I. Section 504 Issues

A. Statutory Basis—Rehabilitation Act of 1973

1. 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 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 or under any program or activity conducted by any Executive agency or by the United States Postal Service. (29 U.S.C. 794)

2. The Americans With Disabilities Act Amendments Act of 2008 (effective January 1, 2009) was passed by the Congress amending provisions of the ADA and the Rehabilitation Act of 1973 commonly referred to as Section 504. The ADA Amendment Act states that the term “disability” shall be construed in favor of broad coverage of individuals to the maximum extent permitted by the Act.
The OCR has issued a revised guidance document Protecting Students With Disabilities: Frequently Asked Questions About Section 504 and the Education of Children With Disabilities (Office for Civil Rights (March 2009)).
The document may be downloaded at: www.ed.gov/print/about/offices/list/ocr/504faq.html

B. Definition of a Qualified Individual with a Disability under Section 504

1. A person with a disability is any person who:
   a. Has a physical or mental impairment which substantially limits one or more major life activities;
   b. Has a record of such an impairment; or
   c. Is regarded as having such an impairment. (Section 504 regulation --34 C.F.R. 104.3(j))

   The 2008 Amendments further define the term “regarded as having an impairment” to mean that the individual must establish that he/she has been subjected to an action prohibited under the ADA because of actual or perceived physical or mental impairments whether or not the impairment limits or is perceived to limit a major life activity. This section of the law does not apply to impairments that are transitory and minor which is an impairment with an actual or expected duration of six months or less.

   Note: The second and third prongs of the definition referring to individuals with a record of or regarded as having an impairment is relevant only when some negative action is taken based on the perception or record. They cannot be the basis upon which the requirement for a free appropriate public education (FAPE) is triggered (OCR Policy Memorandum, (1992)).

   The mere fact that a student has a “record of” or is “regarded as” disabled is insufficient, in itself, to trigger Section 504 protections
that require the provision of FAPE. Therefore, a school district is not required to develop a Section 504 plan for such student (Protecting Students With Disabilities, OCR Guidance, Question 37 United States Department of Education, Office for Civil Rights (2009)).

2. A qualified person with a disability for public preschool, elementary, secondary, or adult education services is a person with a disability:

   a. of an age during which persons without a disability are provided such services;

   b. of an age during which it is mandatory under state law to provide such services to persons with disabilities; or

   c. to whom a state is required to provide a free appropriate public education under the Individuals with Disabilities Education Act (IDEA). (34 C.F.R. 104.3(k))

3. Physical or Mental Impairment (34 C.F.R. 104.3(j)(2)(i))

   a. Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems; neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular, reproductive, digestive, genito-urinary; hermic and lymphatic; skin; and endocrine; or

   b. Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

4. Major Life Activities (34 C.F.R. 104.3(j)(2)(ii))

   The 2008 Amendments redefine major life activities to include, but not limited to, activities such as caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating and working. Major life activities also includes the operation of a major bodily
function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

The previous definition stated that a major life activity included functions such as caring for one’s self, performing learning, and working.

5. **Substantial Limitation**

   a. The 2008 Amendments state that the term “substantially limits” shall be interpreted consistently with the findings and purpose of the Amendments. The Findings in the Amendments highlight that Congress believes the ADA regulations which define the term “substantially limits” as “significantly restricted” is inconsistent with Congressional intent by expressing too high a standard.

   b. The 2008 Amendments also provide that an impairment that substantially limits one major life activity need not limit other major life activities in order to be a disability.

   c. The 2008 Amendments clarify that the determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of specified mitigating measures such as: medication, equipment, low vision devices (which do not include ordinary eyeglasses or contact lenses) prosthetics, hearing aids and cochlear implants, mobility devices, oxygen therapy equipment and supplies, assistive technology, reasonable accommodations or auxiliary aids or services (including qualified interpreters, qualified readers, taped texts, and the acquisition/modification of equipment or devices) or learned behavioral or adaptive neurological modification.

The term “auxiliary aids and services” is defined to include: qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments; qualified readers, taped texts, or other effective methods of making visually delivered materials
available to individuals with visual impairments; acquisition or modification of equipment or devices and other similar services and actions.

In OCR Guidance issued, OCR offered the following:

May school districts consider "mitigating measures" used by a student in determining whether the student has a disability under Section 504?

No. As of January 1, 2009, school districts, in determining whether a student has a physical or mental impairment that substantially limits that student in a major life activity, must not consider the ameliorating effects of any mitigating measures that student is using. This is a change from prior law. Before January 1, 2009, school districts had to consider a student’s use of mitigating measures in determining whether that student had a physical or mental impairment that substantially limited that student in a major life activity. In the ADA Amendments Act of 2008, however, Congress specified that the ameliorative effects of mitigating measures must not be considered in determining if a person is an individual with a disability.

Congress did not define the term “mitigating measures” but rather provided a non-exhaustive list of “mitigating measures.” The mitigating measures are as follows: medication; medical supplies, equipment or appliances; low-vision devices (which do not include ordinary eyeglasses or contact lenses); prosthetics (including limbs and devices); hearing aids and cochlear implants or other implantable hearing devices; mobility devices; oxygen therapy equipment and supplies; use of assistive technology; reasonable accommodations or auxiliary aids or services; and learned behavioral or adaptive neurological modifications.

Congress created one exception to the mitigating measures analysis. The ameliorative effects of the mitigating measures of ordinary eyeglasses or contact lenses shall be considered in determining if an impairment substantially limits a major life activity. “Ordinary eyeglasses or contact lenses” are lenses that are intended to fully correct visual acuity or eliminate
refractive error, whereas “low-vision devices” (listed above) are devices that magnify, enhance, or otherwise augment a visual image. Protecting Students With Disabilities: Frequently Asked Questions About Section 504 and the Education of Children with Disabilities, Question 21, (Office of Civil Rights Guidance (2009)).

