THE LOGIC OF LEGAL OPINIONS REGARDING A SCHOOL DISTRICT'S RESPONSIBILITY FOR PROVIDING ACCOMMODATIONS IN A SECTION 504 PLAN: NO SPECIAL NEEDS CHILD LEFT BEHIND

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Section 504 of the Rehabilitation Act of 1973 is a civil rights statute. The purpose of the statute was to prohibit discrimination on the basis of disability in any program receiving federal funds.

The passage of the Act set the stage for future legislation which addressed the education of students with disabilities. The Individuals with Disabilities Act (IDEA) and the Americans with Disabilities Act (ADA) encased, specified and extended the regulatory requirements of Section 504.

It is this very nature of co-existence that has created a climate of confusion for those who are charged with the responsibility of implementation, particularly in the area of designing 'reasonable accommodations' for disabled students. The language of Section 504 is relatively vague, opening the door for wide interpretation. Common terminology in IDEA and Section 504 are defined differently. Again, creating confusion and, in some cases, argument between parents and the school district. 'Reasonable accommodations' is a relevant term under Section 504 however; it is not a relevant term under the IDEA.

The Office for Civil Rights has infrequently attended to substantive issues but rather focused on procedural issues, leaving ‘reasonable accommodations’ and other such questions to the courts.

Although marked by inconsistency and some confusion, the judicial trend seems to be toward interpreting Section 504 as requiring recipients to make ‘reasonable accommodations’ rather than unqualified affirmative action.

This dissertation will provide an examination of select court cases that address the issue of ‘reasonable accommodations’ under Section 504 of the Rehabilitation Act 1973. It is assumed that the most recent court rulings would incorporate the findings of prior court rulings as a basis for the decision.

This analysis of the interpretations of the rulings will be the foundation for the development of a reference tool for district administration to consider when developing an accommodation plan.

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CHAPTER I

A. Introduction

In his address to the Senate in 1972, Senator Hubert Humphrey of Minnesota stated, "The time has come when we can no longer tolerate the invisibility of the handicapped in America…Every child—gifted, normal and handicapped—has a fundamental right to educational opportunity…Justice delayed is justice denied."[1]

Driven by outrage that his granddaughter was denied admittance to a public school because she had Down 's syndrome, Senator Humphrey was reacting to the common practice of excluding children with severe handicaps from the public schools in the United States.

Parents had historically sought relief from this practice through the courts only to be denied access by the court rulings. In Watson v. City of Cambridge, 157 Mass. 561, (1893) the court decided that a student could be expelled for disorderly conduct or imbecility.[2] Physically handicapped students could be excluded from school because their presence was said to have a depressing and nauseating effect "on other students" through a ruling in Beattie v. State Board of Education, 169 Wis. 231, (1919).[3] In the 1920's, schools raised the minimum IQ requirement to 40 and then to 50.[4] Special education classes were created for students with 'mild disabilities' but students with severe handicaps continued to be excluded. In the case of Board of Education v. Goldman, 47 Ohio App. 417 Ohio Ct. App. (1934), the Ohio state appellate court upheld the authority of school officials to exclude certain students, and the Department was given the

authority to determine if certain students were incapable of benefiting from instruction. If so, those students could be excluded or excused from regular education.[5]

Throughout the early 1900's, children with severe handicaps were typically educated in a separate facility from regular education.

Senator Humphrey's original intent was to amend the Civil Rights Act of 1964 but instead an amendment was added to the Rehabilitation Act of 1973. The single paragraph we now refer to as Section 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 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.§7949A)(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 for the disabled. Programs were generally aimed at providing job opportunities and training to disabled adults. The Vocational Act of 1963 made an important shift from training for specific occupations to focusing on the diverse needs of youth to be served by vocational education.[6] The Rehabilitation Act of 1973 and the regulations promulgated under Section 504 addressed the failure of public schools to educate disabled students.

In the public schools, Section 504 applies to ensure that eligible disabled students are provided with educational benefits and opportunities equal to those provided to non-disabled students.

Educational practitioners, faced with a myriad of regulations required by federal, state and local law in both regular and special education, find the regulations in Section 504 of the Rehabilitation Act of 1973 confusing and convoluted.

Today, the challenge for school districts lies in the application of the law and the appropriate development of Section 504 service agreements. Driven by the mandate of the law and the sincere desire to address the needs of each individual student, educational practitioners seek to find ways to understand their roles and responsibility in addressing those needs. Court decisions provide a means to gain greater understanding of the law through study of the interpretations of the rulings.

While a debate can ensue between the school district and parents regarding aspects of evaluation for Section 504 eligibility, the area of offering ‘ accommodations’ has presented the greatest challenge. Educators, parents, and advocates grapple with the interpretation of ‘accommodations’. School districts are often put in the position of long negotiations with OCR which delays services to students and reallocates resources to legal representation costs.

The Chapter I of this dissertation will provide a historical overview of disability rights laws and the framework of Section 504 of the Rehabilitation Act of 1973 will be presented. Major case law that helped define implementation in public school settings will be addressed and the range of issues surrounding application of ‘ accommodations’ under Section 504 in public school situations will be examined.

B. Historical Overview Of Disability Rights Laws

The concept of civil rights in this country began with the signing of the Declaration of Independence. The Fourteenth Amendment holds that no state can deny any U.S. citizen equal

protection under the law. The Civil Rights Act of 1964 prohibited employment discrimination based on race, sex, national origin or religion, and prohibited public access discrimination.

The first attempts to merge disability with the civil rights movement were unsuccessful. Senator Humphrey wanted to amend the Civil Rights Act of 1964 to include people with disabilities. Congressional leaders who supported the Act feared that open discussion would provide an opportunity for opponents to change the Act and diminish its impact. When the Vocational Rehabilitation Act came up for re-authorization, Congress crafted an even broader piece of legislation called the Rehabilitation Act of 1972 and Humphrey was persuaded to have his disability anti-discrimination protections included in the Act. Congress attempted to expand the program beyond its traditional employment focus by identifying ways to improve the lives of persons with disabilities by giving priority to those with severe disabilities, providing for extensive research and training for rehabilitation services and coordinating federal disability programs. A battle, however, ensued with the Nixon administration. Nixon refused to sign the bill, Congress adjourned and the legislation died. Congress convened in January, 1973 and supporters of the Act reintroduced it. Nixon claimed that the bill was 'fiscally irresponsible' and again vetoed it because of the cost associated with independent living. The Senate engaged in negotiation with the administration and compromise legislation was signed into law on September 26, 1973. Of interesting note, during the bitter battles over this legislation, little attention was given to Section 504 of the Act. Title V of the Act provided Section 501, which requires affirmative action and nondiscrimination in employment by Federal agencies; Section 502 established the Architectural and Transportation Barriers Compliance Board. Under Section 503, parties contracting with the United States were required to use affirmative action to employ qualified persons with disabilities. Section 504 stated that "no qualified individual with a

disability in the United States shall be excluded from, denied the benefits of, or be subjected to discrimination under" any program or activity that either receives Federal assistance or is conducted by any Executive agency or the United States Postal Service. This phrase was modeled after Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments Act of 1972, which prohibited discrimination in federally assisted programs on account of race, color, religion, national origin, or sex.

Although Section 504 was not introduced at the request of the disabled community, the Rehabilitation Act helped energize the community. Cherry was one such advocate. As attorney and disability lobbyist who had a rare, degenerative muscular disease, Cherry began to write letters to HEW requesting that the department issue regulations. When the Department of Health, Education and Welfare was slow to issue 504 regulations, under the leadership of Secretary Mathews, Cherry filed suit. The Cherry v. Mathews lawsuit was filed on February 13, 1976. Mathews presented the regulations to the public on May 17, 1976, but he issued them only as intent to propose regulations, not an actual proposal. U.S. District Court Judge Smith ruled in favor of Cherry on July 19, 1976 and ordered DHEW to develop the Section 504 regulations to prohibit discrimination against 'handicapped persons' in any federally funded program.

Over the next six months, HEW solicited public comment. The OCR made minor changes and presented the revised regulations to Mathews. Mathews again delayed by sending the regulations to the Senate Committee on Labor and Public Welfare for review.

On January 18, 1977, two days before he was leave office, Mathews was directed by the federal district court to sign the regulations. When he refused, he was held in contempt of court. On appeal the next day, Matthews argued that in one day he would no longer be Secretary and that it was properly the new Secretary Califano's responsibility. The appellate court agreed.

Serving under President Carter, Califano deliberated on the construction of the regulations through February and March of 1977. Concerned about the costs associated with the statute and resisting the inclusion of drug and alcohol abusers as a protected class, Califano proposed implementing a limited concept of making individual programs accessible. The American Coalition of Citizens with Disabilities voted to conduct nonviolent demonstrations in HEW offices nationwide if the regulations were not signed by April 4, 1977. On Tuesday, April 5, 1977, the demonstrations began. The resolution of the demonstrators was a dominant force that resulted in the signing of the regulations, without change, by Califano on April 28, 1977.[7]

Advocates for disabled students continued to lobby Congress after the enactment of Section 504 for additional services for disabled students. Their efforts ultimately resulted in the passage of the Education for All Handicapped Children Act (EAHC) in 1975 which established the right of children with disabilities to an integrated public school education. In 1990, it was amended and renamed the Individuals with Disabilities Education Act (IDEA). The IDEA differs significantly from Section 504 by providing a minimal level of funding to school districts as well as detailing very specific eligibility criteria and procedural mandates.

Section 504 protects all children who currently have a physical or mental impairment that substantially limits one or more major life activities. The types of disabilities that qualify a child for eligibility under the IDEA are more limited. In order to meet IDEA eligibility requirements, a student must both fit into one of the eligibility categories and need 'specially designed instruction'34 C. F. R. §300.26(a) (1).

Specially designed instruction means

> adapting, as appropriate to the needs of an eligible child…the content, methodology, or delivery of instruction: (i) to address the unique needs of the child that result from the child's disability; and (ii) to ensure access of the child to the general curriculum, so that he or she can meet the educational standards

> within the jurisdiction of the public agency that apply to all children [34 C.F.R. §300.26(b)(3) Section 504 does not mandate any specific services for students.]

Students who are eligible under the IDEA also meet the eligibility standards of Section 504. Where a student meets eligibility standards under both statutes, they will receive services under the IEP. Section 504 regulations provide that the development of an IEP meets the free appropriate public education standard of Section 504--34 C.F.R. §104.33(b)(2). There is no requirement to develop both an IEP and a service agreement.

The Civil Rights Act of 1964 and the Rehabilitation Act of 1973 would be the principal legal foundation for ADA. The disability movement continued to grow from the final passage of the Rehabilitation Act regulations in 1977. Throughout the 1980's, the disability community had a significant influence on judicial and legislative decisions. Although, not withstanding, several significant setbacks in the courts, this influence eventually formed the basis for the passage of the Americans with Disabilities Act. President Bush signed ADA into law on July 26, 1990.

The American with Disabilities Act prohibits discrimination on the basis of disability in employment, state and local government, public accommodations, commercial facilities, transportation and telecommunications. The ADA goes beyond Section 504 by extending non-discrimination requirements to the private sector. Final regulations for Title I, the employment provisions of ADA, were issued on July 26, 1991 by the Equal Employment Opportunity Commission. The standards for determining employment discrimination under the Rehabilitation Act are the same as those used in Title I of the Americans with Disabilities Act.

The Department of Justice on the same day, issued final regulations for Titles II (public services) and III (public accommodations). Title I and Title II cover public schools. Although Title III does not apply to schools, there are certain 'public accommodation' requirements, which do govern many activities conducted by school districts. In general, the obligations and duties

imposed by ADA emulate the obligations that school districts have under Section 504. Although the ADA applies to public schools by virtue of Title II, the regulations have no specific provisions regarding education programs. Therefore, in interpreting the ADA, the OCR uses the standards under Section 504 except where Title II provides otherwise. In effect, virtually every violation of Section 504 is also a violation of the ADA as it applies to students; in fact, the OCR has stated that complaints alleging violations of one statute will automatically be investigated for violations of the other.

