

An Evaluability Assessment of Section 504 Policies with an Emphasis on
Attention Deficit Hyperactivity Disorder

By

Patricia Anne Devitt

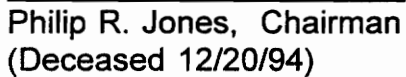
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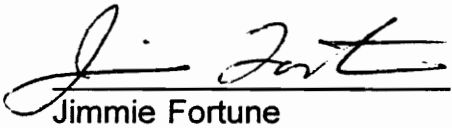
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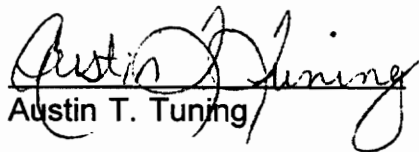

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(ABSTRACT)

The purpose of this study was to accomplish an Evaluability Assessment of Section 504 Policies with an emphasis on children diagnosed as Attention Deficit Hyperactivity Disorder (ADHD). Assessments of program objectives, activities, outcomes, and cost factors were accomplished at state and local education agencies in Mid-Atlantic States.

The eight steps of Evaluability Assessment, as defined by Wholey (1979), were used. The process included review of pertinent documentation regarding Section 504 and ADHD and on-site interviews with Federal policy-makers to ascertain the intended resources (cost), activities (assessment procedures and eligibility criteria), and outcomes (placement, treatment, and due process procedures) for ADHD children with a Section 504 Plan. A "Logic Model" was developed to compare to state and local agencies' policies. On-site visits were made to eight state agencies and a sampling of six local agencies in each state. Telephone interviews were conducted with two administrators and two teachers in each local agency. An Equivalency Model was developed to compare the

federal, state, and local objectives.

An Evaluability Model was developed for each state education agency in the study. The model included resources, activities, and outcomes. A comparison was completed of the local agencies. The model also included evaluator's suggestions of performance objectives that appear feasible. This study was expected to clarify Section 504 goals and objectives for ADHD children at both the state and local levels.

The evaluability assessment indicates Section 504 in the local education agencies is not ready to be evaluated. Based on the criteria set forth by Wholey (1987), there is a lack of definition in the problem addressed and a lack of clear logic on the implementation of Section 504. There are no resources authorized for the implementation of Section 504 therefore cost becomes a barrier to the implementation.

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Without all the support of my family, friends and committee this would never have been completed!

DEDICATION

To Philip R. Jones

My teacher, my mentor, my friend

1934-1994

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Chapter I

Introduction

There have been many studies to clarify the prevalence of Attention Deficit Hyperactivity Disorder (ADHD) in children and young adults, both in the United States (Epstein, 1986; Stewart, 1981; Ullman, 1985; Velez, 1989) and internationally (O'Leary, 1985; Love, 1986; Yao, 1986). It is estimated that between three and five percent of the school-aged population have educational problems related to ADHD. That represents, in the United States, between 1.35 and 2.25 million school-aged children (CEC Task Force, 1992). In 1990, Congress reauthorized The Education of the Handicapped Act, and retitled it as the Individuals with Disabilities Education Act (IDEA). Due to the efforts of several parent organizations, Congress gave consideration to adding ADHD as a disabling condition under Part B of IDEA. Congress directed the Department of Education (DOE) to hold public hearings and collect public comments on ADHD. DOE reviewed the public comments and provided a summary of those comments to Congress. Congress subsequently decided not to include ADHD as a separate category under Part B of IDEA. The members of Congress reasoned that children who require educational services are already eligible to be served under other categories (e. g., specific learning disabilities, seriously emotionally disturbed, and other health impaired (Lerner & Lerner, 1991).

After considerable debate, Congress directed the Office of Special Education Programs (OSEP) to collect public comments on several specific questions related to ADHD and report the findings to Congress (Holcutt, McKinney, & Montague, 1993). The members of Congress also directed the DOE to establish information centers to disseminate current knowledge about ADHD to parents and educators. The Chesapeake Institute in Washington, D. C. was charged with organizing, synthesizing, and disseminating the information through five resource centers.

The conference committee of Congress then directed the DOE to clarify for schools the options for providing services to ADHD children. DOE concurred with the opinion of Congress that many ADHD children would qualify for educational services under certain categories in IDEA. However, there was a belief that a significant population of ADHD children would not qualify for special education. The children who do not qualify under IDEA would need some accommodations in the general education setting. Such children might qualify as disabled under Section 504 of the Rehabilitation Act of 1973, but not under IDEA (Chesapeake Institute, 1993).

In September of 1991, the Department of Education, in conjunction with the Office of Civil Rights (OCR) and the Office of Elementary and Secondary Education (OESE), sent a memorandum to the State Education Agencies (SEA) clarifying their responsibilities for ADHD children under IDEA and Section 504

(Davila, Williams, & McDonald, 1991) (Appendix A). The memorandum was specific:

Should it be determined that the child with ADD¹ is handicapped² for the purposes of Section 504 and needs only adjustment in the regular classroom, rather than special education, those adjustments are required by Section 504.

Local Education Agencies (LEAs) are responsible for the identification of children who may be identified as ADHD and the implementation of services for them.

According to the Chesapeake Institute (1993), existing literature on ADHD and Section 504 is not adequate to guide the field of education with regard to what assessment data are necessary to determine that a child with ADHD requires general education accommodations, especially if that child does not qualify for special education and related services under the IDEA. This critical issue is left to be decided by the LEAs with minimal guidance from the State Education Agencies (SEAs). Some SEAs have provided direction to their LEAs on both ADHD and Section 504 (e.g., Spagnolo, 1991). Because Section 504 is not a state-directed responsibility, it falls on the LEAs to devise a plan to meet the needs of children with ADHD under Section 504. Section 504 is a guarantee of nondiscrimination against the disabled and therefore has no funding attached

¹ There was not a distinction between ADD and ADHD in the memorandum.

² The original legislature used the term "handicapped". It has been changed to "disabled".

to the implementation.

Section 504 does not have a strong legislative history to aid in the development of regulations to implement the law. This circumstance has left the implementation and explication open to interpretation by the Department of Education Office of Civil Rights (OCR) and the courts.

Statement of Problem

Section 504 of the Rehabilitation Act of 1973 is a section of the law passed by Congress with the intent to protect handicapped individuals from discrimination on the basis of their handicap, by any program receiving federal funds. With limited legislative history and no department specifically assigned to oversee its implementation there is little consistency between policies devised by public school districts.

Purpose

The purpose of this research is to determine whether Section 504 Policies at the state and local levels are structured in a manner to facilitate an evaluation of their effectiveness and to examine the goals and objectives set by state departments of education and local education agencies.

Research Questions

1. Based on legislative history, case law, and Office of Civil Rights (OCR) Findings and Memorandums, what was the perceived intent of Congress in the passage of Section 504 of the Rehabilitation Act of 1973?
2. What goals and objectives have State Education Agencies (SEAs) provided for the Local Education Agencies (LEAs) for implementation of Section 504 for children with Attention Deficit Hyperactivity Disorder (ADHD)?
3. Have LEAs met the goals and objectives set by the SEA?
4. Have LEAs formulated goals and objectives for Section 504 and disseminated the information to their faculty?
5. Is there a cost factor in the implementation of Section 504?
6. Have the Mid-Atlantic States made uniform formulations of goals and objectives for Attention Deficit Hyperactivity Disorder children under Section 504?

Delimitations

There are several delimitations involved in this study. The area of the research was the Mid-Atlantic States as defined by the Mid-South Regional Resource Center. The State Educational Agencies are not responsible for Section 504 compliance in the Local Education Agencies and have no obligation to oversee compliance at the local level. The Department of Education, Office of Civil Rights is the overseer of the law. Section 504 is not a funding source for a state, but noncompliance can result in loss of federal funds to individual district's programs.

Assumptions

The research for this study was founded on certain basic assumptions. The first assumption was that the state education agencies in the Mid-Atlantic States have issued some guidelines to the local education agencies in regards to Section 504 and Attention Deficit Hyperactivity Disorder. The second assumption was that all school districts provide services for children with Attention Deficit Hyperactivity Disorder who do not qualify for special education services under IDEA. The third assumption was that children with ADHD who qualify for services under IDEA are served under the category of learning

disabled, emotionally disturbed, or other health impaired.

Definitions

ADD/ADHD - For purposes of this study they both refer to Attention Deficit Hyperactivity Disorder

Handicapped - "Handicapped" was replaced by "disabled" in Section 504.

Mid-Atlantic States - The Mid-Atlantic states in this study are defined by the Mid-South Regional Resource Center; Delaware, Kentucky, Maryland, North Carolina, South Carolina, Tennessee, Virginia, and West Virginia.

Chapter 2

Literature Review

Introduction

Until the passage of Section 504 of the Rehabilitation Act of 1973, federal legislation affecting people with disabilities was focused on rehabilitation and social welfare systems. There were concerns about disabled veterans after World War I which led to the passage of legislation that dealt with physical rehabilitation and employment. This legislation was expanded through time. Section 504 combines previous legislative development in rehabilitation with Title VI of the Civil Rights Act of 1964. The language of Section 504 parallels Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972. The latter prohibits discrimination on the basis of sex for any program receiving federal funding. The Department of Health, Education, and Welfare (HEW) assigned the responsibility for the implementation of Section 504 to its Office of Civil Rights (OCR).

OCR, with limitations, considers Section 504 to be a civil rights mandate and not program specific (Robinson & Sherman, 1982). There were some differences between Section 504, Title IX, and Title VI: (1) Section 504 protection is offered only to "qualified disabled persons" and (2) Special accommodations may be necessary to provide equal treatment.

History of Legislation for Persons with Disabilities

The federal government has played a role in the education of the disabled since the mid-1800's with the establishment of schools for the mentally ill, deaf, and blind. The earliest federal programs created to aid persons with disabilities came after World War I. The Smith-Sears Veterans' Rehabilitation Act of 1918 initiated a program of vocational rehabilitation for disabled veterans returning from the war. The Smith-Fees Act of 1920 broadened the scope of vocational rehabilitation to disabled persons other than veterans. In 1954, Congress recognized the need for aid to education for disabled children on a national level. They passed Public Law 83-531, The Cooperative Research Act, providing funding through grants for institutions of higher learning and state agencies for educational research. The National Defense Education Act of 1958 is considered landmark legislation for special education (Riley, 1978). It was designed to encourage expansion of teaching of mentally retarded children through grants to institutions of higher learning and state agencies.

By the 1960s there was heightened public awareness of the barriers confronting disabled individuals. The 1960s and 1970s brought about a surge of legislation dealing with the disabled:

1961: Public Law 87-276 provided support for training classroom teachers of the deaf;

1963: Public Law 88-164 expanded Public Law 87-276 to include teachers for the hard of hearing, speech impaired, visually impaired, emotionally disturbed, crippled, and other health impaired children. This same law created a Division of Handicapped Children and Youth in the Department of Health, Education , and Welfare;

1968: The Architectural Barriers Act of 1968 provided for the removal of barriers from new federally funded buildings;

1965: Congress amended Title I of the Elementary and Secondary Act to financially assist disabled children in State operated and supported schools that were not eligible to receive funds under the original act;

1966: Congress added a new Title VI to the Elementary and Secondary Education Act to make Federal funds available to States to initiate and/or to expand local programs to meet the special educational needs and related services to their handicapped population;

1968: Congress extended educational assistance to handicapped preschool children through the Handicapped Children's Early Education Assistance Act of 1968;

1970: Developmental Disabilities Services and Facilities Construction Act of 1970 provided a wide range of services to individuals with developmental disabilities including day care, special employment and living arrangements, counseling, and recreation; and

On April 13, 1970 the Amendments to the Elementary and Secondary Education Act were signed into law. This repealed Title IV of the Elementary and Secondary Education Act and, as of July 1, 1971, created a separate act, The Education of the Handicapped Act.

These laws helped make daily activities more accessible to the disabled and educational services available for a portion of the population with disabilities.

However, the struggle to end discrimination for all persons with disabilities continued.

By 1971 there had been 38 court cases in 24 states on the right to

education and due process for all disabled children, and eight court cases in six states on the right for treatment for all children who need it. In cases which had been decided, judgment was given in favor of the disabled child (93rd Cong., 2nd Session, 1972).

With the successful decision of *Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania*, 343 F. Supp. 279 (1972), and *Mills v. Board of Education of the District of Columbia*, 348 F. Supp. 866 (1972), as well as the other court cases, it was apparent to disability advocates that the government needed to present a clear standard for children with disabilities. Congressional responsibility took two directions: one was a civil rights statute which applied to all programs receiving federal funds; and the other was a program statute, (Public Law 94-142), the Education for All Handicapped Children Act.

