

AN OVERVIEW OF §504

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I. A LITTLE HISTORY

A. The Rehabilitation Act of 1973

In 1973 when the Rehabilitation Act was passed, little was being done on a federal level to encourage participation and equal access to federally funded programs by the disabled. While largely geared toward providing job opportunities and training to disabled adults, the Act also addressed, though very discreetly, the failure of the public schools to educate disabled students. The single paragraph we now refer to as §504 of the Rehabilitation Act provided that

“No otherwise qualified individual with a disability in the United States, as defined in section 706(8) of this title, shall, solely by reason of her or his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service....” —29 U.S.C. § 794(a) (1973).

In §504, the focus is on non-discrimination. As applied to the schools, the language broadly prohibits the denial of public education participation, or enjoyment of the benefits offered by public school programs because of a child's disability. To encourage compliance, Congress did not create an additional source of federal funding, but instead, conditioned future receipt of federal funds on the district's compliance with the new requirements.

The failure of §504 to solve the problem of educating disabled populations is hardly surprising. To expect massive change and fairly expensive programs from an unfunded mandate is Congressional cock-eyed optimism at its best. Likewise, it is extremely unclear from this simple paragraph *what* Congress expected the schools to do. If the schools were intended to create special programs and unique educational placements for children, the broad anti-discrimination language hardly conveys that notion. It was not until the regulations were promulgated under §504, some four years later, that the full picture of what was expected emerged. Two years after passage of the Rehabilitation Act of 1973 the need for additional motivation to educate disabled children was again addressed. The result of this second effort was the EHA, the precursor to today's Individuals With Disabilities Education Act (IDEA).

B. The Individuals with Disabilities Education Act (IDEA) (formerly PL 94-142, a/k/a Education of the Handicapped Act (EHA).)

In its introduction to the IDEA (20 U.S.C. §1400, et. seq.), the federal law governing special education, Congress makes clear its desire to provide educational funding for children suffering from severe disabilities to ensure that they receive an appropriate public education. Congress estimated that more than half of the roughly eight million children with disabilities in the United States [in 1976] were not receiving “appropriate educational services which would enable them to have full equality of opportunity.” The special educational needs of these children were not being met. 20 U.S.C. §1400(b)(1)-(3). One million of the children with disabilities in the United States are excluded entirely from the public school system and will not go through the educational process with their peers.” Others attend the public schools and participate but are denied “a successful educational experience” because their disabilities go undetected. 20 U.S.C. §1400(b)(4)-(5).

Congress recognized that adequately trained teachers existed, and diagnostic and instructional advances made

educating disabled children possible, but that the lack of funding available to states and local schools prevented success. Faced with the absence of adequate educational services in the public schools, “families are forced to find services outside the public school system, often at great distance from their residence and at their own expense.” 20 U.S.C. § 1400(b)(6)-(8).

In the IDEA (and its predecessors) Congress provided some of the necessary funding as long as states agreed to implement fairly strict procedural protections designed to empower parents to serve as champions for their disabled children. Not all disabled children will qualify as having one of the disabilities which give rise to IDEA eligibility. But once eligible, the child has access to a unique educational program designed to meet her needs. The program is created utilizing a wide range of special education and related services in a continuum of settings. The child’s parents are endowed with considerable rights to notice and consent, are consensus members on ARD committees, and have the ability to appeal decisions of the ARD committee (IEP team/multidisciplinary team) with which they disagree.

In short, Congress provided some of the funding through the IDEA to ensure that students with the most severe disabilities receive, at no cost to the parent, the services the student requires in order to achieve educational benefit. It is quite clear from the eligibility criteria that some disabled students will not qualify under the IDEA.

C. The Americans With Disabilities Act (ADA)

The ADA was passed in 1990, and seems to pick up where the Rehabilitation Act left off. Borrowing from the §504 definition of disabled person, and using the familiar three-pronged approach to eligibility (has a physical or mental impairment, a record of an impairment, or is regarded as having an impairment), the ADA applied those standards to most private sector businesses, and sought to eliminate barriers to disabled access in buildings, transportation, and communication. To a large degree, the passage of the ADA supplants the employment provisions of §504, reinforces the accessibility requirements of §504 with more specific regulations, but does little to change a District’s obligations to provide educational services to its disabled students. The courts have interpreted §504 and the ADA almost identically, applying doctrines and interpretations freely between the two laws. *Bragdon v. Abbott*, 118 S.Ct. 2196 (1998).

D. How do the three laws interact?

The initial purpose to be served by §504 (with reference to education), was to provide meaningful access to the public schools for students with disabilities. Some of that role is now shared with the IDEA, under which students with the most severe disabilities are now served. What remains in §504 is an anti-discrimination statute which requires that the educational needs of disabled students are met as adequately as the needs of nondisabled students. That nondiscrimination protection extends to IDEA students as well. §504 likewise retains residual responsibility to provide a free appropriate public education (FAPE) to qualifying disabled students whose disabilities are not so severe as to create IDEA eligibility. These are the “§504 Only” students upon whom schools must focus their efforts under §504.

II. FOR 504-ONLY KIDS, THE 504 FREE APPROPRIATE PUBLIC EDUCATION

A. Eligibility for a FAPE under §504

“**504-only students**” are those who are entitled to the protections of §504, but are not also eligible under the IDEA. “A student may be disabled within the meaning of Section 504 and therefore entitled to the rights and protection of Section 504 and its regulations, even though the student may not be eligible for special education under the IDEA.” *Anaheim (CA) Union High School Dist.*, 20 IDELR 185, 186 (OCR 1993). **To be eligible under §504, one must be “qualified”** [which, in Texas, roughly equates to being between three and twenty-two years of age and a resident of the school district, 34 C.F.R §104.3(k)(2).] **and “handicapped.”** Note that since this regulation was drafted, the Americans With Disabilities Act was passed, and the term “**handicapped**” **has been replaced with “disabled.”**

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 impairment, or

(iii) is regarded as having such an impairment. §104.3(j)(1). [References to particular sections of the Code of Federal Regulations are to Title 34 unless otherwise indicated in the text.]

1. Physical or Mental Impairment

Unlike the IDEA, §504 does not list a few disabilities (each with strict eligibility criteria) which result in eligibility. Instead, a broad formula is used to include many more disabilities. Specific physical or mental impairments are not listed in the regulations, “because of the difficulty of ensuring the comprehensiveness of any such list.” Appendix A to the §504 Regulations [hereinafter “Appendix A”], p. 419. The very narrow language used in the eligibility requirements under the IDEA reflects the fact that proportionally fewer children should qualify with the severe types of IDEA disabilities than the more general, less-severe, disabilities which will qualify under §504.