On February 12, 2003, writing on behalf of the National Council on Disability (NCD), Chairman Frieden submitted a report to President Bush voicing concern that "federal agencies charged with enforcement and policy development under Section 504 have, to varying degrees, lacked any coherent and unifying national leadership, coordination, accountability, and funding."

The report asserts that many disabled persons and their advocates are concerned that the focus of federal agencies is away from Section 504 since the passage of the Americans with Disabilities Act. The NCD however continues to be of position that Section 504 differs in significant ways from ADA and 'vigorous' enforcement should be the primary focus of the federal agencies.

The report offers the following reasons for continuing attention to and application of Section 504:

- Section 504 covers a number of entities and federally funded activities not reached by the ADA.
- Section 504 is intended to make certain that tax dollars will not be used to establish, promote, or reinforce discrimination against people with disabilities.
- Department of Justice (DOJ) is selective about the disability rights cases it pursues, often prosecuting only egregious cases or those most likely to have a significant impact in a particular area.

Thus it is necessary to ensure that other federal agencies' Section 504 enforcement programs serve as an available and muscular tool in combating disability discrimination. Government enforcement of Section 504 is particularly important in light of recent Supreme Court decisions that limit the scope of private civil rights enforcement. In Board of Trustees of the University of Alabama v. Garrett, the Supreme Court found that the ADA does not permit individuals to sue a state agency for money damages.[8]

The most significant distinction among the three statutes is that the definition of disability in Section 504 and the ADA is much broader that that in the IDEA. The IDEA is limited to 13 classifications, whereas Section 504 and the ADA extend to a wide range of impairments that limit a major life activity. The IDEA only covers students who require special education, whereas Section 504 and ADA extend to certain students in general education. All students who qualify under the IDEA also fall within the anti-discrimination protections of Section 504 and ADA, while all students who qualify under Section 504 and the ADA are not necessarily IDEA eligible (see Figure 1).

A second major difference among the three statutes is the institutional scope of their coverage. It is not uncommon for students to bring suit under both Section 504 and ADA to ensure that they activate all of the statutes that may impose legal requirements and liability on the organization.

A third major difference between the IDEA, Section 504 and ADA lies in the places or legal forums available to individuals seeking a remedy. Under IDEA, there is only one route by which to pursue a remedy, and it is relatively narrow. Students must typically first pursue a due process hearing. Students are required to exhaust the remedy of due process before resorting to court action. In contrast, under Section 504 and Title II of the ADA, students have a right to request a

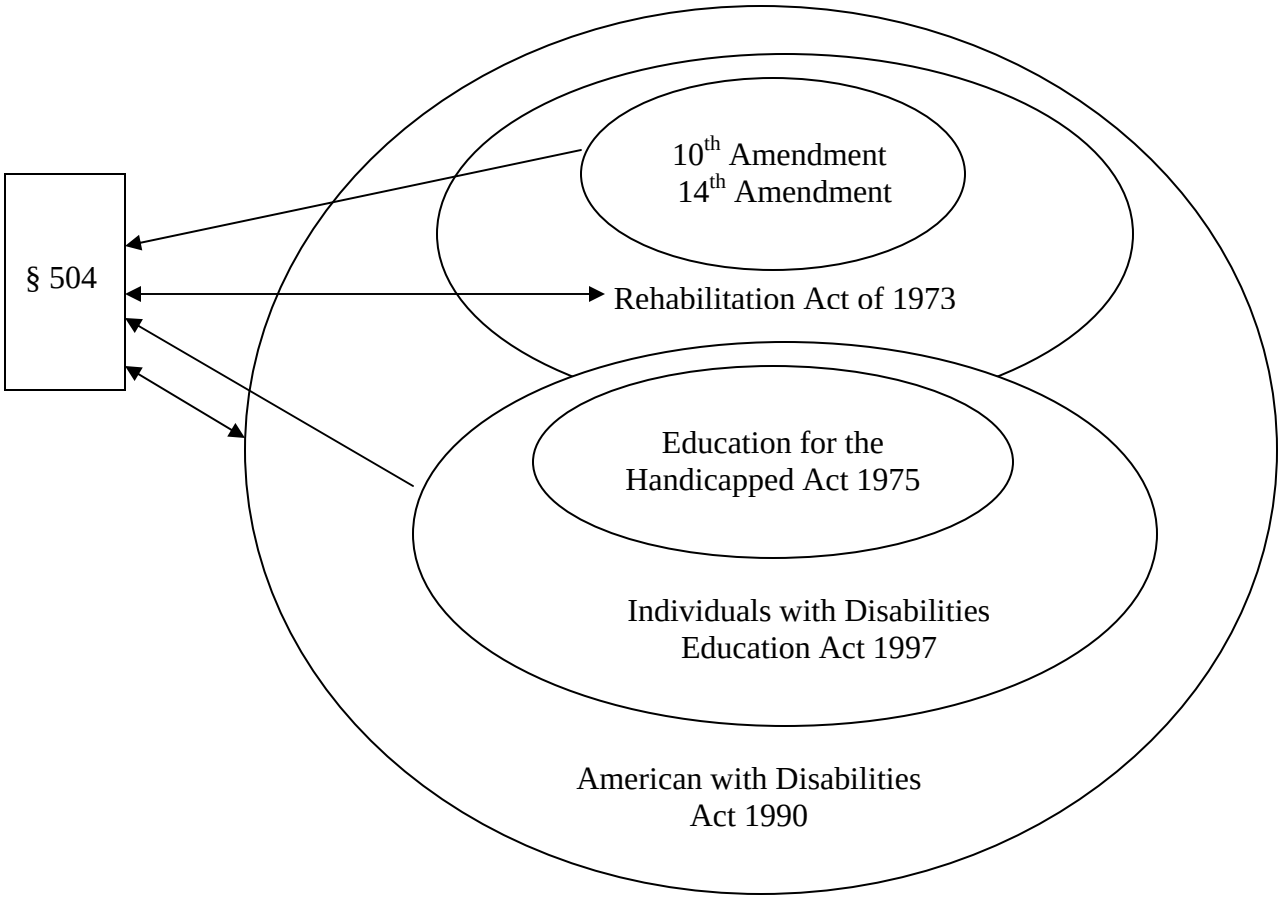

FIGURE 1. AMERICAN WITH DISABILITIES ACT 1990

due process hearing, seek judicial review, and file a complaint with the Office for Civil Rights. OCR evaluates students' complaints, conducts further investigations when warranted, and ultimately can take steps to terminate federal funding if it finds significant violations. This sanction, however, is rarely pursued. The usual result of an OCR investigation is a letter of finding that explains and corroborates the negotiated resolution of the case.

Most of the published decisions to date have been issued by the courts and, to a lesser extent, by OCR.

C. Framework Of Section 504 Of The Rehabilitation Act Of 1973

Section 504 represented the first federal civil rights law protecting the rights of handicapped persons and reflected a national commitment to end discrimination on the basis of handicap--34 C.F.R. §300.26(b)(3).

The law applies to all agencies that receive federal funding, thus including virtually every public school system in the United States. The relevant part of this statute provides that:

> No otherwise qualified individual with a disability…shall, solely by reason of his or her disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.

The focus of the law was on preventing individuals with disabilities from being denied benefits offered to non-disabled individuals in programs receiving federal funds. Section 504 requires schools to meet the educational needs of disabled students as adequately as the needs of non-disabled students. Specific discriminatory actions precluded are: 1) denial of access; 2) denial of equal opportunity; 3) failure to provide equally effective services; and 4) unnecessary segregation--34 C.F.R. §104.4(b)(1).

The statute, however, does not provide a definition of "otherwise qualified". In the landmark case from the higher education context, the Supreme Court established that an "otherwise qualified individual" is "one who is able to meet all of a program's requirements in spite of his [disability]" (Southeastern Community College v. Davis, 1979, p. 406).

The United States Department of Education disseminated the regulations to implement Section 504. These regulations are found at 34 C.F.R. §104.1 *et.seq* and provide the detail and definitions.

The regulations provided definitions of the important terms contained in Section 504 and detailed procedural safeguards as well as the required elements of evaluations and placement procedures.

Section 504 regulations provided that all children of school age were 'qualified' to receive educational services--34 C.F.R. §104.3(1)(2). However, if a student does not meet the essential eligibility requirements for a particular activity within the school, e.g. an extracurricular activity, they may not be considered 'qualified', 34 C.F.R. §104.3(1)(4), unless a reasonable modification will allow them to meet the eligibility requirements.

The federal regulations defined the terminology used to identify those individuals who are eligible for Section 504 service agreements. A person is considered handicapped if they: 1) have a physical or mental impairment which substantially limits one or more major life activities; 2) have a record of such impairment; 3) are regarded as having such an impairment. The first category is the only one routinely encountered in the school context 34 C.F.R. §104.3(j)(1). All three elements of this definition must be met to establish Section 504 eligibility.

Physical or mental impairment is defined generally in the Section 504 regulations. Having a physical or mental impairment is not sufficient to establish eligibility. A physical or mental impairment does not constitute a handicap for Section 504 purposes unless it substantially limits a major life activity. Federal regulations define a major life activity as a function such as "caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working" 34 C.F.R. §104.3(j)(2)(ii). The regulations do not provide an exclusive list of disabilities.

Neither the federal law nor state or federal regulations provided a definition of 'substantially limits'. The Office for Civil Rights has opined that it is up to school districts to make such a determination through the evaluation process. Letter to McKethan, 23 IDELR 504 (OCR 1994).[9]

The Section 504 evaluation process required information to be gathered from a variety of sources 34 C.F.R.§104.35(c)(1).

Congress did not create additional funding to enforce Section 504; rather, it conditioned receipt of federal funds on compliance. Section 504 did not mandate any specific services for students.

The Office for Civil Rights, a division of the United States Department of Education, is charged with interpreting and enforcing these regulations.

The Pennsylvania Department of Education has also promulgated regulations addressing school districts' responsibilities under Section 504 and its implementing regulations. This chapter addresses a school district's responsibility to comply with the requirements of Section 504 and its implementing regulations at 34 C.F.R. 104. The regulations set forth evaluation and procedural requirements as well as the required elements of a service agreement. Pennsylvania regulations implementing Section 504 are found in 22 Pa Code, Chapter 15. Section 15.3 of Chapter 15 provides: A school district shall provide each protected handicapped student enrolled in a district, without costs to the student or family, those related aids, services or accommodations which are needed to afford the student equal opportunity to participate in and obtain the benefits of the school program and extracurricular activities without discrimination and to the maximum extent appropriate to the student's abilities 22 Pa Code 15.3.[10]

The Basic Education Circular promulgated by the Pennsylvania Department of Education entitled "Implementation of Chapter 15" is an additional source of information for the

interpretation for Section 504 in Pennsylvania. The Basic Education Circular provided a definition of a protected handicapped student, set forth applicable procedures, and detailed the elements of a Chapter 15 service agreement.

D. Definition And Legal Literature Pertaining To The Application Of Section 504

The Section 504 definition of eligibility is any person who (1) has a physical or mental impairment which 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.

"Physical or mental impairment" is defined at 34 C.F.R. 104.3(j)(2)(i) as (A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculo-skeletal; 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 disability. The legal definition does not offer a list of specific diseases "because of the difficulty of ensuring the comprehensiveness of such a list" 34 C.F.R.§104.

Section 504 may cover temporary 'disabilities'. The effect of the impairment on a major life activity must be carefully evaluated.

Drug and alcohol addiction are covered under Section 504. Students who are not currently abusing alcohol, or who are participating in or who have completed a supervised drug rehabilitation program are eligible. A student currently using drugs is ineligible.

> The Secretary has carefully examined the issue [of whether to include drug addicts and alcoholics within the definition of handicapped person] and has obtained a legal opinion from the Attorney General. That opinion concludes that drug addiction and alcoholism are "physical or mental impairments" within the

> meaning of Section 7(6) of the Rehabilitation Act of 1973, as amended, and that drug addicts and alcoholics are therefore handicapped for purposes of Section 504 if their impairments substantially limits one of their major life activities. The Secretary therefore believes that he is without authority to exclude these conditions from the definition 34 C.F.R. Part 104, Appendix A, p.386.