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

OCR guidance further provides:

Is an impairment that is episodic or in remission a disability under Section 504?

Yes, under certain circumstances. In the ADA Amendments Act of 2008, Congress clarified that an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active. A student with such an impairment is entitled to a free appropriate public education under Section 504. Protecting Students With Disabilities: Frequently Asked Questions About Section 504 and the Education of Children with Disabilities, Question 35, (Office of Civil Rights Guidance (2009)).

e. The determination of whether a student has a physical or mental impairment that substantially limits a major life activity must be made on the basis of an individual inquiry. The Section 504 regulatory provision at 34 C.F.R. 104.3(j)(2)(i) defines a physical or mental impairment as any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine; or any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. The regulatory provision does not set forth an exhaustive list of specific diseases and conditions that may constitute physical or mental impairments because of the difficulty of ensuring
the comprehensiveness of such a list.

Major life activities, as defined in the Section 504 regulations at 34 C.F.R. 104.3(j)(2)(ii), include functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. This list is not exhaustive. Other functions can be major life activities for purposes of Section 504. In the ADA Amendments Act of 2008, Congress provided additional examples of general activities that are major life activities, including eating, sleeping, standing, lifting, bending, reading, concentrating, thinking, and communicating. Congress also provided a non-exhaustive list of examples of “major bodily functions” that are major life activities, such as the functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions. The Section 504 regulatory provision, though not as comprehensive as the Amendments Act, is still valid – the Section 504 regulatory provision’s list of examples of major life activities is not exclusive, and an activity or function not specifically listed in the Section 504 regulatory provision can nonetheless be a major life activity. Protecting Students With Disabilities: Frequently Asked Questions About Section 504 and the Education of Children with Disabilities, Question 12, (Office of Civil Rights Guidance (2009)).

6. Drugs---An individual with disabilities does not include an individual who is currently engaging in the illegal use of drugs when a covered entity acts on the basis of such use (29 U.S.C. 706(8)(C)(i) amended by the Americans with Disabilities Act)).

a. Illegal use of drugs means the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act. Such term does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provision of Federal Law.
7. Case Law

a. In order to be deemed disabled under Section 504, a student must have a physical or mental impairment which substantially limits a major life activity. It need not be shown that the student could not learn in order to be disabled. The student’s impairment, chronic fatigue syndrome, affected the student’s ability to perform the basic tasks of a student-walking, exerting herself and attending school (Weixel v. Board of Education of the City of New York, 36 IDELR 152 (United States Court of Appeals, 2nd Circuit (2002))).

b. A student who was on a Section 504 plan to address her diabetic condition and also diagnosed as having an adjustment disorder, anxiety and depression was not eligible for IEP services. The parents offered no evidence to show that her diabetes and anxiety were related to her lack of attendance in school or her poor grades. Thus, she was not in need of special education. Loch v. Edwardsville School District 327 F. Appx. 647, 52 IDELR 244 (United States Court of Appeals, 7th Circuit (2009)) Review denied by the United States Supreme Court.

c. The Court upheld the Team’s decision that a student, who was deemed to be a student with a disability under Section 504 was not eligible for IEP services as a student with a specific learning disability. Although the student was diagnosed as dyslexic, the Court found that the Team’s determination that there was not a “severe discrepancy” between the student’s achievement and ability was supported by the evidence. Michael P. v. Hawaii Department of Education Civil No. 08-00146 (United States District Court, Hawaii (2009))

d. A student with a disability was denied admission to a state operated military academy. The parents’ IDEA claims were previously dismissed by the Court of Appeals. The Court remanded the case back to the District Court to hear the claims under Section 504 and the Americans With Disabilities Act.
The Court of Appeals affirmed the District Court’s Summary Judgment Order in favor of the school. In doing so, The Court held that a student on an IEP does not automatically fall within the definition of a disabled person under Section 504. The receipt of an IEP demonstrates a disability but does not automatically demonstrate a “substantial limitation of a major life activity” under Section 504. *Ellenberg v. New Mexico Military Institute* 572 F.3d 815, 52 IDELR 181 (United States Court of Appeals, 10th Circuit (2009)). Appeal to the United States Supreme Court denied.

C. Section 504 v. IDEA definitions of persons with disabilities.

1. The definition of a qualified person with a disability under Section 504 covers a broader population than the definition of a student with a disability under the IDEA (2 IDELR 213:144).

   a. Depending on the severity of their disabling conditions, students who do not meet IDEA eligibility criteria may or may not fit within the definition of Section 504 eligibility. Section 504 eligibility is not automatically bestowed on a student who is referred for a special education evaluation and who is subsequently determined not to be IDEA eligible (*Letter to Veir*, 20 IDELR 864 (OCR 1993)).

   b. The IDEA regulations were amended, effective December 31, 2008, granting the parents of a student on an IEP the unilateral right to revoke consent for the future provision of special education services.

   The Comments to the Regulations clarify that these are IDEA regulations and do not address the protections and requirements under Section 504 and the Americans With Disabilities Act. (Federal Register, Volume 73, No. 231, Page 73013)

   This IDEA regulatory change presents an unresolved issue regarding Section 504. Can a parent revoke consent for IDEA services and then require the public agency to provide
services/accommodations under Section 504? In 1996, the Office for Civil Rights (OCR) issued a letter which stated that if a parent rejects IDEA services, the parent would essentially be rejecting what would be offered under Section 504. See Letter to McKethan 25 IDELR 295 (OCR 1996). Since the recent IDEA regulations regarding revocation of consent do not impact Section 504 protections, there is a strong argument that the parent may still request Section 504 services. In addition, Section 504 has a child find requirement similar to the IDEA which puts the affirmative responsibility on the public agency if there is a reason to believe the student may qualify as an individual with a disability under Section 504. (34 CFR 104.32)

2. Examples of individuals with disabilities under Section 504 not covered by IDEA.

a. Alcohol/Drug Addiction

(1) Alcoholism and drug addiction are physical impairments which fall under the coverage of Section 504 but not under IDEA, IDEA Policy Letter, (2 IDELR 213:144, (1988)), only if the student is currently no longer using drugs (OCR Memorandum, 17 IDELR 609(1991)).