Current versus Historical or Perceived Disabilities: Different Eligibility. The first prong of the definition of “handicapped person” focuses on current disabilities. The second and third prongs cover persons with a history of a disability or persons who are perceived as having a disability. The second and third prongs create a very different type of §504 eligibility. While a “record of” an impairment or being “regarded as having” an impairment by the recipient give rise to anti-discrimination protection under §504, these two prongs do not trigger the school district’s obligation to provide a free appropriate public education or FAPE. **“Logically, since the student [qualifying under prong two or three] is not, in fact, mentally or physically handicapped, there can be no need for special education and related aids and services.”** *OCR Senior Staff Memo*, 19 IDELR 894 (OCR 1992) [bracketed material added by author]. Put more bluntly: “Those two prongs of the definition are legal fictions. They are meant to reach situations where individuals either never were or are not currently handicapped, but are treated by others as if they were.” *Id.* **Consequently, the District has no duty to refer, evaluate, or place students who qualify under prongs two and three. The only duty as to these students is to not discriminate against them on the basis of the history of an impairment or the perception that the child is impaired.**

While the “impairment” language is broad, some disabilities are excluded from §504. Throughout the regulations there is repeated concern that great care be taken so that students are not misclassified. Of particular concern were students with no disabilities who because of other factors (such as poor English skills or lack of previous educational opportunity) may be incorrectly classified as disabled under §504.

“The definition of handicapped person also includes specific limitations on what persons are classified as handicapped under the regulation. The first of the three parts of the definition specifies that only physical and mental handicaps are included. Thus, environmental, cultural, and economic disadvantage are not in themselves covered, nor are prison records, age, or homosexuality. Of course, if a person who has any of these characteristics also has a physical or mental handicap, the person is included within the definition of handicapped person.” Appendix A, p. 419.

OCR has made the over-identification of minority students into disability programs an enforcement priority having recognized that some districts that are not sophisticated in their identification and evaluation processes, and may misclassify minority students due to language proficiency. For example:

- OCR found discrimination against minorities in a district’s disability referral process where referral forms did not include information regarding primary language, student records failed to indicate procedures were followed to ensure that language proficiency was not a factor in the students’ disability evaluation process, committees failed to question validity of testing on language proficiency grounds, and parents were not always notified of their rights in their native language. *San Luis Valley (CO) Board of Cooperative Services*, 21 IDELR 304 (OCR 1994).

•District failed to ensure that students were not placed in disability programs on the basis of criteria affected by their limited English proficiency. Students who were in need of both alternative language programming and disability assistance did not receive both modalities of services. *Ogden (UT) City School District*, 21 IDELR 387 (OCR 1994)

Exceptions to “Physical or Mental Impairment.” Homosexuality and bisexuality are not considered impairments under §504. *1992 OCR Memorandum on Differences Between ADA Title II and §504 Regulations* (OCR 1992). Transvestitism was excluded under §504 by the Fair Housing Amendments Act of 1988. The following are not disabilities under ADA, and **may or may not be disabilities under §504** (1)...pedophilia, exhibitionism, voyeurism, gender identity disorder not resulting from physical impairments, or other sexual behavior disorders; (2) compulsive gambling, (3) kleptomania, (4) pyromania. Americans With Disabilities Act, 42 U.S.C. §12211. *1992 OCR Memorandum on Differences, see above.*

2. Substantial Limitation

Substantial Limitation is Required. Several comments observed the lack of any definition in the proposed regulation of the phrase ‘substantially limits.’ The Department does not believe that a definition of this term is possible at this time.” Appendix A, p. 419. OCR has ruled that the phrase is to be defined by the local educational agency, and not OCR. *Letter to McKethan*, 23 IDELR 504 (OCR 1994). Schools can receive some guidance from the definition in the implementing regulations to the Americans With Disabilities Act. Under the ADA, a major life activity is substantially limited when a person is

“Unable to perform a major life activity that the average person in the general population can perform;” 29 C.F.R. §1630.2(j).(1)(i). EXAMPLE: An individual with paralyzed legs is substantially limited in the major life activity of walking since his impairment makes him unable to walk (unable to perform the major life activity of walking). — OR—

“Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.” 29 C.F.R. §1630.2(j).(1)(ii). EXAMPLE: A person is only able to walk for brief periods of time, or the person falls every few steps.

Remember that for §504 purposes, OCR has issued no definition of “substantially limits” and has instructed that Districts are to define the phrase. For §504 compliance purposes, Districts are not required to use the definitions provided in the ADA, but may certainly look to them for guidance.

Students with A’s & B’s: While parents may honestly believe that a child is not performing to his or her potential, that failure is not sufficient reason for referral and evaluation. For example, OCR has found no duty to qualify a child §504 despite his having ADD when the child had acceptable behavior and was making A’s and B’s in all of his classes. *Jefferson Parish (La.) Public Schools*, 16 EHLR 755 (OCR 1990). “When the handicapped child is being educated in the regular classrooms of a public school system, the achievement of passing marks and advancement from grade to grade will be one important factor in determining educational benefit.” *Hendrik Hudson District Bd. of Education v. Rowley*, 458 U.S. 176, 207 fn. 28 (1982). As a result, where the child is already passing his classes (without modifications) he is likely receiving educational benefit and in no need of §504 or IDEA services. **“By definition, a person who is succeeding in regular education does not have a disability which substantially limits the ability to learn....** A student who is already succeeding in regular education would not need special education to obtain this level of benefit and, thus, would not meet the standards established for LD eligibility.” *Saginaw City (MI) School District*, EHLR 352:413 (OCR 1987).

Child only needs medication: Some students may have a disability that, with medication administered at school, requires no additional accommodations. For these children, it makes little sense to qualify them §504 merely to provide them with a service which schools perform for all regular education students. TEX. EDUC. CODE § 22.052. If administering medication is required as a related service because of the age of the student or severity of the disability (so that the burden is on the school to ensure timely receipt of the medication), a §504 referral may be necessary. The United States Supreme Court reinforced this view in June of 1999 with its

finding under the Americans with Disabilities Act that “those whose impairments are largely corrected by medication or other devices are not ‘disabled’ within the meaning of the ADA.” *Sutton v. United Airlines*, 119 S.Ct. 2139 (1999).

Good teachers modify all the time for students: It is only when a qualified disabled child needs a systematic, consistently implemented battery of modifications in order to have his needs met as adequately as nondisabled children that §504 becomes necessary.