No definition of 'substantial limitation' is presented in the statute. The Office for Civil Rights has ruled that the phrase is to be defined by the local educational agency (*Letter to McKethan,* 23 IDELR 504 (OCR 1994)).[11]

However, the regulation writers defined it in 1991 under the ADA, which applies to Section 504 as well. The term "substantially limits" means "when the individual's important life activities are restricted as to the conditions, manner or duration under which they can be performed in comparison to most people" 28 C.F.R. 35.104. A person who is succeeding in regular education is not considered to have a disability that substantially limits their ability to learn. OCR has ruled that a child who receives satisfactory grades and has acceptable behaviors is not eligible under Section 504[12] Jefferson Parish Public Schools, 16 EHLR 755 (OCR 1990).

"Major life activities" means functions such as caring for one 's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working. The disabling condition need only substantially limit one major life activity in order for the student to be eligible 34 C.F.R. §104.3(j)(2)(ii).

In 2002, the Supreme Court rendered a decision, Toyota Motor Mfg., Kentucky Inc. v. Williams, 534 U.S. 184, 122 S.Ct. 681(2002) which attempted to clarify the meaning of 'major life activity'.

Claiming to be disabled from performing her automobile assembly line job by carpal tunnel syndrome and related impairments, Williams sued, Toyota, her former employer, for failing to provide her with a reasonable accommodation as required by the Americans with Disabilities Act

of 1990 (ADA), 42 U.S.§12112(b)(5)(A). The District Court granted Toyota summary judgment, holding that Williams impairment did not qualify as a "disability" under the ADA, because it had not "substantially limited" any "major life activity", §12102(2)(A), and that there was no evidence that Williams had had a record of a substantially limiting impairment or that Toyota had regarded her as having such an impairment. The Sixth Circuit reversed, finding that the impairments substantially limited Williams in the major life activity of performing manual tasks. In order to demonstrate that she was so limited, said the court, Williams had to show that her manual disability involved a "class" of manual activities affecting the ability to perform tasks at work. Williams satisfied this test, according to the court, because her ailments prevented her from doing the tasks associated with certain types of manual jobs that required the gripping of tools and repetitive work with hands and arms extended at or above shoulder levels for extended periods of time. In reaching this conclusion, the court found that evidence that Williams could tend to her personal hygiene and carry out personal or household chores did not affect a determination that her impairments substantially limited her ability to perform the range of manual tasks associated with an assembly line job. The court granted Williams partial summary judgment on the issue whether she was disabled under the ADA.

The Supreme Court opined, that while the Sixth Circuit addressed the different major life activity of performing manual tasks, it did not apply the proper standard in determining that Williams was disabled under the ADA because it analyzed only a limited class of manual tasks and failed to ask whether Williams's impairments prevented or restricted her from performing tasks that are of central importance to most people's daily lives.[13]

Thus a definition of 'major life activity' was crafted as an activity that is of central importance to daily life.

A school district does not have an obligation to provide a free appropriate public education (FAPE) to students in the second and third categories.

> The "record of" and "regarded as" prongs rarely apply in elementary and secondary cases, and they cannot serve as the basis for FAPE under §504. The reason for the inclusion of the second and third prongs of the definition is explained in the regulation at Section 104.3(j)(2)(iii) and (iv). 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. For instance, a person with severe facial scarring may be denied a job because the person is 'regarded as' handicapped. A person with a history of mental illness may be denied admission to college because of that 'record' of a handicap. The persons are not, in fact, handicapped, but have been treated by others as if they were. It is the negative action taken based on the perception or the record that entitles a person to protection against discrimination on the basis of the assumptions of others. *Senior Staff Memorandum*, 19 IDELR¶894, (OCR, 1992).[14]

A school district's only responsibility to these students is not to discriminate against them.

The Section 504 evaluation process requires information to be gathered from a variety of sources--34 C.F.R.§104.35(c)(1). Sources of information may include aptitude tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior 34 C.F.R.§104.35(c)(1).

Pennsylvania regulations require parents to provide 'available relevant medical records' when making a request for Chapter 15 services. 22 Pa. Code 15.6(b). However, elsewhere, a district does not have the right to require a parent to produce a medical statement to prove that a student has a disability for the purpose of Section 504 eligibility.

> A district may not require a parent or a student to provide a medical statement if the district suspects that the student has a disability that would result in Section 504 eligibility. In such a circumstance, the district is obligated to conduct an evaluation of the student, including a medical assessment, if necessary, at no cost to the parents. On the other hand, if the district does not believe that the student has a disability that would result in Section 504 eligibility, then the district is not required to conduct an evaluation of the student; however, the district must inform the parents of their due process rights to challenge the decision not to evaluate. Letter to Veir, 20 IDELR 864 (OCR 1993).[15]

Students who are eligible under the IDEA also meet the eligibility standards of Section 504. Where a student meets eligibility standards under both statutes they will receive services under the IDEA according to an IEP.

There is no requirement to develop both an IEP and a service agreement. Section 504 regulations provide that the development of an IEP meets the free appropriate public education standard of Section 504--34 C.F.R.§104.33(b)(2).

In a lawsuit under Section 504, students must prove four things. First, they must show that they have a disability as defined by the act. Definitions of the terminology have been presented herein. Second, students must show that they are 'otherwise qualified' to participate with, if necessary, 'reasonable accommodations'. This second element contains two legally complex terms that form the basis of most cases. Third, students must show that the alleged discrimination occurred solely because of their disability and fourth, students must demonstrate that the defendant organization receives federal financial assistance.

E. Summary

An appropriate education for students eligible under Section 504 may consist of education in general or special education classes with accommodations and programs designed to meet the unique needs of a student.

Since Section 504 is a non-discrimination law, any analysis of an appropriate education for a student with disabilities needs to include the educational opportunities provided to students who are not disabled. This is because an appropriate education is one, which meets the needs of a student with disabilities as adequately as the needs of students without disabilities. Unlike IDEA –which focuses on the unique educational needs of the student – Section 504 looks at comparing

the education of students with and without disabilities. The significant feature of Section 504 is accommodation. While not requiring that a school lower its standards, the Section 504 plan seeks to offer reasonable accommodations in order to provide equality in opportunity.

Accommodations are adjustments by the classroom teacher(s) and other school staff to help students achieve in their educational program. The accommodations need to take into account both the functional limitations and the alternative methods of performing tasks or activities to participate with endangering outcomes. The accommodations must be individualized and should place the student with a disability at an equal starting level with the non-disabled student.

The Supreme Court has interpreted reasonable accommodations as those that do not require organizations "to lower or to effect substantial modifications of standards to accommodate" students with disabilities (Southeastern Community College v. Davis, 1979, p.413) and that do not "impose undue financial and administrative burdens or require a fundamental alteration in the nature of the program" (School Board of Nassau County v. Arline, 1987).

Based on the 1991 USDOE Joint Memorandum [34 C.F.R. 104.33 (b)(1) which has been quoted as the law in several judicial decisions, 22 services that must be available in regular education classrooms for Section 504 eligible students include the following:

1) providing a structured learning environment
2) repeating and simplifying instructions about in-class assignments
3) repeating and simplifying instructions about homework assignments
4) supplementing verbal instructions with visual instructions
5) using behavioral management techniques
6) adjusting class schedules
7) changing test delivery

8) using tape recorders

9) using computer-assisted instruction

10) using other audio-visual equipment

11) selecting alternate textbooks

12) selecting supportive workbooks

13) tailoring homework assignments

14) consulting with special education teachers for teaching strategies

15) reducing class size

16) using one-on-one tutorials

17) using classroom aides

18) using classroom note-takers

19) involving services coordinator to oversee implementation of program/services

20) modifying non-academic time such as lunchroom

21) modifying non-academic time such as recess

22) modifying non-academic times such as physical education

Although the memorandum was issued to address accommodations for students with ADD, the application has been for students with any other disability.

The diverse nature of 'reasonable accommodations' causes school districts and parents to struggle with the creation of appropriate service agreements. The extent of accommodations under Section 504 is a source of debate when service agreements are written and school districts continue to consider the question whether there is a limit to what school districts have to do to make accommodations for students under Section 504.

CHAPTER II

A. Introduction

Section 504 of the Rehabilitation Act of 1973 is a civil rights statute designed to prohibit discrimination on the basis of disability in federally funded activities. The U.S. Department of Education regulations implementing Section 504 in the preschool, elementary and secondary education context operate in two basic ways: (1) by generally prohibiting certain practices as discriminatory ones, and (2) by compelling school districts and other recipients to take certain affirmative steps to ensure that students with disabilities receive an appropriate public education.

It is the matter of providing an 'appropriate public education' through 'reasonable accommodations' that is at issue. Significantly, Individuals with Disabilities Education Act regulations stress that a child with a disability may not be excluded from age-appropriate regular classrooms simply because he or she needs modifications or accommodations in the general curriculum. The right to maximum feasible integration applies to the full range of academic program options, nonacademic services, extracurricular activities, and physical education.

Rights against exclusion from regular education classes have also been recognized under the U.S. Constitution.

B. Methodology

The general methodology of this will study will be qualitative legal research. The study will examine sources to delineate the scope of interpretation of 'reasonable accommodations'. The purpose of this study is to examine select court and Office for Civil Rights cases that address the

scope of application of 'reasonable accommodations' under Section 504 of the Rehabilitation Act of 1973, conduct an analysis of the interpretations of the rulings for common elements and create a guide for school personnel to use when creating a service agreement which outlines accommodations.

Figure 2 is included to represent the evolution, linkages, and applications of Section 504. The roots of authority are represented and the Acts and subsequent regulations which grew from the application of the authority on the right side of the chart. The left side of the chart represents the interpretations of the facts, arguments, findings and reasoning which where offered through court cases and Office for Civil Rights positions and application of the interpretations in the creation of a reference tool.

A reference will be developed in order that school personnel would have a deeper understanding of the issues, problems and concerns in creating Section 504 plans for disabled students. The recommendations will be field tested for feedback from a cross section of individuals that would have the occasion to reference the material. Parents, school solicitor, teachers and administrators will be included in this group.

This dissertation is presented to provide educators with a broad knowledge of the cases and rulings pertaining to certain aspects of Section 504 of the Rehabilitation Act of 1973. This material does not include every aspect of the cases, nor does it discuss every case involving Section 504 of the Rehabilitation Act of 1973. It is provided with the understanding that the author is not engaged in rendering legal counsel. Readers are strongly encouraged to seek a legal opinion from the school district's legal counsel regarding any question related to a case and/or issue. If legal advice is required, the services of legal counsel should be sought.