(2) Section 504’s definition of a student with a disability does not exclude users of alcohol. (Protecting Students With Disabilities, OCR Guidance, Question 17 (United States Department of Education, Office for Civil Rights (2009)).

b. Communicable Diseases - AIDS, etc.

(1) Individuals with AIDS, or asymptomatic carriers of the AIDS virus (HIV), are considered “persons with disabilities” under Section 504 (Thomas v. Atascadero Unified School Dist. et al., (1987-88 IDELR 559:113 (United States District Court, Central District, 1987-88)).
(2) Hepatitis B carrier is a person with a disability (Clare-Gladwin Inter. School District, 16 IDELR 105 (United States Department of Education, Office for Civil Rights (1989)).

c. Temporary Impairments

(1) A temporary impairment does not constitute a disability for purposes of Section 504 unless its severity is such that it results in a substantial limitation of one or more major life activities for an extended period of time. The issue of whether a temporary impairment is substantial enough to be a disability must be resolved on a case-by-case basis, taking into consideration both the duration (or expected duration) of the impairment and the extent to which it actually limits a major life activity of the affected individual. In the ADA Amendments Act of 2008, Congress clarified that an individual is not “regarded as” an individual with a disability if the impairment is transitory and minor. A transitory impairment is an impairment with an actual or expected duration of 6 months or less. Protecting Students With Disabilities: Frequently Asked Questions About Section 504 and the Education of Children with Disabilities, Question 34, (Office of Civil Rights Guidance (2009)).

(2) Homebound student, temporarily disabled as a result of an automobile accident, is person with a disability under Section 504 (Lee’s Summit, MO, R-VIII Sch. Dist, IDELR 257:629 (OCR 1984)).

(3) A student with a temporary disability due to a bone marrow transplant did not meet the definition of a person with a disability under Section 504 (Johnstown-Milliken (CO) School District, 31 IDELR 215 (OCR 1989)).
(1999)).

d. Students with severe allergies or chronic asthma (Gloucester County Public Schools, 49 IDELR 21 (OCR 2007)).

e. Students with environmental illness (Montpelier VT Public Schools, 18 IDELR 1054 (OCR 1992)). Students allergic to fumes from new carpeting (See also Simmons College, Complaint 01-90-2041 (OCR 1990)).

f. Students who are 22 or older depending on state law (Williamson County School District, IDELR 352:514 (OCR 1988)).

g. Attention Deficit Hyperactive Disorder -- ADHD medical diagnosis but no substantial limitation on learning (Yorkwood Community Unit School District (SEA IL (2006))).

h. Socially Maladjusted

(1) The determination of the presence of a student being diagnosed as being socially maladjusted and thus not eligible for IDEA services, is not dispositive as to whether the student is handicapped under Section 504 (Irvine Calif. Unified School District, (OCR 1989)).

(2) Section 504 regulations protect students with mental impairments which substantially interfere with their major life activities. OCR concluded, therefore, that students undergoing lengthy psychiatric hospitalization for conditions such as depression, dysthymic disorder or other emotional problems are likely to be handicapped under Section 504 and are entitled to an evaluation (Community Unit School District #300, (OCR)).

i. Parents who have a disabling condition (Rothschild v. Grottenthaler, 907 F.2d. 286 (U.S. Court of Appeals, 2nd Circuit (1990)).
j. Employees

k. Post-Secondary Institutions

D. Policy/Procedural Requirements Under Section 504 for State and Local Education Agencies

1. Non-Discrimination Assurance (34 C.F.R. Section 104.5)

2. Notice to Students, Parents, Employees, Union, and Professional Organizations regarding Non-Discrimination Policy (34 C.F.R. Section 104.8 and Section 104.32 (b)).

   a. Public elementary and secondary schools shall annually take appropriate steps to notify persons with disabilities and their parents/guardians of the school’s responsibilities to students under Section 504 (34. C.F.R. Section 104.32(b)).

   b. Although the student handbook clearly stated that the district prohibited discrimination on the basis of disability, it did not comply with Section 504’s requirement that it also identify the person responsible for coordinating compliance with the district’s nondiscrimination policy (Jacksonville, Alabama City Schools (United States Department of Education, Office for Civil Rights (2006)).

3. Designation/Notice of Section 504 Coordinator (34 C.F.R. Section 104.7(a)).

4. Adoption of Section 504 Grievance Procedure (34 C.F.R. Section 104.7 (b)).

5. Child Find and Referral Procedures for Section 504 eligible individuals (34 C.F.R. Section 104.32(a)).

   a. A school district’s policy of evaluating only those students who fall within IDEA categories does not necessarily satisfy the mandate under Section 504 who needs or is believed to need special education or related services (Linden, CA Unified School District, (IDELR 352:617 (OCR 1988));
b. Under Section 504, school districts may always use regular education intervention strategies to assist students with difficulties in school. (Protecting Students With Disabilities, OCR Guidance, Question 19 United States Department of Education Office for Civil Rights (2009)).