Behavior-only Students: A common outgrowth of the misperception on serving only students with impairments to learning is the notion that students who have behavior problems only (and no cognitive troubles) cannot qualify under §504. OCR and the courts have recognized that students with disabilities affecting behavioral controls may qualify, independent of cognitive difficulties. *Lyons v. Smith*, 20 IDELR 164 (D.C.D.C. 1993); *School Administrative Unit #38*, 19 IDELR 186 (OCR 1992).

Temporary disabilities, such as broken limbs, are not addressed under IDEA. The “Other Health Impaired” eligibility category addresses “chronic” health conditions, and the “Orthopedically Impaired” category addresses “permanent” disfigurements or anatomical losses. Nevertheless, **in various policy letters, the Department of Education has determined that a temporary disability can constitute a physical impairment that substantially limits a major life activity such that §504 services might be required.** See, e.g., *Ventura (CA) Unified School District*, 17 EHLR 854 (OCR 1991). The proper inquiry “is not whether the impairment is temporary or permanent; rather the appropriate inquiry is whether the impairment substantially limits one or more major life activities.” *Letter to Wright*, (OCR 1993). That determination must be made on a case-by-case basis, considering the nature, severity, duration or expected duration and the permanent or long term impact resulting from the impairment.” *Id.*

Some may say that schools always took care of these situations informally in the past, and that the §504 process just adds bureaucracy and paperwork to the school’s efforts to address the problem. **Although it may be true that schools informally addressed these situations without §504 in the past, using the §504 process helps ensure consistency, accountability, and better decisionmaking.** In addition, procedural compliance is necessary to satisfy OCR. **There can be few results as unpalatable as one where the district provides sufficient modifications to a qualified disabled student, but nevertheless is found in violation for not jumping through the procedural hoops.** That was the case where a school district provided a student who had undergone hip surgery with appropriate modifications, but failed to have procedures in place to document the deliberation of, or provision of accommodations [the regulations require no such documentation], or to inform parents of their rights. *Temple (TX) ISD*, 25 IDELR 232 (OCR 1996).

Does this mean that every child who breaks a bone or sprains an ankle needs to be referred to §504? No. Schools only need to refer and evaluate those children who are suspected of needing §504 services due to a physical or mental impairment that substantially limits one or more major life activities. If a child breaks his right wrist, and he is left-handed, the school may legitimately not suspect that §504 services will be necessary. The referral question must be taken up on a case-by-case basis, depending on the physical impairment, whether it substantially limits a major life activity (which may depend on the type of classes or activities the child is involved in at school), and whether it needs to be addressed with §504 services or accommodations of some kind. Likewise, common sense dictates that if the disability will not outlast the process of evaluation and placement (a few weeks) §504 is probably not triggered.

3. Major Life Activities

“**Major life activities**” means functions such as caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, *learning*, and working.” §104.3(j)(2)(ii) (emphasis added). This list is not exhaustive. The phrase “major life activities” is calculated to include “those basic activities that the average person in the general population can perform with little or no difficulty.” ADA, 29 C.F.R. §1630.2(i). **The student need not have a disability limiting the major life activity of learning to qualify.** “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 district 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 regular

administration of the medication and inhaler, the child cannot remain in school.” *Letter to McKethan*, 23 IDELR 504 (OCR 1994).

4. Bottom Line on §504 Eligibility

Two main factors play into eligibility. First, is there a physical or mental impairment? Second, does that physical or mental impairment substantially limit one or more major life activities? While the regulations provide no definition of a substantial limitation, the District may look to the ADA for guidance. Additionally, while a child may be eligible under the criteria of having a record of an impairment or being regarded as having an impairment, his eligibility is limited to the anti-discrimination provisions. Without a current impairment, there is no educational need, and no eligibility for educational services.

B. The 504 Process

1. Child Find

The District cannot wait until eligible children present themselves, requesting services. **The District has an affirmative duty to conduct a “child-find” at least annually**, during which the District must make efforts to notify disabled students and their parents of the District’s obligations to provide a free appropriate public education. §104.32. Note that this duty extends to all disabled students (between the ages of 3 and 22 in Texas) residing in the District, including those currently attending private or homeschool. **Do not confuse the child-find duty with a duty to serve §504 students whose parents have placed them in private or homeschooled.** With regard to those students, once the District has offered the child a free appropriate public education, it has no duty to provide “educational services to students not enrolled in the public school program based on the personal choice of the parent or guardian.” *Letter to Veir*, 20 IDELR 864 (OCR 1993); *Hinds Co. School Board*, 20 IDELR 1175 (OCR 1993). Note that the result is very different under the IDEA where a parent may unilaterally place the child in a private school and may be able to access OT, PT or other special education or related service components.

2. Referral

Prior to referral and evaluation, the district can use screening committees, student assistance teams or intervention teams to address the child’s needs. To refer for evaluation, “the district must have reason to believe that the student is having academic, social, or behavioral problems that substantially affect the student’s overall performance at school. A district, however, has the option of attempting to address these types of problems through documented school-based intervention and/or modifications, prior to conducting an evaluation. Furthermore, if such interventions and/or modifications are successful, a district is not obligated to evaluate a student for special education or related services.” *Karnes City (TX) ISD*, 31 IDELR 64 (OCR 1999). **A student should be referred to §504 when the District believes that the student may be eligible**, i.e., when the District believes that the student has a physical or mental impairment that substantially limits one or more major life activities, AND that the student is in need of either regular education with supplementary services or special education and related services. *Letter to Mentink*, 19 IDELR 1127 (OCR 1993). Once the District suspects a current disability and need for services, the District moves to evaluate.

3. The 504 Committee

The Section 504 Committee is responsible for 504 evaluation and placement. Unlike the IDEA, 504 does not dictate the titles or people who must be members of the Committee. Instead, the regulations require that the 504 Committee is a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options. §104.35(c)(3). The parents are not required members of the Committee [although best practice dictates that they have involvement in the evaluation and placement process, and receive the notices required by the procedural protection provision.] There is no maximum number of members, and the regulations provide no guidance on the level of knowledge required of the members.

4. Evaluation

Parental consent is required prior to initial evaluation. “OCR has determined, through policy clarification,

that the Section 504 regulation... requires parental consent prior to the conduct of initial student evaluation procedures[.] Parental discretion involving student assessment/evaluation is an inherent part of the regulation and parental discretion is an appropriate and necessary policy component at the initial evaluation stage.” *Letter to Durham*, 27 IDELR 380 (OCR 1997)(Dallas Office). *See also, Williamson County (TN) School District*, 32 IDELR 261 (OCR 2000) (parental consent necessary prior to initial evaluation and initial placement.)