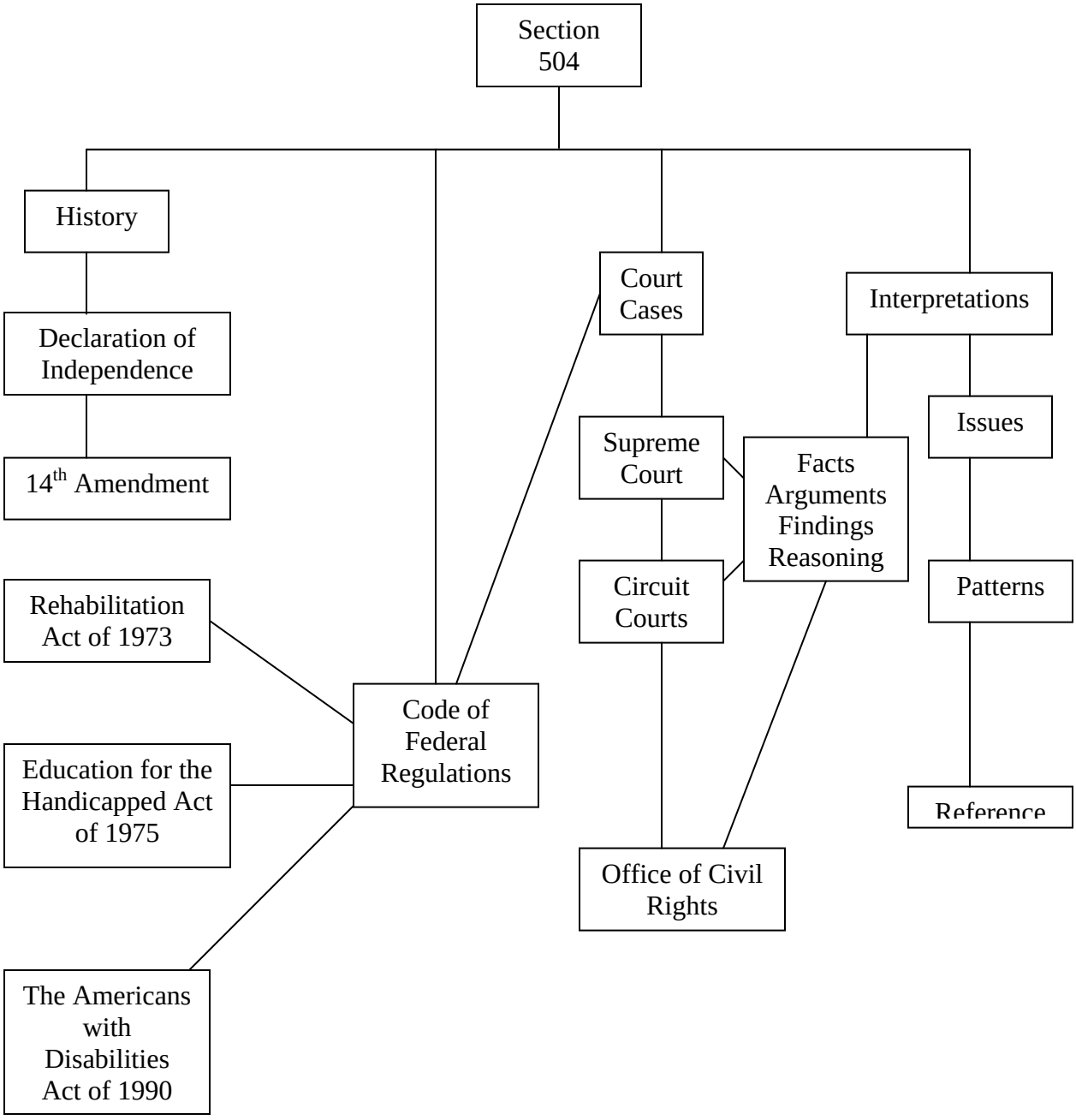

FIGURE 2. EVOLUTION, LINKAGES AND APPLICATION OF SECTION 504

1. Purpose of the Study

With the Court position clearly established in relation to the mandate to make ‘reasonable accommodations’ and acknowledging that Section 504 does not mandate specific services, school districts continue to struggle with the question, “What is a reasonable accommodation?” It is understood that decisions regarding accommodations are made on a case-by-case basis however, when there is disagreement between the parents and school districts, the courts ultimately render an opinion.

2. Elements of the Study

Since the Rehabilitation Act of 1973 did not define ‘reasonable accommodations’ within the law or regulations, then how have the courts and OCR findings defined ‘reasonable accommodations” as it applies to Section 504 cases?

Since legal interpretations have allowed many circumstances to be considered potential ‘handicapping’ conditions, what have the courts and OCR findings considered as ‘handicapping’ conditions as it applies to Section 504 cases?

Since both Section 504 guarantees children with disabilities the right to participate in regular classroom and in extracurricular activities with non-disabled students to the maximum extent appropriate in view of their individual needs, with the use of supplementary aides and services and/or modifications to the regular education curriculum, if necessary, then, what has been the nature and extent of participation that the courts and OCR findings have defined?

How do common elements in court cases translate into references for use by school personnel and parents to address the implementation of ‘reasonable accommodations’ in a Section 504 plan?

3. Case History

Analysis of court cases and OCR rulings will address the following questions:

a. What are the significant court cases, which have addressed 'reasonable accommodations' in education?

b. What common elements are found in the court cases addressing 'reasonable accommodations' in education?

c. When are modifications, adjustments and accommodations in the general education classroom appropriate?

d. What type of accommodation is appropriate in the classroom?

e. When does the refusal by a school district to make specific accommodations mean that there is discrimination?

f. When do accommodations deny FAPE?

4. Sources

a. Analysis of relevant case law and Office for Civil Rights findings

5. Limitations of the Study

The study will be limited to federal court decisions and Office for Civil Rights findings.

6. Definition of Terms

Appellate Court-a court having jurisdiction of appeal and review…a reviewing court, and, except in special cases where original jurisdiction is conferred, not a 'trial court; or court of first instance.

Case Law–law developed by the courts through issuing judicial opinions.

Consent–a written agreement to carry out an activity after being fully informed in one's native language of all information relevant to the activity.

Disability–a physical or mental problem that prevents someone from functioning at a normal rate.

Due Process Rights–parents or guardians have the right to an impartial hearing, with an opportunity to participate and be represented if there is a disagreement between the parents or guardians and the school district in the identification, evaluation, or educational placement of a disabled student.

Evaluation–An evaluation is conducted before any action is taken with a 504 identified student. Evaluation data may include, but is not limited to, formal and informal test instruments, aptitude and achievement tests, teacher recommendations, physical or medical reports, student grades, progress reports, parent observations, and anecdotal records.

Free Appropriate Public Education (FAPE)–Under the IDEA, all children who receive special education services are entitled to an appropriate education, at no cost, as directed by their individualized education program. Under the laws and court decisions, FAPE requires that educational benefit be conferred on the child.

Free Appropriate Public Education (FAPE)-Under Section 504, FAPE consists of regular or special education and related aids and services that are designed to meet the individual student's needs and based on adherence to the regulatory requirements on educational setting, evaluation, placement, and procedural safeguards.

Handicap–a physical or mental problem that prevents someone from functioning at a normal rate

Hearing Officer–an impartial person who conducts an administrative hearing and makes a decision on the merits of the dispute.

Individualized Education Plan (IEP)–a yearly education plan written by teachers, therapists, psychologists, etc. and the child's parents for school age children with disabilities.

IDEA (Individuals with Disabilities Education Act) Eligible Student–an eligible student is a person of age 3 through 21 who: (1) has a physical or mental impairment, as set forth in the

IDEA-B regulations; (2) does not achieve education satisfactorily due to a significant physical or mental impairment; and (3) because of (1) and (2) above needs special education.

Inclusion–disabled children receive services in their home school and are placed in the same classroom with non-handicapped children.

Learning Disabled–a child with average or above average potential has difficulty learning in one or more areas (such as reading or math) and exhibits a severe discrepancy between their ability and achievement.

Least Restricted Environment (LRE)–an educational setting which gives students with disabilities a place to learn to the best of their ability and also have contact with children without disabilities.

Mainstreaming–Some or all of the child's day is spent in a regular education classroom.

Meaningful Education Benefit-1) for a student who has never been enrolled in a public or private elementary school, performance at or not substantially below expected developmental levels for a student of the same age; 2) for a student who is currently enrolled in a public or private elementary or secondary school but not receiving special education and related services, performance at or not substantially below expected competencies established for grade and/or age level (or other educational standards including progress through a curriculum or promotion from grade to grade; or 3) for a student who is currently receiving special education ad related services, substantial progress toward the attainment of the goals in the IEP, as evidenced by the accomplishment of at least a majority of the short-term instructional objectives established in each goal area.

Modification–allows a student to complete the same task as other students, but with a change in the course, standard, timing setting, scheduling, format which fundamentally alters or lowers the standard or expectation of the course.

Precedent–an act or instance that may be used as an example in dealing with subsequent similar situations

Regular Education–the program in which the child would be enrolled if the child did not have disabilities

Related Services/Accommodations–other support services that a child with disabilities requires such as transportation, occupational, physical and speech pathology services, interpreters, and medical services etc. While there is no definition of accommodation in the regulations, there is some agreement as to what it means. An accommodation allows a student to complete the same task as other students, but with a change in the course, standard, timing, setting, scheduling, format which does not fundamentally alter or lower the standard or expectation of the course.

Section 504 Review Committee–committee composed of a group of professionals knowledge-able about the student, including knowledge about the meaning of the evaluation data, the placement options, and the legal requirements.

Service Agreement–a document, written by the 504 Review Committee, setting forth the nature of the concern, specific accommodations and related supportive services

Special Education Programs–programs and services for children over 3 years old with special needs at no cost to families.

Special needs–a child who has disabilities or who is at risk of developing disabilities that may require special education services.

Substantive – of or relating to the essence or substance; essential.

Vacate – to make legally void.

CHAPTER III

A. Introduction

The application of the laws and regulations translate into real life situations for children like John*. John is an elementary student who qualifies for a Section 504 service agreement. The following is a recollection by John's father of the Section 504 meeting and subsequent implementation of accommodations.

> My wife and I were not sure what to expect going into our first Section 504 meeting for our son John. John is in second grade and has Type I Diabetes. We were pleased with the care he had received the year before and wanted to ensure the quality of care would continue. John's teacher, principal, school counselor and two school nurses were in attendance. It was a little intimidating until the principal welcomed us. All of our issues were satisfactorily addressed during the meeting; some concerns had to be compromised. All of John's physical needs are being met as prescribed in the plan. My wife and I both felt his teacher was very serious about the plan.
>
> It is very hard to sit with strangers talking about special needs. It somehow makes you feel that your child is defective or not normal. Even though that is somewhat true, it's hard to have it put out on the table for everyone to see. When we were finished with the plan, we were relieved to have one meeting under our belt and encouraged to realize that there is a system in place to help provide the best care possible for our son.

Accommodations in his Section 504 plan include:

Academic-Related Accommodations

1. Health Care Supervision
2. Trained Personnel
3. Student's Level of Self-Care
4. Snacks and Meals

5. Exercise and Physical Activity

6. Water and Bathroom Access

7. Treating High or Low Blood Sugar

8. Blood Glucose Monitoring

9. Insulin and Administration

10. Field Trips and Extracurricular Activities

11. Tests and Classroom Work

12. Daily Instructions

13. Emergency Evacuation and Shelter-In-Place

14. Equal Treatment and Encouragement

15. Parental Notification[16*]

*Names have been changed to protect confidentiality

Related aids and services, as part of an appropriate education, must be provided to the extent they enable the district to meet the individual needs of students with disabilities as adequately as it meets the needs of non-disabled students.

Section 104.33 of Subpart D—Preschool, Elementary, and Secondary Education of the Rehabilitation Act of 1973 sets forth the regulations regarding a free, appropriate public education (FAPE). Sections 104.33 (b) of the regulations define 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 [accommodations] that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of non-handicapped persons are met and (ii) are based upon adherence to

procedures that satisfy the requirements of Sections 104.34 [Educational setting], 104.35 [Evaluation and placement], and 104.36 [Procedural safeguards].

(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 in or refer such person to a program other than the one that it operates as its means of carrying out the requirements of this subpart. If so, the recipient remains responsible for ensuring that the requirements of this subpart are met with respect to any handicapped person so place or referred.[17]

This language sets forth the loosely defined parameters of providing FAPE to a Section 504 student. The regulations do not describe the boundaries of providing accommodations or "related services". Therefore, we look to the courts and OCR findings to more clearly define reasonable accommodations or related services.

Not only is there a question for 504 coordinators as to where to draw the line when a student with a disability needs accommodations in the regular education classroom but equally perplexing is the range of accommodations that are appropriate for the student to participate in extracurricular activities.

B. Court Decisions/OCR Rulings

In the following court cases, the court dealt directly with the provision of providing reasonable accommodations.

Southeastern Community College v. Davis, 442 U.S. 397, 99 S.Ct. 2361 (1979) was the first Supreme Court 504 case and could be viewed as the Section 504 equivalent of *Rowley*. At issue was the Court's interpretation of the Section 504 regulations applicable to colleges, not those applicable to elementary and secondary schools. However, it has been interpreted to build in a reasonable accommodation requirement (or limit) to all of the provisions of Section 504 whether higher education or basic education.

In this case, the Court held that Section 504 did not compel the college to carry out affirmative action that would dispense with the need for effective oral communication in the college's nursing program so that a student with a bilateral, sensory-neural hearing loss could be included in that program.