OCR held that prior to evaluating a student’s need for special education or related services, the district must have reason to believe that the student is having academic, social or behavioral problems that substantially affect the student’s overall performance in school. A district has the option of attempting to address these problems through documented school-based interventions and/or modifications prior to conducting an evaluation. If such interventions or modifications are successful, a district is not obligated to evaluate a student for special education or related services. OCR found that in this case the district implemented appropriate plans for providing instructional services for students suspected of having dyslexia or a related disorder (Karnes City, Texas Independent School District, 31 IDELR 64 (United States Department of Education, Office for Civil Rights (1999)).

c. Neither a student's health problems nor her poor grades required the school district to evaluate the student's need for Section 504 services. OCR determined that the district had no reason to suspect the existence of a qualifying disability. The district was aware of the student's health problems, as it developed a plan that allowed her to self-administer her asthma inhaler and gastritis medication. However, there was no evidence that those health conditions affected her education. The student has done poorly academically, but poor academic performance is not determinative of whether a student has an impairment that substantially limits a major life activity. Nash-Rocky Mount, North Carolina Public Schools, 50 IDELR 143 (OCR (2008)).

d. The school was found in violation of Section 504 when it did
not evaluate a student with asthma and severe allergies. The school’s informal accommodation of the student’s health condition was not in accord with the 504 policy of evaluating students suspected of having a disability for possible aides and services. Pawnee, Colorado School District 45 IDELR 229 (United States Department of Education, Office for Civil Rights (2005)).

6. Standards and Procedures for Section 504 Evaluations (34 C.F.R. Section 104.35 (a), (b) and (d))

   a. Section 504 does not define the term evaluation. The Regulations do require that public elementary and secondary schools establish standards and procedures for the evaluation and placement of persons, who because of disability, need or are believed to need special education or related services before taking any action with respect to initial placement in a regular or special education program and any subsequent significant change in placement (34 C.F.R. Section 104.35 (a) and (b)).

   b. The evaluation procedures established shall ensure:

   (1) tests and other evaluation materials have been validated

   (2) evaluations are administered by trained personnel

   (3) evaluations are tailored to assess specific areas of education need

   (4) tests are selected and administered that accurately reflect the factors the test purports to measure (34 C.F.R. Section 104.35(b)(1)-(3)).

   c. The amount of information required is determined by the multi-disciplinary committee convened to evaluate the student. The information must be sufficient to make a knowledgeable decision as to whether or not the student has a
disability under Section 504. Sources and factors may include aptitude and achievement tests, teacher recommendations, physical condition, social and cultural background and adaptive behavior (Protecting Students With Disabilities, OCR Guidance, Question 19 United States Department of Education Office for Civil Rights (2009)).

d. A medical evaluation only cannot suffice as an evaluation under Section 504 since the student must have an impairment which substantially limits a major life activity (Protecting Students With Disabilities, OCR Guidance, Question 24 United States Department of Education, Office for Civil Rights (2009)).

e. The results of an outside independent evaluation may be one of the many sources of information considered. The 504 Committee determines the weight of the information given the student’s individual circumstances. The weight of the information is determined by the committee given the student’s individual circumstances (Protecting Students With Disabilities, OCR Guidance, Question 26 United States Department of Education, Office for Civil Rights (2009)).

f. Section 504 requires that a re-evaluation be conducted periodically and prior to a significant change of placement. The re-evaluation may be conducted in accordance with the IDEA regulation which requires a re-evaluation at least every three years (unless waived by the parents and the school) or more frequently if conditions warrant or the parent or teacher requests but not more than once a year unless both the parent and school agree. (Protecting Students With Disabilities, OCR Guidance, Question 29 United States Department of Education, Office for Civil Rights (2009)).

g. A school district was found to have discriminated against a student with leukemia by not beginning a Section 504 evaluation as soon as the student started chemotherapy and radiation treatments. Although Section 504 does not impose a specific timeline for
conducting evaluations or determining placements, OCR noted that districts must conduct evaluations within a reasonable amount of time. If the district had any questions regarding the seriousness of the student's impairment or the duration of time when he could reasonably return to school, the district ought to have inquired further and not wait until the parent requested a Section 504 evaluation. \textit{Yancy, NC County Schools} 51 IDELR 23 (United States Department of Education, Office for Civil Rights (2008)).

h. A school district violated 504 when it took a full year to determine that a student with asthma qualified for Section 504 accommodations. \textit{Detroit Public Schools} 48 IDELR 286 (OCR (2007)).

7. Standards and Procedures for Section 504 Placements (34 C.F.R. Section 104.35(c))

a. Procedurally, schools in interpreting evaluation data shall:

(1) draw upon information from a variety of sources (tests, teacher recommendations, physical conditions, social or cultural background, adaptive behavior)

(2) establish procedures to document that the evaluation information has been considered

(3) ensure that individuals who are knowledgeable about the meaning of the evaluation data are involved in the team making placement decisions (34 C.F.R. Section 104.35(c)).

b. The parents filed a complaint with OCR challenging the process the school followed in developing the student’s Section 504 plan. OCR concluded that the district utilized an appropriate team process to determine the placement and 504 plan. The team was composed of several persons well-acquainted with the student's needs. The team included the Student's classroom teachers and guidance counselor, at least
one teacher who had worked with her the previous year, the building level special education director, and the building level Section 504 coordinator. Furthermore, the team gave adequate consideration to the various placement options, as shown by the meeting notes and the 504 coordinator's circulation and subsequent revision of the plan. New Hampshire School Administrative Unit #24 52 IDELR 297 (United States Department of Education, Office for Civil Rights (2009)).

8. System of Procedural Safeguards (34 C.F.R. Section 104.36)

a. Notice

(1) Parents must have notice of actions regarding the identification, evaluation and placement of their children. The notice does not legally need to be in writing (OCR Memorandum to OCR Senior Staff, October 24, 1988). Note: It would be considered essential best practice to have documentation of such notice.

b. Consent

(1) OCR has determined, through policy clarification, that the Section 504 regulations require informed parental consent for the initial evaluation. Section 504 is silent on the form of parental consent required. OCR has accepted written consent as documentation of compliance.