“Evaluation” does not necessarily mean a “test.” In the §504 context, “evaluation” refers to a gathering of data or information from a variety of sources so that the committee can make the required determinations. §104.35(c)(1). Since specific or highly technical eligibility criteria are not part of the §504 regulations, **formal testing is not required to determine eligibility.** *Letter to Williams*, 21 IDELR 73 (OCR 1994). Common sources of evaluation data for §504 eligibility are the student’s grades, disciplinary referrals, health information, language surveys, parent information, standardized test scores, teacher comments, etc. If formal testing is pursued, the regulations require that the tests are properly selected and performed by trained personnel in the manner prescribed by the test’s creator. §104.35(b)(2). When interpreting evaluation data and making placement decisions, the District is required to **“draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior.”** Information obtained from all such sources is to be documented and carefully considered. §104.35(c)(1)&(2). “[This] paragraph requires a recipient to draw upon a variety of sources in the evaluation process so that the possibility of error in classification is minimized.” Appendix A, p. 430.

A comprehensive reevaluation is required periodically for each eligible student. Districts are considered to be in compliance if they complete reevaluations every three years (as they do with IDEA students). As a practical matter, and to ensure some continuity in the child’s program, Districts should consider an annual review of the child to determine whether changes are necessary due to differences in the child’s schedule in the coming year or changes in the child’s abilities and disabilities. Once the information has been gathered by the §504 Committee, it will determine eligibility based on the criteria previously addressed. If the child is found to be eligible, the Committee will create an accommodation plan for the child which describes the child’s “placement.”

5. Placement

Do not be confused by the word “placement.” In the §504 context, **“placement” simply means the regular education classroom with individually planned modifications.** It does not literally mean taking the child out of the regular classroom and putting him someplace else. Since 504 students have less severe disabilities than their special education counterparts, they will very likely not demand the high level of modification or separate classes sometimes required for students in special education. For the child with ADD served under §504, for example, “placement” may include such things as an assignment notebook, a seat close to the teacher, and shortened assignments. *[See the discussion of placement of 504 students in special education settings in Section IV of this paper on Border Issues.]* **The District must 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.** §104.35(c)(3). The placement must likewise be consistent with the non-segregation mandate or least restrictive environment provision (discussed below). §104.35(c)(4).

6. The Concept of FAPE: Free Appropriate Public Education

Each District has the duty to provide a free appropriate public education (FAPE) to each qualified disabled person within the district’s boundaries regardless of the severity of the student’s disability. §104.33(a). A FAPE has several distinct parts: (1) it is education provided at no cost to the parents, (2) it is designed to provide educational benefit despite the child’s disabilities, [it is “appropriate”] and (3) it is provided in the environment that affords the greatest exposure to non-disabled peers.

a. No cost to the Parents

Simply put, this provision of FAPE mandates that the **educational costs to be paid by parents of a disabled child attending public school are no different than those paid by parents of nondisabled students**. So, while the school cannot charge the disabled child or her parents for highlighted textbooks or special manipulatives required by her disability for her to receive educational benefit, it may charge her for items for which all students are charged (costs of field trips, tickets to football or basketball games, purchase price of school uniforms, yearbooks, class pictures, etc.). §104.33(c)(1). While the “no cost” regulations specifically provide for **residential placement at district expense** under §504, §104.33(c)(3), **this is an unlikely result**. Should a child be so disabled that a residential facility is the least restrictive environment in which that child can receive educational benefit, it is almost a certainty that the child will qualify under IDEA, and be placed under IDEA.

b. Appropriate Education

Under the regulations, an appropriate education is a blend of regular or special education and related aids and services created specifically for this student which is designed to meet his needs as adequately as the needs of nonhandicapped persons are met, and which satisfies the requirements for least restrictive environment, proper evaluation and placement, and procedural safeguards. §104.33(b)(1). More succinctly, it is a program created and maintained pursuant to the procedural requirements of the regulations that gives the disabled child an equal chance to succeed in the classroom.

An accommodation plan is created for the §504 student. This plan can have many names, including IAP (individual accommodation plan). The plan modifies the regular classroom so that the student has equal access to the educational benefits of the school’s program. **The District cannot delegate away its responsibility to provide a FAPE.** Even if it chooses to place the §504 child outside the District, (which should rarely, if ever, occur) the District and not the entity where the child was placed, bears ultimate responsibility for providing the FAPE. §104.33(b)(3).

While curricular modifications may be available to special education students (i.e., reduced mastery of the TEKS), **there is no modification of the essential elements for §504 students.** 504 is not about reducing expectations for disabled students, but providing the types of accommodations that will compensate for their disabilities so that §504 students have an equal chance to compete in class. As a practical matter, modifying the curriculum is potentially disastrous for 504 students in Texas and other states where graduation is conditioned on passing a competency test based on the state-mandated curriculum and no exemption exists for 504 students. The failure to expose 504 students to the required curriculum hardly gives them an equal opportunity to earn a diploma.

Behavior Management Plans. Should the student exhibit behaviors that are recurring or significantly impact upon education and do not seem to be diminishing under the regular discipline management plan, they need to be addressed in a Behavior Management Plan (BMP). Once in place, the BMP and the IAP must be followed to avoid violation of federal law. Failure to have a BMP in place where one is required is not only a violation of federal law, it may also prevent the school from moving the student to a more restrictive setting because the District will be unable to demonstrate that the student could not be served in the regular education classroom with modifications because behavioral modification (the BMP) was never properly attempted.

c. Least Restrictive Environment

The least restrictive environment is the setting that allows the disabled student the maximum exposure to nondisabled peers while still allowing him to receive an appropriate education. §104.34(a)(1). Both IDEA and §504 create the presumption that each disabled child can be educated in the regular classroom. If the District believes that some setting other than the regular classroom is necessary for the child to receive opportunity for educational benefit, the District must be ready to show that it has provided support services and aids to assist the child in the regular classroom, and that such efforts have failed, before determining that a more restrictive placement is necessary. Should the District

segregate disabled students, on buses, at recess, during lunch, classtime, field trips, etc., it must stand ready to demonstrate that the segregation was necessary for the disabled child or children in question to benefit. The presumption is that the disabled child will be educated with regular education children. §104.34(b).

•**§504 presumes a regular classroom placement for the child (or education in the mainstream).** This presumption also exists in IDEA, but is even stronger in §504 since the disabilities encountered in §504 students are typically less severe. A placement other than the regular classroom is only appropriate if the disabled child cannot be educated satisfactorily in the regular classroom with supplementary aids and services such as a behavior management plan, classroom modifications, assistive devices, counselling, etc. §104.34(a).