Davis, who suffered from a serious hearing disability and who sought to be trained as a registered nurse, was denied admission to the nursing program of the Southeastern Community College, a state institution that received federal funds. An audiologist 's report indicated that even with a hearing aid Davis could not understand speech directed to her except through lip reading, and the college rejected the Davis's application for admission because it believed her hearing disability made it impossible for her to participate safely in the normal clinical training program or to care safely for patient. Davis then filed suit against the college in Federal District Court alleging a violation of 504 of the Rehabilitation Act of 1973. The District Court entered judgment in favor of Davis. Although not disputing the District Court's fact findings, the Court of Appeals reversed, holding that in light of intervening regulations of the Department of Health, Education, and Welfare (HEW), 504 required the college to reconsider the Davis's application for admission without regard to her hearing ability, and that in determining whether Davis was "otherwise qualified", the college must confine its inquiry to her "academic and technical

qualifications." The Court of Appeals also suggested that 504 required "affirmative conduct" by the college to modify its program to accommodate the disabilities of applicants.

It appeared unlikely that the plaintiff could benefit from any affirmative action as required with regard to modifications of programs to accommodate handicapped persons and the provision of auxiliary aids such as sign language interpreters. The court wrote, "Such a 'fundamental alternation in the nature of a program' was far more than the reasonable modifications the statute or regulations required". Davis struck a balance between the statutory rights of the handicapped to be integrated into society and the legitimate interests of federal grantees in preserving the integrity of their programs: while a grantee need not be required to make "fundamental" or "substantial" modifications to accommodate the handicapped, it may be required to make "reasonable" ones.

The case was argued before the Supreme Court on April 23, 1979. The Supreme Court held that there was no violation of 504 when the college concluded that Davis did not qualify for admission to its program. Nothing in the language or history of 504 limits the freedom of an educational institution to require reasonable physical qualifications for admission to a clinical training program. Nor has there been any showing in this case that any action short of a substantial change in petitioner's program would render unreasonable the qualifications it imposed.[18]

In Alexander v. Choate, 469 U.S. 287, 1984-85 EHLR 556:293 (1985) Tennessee proposed to reduce the number of annual inpatient hospital days that state Medicaid would pay hospitals on behalf of a Medicaid recipient from 20 to 14.

Faced in 1980-81 with projected state Medicaid costs of $42 million more than the State's Medicaid budget of $388 million, the directors of the Tennessee Medicaid program decided to

institute a variety of cost saving measures. Before the reduction took effect, respondent Medicaid recipients brought a class action in Federal District Court for declaratory and injunctive relief. The District Court dismissed the complaint on the ground that the 14-day limitation was not the type of discrimination that 504 was intended to proscribe.

On appeal, the respondent's position was two-fold. First, they argued that the change from 20 to 14 days of coverage would have a disproportionate effect on the handicapped and hence was discriminatory. The second, and major, thrust of respondent's attack was directed at the use of any annual limitation on the number of inpatient days covered, for respondents acknowledged that, given the special needs of the handicapped for medical care, any such limitation was likely to disadvantage the handicapped disproportionately. Respondents noted, however, that federal law does not require States to impose any annual durational limitation on inpatient coverage, and that the Medicaid programs of only 10 states impose such restrictions. Respondents therefore suggested that Tennessee follows these other States and do away with any limitation on the number of annual inpatient days covered. Instead, argued respondents, the State could limit the number of days of hospital coverage on a per-stay basis, with the number of covered days to vary depending on the recipient's illness; the period to be covered for each illness could then be set at a level that would keep Tennessee's Medicaid program as a whole within its budget. The State's refusal to adopt this plan was said to result in the imposition of gratuitous costs on the handicapped and thus to constitute discrimination under Section 504. A divided panel of the Court of Appeals held that the respondent had established a prima facie case of a 504 violation, because both the 14-day and any annual limitation on inpatient coverage would disproportionately affect the handicapped.

The case was argued before the Supreme Court on October 1, 1984. The court held that assuming that 504 or its implementing regulations reach some claims of disparate-impact discrimination, the effect of Tennessee's reduction in annual inpatient hospital coverage is not among them. The 14-day limit is neutral on its face and is not alleged to rest on a discriminatory motive, and does not deny the handicapped meaningful access to or exclude them from the particular package of Medicaid services Tennessee has chosen to provide. The State has made the same benefit equally accessible to both handicapped and non-handicapped persons. The state is not required to assure the handicapped 'adequate health care' by providing them with more coverage than the non-handicapped. While 504 seeks to assure evenhanded treatment and the opportunity for handicapped individuals to participate in and benefit from programs receiving federal financial assistance, the Act does not guarantee the handicapped equal results from the provision of state Medicaid.

> To determine which disparate impacts 504 might make actionable, the proper starting point is Southeastern Community College v. Davis, (1979), our major previous attempt to define the scope of 504. Davis involved a plaintiff with a major hearing disability who sought admission to a college to be trained as a registered nurse even with full-time personal supervision. We stated that, under some circumstances, a "refusal to modify an existing program might become unreasonable and discriminatory. Identification of those instances where a refusal to accommodate the needs of a disabled person amounts to discrimination against the handicapped [is] an important responsibility of HEW". Id., at 413. We held that the college was not required to admit Davis because it appeared unlikely that she could benefit from any modifications that the relevant HEW regulations required, id., at 409, and because the further modifications Davis sought –full-time, personal supervision whenever she attended patients and elimination of all clinical courses –would have compromised the essential nature of the college's nursing program, id., at 413-14. Such a "fundamental alternation in the nature of the program" was far more than the reasonable modifications the statute or regulations required. Id., at 410. Davis struck a balance between the statutory rights of the handicapped to be integrated into society and the legitimate interests of federal grantees in preserving the integrity of their programs: while a grantee need not be required to make "fundamental" or "substantial" modifications to accommodate the handicapped, it may be required to make "reasonable" ones. [19]

While the Court referenced the responsibility to make "reasonable" accommodations, the parameters of the term were not defined.

In this school related case, Irving County School District v. Tatro, the Supreme Court, in 1984, upheld the second Tatro opinion by the Fifth Circuit Court of Appeals. It found that a catheterization service was a medical service under the related services regulations. It found these regulations were rational and were enforceable. There is language in the opinion, which talks about the difference between medical services and those, which cannot be compensated under the Act. It approves compensation for medical evaluation services. The opinion also notes that room and board services should be provided. It then notes that "expensive" hospital and physician services may not be subject to compensation. It does not reconcile this language.

The defendant in Tatro had said that catheterization is a medical service provided by medical personnel and therefore should not be provided under the Act. The Court looked at the fact that school systems traditionally provide nurses to non-handicapped students and that this service did not have to be provided by a doctor.[20]

The Court created a standard of looking at the substance of the service and not the label placed on it. If specially trained personnel, for example physical, occupational, and speech therapists, are required to assist a student with a disability to participate in an inclusive program, those personnel must be hired.

On March 3, 1999, in the 7-2 decision, the Supreme Court ruled the Individuals with Disabilities Education Act requires school districts to provide nursing services if such services are necessary for the disabled child to receive an education. In Garret F. v Cedar Rapids, Justice John Paul Stevens wrote: "Respondent Garret F. is a friendly, creative, and intelligent young man. When Garret was four years old, his spinal column was severed in a motorcycle accident.

Though paralyzed from the neck down, his mental capacities were unaffected. He is able to speak, to control his motorized wheelchair through the use of a puff and suck straw, and to operate a computer with a device that responds to head movements. Garret is currently a student in the Cedar Rapids Community School District, he attends regular classes in a typical school program, and his academic performance has been a success. Garret is, however, ventilator dependent, and therefore requires a responsible individual nearby to attend to certain physical needs while he is in school." "This case is about whether meaningful access to the public schools will be assured, not the level of education that a school must finance once access is attained. It is undisputed that the services at issue must be provided if Garret is to remain in school." "Under the statute, our precedent and the purposes of the IDEA, the district must fund such related services to help guarantee that students like Garret are integrated into the public schools." "Congress intended to open the door of public education to all qualified children and required participating states to educate handicapped children with non-handicapped children whenever possible." [21]

C. Circuit Court Cases and OCR Rulings

A relatively recent federal appellate case addressing the provision of accommodations is Campbell v. Board of Education of the Centerline School District., 38 IDELR 143 (6th Circuit 2003).

The parents of a student with dyslexia, who was eligible for special remedial educational benefits under Section 504, sued the school district, alleging it violated the Rehabilitation Act by refusing to provide their son with an appropriate reading program. The 6th Circuit held in an unpublished decision that the district did not violate federal law. The parents failed to

demonstrate that the methodology they preferred was superior to that offered by the district, and they did not prove the district acted discriminatorily when it refused to pay for the alternate program, the court explained. The §504 "reasonable accommodation" for eligible students, appears in this court ruling, to mean a program that enables the student to have "reasonable access to an education similar, relative to his or her individual academic potential and cognitive abilities, to that available to the average fellow student".[22]

In J.D. v Pawlett School District, J.D., an academically gifted minor with documented behavioral problems, brought a claim against his local school district and the Vermont state Board of Education challenging the school district's failure to provide a free appropriate public education under the Individuals with Disabilities Education Act (IDEA) and Section 504 of the Rehabilitation Act of 1973. The Court of Appeals found that the plaintiff's status as an academically gifted student with an emotional disability did not entitle him to special education services under IDEA, but that he was entitled to "reasonable accommodations" under Section 504.

The Vermont Department of Education's regulations mandated that special education and related services are provided only where the planning team determines that the student "exhibits the adverse effect of the disability on educational performance". The court upheld the hearing officer's determination that adverse effect meant that the student functioning in one of the eight basic skill areas (oral and written expression, basic reading skills and comprehension, mathematics etc.) was significantly below expected age or grade norms. In this case, J.D.'s documented behavioral impairment did not qualify as an adverse educational performance per se-it was only a component of his educational performance measured in light of the basic skills enumerated in the regulations.

The court also rejected J.D.'s Section 504 claim on the ground that the school district had offered a reasonable accommodation given the disability present. J.D.'s parents, unhappy with the alternatives presented by the local school district, unilaterally enrolled J.D. in a private postsecondary boarding school catering to academically gifted children. The local school district had offered a placement at the local high school, with enrollment opportunity at a local college, and concurrent counseling and peer training sessions to address the behavioral/emotional issues. The court determined that these accommodations were reasonable under Section 504, which gave J.D. "the same access to the benefits of a public education as all other students. [23]

The 11th Circuit Court ruled, in the case of Greer v. Rome City School District, that "before the school district may conclude that a handicapped child should be educated outside of the regular classroom it must consider whether supplemental aids and services would permit satisfactory education in the regular classroom". Parents said that the school determined the child's "severe impairment" justified placement in a self-contained special education classroom. The district argued that the costs of providing services in the classroom would be too high. The court sided with the parents and said the school had made no effort to modify the kindergarten curriculum to accommodate the child in the regular classroom…The court said that the district cannot refuse to serve a child because of added cost. [24]

In the case of Molly L. v Lower Merion School District., 36 IDELR 182 (E.D. Pa 2002) the court upheld the Section 504 accommodation plan offered by the school district to an eight-year-old child with severe asthma, gross motor difficulties, and extreme sensitivity to sensory stimulations. The school district developed a Section 504 plan for the disabled student with 19 accommodations, including a classroom aide, use of nonverbal signals, special cafeteria seating to minimize noise and odors, an alternative class schedule to prevent her from being bumped or

jostled and modified participation in recess and lunch as an option to not participate in activities having a sensory component. The court denied the parents' request for private school tuition.[25]

Crisp County School District v. Pheil, 498 E.E.2d 134, 27 IDELR 1033 (Ga. Ct. App. 1998) involved a claim under the Rehabilitation Act of 1973, arising out of the sudden collapse and death of Jessica Pheil from a pulmonary embolism, approximately one week after she fell on the staircase at Crisp County High School. Her parents brought this action against the Crisp County School District, the Crisp County Board of Education and four individuals who had served as superintendent of schools or principal of the high school. Their claims were based in negligence and nuisance, alleging that defendants removed a handrail from the staircase, failed to allow the students sufficient time to change classes, and violated the Rehabilitation Act by failing to accommodate Jessica's disability. The court held, however, that the parents failed to show that (1) the student had a disability that affected her capacity to negotiate hallways and stairs in time allowed; (2) the school knew of the condition; (3) the school intentionally refused to reasonably accommodate the condition; and (4) a causal link between refusal to accommodate and student's injury.[26]

The Non-Academic Setting section (Section 104.34(b) ensures participation in nonacademic/ extracurricular activities with students without disabilities to the maximum extent possible (e.g. physical education, drama club, sports). Section 104.37 guarantees that there is no categorical exclusion on the basis of disability and equal opportunity to participate in nonacademic and extracurricular activities. Nonacademic and extracurricular services and activities include physical recreational athletics, transportation, recreational activities and special interest groups or clubs sponsored by the recipients.