The nondiscrimination approach was presented to Congress in the early 1970s. On December 9, 1971, Congressman Charles Vanik of Ohio introduced H.R.12154 (117 Cong. Rec 45974). His intention was to amend Title VI of the Civil Rights Act of 1964 by adding "disabled" to the law that already prohibited discrimination on the basis of race or national origin in any program receiving federal funds. Vanik's purpose in introducing the legislation was to "insure equal educational and employment opportunities for the disabled by making discrimination illegal in federally assisted programs and activities." On January

20, 1972 Senator Hubert H. Humphrey of Minnesota, on behalf of himself and Senator Charles Percy of Illinois, introduced a similar proposal to the Senate S.3044 (118 Cong. Rec. 525, 526). Their bill was intended to help provide equal opportunities for school children with disabilities. The concept presented by Vanik and Humphrey eventually became Section 504 of the Rehabilitation Act of 1973.

The only apparent opposition to these bills came from those who were committed to protecting the groups already covered by Title VI of the Civil Rights Act. Civil Rights advocates were concerned that any attempt to broaden the scope of the Act might diminish enforcement of the existing provisions. (Scotch, 1984; Percy, 1989; Robinson & Sherman, 1982).

The legislative history of Section 504 indicates no special significance up to its passage. No hearings were held on the bills, and there were no votes in committee or on the floor of either house. In its initial drafting and discussion the Rehabilitation Act of 1973 did not include Section 504. There was no Congressional discussion on the adding of Section 504 to the Rehabilitation Act. The addendum was conceived by Senate committee staff members and then added to the bill relatively late in the legislative process. It is not unusual for Congressional staff to be involved in the day-to-day decisions which are later ratified by their bosses. (Scotch, 1984; Percy, 1989).

Adding nondiscrimination against the disabled to the Rehabilitation Act

seemed an obvious second choice since the original Title V of the Rehabilitation Act included three civil rights provisions protecting the disabled. Sections 501, 502 and 503 referred to employment and architectural accessibility for the disabled. It seemed logical to the committee to add the nondiscrimination of the disabled to that legislation. They took the wording from Title VI of the Civil Rights Act of 1964 and added this one sentence to the end of the Rehabilitation Act:

No otherwise handicapped individual in the United States, as defined in section 7(6), shall, solely by reason of his handicap, be excluded from participating in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

There were no cost estimates in the House and Senate reports on the implementation of Section 504, indicating that the bill's authors expected that it would not entail any federal expenditures. (Scotch, 1984). In fact, as a whole, Congress took little note of the final section of the Rehabilitation Act.

The House and the Senate reports referred only briefly to Section 504 in their discussion of Public Law 93-112 (the Rehabilitation Act):

The bill further includes a provision proclaiming a policy of nondiscrimination against otherwise qualified disabled individuals with respect to participation in or access to any program which is in receipt of Federal financial funding..... Section (504) provides that no otherwise qualified disabled individual will be discriminated against or excluded from participation in any benefits of any program or activity receiving Federal assistance. (93rd Cong., 1st Session).

The Rehabilitation Act proceeded smoothly through Congress and it was

sent to President Richard Nixon to be signed. President Nixon refused to sign the bill. His rationale for the pocket veto on October 27, 1972 made no reference to the nondiscrimination provision.

One of the first orders of business of the 93rd Congress 2nd session, after the election of 1972, was the reintroduction of the Rehabilitation Act. Comment was made about Section 504 in the hearings. The comment came from The National Federation for the Blind (NFB), one of the few disability advocacy groups with lobbying capacity. John Nagle, director of NFB testified:

This civil rights for the disabled provision brings the disabled within the law when they have been so long outside of the law. It establishes that because a man is blind or deaf or without legs, he is no less a citizen, that his rights of citizenship are not revoked or diminished because he is disabled. (93rd Cong., 2nd Session).

The House and the Senate again passed the bill. Once again the president vetoed the bill. President Nixon's objection was with the funding of the Rehabilitation Act itself. An attempt was made to override the veto but failed in the Senate. Section 504 was not an issue in the veto. On May 23, 1973, the Rehabilitation Act was introduced for a third time to Congress. Finally, Congress yielded to some of the President's concerns and in September of 1973 passed the bill. On September 26, 1973, even though the bill did not meet all the President's objections, President Nixon signed the bill into law as the Rehabilitation Act of 1973, Public Law 93-112.

With the passage of the Rehabilitation Act of 1973, Section 504 became

law. It followed in the footsteps of other civil rights laws. The provision was strong on symbolic statement but short on guidelines for implementation. With practically no legislative history to serve as a guide, substantial and significant policy refinement was required by the Executive Branch as it commenced enforcement of anti-discrimination protection for persons with disabilities. (Percy, 1989).

Unlike the other civil rights laws, Section 504 had no designated administrative authority responsible for implementing and issuing regulations. Since vocational rehabilitation was under the umbrella of the Department of Health, Education, and Welfare (HEW), it was generally perceived by Congress that this department would lead responsibility for implementing Section 504. The Senate Labor and Public Welfare Subcommittee on Disabled supported this decision and noted to the new Secretary of HEW, Casper Weinberger, that he had the statutory mandate to administer the Rehabilitation Act and therefore had the authority to see that all provisions of the Act were effectively carried out (Scotch, 1984). Executive Order 11-914, signed into law by President Gerald Ford, conferred to HEW responsibility as lead agency for Section 504. By agency decision, the task of drafting the regulations was bestowed upon HEW's Office of Civil Rights (OCR). Scotch (1984) contends that HEW's Rehabilitative Services Administration and Office of General Counsel were also considered for the drafting of the regulations, but OCR was given the assignment because of

its familiarity and experience with civil rights laws.

OCR took the same hard-nosed approach taken in breaking down the barriers of racial discrimination. OCR did not rely on the voluntary efforts and good intentions of educational agencies whose behaviors the law was attempting to change. According to Scotch (1984), they did not consider factors affecting recipients such as cost, inconvenience, and disruption of existing programs to be legitimate reasons for failing to meet requirements for nondiscrimination.

OCR director Peter Holmes assigned responsibility for the development of the regulations for Section 504 to his newly appointed deputy, Martin Gerry. Gerry assigned John Wodatch, a staff attorney with five years experience with OCR, to oversee the day-to-day activities. Neither Gerry nor Wodatch had any previous experience with issues involving discrimination on the basis of disability. Wodatch assembled a staff of 11 additional people. The Office of General Counsel assigned an attorney to the project. The other 10 positions were filled with personnel drawn from other parts of OCR and temporarily assigned to the project. Two members had experience with disabilities, Raymond Keith was physically disabled and Ed Lynch was an attorney who worked on the President's Committee for Mental Retardation.

It was important for Wodatch and his staff to know what Congress had in mind when it passed Section 504. According to Scotch (1984), the project staff

had informally talked to the staffers who added Section 504 to the Rehabilitation Act. They felt this informal conversation would not be sufficient for a foundation for the regulations. To further build a foundation, meetings were held with the staff from the Senate Labor and Public Welfare Committee.

One problem, the project staff assigned to developing the regulations noted, was the lack of legislative history. Another problem was the definition of disabled in the Rehabilitation Act. In section 7(6) of the Rehabilitation Act of 1973. Congress defined the term "handicapped individual" as :

Any individual who (a) has a physical or mental disability which for such individual constitutes or results in substantial handicap to employment and (b) can reasonably be expected to benefit in terms of employability for vocational rehabilitative services provided pursuant to Title I and Title III of this Act.

The definition problem was clarified in Section III(a) of the Rehabilitation Act Amendments of 1974. Congress amended the definition of "handicapped individuals" for the purpose of Section 504. For purposes of Section 504 of the Rehabilitation Act, a "handicapped individual" is defined as:

Any person who (a) has a physical or mental impairment which substantially limits one or more of such person's major life activities, or (b) has a record of such an impairment, or (c) is regarded as having such an impairment.

This amended definition clarified the intent of Section 504. The intention was to forbid the discrimination against all children with disabilities, regardless of their need to benefit from vocational rehabilitation services.

A conference committee was responsible for reconciling the House and Senate version of the Rehabilitation Act Amendments of 1974. The committee issued a report to accompany the amendments as legislative history for Congress and retroactively for the Rehabilitation Act of 1973. One part of this report provided legislative history for Section 504. Members of Congress discussed the parallels between Section 504, Title VI, and Title IX, and the intent of Congress that steps be taken to implement the anti-discrimination section:

Section 504 was patterned after, and is almost identical to the anti-discrimination language of Section 601 of the Civil Rights Act of 1964 .. and Section 901 of the Education Amendments of 1972...The section therefore constitutes the establishment of a broad government policy that programs receiving federal financial assistance shall be operated without discrimination on the basis of handicap. It does not specifically require the issuance of regulations or expressly provide for enforcement procedures, but it is clearly mandatory in form, and such regulations and enforcement are intended. (93rd Cong. 2nd Session)

The report went on to describe the anticipated enforcement procedures, informal negotiations, and formal sanctions which included the cutting off of federal funds. The report was issued on November 26, 1974 with an optimistic expectation of the Section 504 Regulations being completed by the end of the year.

Development of Section 504 Regulations

Unlike the statutory provisions, the regulations for implementing Section 504 were controversial. The population of persons with disabilities in the United States is not a cohesive group. They are extremely diverse in their physical, mental, and emotional conditions. The only commonality the disabilities population shared was exclusion.

Physical and attitudinal barriers had to be considered in the regulations. Attitudinal barriers had significantly limited disabled persons equal access to the mainstream of American life. HEW in its final rule realized these problems had been compounded by the fact that "providing equal access" may involve a financial burden on some recipients. Those burdens and costs were not an excuse for non-compliance; the Congressional mandate to end discrimination was clear. It was clear that Congress had not considered the financial burden.

There was discussion of adding "poor" and "aged" to the definition of "disabled", but there was nothing in the legislative history to indicate this population fell under the definition of disabled. Homosexuals were discussed as a possible disabling condition, but in 1973 the American Psychiatric Association had removed homosexuality from its list of mental disorders. Other federal programs had defined alcohol and drug addiction as a disability, so it was included under the protection of Section 504, as long as the drug and or alcohol

addiction would not interfere with their program participation.

Wodatch and his coworkers had finished a draft by the end of April, 1975. The draft was reviewed by various offices within HEW. It was reviewed by Congressional staff members (Scotch, 1984). In cases where consensus on an issue could not be reached, issues were brought before Secretary Weinberger (and later Secretary David Matthews) for resolution.

After the regulations had been approved by the various agencies within HEW, they went to Secretary Weinberger for final approval before being published for comment. They went to Weinberger in July of 1975. This is the point, according to Scotch (1984), that political conflict began to appear. The initial considerations in the drafting of the regulations had been on detailed civil rights grounds. By the time the regulations became exposed to groups outside HEW, there was a strong push to make major changes.

Until 1974 there was little attempt by individuals with disabilities to unite for their common cause: abolishment of exclusion. The common experience of exclusion became a catalyst for a shared identity. There had been active organizations for specific disabled individuals and for groups; blind, deaf, and disabled veterans, but not as a cohesive group of "Disabled" persons. People who were attending the 1972 annual conference of the President's Committee on Employment of the Disabled, outraged by the President's veto of the Rehabilitation Act, demonstrated against the veto. This demonstration helped to

form the foundation for disabled activists.

Judy Heumann (now Assistant Secretary, Office of Special Education and Rehabilitative Services) and Eunice Fiorito of Disabled in Action of New York, among others, organized meetings in Washington to discuss the discrimination issues they felt were not included in the agenda of the President's Committee on Employment of the Disabled (PCED). The approximately 150 people who attended these informal meetings formed a cross-disabilities organization they called the American Coalition of Citizens with Disabilities (ACCD).

Until the spring of 1975, most leaders of organizations representing persons with disabilities organizations were unaware of Section 504 and the regulations being drafted. The exception was the NFB which testified in Congress. In 1975 OCR began to consult disabled organizations such as the Easter Seal Society and the United Cerebral Palsy Association. Through the evolution of contacts between various advocacy organizations, congressional staff, and some Washington civil rights groups, the word about developing regulations for Section 504 spread.

After continued controversy, the Disability groups became frustrated with the delay and James Cherry and the Action League for Physically Disabled Adults (ALPD) filed suit in federal court against then Secretary of HEW David Matthews. In *Cherry v. Matthews* (419 F. Supp. 922, D.D.C., 1976), ALPD attempted to force the signing and issuing of the Federal Regulations for Section

504. Judge Smith of the U. S. District Court of the District of Columbia in July, 1976, ruled that the Secretary of HEW was required to issue the regulations but no date was given. Matthews continued to delay issuance of the regulations, stating that the language of Section 504 was unclear and seeking acknowledgement that HEW had followed Congressional intent. On January 19, 1977, the courts directed Matthews to cease further delays in issuing the regulations. On January 20, 1977, President Jimmy Carter took office. He had already spoken out in favor of the prompt issuance of the regulations for Section 504. He appointed Joseph Califano as Secretary of HEW. Califano was briefed by OCR and several advocacy groups on the regulations and encouraged by them to issue the regulations promptly. Instead, Califano opted to have the regulations studied, reconsider the substantive issues therein, and shortened.

The leaders of the disabilities community had shifted. With a grant, the ALPD had opened a permanent Washington office with Frank Bowe as the executive director. Bowe and other ACPD members focused their attention on the issuance of the regulations. By March the disabilities advocates had decided on a new plan of action. At the beginning of April they organized a protest and had a "sit-in" in HEW Offices across the country.