•**Disruption of the regular classroom by the disabled child is a factor in determining appropriateness of the regular class.** “[I]t should be stressed that, where a handicapped student is so disruptive in a regular classroom that the education of other students is significantly impaired, the needs of the handicapped child cannot be met in that environment. Therefore, regular placement would not be appropriate to his or her needs and would not be required by § 104.34.” Appendix A, p. 429. Note, however, that if supplementary aids and services have not been tried, or a behavior management plan is not in place, disruption by the student does not mean that he cannot be educated in the regular classroom. His disruption means that the District needs to modify appropriately, and then make the determination.

7. Procedural Safeguards & Discipline

The procedural safeguards afforded to parents under §504 are much less extensive than those under the IDEA. Each District “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 (1) **notice**, [which includes child find, notice of parent rights, prior notice of evaluations and meetings, and notice of the results/actions taken at 504 Committee meetings] (2) an opportunity for the parents or guardian of the person to **examine relevant records**, and (3) an **impartial hearing** with an opportunity for participation by the person’s parents or guardian and representation by counsel, and (4) a **review procedure**. §104.36.

Current Drug/Alcohol Exception to the Procedural Safeguard. “For purposes of programs and activities providing educational services, local educational agencies may take disciplinary action pertaining to the use or possession of illegal drugs or alcohol against *any handicapped student* who currently is engaging in the illegal use of drugs or in the use of alcohol to the same extent that such disciplinary action is taken against nonhandicapped students. Furthermore, the due process procedures at 34 C.F.R. 104.36, Procedural Safeguard, shall not apply to such disciplinary action.” 29 U.S.C. §706 (8)(C)(iv) (*italics added*).

OCR has interpreted this phrase to mean that if a student is currently using illegal drugs or alcohol, and is to be disciplined by the school for use or possession, **the student loses the procedural protections provided by §504**, including the manifestation determination prior to a change in placement for disciplinary reasons even if the child has another disability (for example, AD(H)D) that could be related to the misconduct. *1991 OCR Policy Memo on ADA Amendments to §504* (OCR 1991).

The Ten-Day Rule and Manifestation Determination. Students who qualify under §504 may not be subjected to a disciplinary change in placement for more than 10 days unless the appropriate §504 committee first determines that the **behavior giving rise to the discipline was not linked** to the student’s handicapping condition or to an inappropriate placement. To do otherwise is to punish the child because of his disability. Removals for less than ten days can be effected without §504 Committee approval. Note, however, a series of small removals (including teacher removals under §37.002 of the Education Code) over the course of the school year that exceeds ten total days may constitute a **pattern of exclusions** which is itself a violation of federal law.

Does the 45-Day Rule Apply? While originally an Amendment to the IDEA, the Jeffords Amendment (which allowed a school to change the placement of a disabled child for up to 45 days when the child brings a gun to school even if the behavior is related to disability) was applied by OCR to the §504 child. As a result, for 504 students who brought guns to school (or who possessed guns at school) a 45-day change of placement could occur, even if the behavior was related to the child's disability. *Response to Zirkel*, 22 IDELR 667 (OCR 1995). The reauthorization of IDEA has nullified the Jeffords Amendment (as the statute to which the amendment was made has now been replaced). In its place is a 45-day rule applying to drugs and other weapons that is much broader than Jeffords, but which applies only to IDEA students. Until OCR determines that the 45-day rule also applies to §504 student (and we believe it eventually will make that determination), **schools should not assume that the new 45-day drugs and weapons rule applies to §504-only students.**

III. §504 ANTI-DISCRIMINATION PROTECTION FOR IDEA & 504 STUDENTS ELIMINATING DISCRIMINATION BASED ON MISUNDERSTANDING & STEREOTYPE

While the prong under which a child gains eligibility is important for FAPE purposes, students eligible for §504 under any of the three prongs (and students served under the IDEA) receive the benefit of anti-discrimination protection. **Since 504 is a civil rights statute, it concentrates primarily on the notion that disabled persons should not be denied equal opportunity to access and benefit from programs receiving federal financial assistance.** That protection applies not only to individuals with a current disability, but also to persons who have a record of a disability, or who may be "regarded as" or perceived by the district as being disabled. The 504 regulations are calculated to address the prejudices and stereotypes that persist in society about disabled individuals. In 1987, the U.S. Supreme Court analyzed the "regarded as" language, finding that "[e]ven those who suffer or have recovered from such noninfectious diseases as epilepsy or cancer have faced discrimination based on the irrational fear that they might be contagious." *School Board of Nassau County v. Arline*, 480 U.S. 273, 284 (1987). "By amending the definition of "handicapped individual" to include not only those who are actually physically impaired, but also those who are regarded as impaired and who, as a result, are substantially limited in a major life activity, Congress acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment." *Id.* While not pretending to examine every potential form of disability discrimination, this section will investigate the more common nondiscrimination aspects of the Act that do not pertain to the provision of educational accommodations, but nevertheless affect public schools and their relationships with disabled students.

A. Facilities (comparability and accessibility)

Comparability. Section 504 regulations require that districts "ensure that the facility and the services and activities provided therein are comparable to the other facilities... of the recipient." 34 C.F.R. §104.34(c). This requirement goes beyond mere accessibility, and requires that facilities provided for disabled students be of comparable quality and condition. Hopefully, as there are fewer and fewer separate facilities for disabled students, this provision will fall further into irrelevance.

Accessibility. An important facet of accommodation is accessibility of facilities. After all, the quality of the educational program in a school is of little benefit to a student who cannot manage the stairs to enter. The age of the facility is critical in determining the standard of nondiscrimination which applies. **For existing facilities (those constructed before June 3, 1977)**, both 504 and Title II of the ADA "require public entities and recipients to operate programs or activities so that the programs and activities, *when viewed in their entirety*, are readily accessible to and usable by individuals with disabilities. Neither regulation requires public entities or recipients to make all existing facilities or every part of the existing facility accessible to and usable by individuals with disabilities, if the service, activity or program as a whole is accessible." *Dade County (FL) School District*, 23 IDELR 838, 840 (OCR 1995). So, where school officials at an older facility accommodate "students with disabilities by rearranging class schedules, moving classes, and ensuring that the elevator is usable between class periods[.]" 504 is satisfied. *Id.* **For new construction, the accessibility standard is different.** Instead of looking at the program as a whole, accessibility *of the parts* is required. The facility, *and each part of the facility*, must be "readily accessible to and usable by handicapped persons." 34 C.F.R. 104.23 (a)(emphasis added). Under this new construction standard, OCR analyzed two playgrounds that had raised barriers and inaccessible surfacing that prevents access by disabled persons and found that 504 was violated. *Mill Valley (CA) Elementary School District*,

23 IDELR 1190 (OCR 1995). **Note:** Because of a strange anomaly in the definition of “existing facility” under the ADA, satisfying the ADA for a building constructed on or after June 3, 1977, but before January 26, 1992, may not always satisfy 504.