If a parent withholds consent, districts may use due process hearing procedures to override the parents’ denial of consent for an initial evaluation or initial provision of services. (Protecting Students With Disabilities, OCR Guidance, Questions 41-43 United States Department of Education, Office for Civil Rights (2009)).

(2) If the parents no longer want their student to receive
Section 504 services, the school district may initiate a Section 504 due process hearing to resolve the dispute if the district believes the student needs the services in order to receive an appropriate education (Protecting Students With Disabilities, OCR Guidance, Question 32 United States Department of Education, Office for Civil Rights (2009)).

c. Opportunity to examine relevant records

d. Impartial Hearing

(1) If a state does not permit IDEA Hearing Officers from ruling on Section 504 issues, then school districts must offer alternative hearing procedures. Section 504 regulations do not specify timelines or impartiality requirements; therefore OCR applies a standard of fundamental fairness and will be guided by IDEA case law and other decisions (OCR Policy Letter, 18 IDELR 230 (United States Department of Education, Office for Civil Rights (1991)).

(2) The Court of Appeals held that since Section 504 does not have a statute of limitations provision, the Court must borrow from the most analogous statute. The Court therefore found that the two year statute of limitations period in the IDEA applies to parallel claims brought under Section 504. P.P. v. West Chester Area School District, 53 IDELR 109 (United States Court of Appeals, 3rd Circuit (2009))

e. Review Procedure

f. Compliance with the procedural safeguards under IDEA is one means of meeting this requirement.

g. There is no requirement under Section 504 and a mediation option be offered parents and schools who are in disagreement. education (Protecting Students With Disabilities, OCR Guidance, Question 46 United States
E. Free Appropriate Public Education (FAPE) under Section 504

1. Free Appropriate Public Education is the provision of regular or special education and related aids and services that are designed to meet individual educational needs of persons with disabilities as adequately as the needs of persons without disabilities are met and are based upon adherence to procedural requirements (34 C.F.R. Section 104.33(b)(1)) (emphasis added).

a. The Office for Civil Rights reaffirmed that the Section 504 provision providing for a FAPE 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. The OCR’s policy letter rejected the notion that the school’s obligation is limited to providing reasonable accommodations (OCR Letter to Zirkel, (August 23, 1993)).

b. The implementation of an IEP under the IDEA is one means of providing a free appropriate public education (34 C.F.R. Section 104.33(b)(2)).

c. If a student qualifies for services under both the IDEA and Section 504, a school district need not develop both an IEP and a Section 504 plan (Protecting Students With Disabilities, OCR Guidance (2005)).

d. If a student on a 504 plan transfers to a new school district, the new district needs to review the plan and supporting documentation. The new district then would either implement the plan or evaluate the student to determine the educational program appropriate for the student (Protecting Students With Disabilities, OCR Guidance, Question 38, United States Department of Education, Office for Civil Rights (2009)).
2. FAPE and Discrimination Cases

a. A Student who is academically gifted with emotional disabilities was not entitled to tuition reimbursement under Section 504 for the cost of a unilateral placement in a private school. Section 504 does not require a public school to provide a potential maximizing education to students with disabilities, only reasonable accommodations that give those students the same access to the benefits of a public education as all other students (J.D. v. Pawlett School District, 33 IDELR 34 (United States Court of Appeals, 2nd Circuit (2000)).

b. The Court, in affirming the Administrative Hearing Officer’s decision that a student was not eligible for services under the IDEA or Section 504, held that reimbursement for an unilateral private school placement is not available in a claim brought under Section 504 or the state’s Section 504 regulations (Janet G. v. State of Hawaii, 410 F. Supp. 2d 958 (District Court Hawaii (2005)).

c. The availability of relief under the IDEA does not limit the availability of a damage claim under Section 504. Although both the IDEA and Section 504 have overlapping FAPE requirements, there are some distinctions between the two. The most important difference is that unlike FAPE under the IDEA, FAPE under Section 504 requires a comparison between the manner in which the needs of disabled and non-disabled children are met.

The Court found that there is an implied right of action under Section 504 for claiming damages for a FAPE violation. A public entity can be held liable for damages under Section 504 if it intentionally or with deliberate indifference fails to provide meaningful access or reasonable accommodations to a disabled person. Mark H. v. Lemahieu, 49 IDELR 91 (United States Court of Appeals, 9th Circuit (2008)).

d. The Grandparents (who are legal guardians) of a child who is severely disabled initiated a lawsuit under the Americans With Disabilities Act and Section 504 alleging the school was
deliberately indifferent to their grandchild’s disability when he fell from a changing table while his diaper was being changed. The Court, in denying the school’s Motion for Summary Judgment, held that the record contains sufficient evidence to create material factual disputes in regard to the Grandparents claims that the school intentionally discriminated against their grandchild by exhibiting deliberate indifference. Miles v. Cushing Public Schools Independent School District No. 67 et al. 108 LRP 60168 (United States District Court, Western District, Oklahoma (2008)).

e. OCR determined that a school district discriminated against a student with a learning disability when it did not allow her to try out for cheerleading due to her GPA. Her learning disability affected her ability to earn the 2.8 GPA required by the district. In addition, the district was unable to justify the 2.8 GPA requirement. Northshore School District 48 IDELR 199 (United States Department of Education, Office for Civil Rights (2007)).

f. OCR found that the school did not discriminate against a student with diabetes from participating in field trips. The school plan indicated that the student’s parent or school nurse would accompany the student. If both were unavailable, the field trip would be rescheduled to a time where such coverage is available. Westwood Regional School District 49 IDELR 78 (United States Department of Education, Office for Civil Rights (2007)).

g. A school district agreed, as part of a resolution agreement in response to an OCR complaint, to develop a Section 504 plan for a student with diabetes. The plan addressed the student’s needs for meals, testing and treating blood sugar levels and emergency care. The plan had a clinic back up plan in the event an emergency occurred in the absence of nursing personnel. In addition, the school agreed to provide diabetes related training to all school personnel. Lee County, Florida School District 46 IDELR 228 (United States Office of Education, Office for Civil Rights (2006)).
h. OCR determined that the 504 plan for a student with peanut and tree nut allergies was deficient and therefore did not provide the student with a FAPE. The plan did not address the specific measures to be taken to protect the student in settings outside the classroom, cafeteria and field trip, the procedures for the proper handling and administration of medication or staff responsibility and training. Saluda School District One 47 IDELR 22 (United States Department of Education, Office for Civil Rights (2006)).