Under Section 504 and the ADA, students challenging exclusion from interscholastic athletics under either statute usually find that their cases hinge on the same key elements: (a) They are otherwise qualified to participate in the programs; and (b) the waiver of the contested rule is a reasonable accommodation. Baisden v. West Virginia Secondary Schools Activities Com'n (WVSupCt 2002) is one such case.

On January 2, 2001, Mr. Barry Scragg, principal of Spring Valley High School, submitted a written inquiry to the WVSSAC regarding whether M. Baisden could play football for the high school team during the 2001-2002 school year despite the fact that he had attained the age of nineteen prior to August 1, 2002. The Executive Director of the WVSSAC ruled that Mr. Baisden was ineligible to participate in interscholastic athletic competition for the 2001-2002 school year due to the fact that West Virginia Code of State Regulations section 127-2-4.1 provides that "[a] student in high school who becomes 19…before August 1 shall be ineligible for interscholastic competition." Upon review, both the WVSSAC Board of Appeals and the WVSSAC Board of Review upheld the eligibility determination.

On June 6, 2001, Mr. Baisden appealed the WVSSAC determination to the lower court and requested a permanent injunction prohibiting the WVSSAC from enforcing its eligibility decision. By order dated August 28, 2001, the lower court granted a permanent injunction prohibiting the WVSSAC from enforcing its age rule against Mr. Baisden, based upon the fact that Mr. Baisden's learning disability had required him to repeat two years of education and that application of the age rule discriminated against Mr. Baisden based upon the delay in his education. The WVSSAC contended that the lower court erred by granting the injunction and ruling that the age rule was unenforceable against Mr. Baisden.

The Supreme Court of Appeals of West Virginia reversed the determination of the lower court. Stating, "while we decide, through this opinion, that individualized assessments are required in cases of this nature and that reasonable accommodations may be made through waiver of the age nineteen rule under certain circumstances, we do not believe that the facts of this case justify waiver as an accommodation. Mr. Baisden turned nineteen on July 27, 2001. He is six feet four inches tall and weighs 280 pounds. He runs the forty-yard-dash in 5.3 seconds. His participation in high school football would permit him to compete in this contact sport against students approximately five years younger. The safety of younger, smaller more inexperienced students would be unreasonably compromised. In our view, this would fundamentally alter the structure of the interscholastic athletic program, a result which is not required by reasonable accommodations standards in anti-discrimination law". [27]

In the case of Johnson v. Florida High School Activities Association, Inc., 23 IDELR 218, a 19-year-old student/athlete with a hearing impairment filed an action against the association under Section 504 and the ADA, seeking a preliminary injunction that would allow him to participate in interscholastic football despite his failure to meet an age requirement.

According to FHSAA rules, the student was ineligible to participate in high school athletics despite the fact that his "ineligible age" was a result of his disability.

The court found waiving the age requirement for him would not fundamentally alter the nature of the program. Further, irreparable injury would result if the injunction was not granted; there was no risk of harm to the FHSAA or others and the public interest was advanced by issuance of the injunction. The motion was granted, and the FHSAA was enjoined from enforcing the age rule against the student.[28]

The Office for Civil Rights, a component of the United States Department of Education, enforces Section 504 of the Rehabilitation Act of 1973 in programs and activities that receive federal funds. OCR also enforces Title II of the Americans with Disabilities Act of 1990, which extends prohibition against discrimination to the full range of state or local government services regardless of whether they receive any federal funding.

The Office for Civil Rights has offered the following definitions for terminology associated with interpretation of Section 504 regulations. The definitions are presented here to acknowledge OCR's position even though common reference to the terms in court cases differs from the OCR definition.

Accommodation: a term correctly used in the context of public accommodations and facilities; an individual with a disability may not be excluded, denied services, segregated or otherwise treated differently then other individuals by a public accommodation or commercial facility; (term is not to be confused with 'reasonable accommodation,' discussed below)

Equal Access: equal opportunity of a qualified person with a disability to participate in or benefit from educational aids, benefits, or services

Free and appropriate public education (FAPE): a term used in the elementary and secondary context; 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 upon adherence to procedures that satisfy the Section 504 requirements pertaining to educational setting, evaluation and placement, and procedural safeguards

Placement: a term used in the elementary and secondary school context; refers to a regular and/or special education program in which a student receives educational and/or related services

Reasonable accommodation: a term used in the employment context to refer to modifications or adjustments employers make to a job application process, the work environment, the manner or circumstances under which the position held or desired is customarily performed, or that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment; this term is sometimes used incorrectly to refer to the related aids and services in the elementary and secondary school context or to refer to academic adjustments and auxiliary aids and services in the postsecondary school context

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

The U.S. Department of Education's Office for Civil Rights was asked to render an opinion regarding the application of two Supreme Court cases to a "reasonable accommodation" standard.

An often-cited response from the Office for Civil Rights for an interpretation to the question regarding whether there was a limit on what school districts had to do to meet the 504 rights of disabled students is found in the Letter to Zirkel. Attorney Zirkel is a nationally recognized authority in special education law.

1. Digest of Inquiry (June 28, 1993)

- Does OCR recognize that the FAPE requirement under Section 504, at 34 CFR 104.33, implicitly incorporates a reasonable accommodation, reasonable modification, or other cost-conscious limitation, at least as

applied to those students covered by Section 504 who do not meet the narrow definition of disability under the IDEA?

- If OCR does not recognize that the FAPE requirement of the Section 504 regulations incorporates a reasonable accommodation limitation, how does this interpretation square with Supreme Court precedence denying the validity of Section 504 regulatory interpretations that would require "substantial accommodations"?
    - If OCR does not recognize that the FAPE requirement of the Section 504 regulations incorporates a reasonable limitation, how does this interpretation square with the long line of lower federal court decisions that have applied the Supreme Court's limited-modification ruling in *Davis* to appropriate education and related issues in the elementary/ secondary education context?
    - If OCR does not recognize that the FAPE requirement of the Section 504 regulations incorporates a reasonable accommodation limitation, how does this interpretation square with the ADA's recognition of a reasonable accommodation limitation under Title II?

2. Digest of Response (August 23, 1993**)**

FAPE Requirement Does Not Include Reasonable Accommodation Limit

The Section 504 regulations establish different compliance standards for different educational contexts. A reasonable accommodation limitation is contained in both Subpart B (covering employment) and Subpart E (covering postsecondary and vocational education). Such a limitation, however, is not contained in Subpart D (covering elementary and secondary

education). OCR interprets the absence of any cost-conscious limitation in the Subpart D regulations to mean that the regulation writers intended to create a different standard of compliance in the elementary/secondary school context and not to incorporate a reasonable accommodation limitation into the FAPE requirement at 34 CFR 104.33. Furthermore, since the adoption of the regulations, there have been no actions by Congress, the federal courts, or the agencies of the executive branch that would require OCR to modify 34 CFR 104.33 to allow for some limitation on the FAPE requirement.

Supreme Court Rulings Do Not Affect OCR's FAPE Interpretation

In both of the Supreme Court cases pertaining to reasonable accommodations under the Section 504 regulations, *Southeastern Community College v. Davis,* EHLR 551:117 (1979) and *Alexander v. Choate,* EHLR 556:293 (1985), the Court was addressing modifications unrelated to the elementary/secondary education process. Furthermore, the Court in these cases did not rule that "substantial accommodations" were invalid per se, but were only invalid if they went beyond those adjustments necessary to eliminate discrimination. OCR maintains that these Supreme Court rulings have no impact on the FAPE requirement at 34 CFR 104.33 because that section does not require changes beyond those necessary to eliminate discrimination.

Discrimination, Not Accommodation, Was Issue in Lower Courts

The lower court cases that have applied the *Davis* ruling in the elementary/secondary education context do not require, or even suggest, any need to alter the FAPE requirement at 34 CFR 104.33. None of these cases called into question the legality of the FAPE requirement. Furthermore, if the courts denied particular educational services requested by the plaintiffs in these cases, it was almost uniformly because the courts found that discrimination was not occurring. Such findings coincide with OCR's interpretation that the FAPE regulation requires

school districts to meet the individual needs of all students to the same extent, though not necessarily by providing the same programs and services to students with and without disabilities.

Title II of ADA Does Not Weaken FAPE Requirement

Title II of the ADA has been interpreted to adopt the standards of Section 504 in areas where Title II has not adopted a different standard. In addition, Title II regulations may not serve to weaken existing Section 504 requirements. Accordingly, because Title II does not specifically address discrimination in the elementary/secondary context, OCR has the authority to reference the FAPE requirement of 34 CFR 104.33 when interpreting Title II's general discrimination provisions. Furthermore, because OCR has adopted a specific FAPE requirement for Section 504 compliance in the elementary/secondary education context, the general discrimination provisions, including any reasonable accommodation limitation, of Title II may not be applied to weaken the existing Section 504 standard.[29] OCR Policy Letter to Zirkel, 20 IDELR 134 (OCR, 1993)

A common misconception of Section 504 is that a student must possess a physical or mental impairment that substantially limits the major life activity of learning in order to be Section 504 eligible. The Office for Civil Rights' position is that while it "may be true in a practical sense that most impairments that would be of concern in an education setting would be those that impair learning," the major life activity of learning need not be the focus of the equation. "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 at school. Without regular administration of the medication and inhaler, the child cannot remain in school"[30] Letter to McKethan, 23 IDELR 504 (OCR 1994).

In the case of Henderson County (NC) Pub. Schs., 34 IDELR§43 (OCR Opinion, May 12, 2000), the parents of a diabetic student complained that the district discriminated against their daughter by failing to create a health management plan to provide her with diabetic-related aids and services, including administration of insulin injection in the event of a diabetic reaction.[31]

The Office for Civil Rights found for the parents, and required that the district provide school-wide training to all staff, regarding the recognition of the signs and symptoms of diabetes and at all times to provide no less than three full-time staff of the school trained in the use of an insulin pump and the administration of insulin injections.

In Kalama (WA) School District No. 402, 35 IDELR 72 (OCR 2000), the district's failure to evaluate and provide appropriate accommodations for students with asthma denied them a free appropriate public education. The district had notice that the two students had health related issues. The district agreed to conduct an evaluation of the students within 30 days of receiving notice of their enrollment. The areas of assessment were to include staffing and physical setting requirements as well as emergency procedures related to the students' asthma. The district also stated it would develop and implement an IEP for the students and would include a Section 504 accommodation plan in any placement or program decision.[32]

In Quaker Valley (PA) School District, 352 IDELR 235 (OCR 1986), a student with mental retardation and a neuro-degenerative disorder wished to participate on the swimming team. School officials said the student was excluded because the principal felt it was unsafe for her to participate. The Office for Civil Rights found the district violated Section 504 by denying the student the equal opportunity to participate in the swimming program. The evidence did not

support safety considerations as justification for exclusion. The student could have participated safely in the swimming program if she had an aide to assist her in dressing at the pool, the OCR said.[33]

In Crete-Monee (IL) School District 201-U, 25 IDELR 986 (OCR 1996), the parents of a 17-year-old student with Down syndrome alleged the district failed to allow him to participate in extracurricular activities to the maximum extent possible. The student was manager of the basketball team, but was not allowed to travel to away games and was not permitted to sit with team on the bench at home games. The district showed the student required too much supervision on away games and was unable to perform most of the manager's duties. Also, he was not alert enough to avoid an incoming play on the bench. The Office for Civil Rights found the district's decision to reduce the student to co-manager was justified given his level of functioning; the student could not fulfill the responsibilities of a basketball manager's position without constant supervision. To include the student to the maximum extent possible, the district created the co-manager position for him and modified his duties to better match his abilities.34

In Mystic Valley Regional Charter School, 40 IDELR 275 (SEA MA 2004), the parents of a first-grader with a life-threatening allergy to peanut and tree-nut products prevailed on their Section 504 claim. They contended that a charter school failed to accommodate their son's disability by providing a ban on all peanut and tree-nut products in his classroom. The school took many steps to accommodate the student. It asked other parents to refrain from sending such products to school, required its staff and students to wash their hands before and after eating, and provided staff training on recognizing the symptoms of anaphylactic reaction and how to administer medicine. It also stopped supplying peanut butter as an alternative lunch, required the student to eat with a chosen classmate at a peanut/tree-nut free table, and washed all tables and

desks after meals. His teacher carefully checked all food brought to the class for peanut and tree-nut products before the students consumed it.

