low-vision devices’ means devices that magnify, enhance, or otherwise augment a visual image.”.

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

“SEC. 4. ADDITIONAL DEFINITIONS.

“As used in this Act:

“(1) AUXILIARY AIDS AND SERVICES.—The term ‘auxiliary aids and services’ includes—

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

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

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

“(D) other similar services and actions.

“(2) STATE.—The term ‘State’ means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands of the United States, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Mariana Islands.”.

(c) AMENDMENT TO THE TABLE OF CONTENTS.—The table of contents contained in section 1(b) of the Americans with Disabilities S. 3406—5

Act of 1990 is amended by striking the item relating to section 3 and inserting the following items:

“Sec. 3. Definition of disability.

“Sec. 4. Additional definitions.”.

SEC. 5. DISCRIMINATION ON THE BASIS OF DISABILITY.

(a) ON THE BASIS OF DISABILITY.—Section 102 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12112) is amended—

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

(2) in subsection (b) in the matter preceding paragraph

(1), by striking “discriminate” and inserting “discriminate against a qualified individual on the basis of disability”.

(b) QUALIFICATION STANDARDS AND TESTS RELATED TO UNCORRECTED VISION.—Section 103 of the Americans with Disabilities

Act of 1990 (42 U.S.C. 12113) is amended by redesignating subsections (c) and (d) as subsections (d) and (e), respectively, and inserting after subsection (b) the following new subsection:

“(c) QUALIFICATION STANDARDS AND TESTS RELATED TO UNCORRECTED VISION.—Notwithstanding section 3(4)(E)(ii), a covered entity shall not use qualification standards, employment tests, or other selection criteria based on an individual’s uncorrected vision unless the standard, test, or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and consistent with business necessity.”.

(c) CONFORMING AMENDMENTS.—

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

(A) in the paragraph heading, by striking “WITH A DISABILITY”; and

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

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

SEC. 6. RULES OF CONSTRUCTION.

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

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

“(e) BENEFITS UNDER STATE WORKER’S COMPENSATION LAWS.—

Nothing in this Act alters the standards for determining eligibility for benefits under State worker’s compensation laws or under State and Federal disability benefit programs.

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

“(g) CLAIMS OF NO DISABILITY.—Nothing in this Act shall provide the basis for a claim by an individual without a disability

S. 3406—6 that the individual was subject to discrimination because of the individual’s lack of disability.

“(h) REASONABLE ACCOMMODATIONS AND MODIFICATIONS.—A covered entity under title I, a public entity under title II, and any person who owns, leases (or leases to), or operates a place of public accommodation under title III, need not provide a reasonable accommodation or a reasonable modification to policies, practices, or procedures to an individual who meets the definition of disability in section 3(1) solely under subparagraph (C) of such section.”; (2) by redesignating section 506 through 514 as sections 507 through 515, respectively, and adding after section 505 the following:

“SEC. 506. RULE OF CONSTRUCTION REGARDING REGULATORY AUTHORITY.

“The authority to issue regulations granted to the Equal Employment Opportunity Commission, the Attorney General, and the Secretary of Transportation under this Act includes the authority to issue regulations implementing the definitions of disability in section 3 (including rules of construction) and the definitions in section 4, consistent with the ADA Amendments Act of 2008.”; and

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

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

“Sec. 506. Rule of construction regarding regulatory authority.”.

SEC. 7. CONFORMING AMENDMENTS.

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

(1) in paragraph (9)(B), by striking “a physical” and all that follows through “major life activities”, and inserting “the meaning given it in section 3 of the Americans with Disabilities

Act of 1990 (42 U.S.C. 12102)”; and

(2) in paragraph (20)(B), by striking “any person who” and all that follows through the period at the end, and inserting “any person who has a disability as defined in section 3 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12102).”.

S. 3406—7

SEC. 8. EFFECTIVE DATE.

This Act and the amendments made by this Act shall become effective on January 1, 2009.

Speaker of the House of Representatives.
Vice President of the United States and
President of the Senate

PERTINENT SECTION 504 FEDERAL REGULATIONS

Subpart A -- General Provisions

104.1 Purpose.

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

104.2 Application.

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

104.3 Definitions.

As used in this part, the term:

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

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

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

(d) Department means the Department of Education.

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

(f) Recipient means any state or its political subdivision, any instrumentality of a state or its political subdivision, any public or private agency, institution, organization, or other entity, or any person to which Federal financial assistance is extended directly or through another recipient, including any successor, assignee, or transferee of a recipient, but excluding the ultimate beneficiary of the assistance.

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

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

(1) Funds;

(2) Services of Federal personnel; or

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

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

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

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

(j) Handicapped person -- (1) Handicapped persons means any person who (i) has a physical or mental impairment which substantially limits one or more major

life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.

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

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

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

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

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

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

(1)(i) A department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(ii) The entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2)(i) A college, university, or other postsecondary institution, or a public system of higher education; or

(ii) A local educational agency (as defined in 20 U.S.C. 8801), system of vocational education, or other school system;

(3)(i) An entire corporation, partnership, or other private organization, or an entire sole proprietorship--

(A) If assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(B) Which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(ii) The entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) Any other entity which is established by two or more of the entities described in paragraph (k)(1), (2), or (3) of this section; any part of which is extended Federal financial assistance.