B. NonAcademic Services

As with extracurricular activities, districts must provide nonacademic services or benefits in a nondiscriminatory manner that allows disabled students an equal opportunity to participate. 34 C.F.R. §104.37(a)(1). In the student context, this issue arises primarily with respect to after-school programs, summer programs, field trips and recreational activities, all of which must be provided in a manner that allows for disabled students’ participation. **Schools may not condition the provision of the nonacademic service on the parent’s attendance or provision of a babysitter, exclude disabled students, or charge a higher cost than that charged nondisabled students’ parents.** See *OCR Senior Staff Memorandum*, 17 EHLR 1233 (January 3, 1990). The general rule is violated when a district excludes disabled students from field trips (accomplished by only sending home notice of the trip to students in the regular eighth grade classes but not to the eighth grade class serving developmentally disabled students) *Mt. Gilead Ohio Exempted Village School District*, 20 IDELR 765 (OCR 1993); or prevents disabled students from participating in the school’s honor roll, *Forland*, EHLR 353:127 (OCR 1988); or prohibits disabled students from participation in private music lessons by holding the lessons in inaccessible parts of the school. *Akron Ohio School District*, 19 IDELR 793 (OCR 1993). A special provision instructs counselors to not counsel disabled students to “more restrictive career objectives than nondisabled students with similar interests and abilities.” §104.37(b).

C. Honor Roll, Class Rankings, and Notations on Report Cards & Transcripts

For some time, the issue of recognition of academic excellence of disabled students, their class ranking, and notations for modified classes, has been a rather murky area of §504. For years, OCR has been issuing letters indicating that districts must somehow recognize academic excellence of high-achieving disabled students, taking their disability into consideration, but OCR has never been exactly clear on how that is to be accomplished. See, e.g., *Forland (MO) R-III School District*, EHLR 353:127 (OCR 1988); *Fort Smith (AR) Public School*, 20 IDELR 97 (OCR 1993). In 1996, OCR issued a letter attempting to clarify the issues once and for all. *Letter to Runkel*, 25 IDELR 387 (OCR 1996). Although some of the language is still confusing, the following summary distills the clear import of OCR’s opinion on the issues of disabled students and honor roll, class ranking, and notations on report cards and transcripts. The main gist of the letter is that academic excellence in disabled students, in light of their disabilities, should be recognized by districts

1. Eligibility for honor roll and academic awards cannot be denied automatically on the basis of disability status under IDEA or §504. Below-grade level performance should not automatically exclude a student from consideration.
2. Notations on permanent transcripts are only appropriate to designate a modified curriculum (i.e. reduced mastery criteria/modified essential elements)—not instructional delivery modifications.
3. School districts can establish eligibility criteria for class ranking (i.e. weighted classes) as long as IDEA or §504 students are not arbitrarily excluded. The system must be based on “objective rating criteria” and special education or modified courses should not be weighted more lightly automatically.

D. Extracurricular Activities

Under §504, disabled students must be provided an equal opportunity to participate in extracurricular activities. 34 C.F.R. §104.37(a)(1). Disabled students may try out for any extracurricular activity they desire, but they must generally meet the regular performance standards applied to all students. For example, a student with Tourette’s Syndrome was not subjected to discrimination when he was allowed to try out, albeit unsuccessfully, for a school baseball team. The coach ranked the students on a variety of performance criteria: speed, balance, coordination, hand-eye coordination, sprint speed, lateral movement, and softness catching the ball. Out of fourteen students vying for two openings, the claimant finished eighth, and did not receive a position on the team. OCR found

no violation since the “student was given an equal opportunity to compete for a position.” *Maryville City (TN) School District*, 25 IDELR 154 (OCR 1996).

Students must submit to the general behavioral, academic, and performance standards applied to nondisabled students. For example, no 504 violation was found when a district suspended a student from participation in sports for four months due to his criminal conviction. The suspension was required by district policy and there was no evidence of discriminatory application. *Cabarrus County (NC) School District*, 22 IDELR 506 (OCR 1995). Similarly, a school district did not violate §504 when it removed a disabled student from the wrestling team for failing to follow instructions during practice, since nondisabled students were also removed for the same offense. *Carmel (NY) Central School District*, 23 IDELR 1195 (OCR 1995). Disability does not offer a “free ride” to participate in competitive sports.

Some accommodations, however, may be required in order for students to have an “equal opportunity to participate.” And those accommodations can be expensive. A district in West Virginia violated §504, for example, by failing to provide a deaf student with a sign language interpreter for use in basketball games and practices. *Lambert v. West Virginia State Bd. of Education*, 21 IDELR 647 (W. Va. 1994). The good news is that although OCR does not recognize the “reasonable” limitation on accommodations that affect a FAPE, it appears to recognize that accommodations to allow for participation in extracurricular or nonacademic activities are subject to the “reasonable” limitation. **An accommodation in the field of extracurricular or nonacademic activities becomes an unreasonable accommodation when it would require a “fundamental alteration in the nature of a program,”** which in turn means “undue financial and administrative burdens.” See OCR SENIOR STAFF MEMORANDA, “Guidance on the Application of Section 504 to Noneducational Programs of Recipients of Federal Financial Assistance,” January 3, 1990. For example, a 17-year-old student with Down’s Syndrome alleged that the district failed to allow him to participate in extracurricular activities to the maximum possible extent. The student was co-manager of the varsity basketball team, but was not allowed on away games, and was not allowed to sit with the team at home games. The school district showed that the student required too much supervision on away games, could not use the phone or count change, could not keep a shot chart, and could not perform most of the duties of a manager. In addition, the student was not alert enough to get out of the way of an incoming play on the bench. Despite accommodations the student was unable to perform the basic functions of the position of manager, and thus, was reassigned to co-manager. OCR found no violation of §504. *Crete-Monee (IL) School District 201-U*, 25 IDELR 986 (OCR 1996).