On April 16, another version of the regulations was presented to Califano. This version had minor changes from the draft in January. It was shorter, less specific, and permitted greater flexibility for recipients to comply. Consequently,

on April 28, 1977, Secretary Califano called a press conference and signed the regulations for Section 504. The regulations were published in the May 4, 1977, *Federal Register*, "Nondiscrimination on the Basis of Handicap: Programs and Activities Receiving or Benefiting from Federal Financial Assistance".

For elementary and secondary education agencies the regulations seemed to be a duplicate of the more specific mandate under Public Law 94-142, Education for All Handicapped Children Act. No action seemed to be taken by elementary and secondary schools with regards to Section 504, even though on June 29, 1977 Edwin Martin, Deputy Commissioner for Education of the Handicapped wrote an "Informal Letter to Chief State School Officers", State Directors of Special Education, and EHA-B Coordinators suggesting a review be made of State and local policies and procedures relating to Section 504 of the Rehabilitation Act.

Section 504 and Attention Deficit Hyperactivity Disorder

It wasn't until the late 1980s that Section 504 came to the forefront for elementary and secondary schools. Several events happened during that time frame which brought Section 504 into the minds of policy-makers in the local schools. (1) Children and Adults with Attention Deficit (CH.A.D.D.) became a strong lobbying group during the reauthorization of the Education for All

Handicapped Children Act (EHA) and lobbied to have Attention Deficit Hyperactivity Disorder (ADHD) added as a disability category; (2) The Americans with Disabilities Act (ADA), Public Law 101-336 was passed, and (3) in *Rogers v. Bennett* 873 F.2d 1387 (11th Cir. 1989), the court brought to light the overlapping intentions of Section 504 and EHA.

In 1988 Section 504, as well as other civil rights statutes, was amended by the Civil Rights Restoration Act (Public Law 100-259). The legislation defined coverage of Section 504 as broad rather than narrow when federal funds were involved. The Supreme Court decision in *Grove City College v Bell* (465 U.S. 555, 1980) gave a narrow definition of the loss of federal funds (the department where the discrimination was founded for example). The Civil Rights Restoration Act (CRRRA) broadened the meaning to include the entire university.

Title V of The Americans with Disabilities Act affirmed the premise of Section 504. It specifies that the ADA shall not be interpreted as a reduction in the scope of coverage or standards applicable to federal agencies and recipients of federal assistance under Title V of the Rehabilitation Act of 1973, but an affirmation.

On November 29, 1990, the Department of Education, at the request of Congress, published a Notice of Inquiry in the Federal Register concerning questions about the education of students with ADHD. The questions focused on the unique characteristics and educational needs of children and youth with

ADHD and possible eligibility criteria for this population in The Individuals with Disabilities Education Act (IDEA). The comments were reviewed and a summary sent to Congress in May, 1991. Congress opted not to include ADHD as a disability category. They felt children who required educational services already were being served under specific learning disability, severely emotionally disturbed, or other health impaired. After considerable debate, Congress directed the Office of Special Education Programs (OSEP) in the Department of Education to establish information centers throughout the United States to disseminate current information about ADHD to parents and educators. The Chesapeake Institute in Washington, D.C. was charged with the duty of organizing, synthesizing, and disseminating the information.

The conference committee directed DOE to clarify for schools the options for providing services for children identified as ADHD. In September, 1991, the Department of Education Office of Civil Rights and the Office of Elementary and Secondary Education sent a memorandum to the State Education Agencies clarifying their responsibility for children with ADHD (Appendix A). They reiterated the opinion of Congress that some ADHD children were being served under IDEA. However, they added that the ADHD children who did not need special education, but needed adjustments in the regular classroom, would qualify for services under Section 504.

Under Section 504, a Local Education Agency (LEA) must provide a free

appropriate public education to each qualified child with a disability. If a parent believes that a child is disabled by ADHD, the LEA must evaluate the child to determine whether he or she has a disability under Section 504. The parent has the right to contest that determination. If the child is determined to have a disability under Section 504, the LEA must make an individual determination of that child's education needs for regular or special education or related aids and services.

Attention Deficit Hyperactivity Disorder (ADHD)

Today a large percentage of children are being diagnosed as having Attention Deficit Hyperactivity Disorder (ADHD). According to a review of the literature by Trites, Dugas, Lynch, and Ferguson (1979) and LaGreca and Quay (1984), children with ADHD account for a substantial percentage of all children referred to outpatient mental health clinics in the United States. They also account for 40% of the referrals to child guidance clinics (Teeter, 1991; DuPaul & Stoner, 1994). The prevalence of ADHD is estimated at 3% to 5% in school-aged children (American Psychological Association, 1994).

ADHD is not a new development; as early as the mid-1800s reports began to appear in the medical literature of children having chronic problems with impulsiveness, over-activity, and inattentiveness (Greenberg and Horn,

1991). There has been extensive controversy over the cause of the disorder, as well as what to call these identified children. Terms such as "minimal brain damaged", "minimal brain disfunction", "hyperactive", and "attention deficit disorder with or without hyperactivity" have dominated the literature. The terminology used in the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, 1994 (DSM-IV) is Attention Deficit Hyperactivity Disorder. Each revised classification brings new information about the disorder. The controversy does not end with classification; it continues with debates over cause, identification, and appropriate treatment. The abundance of the research over the last 25 years suggests medication and behavior management as the most effective treatments (Barkley, 1990).

The lack of consensus as to the best method for defining ADHD has been one of the biggest obstacles in developing a better understanding of the disorder (Frick & Lahey, 1991). There is a lack of consensus as to the cause of ADHD. Hynd, Hern, Voeller, and Marshall (1991) support a neurobiological basis for ADHD. Others believe environmental factors such as lead poisoning, chromosomal anomalies, (e.g., Fragile X and XXY), and allergies can contribute to ADHD. There is also a school of thought that supports sugar and food additives as possible causes of ADHD (Hynd, et al., 1991).

ADHD has become relevant to educators because of the efforts of advocacy groups to add ADHD as a disability category under IDEA. Several

groups have expressed concerns for the adequacy of services for children with ADHD (Reid, et al., 1993). Many educational organizations such as the National Association of State Directors of Special Education (NASDSE), the National Education Association (NEA), the National School Board Association (NSBA), and the Council for Exceptional Children (CEC) objected to the inclusion of ADHD as a disability category. They argued that: (a) many children and youth with ADHD already qualify for special education and related services because they also have learning disabilities or serious emotional disturbance; (b) if all students with ADHD were to be eligible for special education, limited resources would be diverted away from students with more serious disabilities; and (c) ADHD is difficult to define and identify (Hocutt, et al., 1993). Scientists, doctors, and researchers are still unsure about how to best identify and provide services for children who appear to be ADHD.

On September 6, 1991, the Department of Education, Office of Rehabilitative Services, with the support of the Office of Civil Rights, and the Office of Elementary and Secondary Education issued a joint memorandum (Appendix A). The subject of the memo was the clarification of policy to address the needs of children with attention deficit disorder within the general and/or special education population. It clarified state and local responsibility under federal law for addressing the needs of children with ADHD in the schools. According to the clarification, a child identified as ADHD may be eligible for

special education and related services under the existing education categories of IDEA if eligibility criteria are met. If a child is diagnosed as having ADHD, and does not meet the criteria for eligibility under IDEA, they may qualify for services under Section 504 of the Rehabilitation Act. The Section 504 evaluation and eligibility process is similar to the IDEA process. For children identified as disabled under Section 504, implementation of an individualized education program developed in accordance with Part B of IDEA, although not required, is one means of meeting the free appropriate public education requirement of Section 504. The child's education must be provided in a regular education setting unless it is demonstrated that education in a regular classroom environment with the use of supplementary aids and services cannot be achieved satisfactorily.

If it is determined the child qualifies for services under Section 504 and needs only adjustments, those adjustments are required under Section 504. Other provisions range from consultation to special resources and may include: reducing class size, use of one-on-one tutorials, classroom aides and scribes, involvement of a "service coordinator" to oversee implementation of special programs and services, and modification of non-academic times such as lunchroom, recess, and physical education.

The DOE believes that the LEA, through the use of appropriate adaptations and interventions in regular classes, many of which are required by

Section 504, will be able to effectively address the instructional needs of many ADHD children. Section 504 and IDEA educational decisions should be made on the basis of each child's needs, not on the basis of unfounded assumptions about a child's performance capacity (Robinson & Sherman, 1982).

Section 504 requires the LEA to make available a system of procedural safeguards that permit parents to challenge actions regarding the identification, evaluation, or educational placement of their disabled child.

It is difficult to determine how many children with ADHD qualify for services under Section 504 or IDEA. The Department of Education does not require the states to keep a count of ADHD children under IDEA, and State Education Agencies (SEA) are not keeping any records of students who qualify under Section 504 (Katsiyannis & Conderman, 1994). If it is possible to serve a child under either law, schools may opt to provide service under IDEA since federal funds are available to cover some of the expenses (Aleman, 1991).

In 1994, the Office of Civil Rights (OCR) issued a clarification on Section 504 coverage for students with ADHD. The agency classify ADHD as a neurobiological disability. This theory has wide support in the field of education (Riccio, et al., 1993). They characterize ADHD by attention skills that are developmentally inappropriate, impulsiveness, and in some cases, hyperactivity.

OCR specifically stated that not all children with ADHD are automatically protected under Section 504. A child's condition must meet the definition of

disabled to be protected under the regulation. A person with a disability is defined under Section 504 as any person who has a physical or mental impairment which substantially limits a major life activity. In the case of schools the life activity would be learning.

ADHD Assessment

There is a great deal of confusion among professionals regarding proper diagnostic and evaluation procedures (Barkley, 1990; DuPaul, 1994; Silver, 1992). The diagnostic criteria for ADHD have been developed in the context of the medical model for children with behavior problems. However, these criteria are not very useful in an educational setting (DuPaul and Stoner, 1994).

The DSM-IV provides specific criteria for the identification of ADHD children. The criteria are (American Psychological Association, 1994):

A. Either (1) or (2):

(1) six (or more) of the following symptoms of **inattention** have persisted for at least six months to a degree that is maladaptive and inconsistent with developmental level:

Inattention

- (a) often fails to give close attention to details or makes careless mistakes in schoolwork, work or other activities
- (b) often has difficulty sustaining attention to task or play activities
- (c) often does not seem to listen when spoken to directly
- (d) often does not follow through on instructions and fails to finish schoolwork, chores, or duties in the workplace (not due to

- oppositional behavior or failure to understand instruction)
- (e) often has difficulty organizing tasks and activities
- (f) often avoids, dislikes, or is reluctant to engage in tasks that require substantial mental effort (such as schoolwork or homework)
- (g) often loses things necessary for tasks or activities (e.g., toys, school assignments, pencils, books, and tools)
- (h) is often easily distracted by extraneous stimuli
- (i) is often forgetful in daily activities

(2) six (or more) of the following symptoms of **hyperactivity-impulsivity** have persisted for at least six months to a degree that is maladaptive and inconsistent with developmental level:

Hyperactivity

- (a) often fidgets with hands or feet or squirms in seat
- (b) often leaves seat in classroom or in other situations in which remaining seated is expected
- (c) often runs about or climbs excessively in situations in which it is inappropriate (in adolescents or adults, may be limited to subjective feeling of restlessness)
- (d) often has difficulty playing or engaging in leisure activities quietly
- (e) often "on the go" or often acts as if "driven by a motor"
- (f) often talks excessively

Impulsivity

- (g) often blurts out answers before questions have been completed
- (h) often has difficulty awaiting turn
- (i) often interrupts or intrudes on others (e.g., butts into conversations or games)

B. Some hyperactive-impulsive or inattentive symptoms that caused impairment were present before age seven years.

C. Some impairment from the symptoms is present in two or more settings (e.g., school [or work] and at home)

D. There must be clear evidence of clinically significant impairment in social, academic, or occupational functioning

E. The symptoms do not occur exclusively during the course of Pervasive Developmental Disorder, Schizophrenia, or other Psychotic Disorder and are not better accounted for by another mental disorder (e.g., Mood Disorder, Anxiety Disorder, Dissociative Disorder, or other Personality Disorders) (p. 83-85).

Attention Deficit Disorder without hyperactivity (ADD) was removed as a subtype and relegated to a vaguely defined category (Barkley, 1990).

Undifferentiated ADD is now classified in a subcategory known as Disruptive Behavior Disorder (DSM-IV, 1994).

Multiple assessment techniques are typically used in the home and school setting in a comprehensive evaluation of children suspected of having ADHD (Barkley, 1990; DuPaul & Stoner, 1994). Until recently the diagnostic criteria for this disorder have been primarily in the hands of physicians. School professionals have become more involved because of the high incidence of referrals of children suspected of having ADHD. The stages of an ADHD evaluation should include a screening, multimethod assessment, interpretation of obtained results to reach a diagnostic decision, development of a treatment plan based on the assessment, and ongoing evaluation of the success of the intervention program (Barkley, 1990; DuPaul, 1994).