3. Vocational Technical Programs

a. Federal Guidelines under Section 504

Recipients may not deny handicapped students access to vocational education programs or courses because of architectural or equipment barriers, or because of the need for related aids and services or auxiliary aids. If necessary, recipients must: (1) modify instructional equipment; (2) modify or adapt the manner in which the courses are offered; (3) house the program in facilities that are readily accessible to mobility impaired students or alter facilities to make them readily accessible to mobility impaired students; and (4) provide auxiliary aids that effectively make lectures and necessary materials available to postsecondary handicapped students; (5) provide related aids or services that assure secondary students an appropriate education.

Academic requirements that the recipient can demonstrate are essential to a program of instruction or to any directly related licensing requirement will not be regarded as discriminatory. However, where possible, a recipient must adjust those requirements to the needs of individual handicapped students.

Access to vocational programs or courses may not be denied handicapped students on the ground that employment opportunities in any occupation or profession may be more
limited for handicapped persons than for non-handicapped persons.

**VOCATIONAL EDUCATION PROGRAMS GUIDELINES FOR ELIMINATING DISCRIMINATION AND DENIAL OF SERVICES ON THE BASIS OF RACE, COLOR, NATIONAL ORIGIN, SEX AND HANDICAP** United States Department of Education, Office for Civil Rights (1979)

b. A vocational high school did not violate Section 504 when it denied admission to a student with autism. The school adopted and employed the same facially neutral admissions criteria for each applicant. The student’s score was below the cutoff mark for acceptance. The criteria included student grades, conduct, attendance record, effort, interests and activities and faculty recommendations. The Court found that the evidence supported the conclusion that the criteria were related to the goals of the program and necessary qualifications of its students. The data also indicated that a number of students with disabilities were accepted into the program. Therefore, the data did not support a disparate impact on students with disabilities. *Cordeiro v. Driscoll* 47 IDELR 189 (United States District Court, Massachusetts (2007)).

4. Least Restrictive Environment

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

b. Nonacademic settings. In providing or arranging for the provision of nonacademic and extracurricular services and activities, including meals, recess periods, and the services and activities set forth in Reg. 104.37(a)(2), a recipient shall ensure that disabled persons participate with non-disabled persons in such activities and services to the maximum extent appropriate to the needs of the disabled person in question. (34 C.F.R. Section 104.34)

5. Discipline

a. For purposes of programs and activities providing educational services, local educational agencies may take disciplinary action pertaining to the use or possession of illegal drugs or alcohol against any student with a disability who currently is engaging in the illegal use of drugs or in the use of alcohol to the same extent that such disciplinary action is taken against students without disabilities. Furthermore, the due process procedures at (34 C.F.R. Section 104.36) shall not apply to such disciplinary actions (29 U.S.C. Section 706(8)(a)(c)(iv)) amended by the Americans with Disabilities Act of 1990. See also OCR Memo, 17 IDELR 609 (United States Department of Education, Office for Civil Rights (1991)). See also, (Protecting Students With Disabilities, OCR Guidance, Question 17 United States Department of Education, Office for Civil Rights (2009)).

b. Accumulated Days of Suspension

(1) According to OCR policy, a series of suspensions that in the aggregate exceed 10 days during a school year may constitute a significant change of placement.

(2) The determination of whether a series of suspensions creates a pattern that constitutes a significant change of
placement must be made by the placement team on a case-by-case basis taking into consideration the following factors:

(a) length of each suspension

(b) proximity of the suspensions to one another

(c) total amount of time the student is excluded from school. OCR Memorandum, October 28, 1988.

(d) cause of misconduct

c. If it is determined that the misconduct is not a manifestation of the child’s disability, the child may be excluded from school in the same manner as children who are not disabled. In such a situation, all educational services to the child may cease. (See OCR Memo, 307 IDELR 05)

d. In-school suspensions are governed by the same procedures and time limitations applicable to other suspensions (OCR Letters, IDELR 305:26 and 305:28 (United States Department of Education, Office for Civil Rights (1986)).

e. OCR has determined that the Guns-Free School Act and the Jefford’s Amendment apply to students solely covered by Section 504 (Letter to Zirkel, 22 IDELR 667 (United States Department of Education, Office for Civil Rights (1995)).

f. The district’s three day suspension of a student for carrying an asthma inhaler was appropriate under the district’s drug policy and did not violate Section 504 (North East Texas Independent School District, 31 IDELR 217 (United States Department of Education, Office for Civil Rights (1999)).

g. OCR found no violation under Section 504 when a parent was not notified of a 504 manifestation meeting. The parent was notified of the decision and provided a right to appeal (Dekalb County (GA) School District, 32 IDELR 8 (United States Department of Education, Office for Civil Rights (1999)).
h. A judicial decision held that a manifestation determination is not necessary to satisfy Section 504 requirements. See attached Centennial School District v. Phil L, 559 F. Supp. 2d 634 (United States District Court, Eastern District, Pennsylvania (2008). This conflicts with past OCR positions regarding manifestation.

i. Although a kindergartner's behavioral problems posed a safety risk to himself and other children, the school district was found to have violated Section 504 when it dismissed him from a district sponsored after school care program. The child's mother informed the program staff that she was trying to hire a one-to-one aide to accompany her son in the program. When the parent failed to find an aide, the district dismissed the child from the program. OCR criticized the district's view that parents were responsible for obtaining and funding accommodations not identified in a child's IEP. Hayward, California Unified School District, 50 IDELR 289 (United States Department of Education, Office for Civil Rights (2008)).