E. Retaliation/Intimidation/Coercion

The §504 regulations prohibit schools from intimidating, coercing, threatening, or discriminating against any person for the purpose of interfering with their rights, or because of their filing of a complaint or participation in an investigation. See 34 C.F.R. §100.7(e). Thus, OCR can take action if it feels that parents have been retaliated against in some fashion for exercising their rights under §504. **While allegations of retaliation are legion, actual violations are relatively rare.** For example, a parent alleged that a district employee (an instructional aide) made a series of harassing phone calls to her home in the early morning hours on several occasions. The parent argues that the calls were made in retaliation of the parent’s complaints about the child’s program and the aide’s concern that she would be fired as a result of the parent’s charges. The phone company confirmed that the calls came from the employee’s apartment, but the employee denied making them (alleging instead that someone was using her phone line without her permission to make the calls). Since OCR could not confirm who made the calls, no retaliation is found. *Mansfield (WA) School District #207*, 23 IDELR 1199 (OCR 1995). **But violations do occur.** A parent who had filed two due process hearings against another school was told that her advocacy position would raise a conflict of interest that might preclude her employment within the District. OCR found that this was a misstatement of law that constituted intimidation of a parent for seeking to exercise her rights under §504. *Ocean View (CA) Elem. School District*, 23 IDELR 48 (OCR 1995).

F. Parents or Members of the Public with Disabilities

Many believe that the requirements of §504 apply only to students and employees, but in fact, the provisions apply also to disabled parents of students or disabled members of the public who participate in school programs, board meetings, or PTAs. **Interpreters at school board meeting required for hearing impaired residents.** A Pennsylvania district refused to provide sign language interpretation for board meetings as requested by a

hearing-impaired resident who had a child attending the schools. The resident brought her own interpreter, and demanded that the board provide the service in the future. She also demanded reimbursement of her costs for the interpreter. The district refused, and denied responsibility for providing sign language interpreters. According to the board, it had no duty to provide an interpreter for “services unrelated to the academic or disciplinary situation of the [resident’s] child.” OCR finds that as school board meetings are open to the public, anyone can attend, participate and ask questions. “Because these meetings had allowed the general public to participate through questions and comments during the meeting, [the resident] should have been afforded an aid or service that would have allowed her to understand what was being said at the meetings, to ask questions and to make comments, just as other members of the public could do.” *Lake-Lehman (PA) School District*, 20 IDELR 546 (OCR 1993). The interpreter was required to provide the disabled resident equal benefit from the meeting. **Where hearing-impaired parents need a sign language interpreter to participate in a school activity designed for parents, then the school must provide the interpreter at no cost to the parents.** *Sherburne-Earville (NY) School District*, EHLR 353:245 (OCR 1989).

IV. BORDER ISSUES

A. IDEA eligible students who also have 504 disabilities

Educators sometimes ask what to do when a student who is IDEA -eligible also has a disability which does not rise to the level of a special education disability. Does that mean that one disability is dealt with by the ARD Committee and the other by 504? No. While IDEA-eligible students also technically qualify as eligible under §504, special education and related services for these children are provided under the IDEA only. Of course, IDEA-eligible students enjoy the anti-discrimination provisions of §504, but they are not served educationally under §504 since a more specific and comprehensive law was created to address their disabilities. To provide services under both 504 and IDEA would be to treat one portion of the student’s body/mind differently than another, with one receiving substantial rights while the other receives much fewer rights. This result is chaotic and wrong. As long as a child is eligible under the IDEA, a §504 Committee does not meet on the child.

B. Should IDEA or §504 serve students with AD(H)D?

In 1989, the Department of Education issued a memorandum on serving children with AD(H)D in the schools. **Its major conclusion was that schools could qualify AD(H)D kids under IDEA as “learning disabled” (if they otherwise met the criteria), or as “other health impaired” (OHI).** Since many AD(H)D students do not qualify as “learning disabled” under the Texas standard deviation discrepancy model, Texas schools in the past looked to the OHI category as a means of qualifying AD(H)D students for IDEA services. The Department of Education’s concern was that students with AD(H)D who did not qualify for IDEA services were simply not being accommodated at all until a few years ago, when schools began to realize that some students who do not qualify under IDEA in fact need assistance due to a disability—under §504. Thus, the Department of Education was trying to help the schools find a way to serve these children under the better-known IDEA process. **The real question for districts to ask is whether an AD(H)D student requires special education and related services under IDEA.** If the child’s needs can be met as adequately as the needs of nondisabled students by use of a set of accommodations in the regular class under §504, does the child really need to be served under IDEA? The answer is no. *See e.g., Christopher B. v. Bishop ISD*, Docket No. 022-SE-996 (Hearing Officer Kevin O’Hanlon—December 6, 1996) (ADHD student making progress with §504 modifications does not need to be identified under IDEA). Schools must also remember that with the benefits of IDEA funding also come the heavy responsibilities and duties under IDEA, with its extensive parental involvement rights and procedural safeguards.

Interestingly, 504 may need to look to special education eligibility for some ADD/ADHD students who can no longer be educated in the mainstream classroom. Since 504 is unfunded, there is no real continuum of educational placements available to the 504 Committee. When a student, despite behavior management and supplementary aids and services, can no longer be taught in the mainstream classroom because of his behaviors, 504 may refer to special education so that, if IDEA -eligible, a more restrictive (IDEA-funded) placement can be found. In addition to the interesting legal questions, note that some parents will prefer their AD(H)D children to be served under IDEA due to the extensive parent involvement and rights it provides (including possible TAAS exemption). Others, wary of the special education “label,” may prefer §504, with its emphasis on regular class placement and modifications. To be sure, **IDEA will likely have to increasingly share with §504 the responsibility for serving**

the AD(H)D population.

C. How does Dyslexia fit?

Unlike other disabilities, dyslexia was singled out by the Texas Legislature, which created a special program and procedures for eligible students. See TEX. EDUC CODE §38.003; 19 TAC §74.28. In February of 2001, TEA released the new “purple book” on dyslexia (replacing the old red book). With a few exceptions, including an unfortunate (and incorrect) reference to a §504 duty to serve students “regarded as disabled” (see *discussion of physical and mental impairment, supra and Purple Book, Question 2.*), the new Dyslexia Handbook seems to merge the state dyslexia process with federal law fairly well.

Assessment of a student for dyslexia triggers the protections of Section 504. “When students are singled out for individualized assessment, the procedures for assessing students for dyslexia must be carried out within the requirements of Section 504 including notification of parents, opportunity for parents to examine relevant records; use of valid measures; and evaluation and placement by a team of persons knowledgeable about the student, meaning of the evaluation data, and placement options.” Purple Book Appendix D, Question 1, ¶3. When dyslexia testing moves beyond screening to assessment, the 504 process begins.