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

(l) Qualified handicapped person means:

(1) With respect to employment, a handicapped person who, with reasonable accommodation, can perform the essential functions of the job in question;

(2) With respect to public preschool elementary, secondary, or adult educational services, a handicapped person (i) of an age during which nonhandicapped persons are provided such services, (ii) of any age during which it is mandatory under state law to provide such services to handicapped persons, or (iii) to whom a state is required to provide a free appropriate public education under section 612 of the Education of the Handicapped Act; and

(3) With respect to postsecondary and vocational education services, a handicapped person who meets the academic and technical standards requisite to admission or participation in the recipient's education program or activity;

(4) With respect to other services, a handicapped person who meets the essential eligibility requirements for the receipt of such services.

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

104.4 Discrimination prohibited.

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

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

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

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

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

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

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

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

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

(2) For purposes of this part, aids, benefits, and services, to be equally effective, are not required to produce the identical result or level of achievement for handicapped and nonhandicapped persons, but must afford handicapped persons

equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement, in the most integrated setting appropriate to the person's needs.

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

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

(5) In determining the site or location of a facility, an applicant for assistance or a recipient may not make selections (i) that have the effect of excluding handicapped persons from, denying them the benefits of, or otherwise subjecting them to discrimination under any program or activity that receives Federal financial assistance or (ii) that have the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the program or activity with respect to handicapped persons.

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

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

104.5 Assurances required.

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

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

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

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

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

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

(3) Where Federal financial assistance is provided in the form of real property or interest in the property from the Department, the covenant shall also include a condition coupled with a right to be reserved by the Department to revert title to the property in the event of a breach of the covenant. If a transferee of real property proposes to mortgage or otherwise encumber the real property as security for financing construction of new, or improvement of existing, facilities on the property for the purposes for which the property was transferred, the Assistant Secretary may, upon request of the transferee and if necessary to accomplish such financing and upon such conditions as he or she deems appropriate, agree to forbear the exercise of such right to revert title for so long as the lien of such mortgage or other encumbrance remains effective.

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

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

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

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

(b) Voluntary action. A recipient may take steps, in addition to any action that is required by this part, to overcome the effects of conditions that resulted in limited

participation in the recipient's program or activity by qualified handicapped persons.

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

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

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

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

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

(i) A list of the interested persons consulted,

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

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

104.7 Designation of responsible employee and adoption of grievance procedures.

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

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

104.8 Notice.

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

placement of notices in recipients' publication, and distribution of memoranda or other written communications.

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

104.9 Administrative requirements for small recipients.

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

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

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

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

Subpart D -- Preschool, Elementary, and Secondary Education

104.31 Application of this subpart.

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

104.32 Location and notification.

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

(a) Undertake to identify and locate every qualified handicapped person residing in the recipient's jurisdiction who is not receiving a public education; and

(b) Take appropriate steps to notify handicapped persons and their parents or guardians of the recipient's duty under this subpart.

104.33 Free appropriate public education.

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

(b) Appropriate education. (1) For the purpose of this subpart, the provision of an appropriate education is the provision of regular or special education and related

aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of 104.34, 104.35, and 104.36.

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

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

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

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

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

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

(d) Compliance. A recipient may not exclude any qualified handicapped person from a public elementary or secondary education after the effective date of this part.

A recipient that is not, on the effective date of this regulation, in full compliance with the other requirements of the preceding paragraphs of this section shall meet such requirements at the earliest practicable time and in no event later than September 1, 1978.

104.34 Educational setting.

(a) Academic setting. A recipient to which this subpart applies shall educate, or shall provide for the education of, each qualified handicapped person in its jurisdiction with persons who are not handicapped to the maximum extent appropriate to the needs of the handicapped person. A recipient shall place a handicapped person in the regular educational environment operated by the recipient unless it is demonstrated by the recipient that the education of the person in the regular environment with the use of supplementary aids and services cannot be achieved satisfactorily. Whenever a recipient places a person in a setting other than the regular educational environment pursuant to this paragraph, it shall take into account the proximity of the alternate setting to the person's home.

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

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

104.35 Evaluation and placement.

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

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

(1) Tests and other evaluation materials have been validated for the specific purpose for which they are used and are administered by trained personnel in conformance with the instructions provided by their producer;

(2) Tests and other evaluation materials include those tailored to assess specific areas of educational need and not merely those which are designed to provide a single general intelligence quotient; and

(3) Tests are selected and administered so as best to ensure that, when a test is administered to a student with impaired sensory, manual, or speaking skills, the test results accurately reflect the student's aptitude or achievement level or whatever other factor the test purports to measure, rather than reflecting the student's

impaired sensory, manual, or speaking skills (except where those skills are the factors that the test purports to measure).

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

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

104.36 Procedural safeguards.

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

104.37 Nonacademic services.

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

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

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

(c) Physical education and athletics. (1) In providing physical education courses and athletics and similar aid, benefits, or services to any of its students, a recipient

to which this subpart applies may not discriminate on the basis of handicap. A recipient that offers physical education courses or that operates or sponsors interscholastic, club, or intramural athletics shall provide to qualified handicapped students an equal opportunity for participation.

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

104.38 Preschool and adult education.

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

104.39 Private education.

(a) A recipient that provides private elementary or secondary education may not, on the basis of handicap, exclude a qualified handicapped person if the person can, with minor adjustments, be provided an appropriate education, as defined in 104.33(b)(1), within that recipient's program or activity.

(b) A recipient to which this section applies may not charge more for the provision of an appropriate education to handicapped persons than to nonhandicapped persons except to the extent that any additional charge is justified by a substantial increase in cost to the recipient.

(c) A recipient to which this section applies that provides special education shall do so in accordance with the provisions of 104.35 and 104.36. Each recipient to which this section applies is subject to the provisions of 104.34, 104.37, and 104.38.