The school unsuccessfully asserted it offered reasonable accommodations to the student, that a classroom ban would be an undue burden, and that the student could "advocate" for himself. The hearing officer concluded the medical evidence and the student's history demonstrated his reaction to peanut/tree-nut products was life-threatening and warranted a classroom ban on the products. She explained that very young children are impulsive and share food. It was very possible the student would inadvertently come in contact with those products and would require medical intervention. The fact the student could advocate for himself did not relieve adults from providing him a safe environment, the hearing officer said. The hearing officer determined the current situation was discriminatory. The student was not allowed to participate in an education experience involving Asian food, and his table assignment was "stigmatizing and isolating." He was "entitled to equal access to a pool of other students during snacks and lunchtime so that he may learn appropriate social pragmatics in a natural environment, simultaneously with the rest of the age like peers in his class." The hearing officer also found the charter school failed to demonstrate the peanut/tree-nut ban in the classroom would "fundamentally alter the nature of [the school's] educational program" and concluded a classroom ban of peanut/tree-nut products, along with continuation of the rest of the current modifications would allow the school to maintain the student's safety.35

In Cascade School District, 37 IDELR 300 (SEA OR 2002), the district offered an appropriate Section 504 plan designed to meet the requirements of a fourth-grade student with a severe allergy to nuts. The parents believed the Section 504 plan did not assure their daughter would not be exposed to products containing nuts or peanuts, which could cause life-threatening

symptoms. However, the hearing officer determined the district's November 2001 plan made the school as safe and accessible for this student as for any other. The new plan, proposed in January 2002, also met Section 504 requirements, the hearing officer found. It required the student's teachers to post a sign reminding students to wash their hands if they handle nut products. The hearing officer refused to require the school to impose a blanket prohibition on food products without a label or to ban parents from sending homemade treats, stating it interfered with individual rights and went beyond the applicable standard.

The parents were also concerned about their daughter's ability to safely access mandatory school-sponsored events, but the district's plan provided the same protection for the student as she received in school.

For the extracurricular activities, the hearing officer determined it would be an undue administrative burden for the district to police the behavior of other participants and prohibit the distribution of any food that might contain nut products.36

In Salem-Keizer School District, 26 IDELR 508 (SEA Or. 1997), the district proposed a 504 plan deemed appropriate by the Office for Civil Rights to accommodate a student with severe chemical sensitivities and allergies. The plan included the following adaptations and accommodations to allow reintegration into the building setting: 1) Evaluation of environment by specialist; 2) Provision of air filtration to classroom setting (portable air filters); 3) Notification to staff and students requesting they refrain from us of products with scents, use natural fiber clothing, use of products containing formaldehyde, etc.; 4) Designation of a rest room to be cleaned and stocked with products appropriate for a chemically free (or reduced) environment; 5) Provision of advanced notice to student's family and staff of planned building maintenance and renovation that might involve materials offensive to chemically reduced environment; and 6)

Provision of outdoor physical education activity in an area that has not been treated with pesticides or fertilizers.37

In Wheaton Community Uni. Sch. Dist. No. 200, 35 IDELR 50 (SEA IL 2001), the hearing office denied the flexible start time request noting that the student was tardy only 10 out of 126 days therefore, a flexible start time is not a needed accommodation.[38]

In a case related to assertive technology as an accommodation, OCR found that there was no violation of Section 504 where the school purchased a MacIntosh computer for the student to use while in school. The student could use his IBM compatible computer at home for homework, store the work on a disk, bring the disk in and have the work converted to MacIntosh format at school.[39] Glendale (AZ) High School District, 30 IDELR 62 (OCR 1)

In an effort to raise the educational achievement of all students, local school districts and states throughout the nation have sought to hold administrators, teachers and students accountable for the educational progress of their students.

When a student with a disability receives Section 504 modification in the general education classroom, he/she should be graded in accordance with the district's applicable grading policies. Districts cannot modify grades based on the student's special education status alone.

However, grades cannot be modified and eligibility for honors awards cannot be decided on the basis of special education status alone and the student's IEP should discuss any applicable alternative grading. When a student with a disability takes a general education class for no credit, it is permissible to exclude the student from grading and evaluate the student based on IEP objectives. Collaboration of general and special education teachers in grading students with disabilities is allowed.

A school district may not identify special education classes on a high school student's transcript in order to indicate that the student has received modifications in the general classroom. However, course designations with more general connotations, which do not give rise to a suggestion of special education programs, are not in violation of Section 504 and Title II of the ADA and this determination largely depends upon how the labels are used in a specific state or region. A school district can use asterisks or other symbols on a transcript to designate a modified curriculum in general education provided the grades and courses of all students are treated in a like manner. A school can disclose the fact that a student has taken special education courses to a post-secondary institution in instances where the parent and the student have knowledge of what information is on the transcript and have given written consent[40]--Letter to Runkle, 25 IDELR 387 (OCR 1996).

In Snowline (CA) Joint Unified School District, 35 IDELR 164 (OCR 2001), the district agreed to expunge a student's failing grade in physical education in response to a complaint the student was unable to meet required performance standards because his physical education teacher failed to implement an accommodation.

In its resolution plan, the district agreed to replace the F grade with a P (pass) and award the student credit for the physical education class. It also stated it would provide notice to all staff when a student presents evidence of a disability and requests an accommodation, the staff person must follow district procedure for providing or objecting to the accommodation. All teachers, including physical education instructors, would receive in-service training on Section 504 and IDEA requirements and responsibilities.[41]

In Amherst-Petham (MA) School District, 41 IDELR 102 (OCR 2003), the failure of a student's English teacher to provide him lined paper for assignments and tests as provided in his

504 plan did not deny him FAPE. Concluding the district failed to implement only one of the 15 accommodations the parent of an eighth-grader alleged were not provided, the Office for Civil Rights determined the sole violation did not deny the student a free and appropriate public education. The student was diagnosed with attention deficient disorder, dyslexia, and dyscalculia. His English teacher allowed him the choice of lined or unlined paper for assignments and tests. His plan called only for lined paper. The Office for Civil Rights provided the district with 'technical assistance' on how to amend 504 plan accommodations. The district agreed to remind its principals that 504 plan accommodations must be implemented and only 504 teams may make changes to the plan.[42]

IDEA 1997, Section 504 and the Department of Education Federal Regulations all state that accommodations may be necessary for a student with a disability to participate in any standardized testing.

The accommodations are to be selected on the basis of the individual student's needs. Generally, the accommodations specified for instruction should be provided for testing. Consideration must be given to the basis for invalidating a test score, the availability of less restrictive alternatives, the fairness of the process and other factors including the availability of additional evidence in lieu of a single test score[43]--Letter to Chief State School Officers, 34 IDELR 293 (OSERS 2001).

A number of adaptations have been held to be modifications. For example, in the Nevada State Department of Education, the OCR upheld the State of Nevada's determination that computational skills were an essential part of the State's educational program, and that to provide a calculator to a disabled student on the math portion of the test would be a modification, not an accommodation. In upholding the SEA's determination that computational skills were an

essential part of the state's educational program, such an accommodation would be a significant alteration of the program which would not be reasonable. Most notably, the Office for Civil Rights specifically noted the other accommodations, which were made available to students.[44]

In California, the State Board of Education concluded that the use of audio or oral presentations for the reading portion of the exit exam, would only test the student's ability to listen, not the student's ability to decode and "read to learn" and a state hearing officer determined that the use of a computer with spell check and grammar check on the district's writing test was impermissible. The hearing officer held that, since the purpose of the writing exam was to test the student's ability to spell, punctuate and use appropriate grammar, the use of the spell check and grammar check fundamentally altered the nature of the test.[45]

Test accommodations should mirror those used by the student in school. However, on high stake tests, permissible accommodations may be more limited so as not to invalidate the test. The Office for Civil Rights upheld the State of Florida's guidelines prohibiting reading or explaining the communications portion of the exam to a student on the basis that it would invalidate the test. The Office for Civil Rights found no violation of either Section 504 or the ADA, even though the student was allowed such accommodations in other test situations in school.[46]

In Rene v. Reed, 34 IDELR 284 (Ind. Ct. App. 2001), the Court upheld the decision that students were not denied due process when the State required students with disabilities to pass a graduation exam to receive a diploma and that accommodations listed in individualized education plans do not have to be provided for these graduation exams. Students are not denied due process if they were previously exposed to the subjects tested on a high school graduation exam, had adequate notice that they needed to pass the exam to receive a diploma, and were

allowed to re-take the exam after receiving remediation services. The State is not required to provide all of the accommodations listed in a student's IEP for administration of the graduation exam. In particular, the State does not have to provide accommodations for cognitive disabilities, which would affect the validity of the graduation exam scores. For example, if reading comprehension is the skill being tested, then the State may prohibit the student's use of a reader as a testing accommodation. The court contrasted accommodations appropriate for IEPs with accommodations appropriate for graduation exams by explaining that an IEP is a program created to help a student access her education, whereas a graduation exam is the measure of her mastery of skills acquired as a result of an effective IEP.[47]

D. Summary

In 2001, Congress reauthorized the Elementary and Secondary Education Act and gave the ESEA a new name. The No Child Left Behind Act (NCLB). NCLB reaffirmed the federal government's position that all students should meet high academic standards. In order to obtain funding under Title l, states must develop plans to demonstrate that the state has adopted challenging academic and content standards for all students in the areas of reading or language arts, math and science. These state plans must be developed in coordination with IDEA requirements.

Under NCLB, State content standards must 1) specify what children are expected to know and do; 2) contain rigorous content; and 3) encourage the teaching of advanced skills. State achievement standards must be aligned with content standards and must describe two levels of high achievement: proficient and advanced. These achievement levels determine how well children are mastering the material in the state academic content standards. A third level of

achievement called 'basic' is required to provide complete information about the progress of students towards meeting the proficient or advanced levels.

NCLB requires that all students, including students with disabilities, be at the proficient or advanced levels by the 2013-14 school year. All schools must make adequate yearly progress (AYP) towards attaining this goal of all students reaching the proficient or advanced levels. While the specifics of AYP differ from state to state, AYP must be based on student achievement on annual statewide assessment tests that measure the percentage of students who are at the advanced or proficient levels on the state's achievement standards.

Beginning in the 2005-2006 school year, students must be tested every year in grades three through eight in language arts and math and at least once in grades 10-12. Beginning in the 2007-2008 school year, students must be assessed in science at least once in grades three to five, once in grades six to nine, and once in grades 10-12. Schools must demonstrate that their students are improving at steady and consistent increments each year towards meeting the requirement that 100% of students are at the proficient or advanced levels by 2013-2014.

The assessment data for adequate yearly progress (AYP) is disaggregated into subgroups including:

1) economically disadvantaged students;
2) students of major racial and ethnic groups;
3) students with limited English proficiency; and
4) students with disabilities.