Dyslexia program eligibility and placement is determined by a committee of knowledgeable people— a properly constituted 504 Committee. To emphasize that the dyslexia evaluation and eligibility process is the 504 process, the Purple Book refers to the persons evaluating the child as a “committee of knowledgeable persons.” Note, however, that while the 504 language is adopted, and the 504 regulations form the basis of the group’s makeup, state law adds some extra elements. While federal law only requires knowledge of the child, the meaning of the evaluation and the placement options, state law requires a higher level of knowledge with respect to reading and reading disorders when the eligibility of a child on the basis of dyslexia is considered. Purple Book, at p. 14.

Additional factors in evaluation. Note that when the 504 Committee is also determining a student’s eligibility into the dyslexia program, the Committee must also consider a variety of state law factors enumerated by Education Code Section §38.003 and 19 Texas Administrative Code §74.28: the student’s unexpected lack of appropriate progress; the student’s exhibiting characteristics associated with dyslexia; the student’s having adequate intelligence, the ability to learn; the student’s receiving conventional instruction; and the student’s lack of progress not being due to sociocultural factors such as language differences, irregular attendance and lack of experiential background. [Purple Book, at 5]. **The Purple Book is quite clear in its statement that merely having dyslexia does not qualify an individual as 504.** Purple Book, Question 2. But Texas state law requires that every child who is assessed for dyslexia receives a 504 evaluation. Purple Book, Question 1, ¶3. That is the source of some confusion—some have taken the evaluation requirement to mean that all these kids are actually eligible 504. That position is incorrect. State law merely requires that dyslexia program eligibility be determined consistent with 504 procedures. So although a 504 evaluation is conducted (in which the dyslexia assessment is part of the evaluation data) there is no guarantee that even if the child has dyslexia, he will still meet the substantial limitation or other requirements of 504 eligibility.

OCR takes a different approach, requiring 504 evaluation for students with dyslexia when the dyslexia program fails to meet their needs. In *Karnes City*, OCR determined that the district’s practice of serving a dyslexic student in the district dyslexia program, which services resulted in the student’s success, was an appropriate intervention prior to attempting 504. It approved of the district’s practice of using dyslexia program interventions first, and moving forward with 504 or special education “if at any time the instructional interventions implemented for the student are unsuccessful[.]” *Karnes City (TX) ISD*, 31 IDELR 64 (OCR 1999). This position is far less complicated than that taken by the state in the Purple Book which requires an evaluation prior to individual assessment for the dyslexia instructional program. Because of differences in eligibility criteria, it is possible for a student to be eligible and receive services in the school’s dyslexia program while not qualifying under §504. This result arises from the preventive focus of the dyslexia program, which can provide services to a student who is not yet substantially limited, and therefore, not yet eligible for §504 services under prong one (having no current physical or mental impairment that substantially limits a major life activity). That result is underscored by *Karnes City*, where the district successfully served a student in the dyslexia program and then three years later *at the parent’s request*, the student was found ineligible under Section 504 despite continuing dyslexia services. Following the Purple Book guidance on evaluation will not violate §504, so Texas districts need to follow it, even though the

result is evaluating students under 504 prior to trying the regular education dyslexia program.

D. Parents demanding special education services through 504

On occasion, a parent of an IDEA-eligible students may desire all that IDEA has to offer (special education and related services) but demand that the District provide those services under §504 so that the child is not in special education and is less subject to the stigma that sometimes attaches to the special education label. OCR has rejected this demand, finding that when a child qualifies under the IDEA, the District satisfies the provisions of §504 as to that child by developing and implementing an IEP under IDEA. Therefore, **when parents reject that IEP developed under IDEA, they “would essentially be rejecting what would be offered under Section 504. The parent could not compel the district to develop an IEP under Section 504 as that effectively happened when the school followed IDEA requirements.”** (*Letter to McKethan*, 25 IDELR 295, 296 (OCR 1996). Similar findings have been made in a Texas §504 Hearing (*Errol B. v. Houston ISD*, Hearing Officer Ann Vevier Lockwood, October 26, 1995)(finding that funding programs and allocating resources is the district’s prerogative), and by a federal district court. *Lyons v. Smith*, 20 IDELR 164, 167 fn. 11 (D.C.D.C. 1993).

E. 504 students who seem to need special education services

Since 504 students have less severe disabilities than their special education counterparts, they will very likely not demand the high level of modification or separate classes sometimes required for students in special education. For the child with ADD served under §504, for example, “placement” may include such things as an assignment notebook, a seat close to the teacher, and shortened assignments. Resist the urge to provide core special education services under §504. First, such action is likely in violation of the funding provisions of IDEA part B, in that 504 students are not IDEA-eligible, and therefore cannot avail themselves of services funded by IDEA. Second, logic demands that result. When the §504 Committee is considering removing the child from the regular classroom and placing him in resource or special education content mastery or a more restrictive setting, the Committee should seriously consider whether this is a §504-only child. **It seems incongruous that a child could need special education and related services available through IDEA in order to benefit from education, but at the same time not be able to qualify as an IDEA child.** At least one court agrees. “The Court believes that **the only students likely to be entitled to special education under §504 are the same students also entitled to special education under the IDEA.**” (*Lyons v. Smith*, 20 IDELR 164, 167 fn. 11 (D.C.D.C. 1993).

F. Students Dismissed From IDEA

When students are dismissed from IDEA (upon a finding that they are no longer eligible) ARD Committees sometimes mistakenly believe that the child will, in §504, continue to receive the same level of services previously enjoyed under the IDEA. First, there is no automatic FAPE in 504 for a former IDEA student. Remember that unless that student meets the eligibility requirements of prong one (current physical or mental impairment) there is no 504 duty to provide FAPE. A former IDEA student certainly has a record of a disability, but that only entitles the child to nondiscrimination protection. For a speech-only student exited from IDEA, for example, there may no longer be any substantial limitation, and thus no FAPE eligibility under 504. A former IDEA student with a learning disability, on the other hand, who is exited because his/her discrepancy is no longer over 15 points, may still have a large gap between IQ and achievement, and still may be very learning disabled (although not so severely disabled as to qualify under the IDEA.) That student may qualify under prong one of §504. However, even if the student qualifies, various services the student once enjoyed (resource classes, or content mastery, for example) may no longer be available because of the lack of IDEA eligibility. **Great care should be taken when describing to parents the types of services available for a student moving from IDEA to 504 so as not to cause unrealistic expectations.** Finally, remember when exiting students late in their high school careers that 504 cannot give exemptions to TAAS (the 504 Committee can only provide some approved modifications to the exam). A student who has been exempt throughout his years in school and is suddenly subjected to TAAS will likely encounter difficulties with it.