Unfortunately there is no simple assessment for determining whether a child has ADHD. Diagnosing ADHD is a complicated process and should be conducted by a well-trained professional (Fowler, 1990; Levin, 1992; DuPaul, 1992). Fowler (1990) suggests the assessment be conducted by a

developmental pediatrician, child psychologist, child psychiatrist, or pediatric neurologist. An evaluation for ADHD should include, according to Fowler (1990):

- (1) A thorough medical and family history;
- (2) A physical examination;
- (3) Interviews with parents, child, and child's teacher;
- (4) Behavior rating scales;
- (5) Observation of the child; and
- (6) Psychological tests which measure IQ and social and emotional adjustment, as well as screen for learning disabilities.

Sophisticated medical tests are not part of the assessment. Positron emission tomography (PET Scan) has been used for research purposes, but it is not routinely part of an assessment.

Others have suggested a different approach to the assessment of a child suspected of ADHD. DuPaul (1992), Barkley (1990), and Burnely (1989) suggest the assessment can be done by a well-trained school psychologist. They have access to sources of information and data crucial to aid in the diagnosis of ADHD and are at least familiar with community-based professionals who can provide an relevant evaluation. The assessment of ADHD according to Schaughency and Rothlind (1991) is a psychiatric diagnosis and there is no comparable educational category. There is some evidence that there is a

correlation between the identification by teachers rating and the child diagnosis as ADHD based on the DSM-III-R rating (Newcorn et al., 1989 & Lahey, et al., 1990).

Good diagnostic assessment is necessary to guide schools in their decision-making regarding referrals of children (Schaughency & Rothlind, 1991; Teeter, 1991; Fowler, 1990; Barkley, 1990; Lahey, Loeber, et al, 1990; Silver, 1992). Many researchers seem to agree that any educational decision made about a child should be based on reliable assessment of ADHD.

One conclusion drawn by the Chesapeake Institute (1993) was that the existing literature on ADHD was not adequate to guide the field with regards to what assessment data are necessary and sufficient to qualify a child for general education accommodations under Section 504. Nor is it adequate to provide guidance on the appropriate roles of professionals in the assessment and identification of ADHD.

ADHD Eligibility as Disabled

Another assessment level may be more relevant to the schools. This level of assessment focuses on determining whether or not the child with ADHD qualifies for special education. Montague et al., (1994) recommend using both formal and informal measures of ability, achievement, and behavior. Based on

the information collected about the child, a professional team can determine what specialized services or accommodations in a regular classroom are necessary. Montague, et al., (1994) suggest that (based on the guidelines from the Professional Group on Attention and Related Disorders) the team consider three questions:

- (1) Do the ADHD symptoms adversely affect educational performance to the extent that a significant discrepancy exists between the child's intellectual ability and productivity with respect to listening, following directions, organizing, planning, and completing academic assignments that require reading, writing or mathematics?
- (2) Do the inattentive behaviors arise from cultural or linguistic differences socioeconomic disadvantages, or lack of adequate exposure to instruction?
- (3) Do the inattentive behaviors arise from stressful family events, post traumatic stress reaction, frustration resulting from inappropriate school assignments, or emotional disorder?

If the answer to question one is positive and two and three are negative, then special education services and/or accommodations may be necessary.

Treatment and Accommodations for ADHD

Treatment from the medical perspective includes medication. The most commonly prescribed drugs for children diagnosed as ADHD are Dexedrine and Ritalin (Liden, 1989; Lerner, 1995; Barkley, 1990). Cylert is prescribed but not as frequently. Antidepressants such as Tofranil, Norpramin and Elavil and antihypertension medications such as Clonidine are also used, though less frequently. It is generally agreed that medication should only be part of a multimodal approach to the treatment of children with ADHD. The components most important to the schools are effective instruction and behavior management plans (Lerner et al., 1995; Levine, 1993; Barkley, 1990).

There are other more controversial treatments used for children suspected of ADHD. One of the most controversial theories is that of Dr. Benjamin Feingold (Lerner et al., 1995) who proposed that food additives in the diet increase hyperactivity. Feingold believed artificial coloring, preservatives, and artificial flavoring should be removed from the child's diet. Some studies have indicated limited success with this theory.

Another theory is that the child is allergic to substances in their diet and/or their environment (Lerner, et al., 1995). This theory has not been adequately researched to make any assumptions about children with ADHD (Friedman & Doyal, 1992). Others contend that the problem is caused by an

imbalance in the inner ear, an imbalance in candida (a yeast-like organism that lives in the body) and a need to increase brain wave activity. Researchers continue to probe a variety of theories looking for the answer to ADHD.

Generally the two areas that affect the teacher of children with ADHD are classroom accommodations and behavior plans. According to the regulations, the least restrictive environment for Section 504 is the general education classroom. This puts the burden on general educators to meet the needs of the ADHD child who may qualify under Section 504. Since Section 504 has no funding attached, there generally are no additional personnel to help meet the needs of such children.

Recommended accommodations for children are extensive. They include suggestions for classroom organization, classroom management, curriculum modification, behavioral interventions, and parent-teacher collaboration (Fowler, 1990; Lerner et al., 1995; DuPaul & Sloner, 1994). Braswell, Bloomquist, and Penderson (1991) presented a summary of classroom intervention strategies to be used by the general education teacher. They included the strategies listed above, but also emphasized the importance of adopting a positive problem solving approach. The National Information Center for Children and Youth with Disabilities (NICHCY), Children with Attention Deficit Disorder (CH.A.D.D.), and the Council for Exceptional Children (CEC) are among the many organizations that provide information on meeting the needs of ADHD children in the general

education setting. In 1991, the DOE listed possible accommodations for children identified as ADHD under Section 504. Adaptations in the regular classroom program included (Davila, et al., 1991):

Providing a structured learning environment, repeating and simplifying instructions about in-class and homework assignments, supplementing verbal instructions with visual instructions, using behavior management techniques, adjusting class schedules, modifying test delivery, using a tape recorder, computer or other audio-visual equipment, selecting modified textbooks and workbooks, and tailoring homework assignments (p. 7).

General educators have a great deal of concern with modifications being made for children, regardless of the disability. There have been questions about the validity of testing when accommodations are made. Wild and Durso (1987) found that an increase in time allowed in taking the Graduate Record Exam (GRE) resulted in a small but statistically significant increase in scores. Administration of tests orally is often a recommendation for disabled students. Location and testing on a one-to-one basis have been studied. Ragosta (1980) notes problems such as the test administrator unknowingly giving hints causing the child to score higher or the administrator being uncomfortable with the disability causing an uneasy testing situation. Some research has also been conducted in postsecondary schools. Davis and Nolan (1961) found that a written achievement test given orally results in inflated scores relative to the examinee reading the test. How serious the inflation might be is unknown but it is a genuine concern of general educators.

Summary

Many educational organizations such as the National Association of State Directors of Special Education (NASDSE, 1991), the Council for Exceptional Children (CEC, 1991), LRP Publications (Zirkel, 1994) and the Council for Administrators in Special Education (CASE, 1991) have provided guidelines for the development of a Section 504 Policy for LEAs. They presented comparisons of Section 504 to IDEA, summaries of OCR Memorandums and legal proceeding, and sample policies, procedures and plans in an attempt to guide the LEA in its development of a 504 Policy. Many of the legal journals have reported about Section 504 with relevant case law and OCR Findings, but there is little research or publication in educational journals to support administrators in their policy development. ADHD has been a companion topic to 504. Until recently, the journal articles have not examined practical applications.

The law was created with minimal discussion in Congress, as an amendment to the Civil Rights Act of 1964 to include the disabled. With inadequate guidance from Congress and a tremendous amount of debate and confusion in the field, the federal regulations were developed. The OCR has been delegated for the compliance with no direct intervention from the SEAs.

School systems were less concerned with Section 504 until the

reauthorization of EHA. One of the key factors that alerted school systems to Section 504 was the increased attention to ADHD. When Congress opted not to include ADHD as a separate disability category in IDEA, the members of Congress directed the Department of Education to investigate other means of meeting the needs of the ADHD children who do not qualify for special education. OCR was explicit in its memorandum in 1991 (Davila, et al., 1991):

Even if a child with ADD is found not to be eligible for services under Part B, the requirements of the Rehabilitation Act of 1973 (Section 504), and its implementing regulations at 34 CFR 104, may be applicable (p. 5).

The intent for children with ADHD is clear; the definition is not. Professionals in the field of education and the medicine have not been able to reach consensus on the definition of ADHD or the best methods of treatment. This disagreement among professionals has been a primary hindrance to the effective implementation of Section 504 for children with ADHD in the schools.

Chapter 3

Research Design

Design of the Study

An Evaluability Assessment was employed for the study. This is a method that determines the extent to which a program¹ is ready for an evaluation and any changes that might be needed to increase its readiness (Rog, 1985; Smith, 1990). Evaluability assessment was developed as a way to improve summative program evaluations (Smith, 1990). Program evaluation is potentially useful to key policy makers in ways that will lead to improved program performance: greater efficiency, greater effectiveness, or greater net benefit (Wholey, 1987). Wholey (1987) identifies four problems that inhibit the uses of evaluation:

- (1) Lack of definition of the problem addressed, the program intervention, the expected outcomes of the program, or the expected impact on the problem addressed;
- (2) Lack of clear logic of testable assumptions linking expenditure of program resources, the implementation of the program, the outcomes to be caused by that program, and the resulting impact;
- (3) Lack of agreement on evaluation priorities and intended uses of

¹ Section 504 is not a program of nondiscrimination, it is a guarantee against discrimination in any program receiving federal funds. For the purpose of this study it is referred to as a "program".

evaluation; and

- (4) Inability or unwillingness to act on the basis of evaluation information (p. 79).

If any of the first three problems exist, evaluation often proves to be inconclusive or irrelevant. If the third or fourth problem exists, even relevant, conclusive evaluations are unlikely to produce improvements in program performance.

Evaluations, according to Wholey (1979) are likely to be useful if three standards are met:

- (1) Program objectives are well defined;
- (2) Program assumptions / objectives are plausible; and
- (3) Intended uses of evaluation information are well defined.

There are typically eight steps in an Evaluability Assessment. They are usually done in succession, but not necessarily. Generally, they are done in successive interactions. The eight steps are;

- (1) Defining the program to be evaluated;
- (2) Collecting information on the intended program ;
- (3) Modeling;
- (4) Analysis;
- (5) Collecting information on program reality;
- (6) Modeling and Analysis;
- (7) Identification of evaluation / management options; and

(8) Presentation to management .

Model for the Study

An Evaluability Assessment was the basic design of the study. The focus of the study was Section 504 of the Rehabilitation Act of 1973. The study looked at the implementation of Section 504 in elementary and secondary schools with an emphasis on children with Attention Deficit Hyperactivity Disorder (ADHD). The study focused on goals (was a policy in place), intended resources (to determine if the personnel responsible for compliance perceive a cost factor in the implementation), activities (assessments used in identification and criteria set up to decide eligibility for Section 504), and outcomes (plans written for a child who qualifies as disabled and the due process procedures used).

Section 504 was chosen for the study because of the confusion that seems to be evident among educators about implementation of the law. An emphasis on Attention Deficit Hyperactivity Disorder was selected because of the Memorandum that the Office of Civil Rights sent out which specifically stated that ADHD could be a disability under Section 504.

Collecting Information

Information was collected from a variety of sources. The first step was to identify and review pertinent documentation. The relevant sources were deemed to be: authorizing legislation, the law, the Code of Federal Regulations for Section 504 (34 CFR 104), case law, and Office of Civil Rights (OCR) Findings and Memorandums. A review of this information was undertaken to discover assumptions that link the goal with the activities, objectives and outcomes as defined in the model for the study. This information was then summarized and used for information gathering during the interviews with Federal staff and disability advocates.

The next step in the process was to interview personnel involved in the development and oversight of Section 504, a disability advocate, and advocates for children with Attention Deficit Hyperactivity Disorder. On-site interviews were conducted with persons in each category. At the Federal level, interviews were conducted with personnel presently employed at OCR (a technical assistant and an analyst), a Senate Staff member from the Senate Subcommittee on the Disabled¹ (employed by OCR during the final development of the Regulations for Section 504), and a former Senate Staff member from the Subcommittee on the

¹ Handicapped was changed to disabled

Handicapped.

People interviewed from the disability perspective included the director of the Disabilities Rights Education and Defense Fund, Inc. (disability advocate during the development of the Regulations for Section 504), the Federal Liaison for Children and Adults with Attention Deficit Disorder (CH.A.D.D.), and the legal counsel for CH.A.D.D..

The interviews were informal with no scripted list of questions to be answered. The information gathered from the legislative history, regulations, OCR Memorandums and Findings, and case law were used as a guide for the interviews. Each interview took approximately 90 minutes. The interviewee was told that the purpose of the interview was to gather information on the perceived purpose and history of Section 504 as it related to children with Attention Deficit Hyperactivity Disorder.

The information was collected and summarized. This information was synthesized and a Logic Model was designed to be used as a comparison with the Policy for Section 504 at the State Education Agency (SEA). The focus was the purpose of Section 504, resources available for implementation, assessment procedures, eligibility criteria, plans, and due process procedures for children with ADHD.