Each subgroup must make adequate yearly progress. If any subgroup of students at a Title I school does not make adequate yearly progress for two consecutive years, the school will be "a

school in need of improvement" and must offer all students in the school the choice of attending another public school that is not in need of improvement (this is called "public school choice").

A school in need of improvement must develop a school improvement plan in consultation with parents, school staff, the local educational agency and other experts. The improvement plan must address how the school will specifically address the issues that prevented it from making adequate yearly progress in the past. The improvement plan must include research based strategies, professional development, and strategies to promote effective parental involvement and mentoring for new teachers.

A Title I school that fails to make AYP for three consecutive years, or is in its second year as a "school in need of improvement," must offer public school choice to all students and must offer supplemental educational services to students from low income families. Supplemental services must be in addition to instruction provided during the school day and must focus on helping students meet state academic achievement standards. For students who receive special education services, supplemental services must also be consistent with the student's IEP.[48]

Other sanctions and corrective actions apply to schools that continue to be "in need of improvement" for more years, including staff restructuring, implementing a new curriculum, and take over of the school. NCLB makes clear that under federal law, students with disabilities are entitled to and expected to meet high academic standards.

Failure to apply standards to students with disabilities is a failure to provide "comparable benefits and services". Schools violate Section 504 and ADA regulations whenever students with disabilities are denied the benefits of education reform standards. For some students, the method of teaching some or the entire curriculum may need to be modified, perhaps as a reasonable accommodation, or as a supplementary aid or service necessary for maximum

feasible participation in regular education. For a small number of students who have significant disabilities, it may be necessary to modify, adapt, or expand the curriculum or instruction to provide access to the standards. These decisions must be made on an individual basis, and based upon valid and competent individualized educational evaluations.

This national effort to increase educational accountability has led to wide spread use of standards-based education, decreased use of "social promotion", and high school exit exams as a condition of receiving a high school diploma. Achievement, accountability and assessment have become a standards-based reform effort.

The courts and Office for Civil Rights rulings are diverse in their interpretation of 'reasonable accommodation'. The presentation of cases, however, has provided insight to the logic of the decisions of the court and the Office for Civil Rights positions.

As elusive as it has seemed to be to capture the essence of 'reasonable accommodations', the fundamental characteristics of the court rulings, Office for Civil Rights positions and the mandates of No Child Left Behind speak clearly to the establishment of an environment in the school which promotes the individualization of programming for all children. The question is no longer, "Is this a 'reasonable accommodation' but rather "What can we, as educators, do to ensure that this child masters the standards?" Educational planning for all students should be characterized by logical approaches to adjustments, modifications and accommodations for every student.

This logic will be characterized through recommendations for practice in the Reference for addressing 'reasonable' accommodations in a Section 504 plan.

CHAPTER IV

A. Introduction

Cases were selected for review in Chapter III based upon the wide diversity of opinion that was presented either through Supreme Court rulings, Circuit Court decisions or OCR positions. Sufficient detail of the specifics of each case was recorded in order that the reader could capture the essence of individuality, which each case presented. The premise of looking to the courts for a pattern of ruling could not be corroborated. No chart, graph or other visual representation could be created to illustrate a pattern of rulings in the court systems and Office for Civil Rights reviews.

The very fact that cases could not be categorized, leads the study to consideration of recommendations to the school community to address the elusive applications of 'reasonable accommodations' in Section 504 plans to ensure that all students are presented with an equal opportunity to master the standards and participate in the school community on a 'level playing field'.

B. Reference

Recommendations For The Application Of 'Reasonable Accommodations' In A School Setting

This reference material was field tested for feedback from a group consisting of parents, school solicitor, teachers and administrators. Recommendations were incorporated and comments were addressed. It is important to note that the following advice is not intended to replace legal

counsel. If legal advice is required, the services of legal counsel should be retained. The writer makes no representation that this reference tool should be utilized as a legal text. The recommendations represent suggestions for consideration in the creation of accommodations in a Section 504 plan.

C. Planning Accommodations

1. Follow procedures to evaluate, plan, implement a Reevaluate Section 504 plans. Formalize the process and consistently apply a rigorous standard of execution. See Figure 3 for a graphic representation of the process to initiate consideration of IDEA or Section 504 eligibility.
2. Provide professional development for staff members to ensure understanding of Section 504 regulations in order that appropriate accommodations are well thought-out and implemented.
3. Individualize the plan. Avoid the use of checklists when creating a Section 504 Service Plan. Use of a checklist predisposes the team to consideration of listed accommodations which could be implemented rather than addressing the individual needs of the student and recommending accommodations which will 'level the playing field' for the student.
4. Address the formation of accommodations from a categorical perspective. Consider if accommodations are necessary in the areas of: a) Instruction; b) Health and Safety Procedures; c) Communication; d) Student Organization and Management; e) Program Organization and Management; f) Classroom Organization and Management; g) Environment Outside of the Classroom; and h) Student Behavior Management.

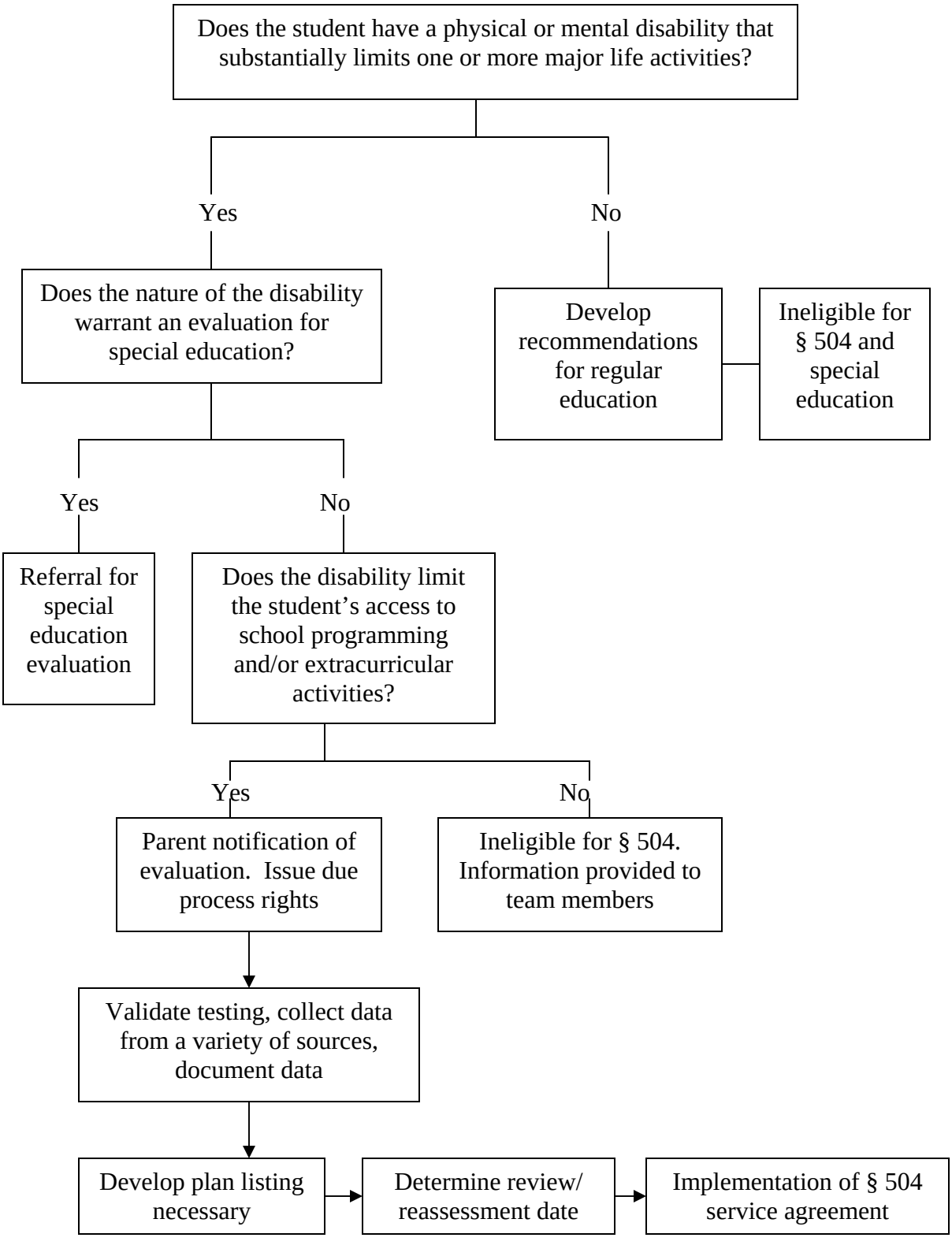

FIGURE 3. § 504 DETERMINATION FLOWCHART

5. Make certain that individuals who are knowledgeable about the disability are part of the Section 504 team. Their knowledge will ensure that all necessary accommodations to mitigate the effects of the disability will be considered.

6. Detail accommodations with an appropriate level of specificity to avoid confusion and/or non-compliance by staff responsible for implementing the accommodation. A well-crafted, succinct, simple description of an accommodation is more likely to ensure compliance than a convoluted, complicated description of an accommodation.

D. Implementing Accommodations

1. Clearly identify in the Section 504 plan, the individual/s that are responsible for implementing the accommodations.

2. Emphasize the fact that staff personnel cannot change an accommodation independently but must convene the Section 504 team if the staff member believes an adjustment is warranted.

3. Consider the impact and effect of all accommodations in order that all concerns regarding implementation are addressed during the Section 504 team meeting.

4. Teachers of the student are critically important members of Section 504 team. Use their professional expertise to develop appropriate accommodations based upon the student's individual needs.

5. Encourage the participation of the student, if age appropriate, in the development of the accommodations.

6. Ensure that the accommodations address the identified needs, which were established in the evaluation data.

7. Accommodations must be consistently applied across all aspects of the student's programming. Make certain that all of the student's teachers are consistently implementing the accommodation/s in the same manner, particularly on the secondary level where it is more common for the student to have several teachers during the course of the day.
8. Notification of accommodations should be disseminated to school personnel who sponsor extracurricular activities (e.g. interscholastic clubs, intramural activities etc).

E. Evaluating Accommodations

1. Closely monitor the progress of the student to assess the effectiveness of the accommodations following an established schedule for review of progress and parent notification. The progress monitoring methods should be established at the team meeting in order that those responsible for implementing the accommodations and monitoring the progress are aware of the reporting procedures. Reconvene the team as necessary to address areas of concern.
2. Conduct timely reevaluations to ensure that the accommodations in the current plan are appropriate.

F. Summary

Addressing seemingly similar cases, courts have not ruled in a consistent manner. However, the commonality is found in the basis premise that all students must have an equal opportunity to academic success and school integration. Consistency of process has been recognized through the analysis. Office for Civil Rights findings and court decisions consistently recognize and

emphasize the need to individualize the Section 504 plan and to apply common sense to the incorporation of accommodations.

The decisions and findings looked for sound reasoning in the development of the accommodations using the evaluation data as the guide in creating the plan.

Therefore, school districts must ensure that (a) knowledgeable teams are assembled, (b) categories of accommodations are considered, (c) necessary accommodations are identified, (d) plans for implementation of accommodations are developed, and (e) progress monitoring for effectiveness of accommodations is established.

All considerations during evaluation of students, planning for accommodations and implementing the Section 504 accommodations must address the same question: Have we eliminated all situations, which could cause discrimination due to the student's disability? When we answer in the affirmative, we will be certain that we have implemented "reasonable accommodations".

G. Future Study

A future study could include an examination of the impact of the No Child Left Behind law as it relates to providing accommodations through Section 504 in order that all students attain at the proficient or advanced level by the year 2013-14.

The objective of education reform is to make certain that students gain knowledge of a core curriculum that reflects the standards. Therefore, all children, including those with disabilities, must be provided with instruction that leads students to mastery of the standards. Otherwise, they will be denied comparable benefits and services, in violation of Section 504. The courts have examined the issue of accommodating students in the administration of high stakes tests.

This concern of accommodating for high stakes tests, as well as the means to deliver standards based instruction and the accommodations necessary to successfully ‘level the playing field for disabled students in the environment of education reform, will continue to receive national attention.

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