6. Miscellaneous Issues Under Section 504

a. Program Accessibility

(1) Each program or activity, when viewed in its entirety, must be readily accessible to persons with disabilities (34 C.F.R. 104.22(a)).

(a) A playground on school district premises, constructed by private funds, was not accessible to students who use wheelchairs in violation of Section 504 (34 C.F.R. 104.23 and 104.37(a)) (Hazelton (PA) Area School District, 17 IDELR 907 (OCR 1991)). OCR determined that the school’s playground was not accessible since it lacked an accessible route, a sturdy ground covering and appropriate activities for students. 

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(b) OCR required a district to install Braille and raised letter signage throughout the school to bring the building into compliance with Section 504 and the ADA (East Windsor (CT) Public Schools, 31 IDELR 14 (OCR (1999)).

(2) Methods for providing accessible programs

(a) redesign of equipment

(b) reassignment of class or other services to accessible sites

(c) assignment of aides

(d) alteration of existing facilities

(e) carrying the student is an unacceptable method or providing program accessibility (OCR Staff Memorandum, 17 IDELR 613 (OCR 1991)).

b. Accelerated Programs

The Office for Civil Rights (OCR) issued a letter advising school districts that any practice of denying a qualified student, on the basis of disability, the opportunity to participate in an accelerated programs (such as honors courses, advanced placement programs, etc.) would violate Section 504 and the ADA. If a qualified student with a disability requires related aids and services to participate in such program, they must be provided. Letter from Monroe (OCR 2007).

c. Transcripts and Report Cards
The Office for Civil Rights (OCR) issued guidance regarding report cards and transcripts for students with disabilities. OCR opined that report cards may contain information about a student’s disability, special education services received and the student’s progress in specific classes, course content or curriculum. Transcripts, however, may not contain information that the student has a disability or was receiving special education services. Transcripts may indicate that a student took classes with a modified or alternate curriculum by using an asterisk or other symbol as long as it does not specifically disclose that the student has a disability. Questions and Answers on Report Cards and Transcripts for Students with Disabilities Attending Public Elementary and Secondary Schools (United States Department of Education, Office for Civil Rights (2008)).

d. If a student on a Section 504 is absent for an extended period of time (generally more than 10 consecutive school days) because the student is infected with the H1N1 virus, the 504 Team must meet to determine which services can be provided through alternate methods such as the phone or Internet. If the student did not receive services after an extended period of time, a subsequent individualized determination is required to decide whether the child requires compensatory education to make up for any skills that may have been lost. Questions and Answers on Providing Services to Children with Disabilities During an H1N1 Outbreak, Question A-1 (United States Department of Education, Office of Special Education and Rehabilitative Services (2009)).

II. Harassment

A. Harassment based on disability violates Section 504, Title II of the Americans with Disabilities Act (ADA) and the IDEA. Disability harassment is “intimidation or abusive behavior toward a student based on disability that creates a hostile environment by interfering with or denying a student’s participation in or receipt of benefits, services or opportunities in
the institution’s programs (United States Department of Education Letter, (July, 2000)).

B. Schools are not liable when school personnel engage in sexual harassment of students unless officials in positions of authority knew about the harassment and fail to act (Gebser v. Lago Vista Independent School District, (United States Supreme Court (1998)).

C. Schools may be liable for peer sexual harassment if it deliberately fails to stop pervasive harassment. The conduct must be so severe, pervasive and objectively offensive that the student is precluded from benefiting from a public education before liability is imposed (Davis v. Monroe, (United States Supreme Court (1999)).

D. The parents of a student with disabilities alleged that he was harassed on the basis of disability and the school failed to respond. The behavior consisted of name calling, swearing, pushing, tripping, hitting and interfering with his computer use. Parents withdrew student from school and placed him in a private school.

OCR found that there was insufficient evidence to show that the alleged harassment was disability related (Washington West Supervisory Union, (United States Department of Education, Office for Civil Rights (2002)).

E. Allegations that a teacher called her special education students “stupid” and “idiots” and commented to an aide that she would like to “drop kick” certain students did not amount to finding that the district allowed a hostile environment to exist although the statements were deemed insensitive. Desert Sands Unified School District, (United States Department of Education, Office for Civil Rights (2007)).

F. A student with a disability had wooden blocks thrown at him and was teased and called names by two other students. The Court held that damages are not available for simple teasing and name calling. The student did not provide sufficient evidence to show that he was “harassed” because of his disability and did not establish that the school acted in a deliberate indifferent manner (Werth v. Board of Directors of the Public Schools of the City of Milwaukee (United States District Court, Eastern District of Wisconsin (2007)).
G. A student with a disability alleged he was harassed and bullied by his peers and sued the school based on discrimination under Section 504. The Court held the following elements must be shown before a school can be held liable for peer harassment based on disability: (1) the student is a student with a disability; (2) the he/she was harassed based on their disability; (3) that the harassment was sufficiently severe or pervasive that it altered his/her education or created an abusive/hostile environment; (4) that the school knew of the harassment; and (5) that the school was deliberately indifferent to the harassment.

In this case, the school investigated the matter, disciplined the students involved, monitored the student with a disability and separated him from his harassers, held mediation sessions, contacted the parents and provided training to the student body. The affirmative steps taken by the school was clear evidence that it was not deliberately indifferent. S.S. v. Eastern Kentucky University 532 F. 3d. 445, 50 IDELR 91 (United States Court of Appeals, 6th Circuit (2008)).