On-site interviews were conducted with personnel in the State Education Agencies (SEAs) in Delaware, Kentucky, Maryland, North Carolina, South

Carolina, Tennessee, Virginia, and West Virginia. The person interviewed was responsible for providing information to the Local Education Agencies (LEAs) on Section 504 and Attention Deficit Hyperactivity Disorder. Each SEA's input was compared to the Logic Model. The purpose of the comparison was to ascertain whether there was consistency among the SEAs in their Policies on Section 504 as they related to assessment, eligibility criteria, plans, and due process procedures and to analyze how the cost affected the implementation of Section 504.

On-site interviews were then conducted at six LEAs in each of the eight states. An attempt was made to avoid the larger and smaller school divisions in each state (Appendix B). The LEAs were chosen based on the availability and willingness of the Compliance Officer for Section 504 to be interviewed in the time frame when the researcher was in that particular state.

The 504 Compliance Officers for the LEAs were interviewed and asked about the purpose of Section 504, assessment for children with ADHD, eligibility criteria, plans, and due process procedures. They were also asked if they saw a cost in complying with Section 504. A copy of the Section 504 Policy was collected from each LEA. If the Compliance Officer was unable to locate the Policy, at the interview a follow-up letter was sent requesting the policy. A follow-up telephone call was done approximately two weeks later if no policy was sent. Only one LEA said they had a policy and were unable to produce a copy.

The written policy was compared to the information collected at the interview. The purpose of the comparison was to look for consistency between each interviewee's knowledge and the actual policy.

Interviews were conducted by telephone with two administrators and two teachers from each of the six LEAs. An effort was made to interview administrators and teachers from a variety of schools in the LEA. They were chosen at random from a list of schools in each individual LEA. The teachers were interviewed on a voluntary basis. The researcher called the school and asked the secretary if she might be able to find a volunteer to participate in an interview for a doctoral study. Generally, school secretaries were very good at soliciting a volunteer.

The purpose of the interviews of the administrators and teachers was to confirm the program reality. The administrators were asked about the existence of the Section 504 Policy for their LEA, the training they've received on Section 504 and Attention Deficit Hyperactivity Disorder. The information base of the administrators and teachers were expected to be much more general than that of the Compliance Officer for the LEA. The administrators were also asked specifics about the assessment and eligibility process, plans written for qualified children, and due process rights given to parents. Teachers were asked whether their LEA had a Section 504 Policy, and if so, how and why they would refer a child for a possible identification under Section 504.

The information from the administrators and teachers was compared to the information and policy from the Compliance Officer for Section 504 in their LEA. The purpose of the comparison was to look at the flow of information to confirm the goals of Section 504 were being met in each school.

The last step in the evaluability assessment was to look at possible changes and methods for implementing these changes. The evaluability assessment looks at what part of the program is ready to be evaluated. An alternative model was designed as a possible base for an evaluable program.

Chapter 4

Results of the Study

An Evaluability Assessment was conducted in the eight states as defined by the Mid-South Regional Resource Center; Delaware, Kentucky, Maryland, North Carolina, South Carolina, Tennessee, Virginia, and West Virginia. The District of Columbia is included in this region but not included in the study, because there is no State Education Agency for the District of Columbia, and the distinction between the State Education Agency (SEA) and Local Education Agency (LEA) was necessary. The study included personnel at the SEA in each of the eight states, Compliance Officers in six LEAs in each state, two administrators from each LEA, and two teachers in each LEA.

Defining the Program to be Evaluated

The Program chosen for the study was Section 504 of the Rehabilitation Act of 1973 (Section 504) as it relates to elementary and secondary schools, with a focus on children with Attention Deficit Hyperactivity Disorder (ADHD). Section 504 is defined as a program for this study in the sense that it provides plans and procedures to assure that schools receiving federal funds do not

discriminate against children with disabilities.

The study considered the following areas: the goals of the states and local education agencies as they relate to the purpose of Section 504, assessments used in identifying children with ADHD for Section 504, eligibility criteria used in deeming a child "qualified" for Section 504, plans used by the individual districts for children identified, and the due process rights issued to parents of children when they are considered disabled under Section 504. Cost was also a consideration since Section 504 has no direct funding.

SUMMARY OF DOCUMENTATION ON SECTION 504

Documenting intended activities and objectives was accomplished through a review of the legislative history, the law as approved by Congress, Public Law 93-112 (Appendix C), the Regulation for Section 504 general provisions (Subpart A) and preschool, elementary and secondary education (Subpart D) (34 CFR 102) (Appendix D), a review of case law (Appendix E) and findings of the Office of Civil Rights (OCR) investigations and OCR Memorandums (Appendix F).

Legislative History

A search of the Congressional Records for the 92nd and 93rd Congress noted minimal discussion on the issue of non-discrimination against the disabled. Senator Hubert Humphrey presented the bill to the Senate and Representative Charles Vanick presented the bill to the House. They both had intended to add "disability" to the Civil Rights Act of 1964 which prevents discrimination on the basis of race or national origin. The opposition to the addition of disabled to the Civil Rights Act did not come from Congress but from Civil Rights Activists who felt the addition of disabled to the Act might take away from the intended focus. During the 92nd Congress the reauthorization of the Rehabilitation Act was being discussed. This Act already had three sections that addressed the disabled. These sections referred to employment and accessibility for the disabled. Section 504 was added to the Rehabilitation Act and passed with little note from Congress. This gave minimal guidance for policy-makers to aid in the development of regulations. The lack of discussion made it difficult to clarifying the intent of Congress with the passage of Section 504. Two areas of discussion were noted: (1) it paralleled Title VI of the Civil Rights Act of 1964; and (2) it included disabled individuals in the broadest sense. They did not discuss assessment, eligibility, plans or services, or specific guidelines for due process. Cost was not discussed in the original

discussion in Congress. It can be assumed the members of Congress did not anticipate a cost (paralleling Title V and Title IX).

The Law, PL 93-112

PL 93-112 as approved by Congress in 1973 was a guarantee not to discriminate against the handicapped in any program receiving federal funds. The definition of handicapped and who the law applied to was initially unclear. In 1974 Congress expanded the definition of handicapped in the Rehabilitation Act Amendments of 1974 and clarified the recipients of federal funds to include students in the public schools. There was no indication of how this was to be implemented.

Regulation for Section 504 (34 CFR 102)

Regulations guide the implementation of the law. For Section 504 they are intended to offer some direction to preschool, elementary, and secondary educational institutions in developing policies for the implementation of PL 93-112. The purpose or goals are well defined, to eliminate discrimination against the disabled. However, the process is not presented as specific. The Regulations provide guidance but give a very broad perspective. The regulations

specify a need for assessment, eligibility criteria, a plan, and the issuance of due process rights to parents. The only mention of cost is in the loss of all federal funding if the LEA does not comply with the law.

Case Law

Section 504 has been addressed extensively in case law in relation to elementary and secondary education, however, a majority of the case law on Section 504 is in conjunction with the Individuals with Disabilities Education Act (IDEA), not 504 specific. Case law has helped clarify several issues in regards to Section 504. The first issue to come to court was not related to elementary and secondary schools, but it addressed an issue relevant to them: the question of whether the intent of Section 504 included fundamentally altering a program in order to comply with the law. In *Southwestern Community College v. Davis* (1979), the Supreme Court said agencies receiving federal funds did not have to fundamentally alter a program to accommodate a disabled student. *Franklin v. Gwinnett County Public Schools* (1992) gave power of the court to award damages and equitable remedies (including monetary relief) under Title XI. Although neither of these cases deal directly with the issues in the study they present some guidance reflecting the intent of Congress when it is parallel to Title VI and Title XI.

OCR Findings and Memorandums

OCR Finding do not have the same impact as case law. They are very case specific. The advantage of reviewing OCR Findings is to identify trends and similar decisions from across the country. Information from OCR confirms that there has to be some assessment before consideration of a child as disabled under Section 504. The assessment is to be done by a qualified individual and the assessment. There should be some criteria for finding a child disabled under Section 504 and the decision should be made by a team of professionals knowledgeable in the field of disabilities. Accommodations and modifications should be made to a general education program to meet the individual needs of the child. And parents are afforded due process. These finding confirm what is written in the regulations.

An OCR memorandum is clarification of a particular issue from the point of view of OCR. Generally, they come about at the request of Congress or when there is an abundance of inquiry on a particular issue. Attention Deficit Hyperactivity Disorder was one of those issues. In the Joint Memorandum , Attention Deficit Hyperactivity Disorder (ADHD) is specifically mentioned as a possible disabling condition under Section 504. OCR Findings have continued to support the assessment of children with ADHD to determine their eligibility under Section 504. (Results summarized in Appendix G.)

PERTINENT PERSONNEL INTERVIEWS

Information gained through informal interviews with policy-makers from the federal government and the disability advocates was used to further document the goals of the program and the methods for achieving those goals, specifically for children with ADHD. Informal interviews were conducted with the Federal Affairs Liaison from Children and Adults with Attention Deficit Disorder (CH.A.D.D.), the Legal Counsel for CH.A.D.D., and the Director, Disabilities Rights Education and Defense Fund, Inc.. The latter individual was also a disability advocate during the process leading to the development of the passage of Section 504 and the development of the Federal Regulations. Federal personnel were also interviewed; a Program Analyst for the Office of Civil Rights, a Chief of the Technical Assistance and Program Support Branch in OCR, a Senate Staffer (Senate Subcommittee on Disability Policy¹), and a former Senate Staffer (Former member of the Subcommittee on Handicapped). Each interview took approximately ninety minutes.

The interviews were informal with no scripted list of questions. The interviewees were told that the purpose of the interview was to get background information on the catalyst(s) behind Section 504, the development and

¹ Due to schedule conflicts this interview was conducted by telephone.

passage of Section 504, and its relationship to children with Attention Deficit Hyperactivity Disorder. I explained my research design and research questions to give them a framework for the discussion.

Federal Personnel Interviews

Each interview took a different focus. The OCR personnel concentrated on present implementation. Neither of the OCR personnel had any knowledge of the history of Section 504, but they were aware of the controversy among states and school districts about the implementation of Section 504. Their focus was on concerns in the preschool, elementary, and secondary schools that are working to guarantee nondiscrimination of the disabled in any of their programs. They did not contribute any specific information on ADHD except that it could qualify as a disability under Section 504. Neither of the OCR personnel had any input on assessment or eligibility, other than quoting the regulations.

Both staffers and disability rights advocate were involved with the early development of the regulations and were willing to share their understanding of the development of Section 504 as a law and the development of the Regulations for its implementation. All three felt the law was long overdue. The disabled had been discriminated against long enough. Interestingly, their perception was from a physical accessibility perception. They were unable to

give information on the specific areas of assessment, eligibility, or cost. They felt a catalyst for the law was related to transportation and the inaccessibility of public transportation for the disabled (physically disabled and blind). They also felt Humphrey's disabled granddaughter motivated his interest.

Disability Advocates Interviews

The CH.A.D.D. liaison and general counsel for CH.A.D.D. had no background in Section 504 before the OCR Memorandum of September, 1991, when OCR specifically noted that children with ADHD can qualify as disabled under Section 504. They are both involved in policy-making and lobbying for CH.A.D.D., but neither of them had any knowledge of specifics involving assessment, eligibility, services, or cost for ADHD children under Section 504. Although they were familiar with the Regulations for Section 504 they did not contribute to its interpretation. Their focus was the elimination of discrimination of children labeled ADHD in the school setting. CH.A.D.D.'s concern was that LEAs comply with Section 504 as it relates to children with ADHD.

The information from the legislative history, the law, federal regulations, case law, OCR Findings and Memorandums, and interviews was synthesized into a "Logic Model". The Logic Model (Table 1) was used for a comparison for each of the SEAs. This represents the first step in consideration of program

Table 1: Logic Model

	Summary of Information
Purpose of Section 504	Eliminate discrimination against disabled
Assessment	<ul style="list-style-type: none"> ~Must assess if suspected disability ~Tests administered by trained professional ~Test valid for assessment ~More than observation and standardized achievement tests necessary ~Designed to meet the individual needs ~ADHD considered
Eligibility Criteria	<ul style="list-style-type: none"> ~Mental or physical impairment ~Substantially limits education ~Multidisciplinary team ~Carefully consider on an individual basis
Services/Plans Provided	<ul style="list-style-type: none"> ~Accommodations in regular education classroom ~Can receive special education and related services ~FAPE designed to meet the individual needs ~With nondisabled to the maximum extent possible
Due Process Rights	<ul style="list-style-type: none"> ~Must be afforded to parents ~Procedural safeguards ~Impartial hearing
Cost Factor	<ul style="list-style-type: none"> ~Can award appropriate relief for damages ~Accommodations (reasonableness not discussed)

reality. (Results summarized in Appendix H.)

RESULTS OF INTERVIEWS AT THE STATE EDUCATION AGENCIES

Eight State Education Agencies (SEA) were included in the study; Delaware, Kentucky, Maryland, North Carolina, South Carolina, Tennessee, Virginia, and West Virginia. The interviewee at the state level was with the person who was responsible for answering questions, giving guidance, or willing to talk about Section 504. Since the State Education Agency has no regulator power over the Local Education Agencies in regard to Section 504, the SEAs do not have someone specifically assigned to the task. In each state the responsibility fell on different personnel. In Virginia, South Carolina, and Tennessee the responsibility fell with the Compliance/Legal Department. In Delaware, West Virginia, and Kentucky the responsibility fell within the Department of Special Education. In North Carolina the responsibility was assigned to a Consultant for Drop-Out Prevention on the High School Team. In Maryland no one had that responsibility. However, the 504 Compliance Officer, who was responsible for Section 504 for all state run schools and the SEA itself, was willing answer questions and give general information if asked by a LEA.

Interviews were also conducted with SEA personnel who were responsible for disseminating information on ADHD to the LEAs, if such a

person existed at the SEA. In all of the states except Maryland and North Carolina the assigned person was in the Division of Special Education. In Maryland no one was assigned this responsibility. The researcher attempted to interview personnel from the Department of Special Education but no one would agree to answer questions on ADHD for the state. The person in North Carolina responsible for Section 504 was also responsible for disseminating information on ADHD (in relation to 504). All interviews were done in person. Interviews for North Carolina and Kentucky were not done at the State Education Agency offices, but at mutually convenient sites.

West Virginia has an intermediate Agency between the SEA and the LEAs. The state is divided into eight education regions, and each region has a Regional Education Service Agency (RESA). These RESAs have physical centers. They disseminate information from the SEA to the LEAs and provide Inservice Training. The information they disseminate to the LEAs originates from the SEA.

There is a great deal of diversity in the manner the states have dealt with Section 504 and ADHD. Maryland has given no direction and provides no SEA assistance. The action that Maryland has undertaken is distribute the OCR Memorandums on Section 504 and ADHD. Kentucky has written and distributed "Best Practice" on compliance of Section 504 to each LEA. The other SEAs have acted as an intermediary, summarizing and distributing information about OCR

Findings and Memorandums together with articles related to ADHD and Section 504. Those states have not provided no other guidelines for the LEAs.

Tennessee and Delaware are presently working on guidelines on Section 504 for their LEAs. This was confirmed in Delaware by information collected during interviews. Two of the LEAs interviewed in Delaware were waiting for the SEA to provide guidelines. Three of the other LEAs in Delaware were waiting for the guidelines to clarify their policies. However, one of the LEAs in the study from Tennessee mentioned the possibility of a state policy on Section 504. Interestingly, despite the fact that Maryland offered no assistance to the LEAs, Maryland was the only state where all six LEAs interviewed had a Section 504 Policy.

COMPARING INFORMATION FROM SEA WITH LEAS

There was no clear connection between the SEA direction and the LEAs action in regards to assessment or eligibility criteria for children with ADHD under Section 504. There was no consistency in the LEAs within a state. In the LEAs with a Section 504 Policy there was agreement that ADHD could qualify as a disability under Section 504. Some LEAs would consider all children with ADHD (who do not qualify for IDEA) eligible for Section 504. Other LEAs qualify all ADHD children under the provisions of IDEA. In those instances children who

are not deemed to be qualified Learning Disabled or Emotionally Disturbed automatically qualify under the category of Other Health Impaired.

South Carolina has not provided any instructional training on Section 504 for their LEAs. They have, however, distributed some information to the LEAs through the Vocational Education Department.

The one area of consistent agreement among all of the LEAs was in relation to plans for children with ADHD. All of the LEAs' plans included accommodations or modifications in a general education classroom. One LEA included accommodations in a special education classroom for a child who only qualifies as disabled under Section 504. The accommodations mirror those suggested by OCR.

There was one area in which the LEAs consistently received guidance from the SEAs in relation to Section 504. Due process has been addressed in each of the eight states. Virginia, Tennessee and West Virginia have encouraged the LEAs to utilize the hearing officers used for IDEA. Maryland does not endorse the use of hearing officers used for IDEA for Section 504. In Maryland there is a list of attorneys available who are willing to hear Section 504 cases. Delaware delegated this function to the LEAs. The only guidance given is to ensure that the hearing officer is impartial. In South Carolina, where they have a two tiered process, the Administrative Judges will only hear 504 cases if they are part of an IDEA complaint. South Carolina has encouraged the

use of school board attorneys and have stated that school board attorneys are impartial. Since no LEA has yet directed a Section 504 Due Process Hearing to the SEA, South Carolina has not approached the issue at the state level.

Kentucky has taken an entirely different path. The Kentucky School Board Association provides training for interested parties, generally school administrators, to serve as due process hearing officers for Section 504.

It is of interest to note, both North Carolina and South Carolina have encouraged the Vocational Education Department to take the lead on Section 504. The Vocational Education Department, in conjunction with Special Education (ADHD), is planning the instructional training on Section 504 in South Carolina.

Cost is always an issue, yet none of the states in the study provide additional funds to the LEAs for Section 504. Noncompliance with Section 504 can result in loss of all federal funding. Tennessee is the only state that took the stand that they had some accountability for Section 504 compliance in their LEAs. They contend if the LEA lost funding due to noncompliance the state could also lose funding. In a case filed against one of their LEAs the SEA was named and from that case. It is based on this filing that the state is assuming responsibility. This assumption is the reason the Tennessee SEA is in the process of developing guidelines for their LEAs. Unlike IDEA there is no reference in Section 504 of the states responsibility to oversee compliance.

RESULTS OF INTERVIEWS WITH LEAS

The Compliance Officer, administrators, and teachers were assured anonymity if they would participate in the study. The LEAs were chosen at random. An attempt was made to choose LEAs that were neither the largest or the smallest by student population in each state (Appendix B). They were chosen based on availability of the 504 Compliance Officer for the LEA in the time frame when the interviewer was in their geographic location.

A specific list of questions was asked of each Section 504 Compliance Officer (Appendix I). They were asked if the LEA had a Section 504 Policy and if they had discussed that policy with their faculty. A copy of the policy was requested. The information obtained from the Compliance Officer was compared to their Section 504 Policy. In all cases the information obtained in the interview with the Section 504 Compliance Officer coincided with the LEA written policy. The Compliance Officers were asked about assessment, eligibility, and plans for children with ADHD who were considered for eligibility for Section 504. They were asked about the due process rights given to parents and if they see a cost involved in the implementation of Section 504. All of the Compliance Officers responded to the list of questions, even if they did not have a Section 504 Policy or written procedures for their LEA.

Administrators and teachers were interviewed by telephone. The

administrators and teachers were chosen at random. A list of all the schools in the LEA was used to select a school, and the researcher arbitrarily selected a school or central office administrator. If the administrator was not available another administrator was called. For the teacher interview, the researcher called a school, other than the school in which the administrator was located. The researcher identified herself as a doctoral student from Virginia Tech and asked if a teacher was available who would like to "volunteer" to participate in a dissertation research survey. Generally, the school secretaries were very good at soliciting a volunteer. Additional schools were called until two teachers were obtained for interview.

A specific set of questions was used for the interviews (Appendix I). The administrators were asked if they had received guidance on Section 504 and if they had a copy of the Section 504 Policy. The teachers were asked if their school district had a Section 504 policy. If they answered affirmatively, they were asked to describe the referral process for a child to possibly qualify under Section 504 (Appendix I).

RESULTS OF EVALUABILITY ASSESSMENT

The Evaluability assessment of Section 504 with an emphasis on Attention Deficit Hyperactivity Disorder indicates that Section 504 is not ready to

be evaluated. This conclusion is based on the criteria noted by Wholey (1987). (See p. 42-43). (1) There is a lack of definition in the problem addressed. For example, there is a lack of agreement on the processes for assessment criteria for identification of children with ADHD to be considered eligible for services under Section 504. (2) There is a lack of clear logic in the implementation of Section 504 at the elementary and secondary level. There were no resources proposed with Section 504. Consequently, the cost factor becomes a consideration in the implementation.

Since the evaluability assessment was not done for policy-makers the final two inhibitors to use for evaluating cited by Wholey are not relevant: lack of agreement on evaluation priorities and unwillingness on the part of the policy-makers to act, are not relevant. Summary of responses in Appendix J.

The following section addresses each of the research questions found in this study.

Research Questions

- 1. Based on legislative history, case law, and Office of Civil Rights (OCR) Findings and Memorandums, what was the perceived intent of Congress in the passage of Section 504 of the Rehabilitation Act of**

1973?

The perceived intent of Congress in the passage of Section 504 of the Rehabilitation Act of 1973 was the elimination of discrimination against the disabled by any program receiving federal funds. There was inadequate discussion in Congress to deem any other purpose. The concept was originally presented to Congress as an amendment to the Civil Rights Act of 1964. Discussion in Congress about this issue was minimal. The only objection came from Civil Rights advocates who felt the addition of disability to the Civil Rights Act would minimize the intent of the Civil Rights Act.

Case law on Section 504 (Subpart D Preschool, Elementary, and Secondary Education) in the absence of the Individuals with Disabilities Education Act (IDEA) is limited. There are numerous cases for Section 504 in relation to accessibility (especially public transportation and public buildings) and postsecondary education.

OCR Finding and Memorandums confirm the perceived meaning of Congress: a person cannot be discriminated against because of their disability. Most of the confusion seems to be with the definition of disabled and the implementation of the Code of Federal Regulations for Section 504 .

Based on the legislative history, case law, and OCR findings and memorandums the intent of Congress in the passage of Section 504 was to eliminate discrimination against the disabled in preschool, elementary, or

secondary education.

2. What goals and objectives have State Education Agencies (SEAs) provided for the Local Education Agencies (LEAs) for the implementation of Section 504 for children with Attention Deficit Hyperactivity Disorder (ADHD)?

All of the State Education Agencies in the eight states studied (Delaware, Kentucky, Maryland, North Carolina, South Carolina, Tennessee, Virginia, and West Virginia) indicated that they sent a copy of the Joint Memorandum on Section 504 and ADHD to the Local Education Agencies. All SEAs except Maryland have offered inservice training on ADHD for the LEAs. Kentucky was the only state that indicated they had disseminated specific information regarding implementation of Section 504 for the LEAs in their state.

In Virginia, West Virginia, South Carolina, Kentucky, Delaware, and Tennessee the information on ADHD was distributed through the Special Education Department, usually to the person responsible for Learning Disabilities who also answered questions on ADHD. In North Carolina the ADHD/Section 504 issues were delegated to the person responsible for Drop-out prevention. That individual had a special education background.

All of the SEAs' personnel agreed that ADHD could be considered a disability under Section 504 if the child meets the criterion: if the ADHD

substantially limits the child's education. None of the SEAs were clear on the term "substantially" but agreed the decision should be made on an individual basis.

The SEAs have not set up any goals and objectives for the LEAs in relation to children with ADHD under Section 504. This is no surprise, because the SEAs have not been given responsibility under Section 504 to provide such guidance to the LEAs. The only responsibility the federal government assigned was for the SEA to notify the LEAs of their duty to comply with Section 504. Kentucky has provided guidelines for the LEAs and Tennessee and Delaware are in the process of drafting guidelines on Section 504 for the LEAs.

3. Have LEAs met the goals and objectives set by the SEA?

The only state that has provided goals and objectives for Section 504 was Kentucky. Of the six LEAs surveyed in that state five have a policy on Section 504.

All of the states did send their LEAs a copy of OCR's Joint Memorandum on Section 504 and Attention Deficit Hyperactivity. Seven of the states issued notice to the LEAs that they must develop a policy and/or guidelines for Section 504 (Appendix I). Goals and objectives for LEAs have not been set by the SEAs.

4. Have LEAs formulated goals and objectives for Section 504 and disseminated the information to their faculty?

Eleven of the forty-eight LEAs surveyed had no Policy for Section 504. For 37 LEAs that had developed a Policy the Compliance Officers were knowledgeable about their policy. Seventy-one of the ninety-six administrators were aware of a Section 504 Policy in their LEA. Thus, 25 of the 96 administrators were not aware of a Section 504 Policy for their LEA. Some administrators were aware of policies that were not in existence.

Fifty-five of the ninety-six teachers interviewed were informed about Section 504 and had a basic understanding of the purpose (why they would refer a child for identification under Section 504). Forty-one teachers were not informed about Section 504 nor did they have any notion of why a child would be referred. See Table 2.

Table 2. Dissemination of Information from SEA through LEA to Administrators and Teachers

SEA Distribution of Information on Section 504 to LEAs		
YES	NO	Provided "Best Practice"
6	1	1

LEAs Develop a 504 Policy	
No Policy	Developed a Policy
11	37

Administrators aware of Policy on Section 504	
YES	NO
71	25

Teachers aware of Section 504	
YES	NO
55	41

5. Is there a cost factor in the implementation of Section 504?

The Section 504 Compliance Officer at each LEA was asked if they saw a cost factor in the implementation of Section 504. Seven people indicated there

was no cost involved in the implementation. One noted if there would be a cost the child would be identified under IDEA (which is funded). Forty-one LEAs noted a cost with Section 504. Costs mentioned were personnel used in the Section 504 process, testing materials, medical evaluations for children suspected of having Attention Deficit Hyperactivity Disorder, services (e.g., Occupational Therapy and Physical Therapy), and materials needed to meet the accommodations for a disabled child in general education classrooms. One LEA lists Section 504 as a line item in their annual budget.