III. Miscellaneous Issues

A. An experienced special education teacher voiced concerns to her supervisors for two years that the special education services being provided by the school district were not in compliance with federal and state special education laws. She ultimately filed a complaint with the United States Department of Education’s Office for Civil Rights (OCR) alleging that students with disabilities were being denied a Free Appropriate Public Education.

The teacher alleged that the school district engaged in retaliation in response to her filing the complaint with OCR. Specifically, she alleged that her supervisors intimidated her, failed to respond to her emails and phone calls, excluded her from staff meetings, changed her work assignment to a sites further from her home, and reduced her work even though the number of students increased. She filed a second OCR complaint alleging retaliation.

OCR eventually issued a report stating that the preponderance of evidence supported her claim of retaliation. The teacher then resigned alleging she was “constructively terminated” due to being subjected to an intolerable work environment.

She then filed a lawsuit under Section 504 and Title II of the Americans
with Disabilities Act contending the school district violated the anti-retaliation provisions of the law. The Court of Appeals, in overturning the District Court’s dismissal, held that the former teacher had legal standing to sue under both laws even though she was not disabled or the parent of a child with a disability. The Court noted that its conclusion is consistent with the statutory goal of protecting the rights of individuals with disabilities. Barker v. Riverside County Office of Education 584 F.3d 821, 109 LRP 67281 (United States Court of Appeals, 9th Circuit (2009)).

B. No Child Left Behind and Section 504

1. Assessments and Accommodations for IEP and Section 504 Students (U.S. Department of Education Non-Regulatory Draft Guidance)

   a) A state’s assessment system must be designed to be valid and accessible to students with disabilities under the IDEA and Section 504.

   b) Accommodations must be determined by the student’s IEP Team or Section 504 Team, as appropriate, based on the individual student needs. Accommodations should be similar to those provided to the student during classroom assessment.

   c) Accommodations are defined as changes in testing materials or procedures that ensure that an assessment measures the student’s knowledge and skills rather than the student’s disability.

   d) Out of level testing is not an acceptable means for meeting either the assessment or accountability requirements of the NCLBA.

2. Public School Choice Option

   Regulations – Student With Disabilities
   For students with disabilities under the IDEA and students covered under Section 504, the public choice option must provide a free appropriate public education as that term is defined in section 602(8) of the IDEA or 34 C.F.R. 104.33, respectively. (34 C.F.R. 200.44(j)).
What are the responsibilities of the school that receives transfer students with disabilities?

LEAs must work with their schools to ensure that students with disabilities are provided a free appropriate public education consistent with the Individuals with Disabilities Education Act (IDEA), Section 504 of the Rehabilitation Act of 1973 (Section 504), and Title II of the Americans with Disabilities Act (Title II) in their schools of choice. The LEA can allow the school of choice to either implement the individualized education program (IEP) or Section 504 plan (for students eligible only under Section 504 and Title II) that the prior school developed for new school year, or convene an IEP team meeting and develop a new IEP that meets the student’s needs (or, for the Section 504/Title II-only eligible student, determine the regular and special education and related aids and services necessary to meet the student’s needs). In addition, LEAs must ensure that schools comply with the other non-discrimination provisions of Section 504 and the ADA, including accessibility provisions.

Must students with disabilities be offered their choice of the same schools as nondisabled students?

School districts must offer students with disabilities and those eligible under Section 504 the opportunity to be educated in a school that has not been identified as in need of school improvement and has not been identified by the State as persistently dangerous if nondisabled students have that opportunity.

However, students with disabilities do not have to be offered their choice of the same schools as are offered to nondisabled students. A school district must ensure that students with disabilities receive free appropriate public education (FAPE) when they enroll in their school choice. In offering choice to students with disabilities, school districts may match the abilities and needs of a student with disabilities to the possible schools that have the
ability to provide the student FAPE.

3. Supplemental Services

For students with disabilities under the IDEA or a student covered by Section 504, the provisions of the agreement between the LEA and each service provider selected by the parents must be consistent with the student’s IEP or services under Section 504 (34 C.F.R. 200.46(b)(3)).

Final Guidance – Supplemental Educational Services, Non-Regulatory Guidance, (U.S. Department of Education)

An SEA and each LEA that arranges for supplemental educational services must ensure that eligible students with disabilities and students covered under Section 504 may participate. Furthermore, the supplemental educational services program within each LEA and within the State may not discriminate against these students. Consistent with this duty, an LEA may not, through contractual or other arrangements with a private provider, discriminate against an eligible student with a disability or an eligible student covered under Section 504 by failing to provide for appropriate supplemental educational services with necessary accommodations. Such services and necessary accommodations must be available, but not necessarily from each provider. Rather, SEAs and LEAs are responsible for ensuring that the supplemental educational services providers made available to parents include some providers that can service students with disabilities and students covered under Section 504 with any necessary accommodations, with or without the assistance of the SEA or LEA. If no provider is able to make the services with necessary accommodations available to an eligible student with a disability, the LEA would need to provide these services, with necessary accommodations, either directly or through a contract.

Supplemental educational services must be consistent with a student’s individualized education program under Section 614 of the IDEA or a student’s individualized services under Section 504.
These services are in addition to, and not a substitute for, the instruction and services required under the IDEA and Section 504 and should not be written into IEPs under the IDEA or into Section 504 plans. In addition, parents of students with disabilities (like other parents) should have the opportunity to select a provider that best meets the needs of their child.

Note: This outline is intended to provide workshop participants with a summary of selected Federal statutory provisions and selected judicial interpretations of the law. The presenter is not, in using this outline, rendering legal advice to the participants. The services of a licensed attorney should be sought in responding to individual student situations.