6. Have the Mid-Atlantic States made uniform formulations of goals and objectives for Attention Deficit Hyperactivity Disorder children under Section 504?

There is no uniformity among the Mid-Atlantic States in dealing with the issue of Attention Deficit Hyperactivity Disorder under Section 504. The only consistent factor was the distribution of the OCR Joint Memorandum on Section 504 and Attention Deficit Hyperactivity Disorder (ADHD). In some states (Virginia, Maryland, and North Carolina), the State Attorney General has advised the SEA to refrain from involvement in policy for Section 504 where it related to the LEAs.

Use of Due Process Hearing Officers was the only issue on which SEAs took positions. The Attorney Generals in West Virginia and Virginia have

suggested that the LEAs use the IDEA Due Process Hearing Officers. The Maryland Attorney General has told the LEAs that they may not use the IDEA Due Process Hearing Officers. North Carolina and South Carolina LEAs are encouraged to use School Board Attorneys. Because South Carolina has a two tiered due process procedure the SEA has not had to address the issue of a 504 Hearings. Delaware's only guidance to the LEAs is that the Hearing Officer must to be impartial. Tennessee encourages mediation, but the IDEA Due Process Hearing Officers can hear Section 504 cases. The Kentucky School Board Association is training individuals to serve as Section 504 Due Process Hearing Officers. Generally, they are LEA Directors of Special Education.

Chapter 5

Discussion, Conclusion, and Recommendations

Discussion

Numerous controversy concerning Section 504 and Attention Deficit Hyperactivity Disorder (ADHD) are found in the literature. Professionals from the fields of medicine and education have not yet come to agreement on definition, characteristics for identification, or methods of addressing the needs of children with ADHD. Some guidance was provided to educators when the Office of Civil Rights took the position that a child with ADHD could qualify for services under the Individuals with Disabilities Education Act (IDEA). However, the memorandum that was intended to clarify the ADHD issues created additional confusion. The memo stated that ADHD could be considered a disability under the IDEA category of Other Health Impaired (OHI). In addition, it stated that children with ADHD may also be considered disabled and served under Section 504. The definition of disabled under Section 504, which includes the phrase "substantially limits learning", may be a contributor to the confusion. The question might be raised: If a disabled child is (ADHD) and his disability substantially limits learning, why isn't the child being served under IDEA as OHI?

Conversely, if the disability does not substantially affect the child's learning, the child could not qualify under Section 504. For Section 504 the question should be: Is the child being discriminated against because of the disability (ADHD)? If the answer is yes, there is a violation of Section 504. However, this is all dependent on being able to answer the question that has so far been unanswered: What is ADHD?.

There was no agreement among the eight states in this study in regards to assessment, eligibility criteria, or cost for ADHD children under Section 504. Generally, LEAs felt a medical diagnosis was necessary for a child to be eligible for Section 504, but some LEAs do not agree. Many LEAs use medical diagnosis as the only criteria for eligibility, while others require the same extensive battery of tests as they require for a child referred through the IDEA eligibility process.

Eligibility criteria for an ADHD child varied. Some LEAs will qualify a child with ADHD for Section 504 with merely a request from a parent and a medical diagnosis. Other LEAs use only the DSM-IV, while others require documentation of substantial problems in learning.

The LEAs do not agree on whether there is a cost factor involved in the implementation of Section 504. A majority of the LEAs feel there is a cost factor and expressed concern about the lack of funding, since Section 504 is an unfunded mandate.

SEAs have not provided guidance to the LEAs on Section 504. The SEAs have disbursed information on Section 504, and generally, will answer non-specific questions, but will not take responsibility for the implementation of Section 504 in the LEAs. It would be interesting to revisit the states that are "developing" policies for the LEAs to see if there is any change in the responses at the LEAs.

Conclusion

Based on the information collected for this study, it is clear that confusion exists among the LEAs and SEAs in regard to Section 504. The SEAs are unclear about their role in the implementation of Section 504. They are, however, aware of their charge to inform the LEAs of their responsibility to comply to Section 504. SEAs are also cognizant of the confusion among the LEAs about the implementation of Section 504. Exacerbating such misunderstandings is the fact that educators, psychologists, and physicians do not agree on the causes or identifying characteristics of ADHD.

Encouraged by the regulations, many LEAs are patterning their Section 504 Policy after those used for IDEA, especially in regards to the Plan, reevaluation, and procedural safeguards. This, too, has caused confusion. LEAs have been viewing Section 504 as a program, but Section 504 is not a

program in the way IDEA is a program. The purpose of Section 504 is to prevent discrimination against children with disabilities in schools which receive federal funds. The purpose of IDEA is to provide a free appropriate public education for children with disabilities.

It would seem appropriate for SEAs to take the lead in effecting the implementation of Section 504. Ironically, although Maryland was the only state in the study that has not provided guidance to LEAs regarding implementation or due process, it was the only state in which six LEAs had developed a Section 504 policy.

Inconsistencies in implementation Section 504 will continue until the confusion and misunderstandings documented in this study as addressed. Lines of accountability must be strengthened among federal, state, and local systems. In addition, it is important that the fields of medicine and education reach consensus in regard to ADHD issues.

Recommendations

Following are recommendations that are suggested by the findings of this study.

1. Each LEA should have a Section 504 policy and should inform their staff of the policy and procedures.

2. SEAs should continue to synthesize and distribute information about Section 504 and ADHD to LEAs.
3. SEAs should hold LEAs accountable for the development of local policies for Section 504.
4. A follow-up study should be conducted in Delaware and Tennessee. The study would determine whether those states have developed Section 504 policies and whether the LEAs have complied.
5. A survey of physicians and psychologists who diagnose children with ADHD could determine what criteria they use and provide insights to LEAs.
6. Inservice training should be provided to LEAs by the Office of Civil Rights to help focus the LEAs on the purpose of Section 504.
7. Parents should be provided with the definition of disabilities and their rights under Section 504.
8. Revisit Delaware and Tennessee to see if: (1) the SEAs has issued guidelines to the LEAs on Section 504; and (2) if the LEAs have followed the guideline issued by the state.

Researcher's Reaction

There is a great deal of confusion in the field about Section 504. The confusion seems to come from several sources. (1) OCR is charged with the implementation of Section 504 yet has no organized contact with the LEAs; (2) The regulations note in three separate places that the procedures for IDEA may be used as one means of meeting the regulations, causing the LEAs to parallel Section 504 and IDEA. (This parallel concept is further reinforced by organizations (e.g., CASE) that publish information on Section 504 comparing and contrasting it to IDEA); and (3) Since IDEA is regulated by the state, and they perceive the laws as similar LEAs appear to be waiting for assistance from the state on Section 504. SEAs have not authority for the implementation of Section 504 at the local level.

IDEA is a program which means it is funded. Section 504 is not a program. Section 504 is a guarantee that a disabled child in any federally funded program will not be discriminated against because of their disability. They are both laws directed at the disabled and that is where the similarity should end.

In my opinion, the LEAs need to change their perception of Section 504. The general focus seems to be how to "provide" for the disabled student under Section 504. The perception should be, how can we guarantee we are not discriminating against a disabled child because of the disability. The LEAs

should be looking at modifications and accommodations to assure a disabled child has equal access to education. The LEAs need to keep in mind that if they write a Section 504 Plan for a child, they are qualifying the child as disabled. Not every child that might need an accommodation or modification in a program is disabled. Accommodations and modifications need to be made in the classroom just to meet a variety of children's learning modalities. All of these children do not have a disability that substantially limits their education.

If a child's disability substantially limits the child's education, then the child may be considered disabled under Section 504. If the LEAs are differentiating instruction for all children, then the percentage of disabled children who need specific accommodations and modifications under Section 504 should be minimal.

When Section 504 was passed the disabled were looking for equal rights. The equality minorities sought when the Civil Rights Act was passed and women sought when Title XI was passed. LEAS should look at the implementation of Section 504 with the same perception they look at Civil Rights and Title IX. If educators could change their focus of Section 504 to parallel the Civil Rights Act, I believe some of the confusion about Section 504 would be eliminated.

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APPENDIX A

UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES

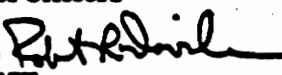
THE ASSISTANT SECRETARY

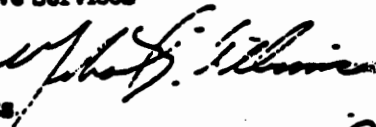
MEMORANDUM


SEP 16 1991

DATE :

TO : Chief State School Officers

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

Michael L. Williams 
Assistant Secretary
Office for Civil Rights

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

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

I. Introduction

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

¹While we recognize that the disorders ADD and ADHD vary, the term ADD is being used to encompass children with both disorders.

MARYLAND AVE. S.W. WASHINGTON D.C.

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

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

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

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

A. Description of Part B

Part B requires SEAs and LEAs to make a free appropriate public education (FAPE) available to all eligible children with disabilities and to ensure that the rights and protections of Part B are extended to those children and their parents 20 U.S.C. 1412(2); 34 CFR 88300.121 and 300.2. Under Part B, FAPE, among other elements, includes the provision of special education and related services, at no cost to parents, in conformity with an individualized education program (IEP). 34 CFR §300.4.

In order to be eligible under Part B, a child must be evaluated in accordance with 34 CFR §§300.530-300.534 as having one or more specified physical or mental impairments, and must be found to require special education and related services by reason of one or more of these impairments.³ 20 U.S.C. 1401 (a) (1); 34 CFR §300.5. SEAs and LEAs must ensure that children with ADD who are determined eligible for services under Part B receive special education and related services designed to meet their unique needs, including special education and related services needs arising from the ADD. A full continuum of placement alternatives, including the regular classroom, must be available for providing special education and related services required in the IEP.

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

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

C. Eligibility for Part B services under Other Disability Categories

Children with ADD are also eligible for services under Part B if the children satisfy the criteria applicable to other disability categories. For example, children with ADD are also eligible for services under the "specific learning disability" category of Part B if they meet the criteria stated in §§300.5(b) (9) and 300.541 or under the "seriously emotionally disturbed" category of Part B if they meet the criteria stated in §300.5(b) (8).

³The Part B regulations define 11 specified disabilities. 34 CFR §300.5(b) (1)-(11). The Education of the Handicapped Act Amendments of 1990 amended the Individuals with Disabilities Education Act (formerly the Education of the Handicapped Act) to specify that autism and traumatic brain injury are separate disability categories. See section 602(a) (1) of the Act, to be codified at 20 U.S.C. 1401(a) (1).

III. Evaluations under Part B

A. Requirements

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

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

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

B. Disagreements over Evaluations

Any proposal or refusal of an agency to initiate or change the identification, evaluation, or educational placement of the child, or the provision of FAPE to the child is subject to the written prior notice requirements of 34 CFR §§300.504-300.505.³ If a parent disagrees with the LEA's refusal to evaluate a child or the LEA's evaluation and determination that a child does not have a disability for which the child is eligible for services under Part B, the parent may request a due process hearing pursuant to 34 CFR §§300.506-300.513 of the Part B regulations.

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

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

A. Definition

Section 504 requires every recipient that operates a public elementary or secondary education program to address the needs of children who are considered "handicapped persons" under Section 504 as adequately as the needs of nonhandicapped persons are met. "Handicapped person" is defined in the Section 504 regulation as any person who has a physical or mental impairment which substantially limits a major life activity (e.g., learning). 34 CFR §104.3(j). Thus, depending on the severity of their condition, children with ADD may fit within that definition.

³Section 300.508 of the Part B regulations sets out the elements that must be contained in the prior written notice to parents:

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

34 CFR §300.508(a) (1)-(4).

B. Programs and Services Under Section 504

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

Under Section 504, if parents believe that their child is handicapped by ADD, the LEA must evaluate the child to determine whether he or she is handicapped as defined by Section 504. If an LEA determines that a child is not handicapped under Section 504, the parent has the right to contest that determination. If the child is determined to be handicapped under Section 504, the LEA must make an individualized determination of the child's educational needs for regular or special education or related aids and services. 34 CFR §104.35. For children determined to be handicapped under Section 504, implementation of an individualized education program developed in accordance with Part B, although not required, is one means of meeting the free appropriate public education requirements of Section 504.⁴ The child's education must be provided in the regular education classroom unless it is demonstrated that education in the regular environment with the use of supplementary aids and services cannot be achieved satisfactorily. 34 CFR §104.34.

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

⁴Many LEAs use the same process for determining the needs of students under Section 504 that they use for implementing Part B.

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

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

Other provisions range from consultation to special resources and may include reducing class size; use of one-on-one tutorials; classroom aides and note takers; involvement of a "services coordinator" to oversee implementation of special programs and services, and possible modification of nonacademic times such as lunchroom, recess, and physical education.

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

C. Procedural Safeguards Under Section 504

Procedural safeguards under the Section 504 regulation are stated more generally than in Part B. The Section 504 regulation requires the LEA to make available a system of procedural safeguards that permits parents to challenge actions regarding the identification, evaluation, or educational placement of their handicapped child whom they believe needs special education or related services. 34 CFR §104.36. The Section 504 regulation requires that the system of procedural safeguards include notice, an opportunity for the parents or guardian to examine relevant records, an impartial hearing with opportunity for participation by the parents or guardian and representation by counsel, and a review procedure. Compliance with procedural safeguards of Part B is one means of fulfilling the Section 504 requirements.⁵ However, in an impartial due process hearing raising issues under the Section 504 regulation, the impartial hearing officer must make a determination based upon that regulation.

⁵ Again, many LEAs and some SEAs are conserving time and resources by using the same due process procedures for resolving disputes under both laws.

V. Conclusion

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

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

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

It is our hope that the above information will be of assistance to your State as you plan for the needs of children with ADD who require special education and related services under Part B, as well as for the needs of the broader group of children with ADD who do not qualify for special education and related services under Part B, but for whom special education or adaptations in regular education programs are needed. If you have any questions, please contact Jean Peelen, Office for Civil Rights; (Phone: 202/732-1635), Judy Schrag, Office of Special Education Programs (Phone: 202/732-1007); or Dan Bonner, Office of Elementary and Secondary Education (Phone: 202/401-0984).

APPENDIX B

Information on States

DE	LEA 1	LEA 2	LEA 3	LEA 4	LEA 5	LEA 6
Population	3,471	3,072	6,812	6,588	3,583	3,762
Special Education ¹	315	252	1,157	473	422	517
Other Health ² Impaired	2	27	10	9	35	0
Section 504 Plans ³	No Idea	3	12	5	34	15

largest - 14,614

smallest - 644

KY	LEA 1	LEA 2	LEA 3	LEA 4	LEA 5	LEA 6
Population	930	2,965	2,850	1,657	8,387	3,132
Special Education	76	431	361	199	765	495
Other Health Impaired	0	4	4	0	1	2
Section 504 Plans	0	10	10	4	20	3

largest - 93,424

smallest - 214

¹Special Education December 1, 1994 count for all states.

²Other Health Impaired is included in Physically Impaired.

³All Section 504 Plans are estimates

MD	LEA 1	LEA 2	LEA 3	LEA 4	LEA 5	LEA 6
Population	31,655	19,510	12,819	13,428	20,419	24,515
Special Education	3,888	2,869	1,450	1,791	2,515	3,181
Other Health Impaired	25	115	115	38	49	117
Section 504 Plans	5	200	75	50	30	100

largest - 118,478
smallest - 3,339

NC	LEA 1	LEA 2	LEA 3	LEA 4	LEA 5	LEA 6
Population	8,989	2,110	4,818	11,640	2,823	6,557
Special Education	1,367	479	100	2,288	633	1,264
Other Health Impaired	12	4	17	31	32	13
Section 504 Plans	75	80	45	230	3	150

largest - 76,789
smallest - 763

SC	LEA 1	LEA 2	LEA 3	LEA 4	LEA 5	LEA 6
Population	15,500	6,633	3,154	8,430	14,291	5,442
Special Education	1,353	941	450	927	1,790	750
Other Health Impaired	10	3	0	1	6	9
Section 504 Plans	30	6	2	25	50	10

largest - 54,353

smallest - 544

TN	LEA 1	LEA 2	LEA 3	LEA 4	LEA 5	LEA 6
Population	5	25	11	4	50	70
Special Education	133	847	267	569	614	800
Other Health Impaired						
Section 504 Plans	5	25	11	4	50	70

largest - 70,105

smallest - 290

VA	LEA 1	LEA 2	LEA 3	LEA 4	LEA 5	LEA 6
Population	2,560	3,758	13,691	4,352	12,925	15,459
Special Education	297	506	2,193	783	2,192	1,722
Other Health Impaired	11	21	210	40	20	83
Section 504 Plans	15	6	52	1	12	32

largest - 137,646

smallest - 377

WV	LEA 1	LEA 2	LEA 3	LEA 4	LEA 5	LEA 6
Population	4,987	7,051	1,939	2,244	11,493	10,492
Special Education	761	1,051	333	250	1,541	1,503
Other Health Impaired	17	0	0	3	6	9
Section 504 Plans	7	20	20	5	70	20

largest - 33,190

smallest - 1,395

APPENDIX C

SECTION 504 LEGISLATION

Sec.

- 706 Definitions
- 794 Nondiscrimination under Federal grants and programs; promulgation of rules and regulations
- 794a Remedies and attorney fees

706 Definitions

(8) (A) Except as otherwise provided in subparagraph (B), the term "individual with a disability" means any individual who

(i) has a physical or mental impairment which for such individual constitutes or results in a substantial impediment to employment and

(ii) can benefit in terms of employment outcome from vocational rehabilitation services provided pursuant to subchapters I, III, VI, or VIII of this chapter.

(B) Subject to subparagraphs (C), (D), (E), and (F) the term "individual with a disability" means, for purposes of Secs. 701, 713, and 714 of this title, and subchapters II, IV, V, and VII of this chapter, any person who

(i) has a physical or mental impairment which substantially limits one or more of such person's major life activities,

(ii) has a record of such an impairment, or

(iii) is regarded as having such an impairment.

(C) (i) For purposes of subchapter V of this chapter, the term "individual with a disability" 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.

(ii) Nothing in clause (i) shall be construed to exclude as an individual with a disability an individual who—

(I) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use;

(II) is participating in a supervised rehabilitation program and is no longer engaging in such use; or

(III) is erroneously regarded as engaging in such use, but is not engaging in such use; except that it shall not be a violation of this chapter for a covered entity to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual described in subclause (I) or (II) is no longer engaging in the illegal use of drugs.

(iii) Notwithstanding clause (i), for purposes of programs and activities providing health services and services provided under subchapters I, II and III of this chapter, an individual shall not be excluded from the benefits of such programs or activities on the basis of his or her current illegal use of drugs if he or she is otherwise entitled to such services.

(iv) 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 who is an individual with a disability and 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 who are not individuals with disabilities. Furthermore, the due process procedures at 34 CFR 104.36 shall not apply to such disciplinary actions.

(v) For purposes of Secs. 793 and 794 of this title as such sections relate to employment, the term "individual with a disability" does not include any individual who is an alcoholic whose current use of alcohol prevents such individual from performing the duties of the job in question or whose

employment, by reason of such current alcohol abuse, would constitute a direct threat to property or the safety of others.

(D) For the purpose of Secs. 793 and 794 of this title, as such sections relate to employment, such term does not include an individual who has a currently contagious disease or infection and who, by reason of such disease or infection would constitute a direct threat to the health or safety of other individuals or who, by reason of the currently contagious disease or infection, is unable to perform the duties of the job.

(E) For the purposes of Secs. 791, 793 and 794 of this title--

(i) for purposes of the application of subparagraph (B) to such sections, the term "impairment" does not include homosexuality or bisexuality; and

(ii) therefore the term "individual with a disability" does not include an individual on the basis of homosexuality or bisexuality.

(F) For the purposes of Secs. 791, 793, and 794 of this title, the term "individual with a disability" does not include an individual on the basis of--

(i) transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders;

(ii) compulsive gambling, kleptomania, or pyromania; or

(iii) psychoactive substance use disorders resulting from current illegal use of drugs.

794 Nondiscrimination under Federal grants and programs; promulgation of rules and regulations

(a) No otherwise qualified individual with a disability in the United States, as defined in Sec. 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. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

(b) For the purposes of this section, the term "program or activity" means all of the operations of--

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

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

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

(B) a local educational agency (as defined in Sec. 2891(12) of title 20), system of vocational education, or other school system;

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

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

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

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

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

(c) Small providers are not required by subsection (a) of this section to make significant structural alterations to their existing facilities for the purpose of assuring program accessibility, if alternative means of providing the services are available. The terms used in this subsection shall be construed with reference to the regulations existing on March 22, 1988.

(d) The standard used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under subchapter I of chapter 126 of title 42 and the provisions of Secs. 12201-12204, and 12210 of title 42, as such sections relate to employment.

(Pub. L. 93-112, title V, Sec. 504a, Sept. 26, 1973, 87 Stat. 394; Pub. L. 95-602, title I, Secs. 119, 122(d)(2), Nov. 6, 1978, 92 Stat. 2982, 2987; Pub. L. 99-506, title I, Sec. 103 (d)(2)(B), title X, Sec. 1002(e)(4), Oct. 21, 1986, 100 Stat. 1810, 1844; Pub. L. 100-259, Sec. 4, Mar. 22, 1988, 100 Stat. 29; Pub. L. 100-630, title II, Sec. 206(d), Nov. 7, 1988, 102 Stat. 3312; Pub. L. 102-569, title I, Sec. 102(p)(32), title V, Sec. 506, Oct. 29, 1992, 106 Stat. 4360, 4428).

794a Remedies and attorney fees

(a)(1) The remedies, procedures, and rights set forth in Sec. 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16), including the application of Secs. 706(f) through 706(k) (42U.S.C. 2000e-5(f) through (k)), shall be available, with respect to any complaint under Sec. 791 of this title, to any employee or applicant for employment aggrieved by the final disposition of such complaint, or by the failure to take final action on such complaint. In fashioning an equitable or affirmative action remedy under such section, a court may take into account the reasonableness of the cost of any necessary work place accommodation, and the availability of alternatives therefor or other appropriate relief in order to achieve an equitable and appropriate remedy.

(2) The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.] shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under Sec. 794 of this title.

(b) In any action or proceeding to enforce or charge a violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

(Pub. L. 93-112, title V, Sec. 505, as added Pub. L. 95-602, title I, Sec. 120, Nov. 6, 1978, 92 Stat. 2982.)

APPENDIX D

34 C.F.R. Part 104

Nondiscrimination on the Basis of Handicap in Programs and Activities Receiving or Benefiting from Federal Financial Assistance

SUBPART A GENERAL PROVISIONS

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EDUCATION PROGRAMS [NOTE]

Authority: Sec. 504, Rehabilitation Act of 1973, Pub. L. 93-112, 87 Stat. 394 (29 U.S.C. 794); sec. 111(a), Rehabilitation Act Amendments of 1974, Pub. L. 93-516, 88 Stat. 1619 (29 U.S.C. 706); sec. 606, Education of the Handicapped Act (20 U.S.C. 1405), as amended by Pub. L. 94-142, 89 Stat. 795.

Source: 45 FR 30936, May 9, 1980, unless otherwise noted.

Effective Date Note: For an interpretation document affecting Part 104, see 46 FR 4912, Jan. 19, 1981. The effective date of the interpretation was deferred to March 30, 1981, at 46 FR 12495, Feb. 17, 1981. The effective date was again deferred to May 10, 1981, at 46 FR 18975, Mar. 27, 1981, and deferred until further notice at 46 FR 25614, May 8, 1981.

34 C.F.R. Part 104

SUBPART A GENERAL PROVISIONS

- 104.1. Purpose

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

104.2. Application

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

104.3. Definitions

As used in this part, the term:

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

(b) "Sec. 504" means Sec. 504 of the Act.

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

(d) "Department" means the Department of Education.

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

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

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

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

(1) Funds;

(2) Services of Federal personnel; or

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

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

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

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

(j) "Handicapped person." (1) "Handicapped persons" means any person who (i) has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.

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

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

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

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

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

(k) "Qualified handicapped person" means:

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

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

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

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

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

104.4. Discrimination prohibited

(a) General

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

(b) Discriminatory actions prohibited

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

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

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

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

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

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

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

(vii) Otherwise limit a qualified handicapped person in the enjoyment of any right, privilege,

advantage, or opportunity enjoyed by others receiving an aid, benefit, or service.

(2) For purposes of this part, aids, benefits, and services, to be equally effective, are not required to produce the identical result or level of achievement for handicapped and nonhandicapped persons, but must afford handicapped persons equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement, in the most integrated setting appropriate to the person's needs.

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

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

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

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

(c) Programs limited by Federal law

The exclusion of nonhandicapped persons from the benefits of a program limited by Federal statute or executive order to handicapped persons or the exclusion of a specific class of handicapped persons from a program limited by Federal statute or executive order to a different class of handicapped persons is not prohibited by this part.

104.5. Assurances required

(a) Assurances

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

(b) Duration of obligation

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

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

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

(c) Covenants

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

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

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

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

(a) Remedial action

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

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

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

(b) Voluntary action

A recipient may take steps, in addition to any action that is required by this part, to overcome the effects of conditions that resulted in limited participation in the recipient's program or activity by qualified handicapped persons.

(c) Self-evaluation

(1) A recipient shall, within one year of the effective date of this part:

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

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

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

(2) A recipient that employs fifteen or more persons shall, for at least three years following completion of the evaluation required under paragraph (c)(1) of this section, maintain on file, make available for public inspection, and provide to the Assistant Secretary upon request: (i) A list of the interested persons consulted (ii) a description of areas examined and any problems identified, and (iii) a description of any modifications made and of any remedial steps taken.

104.7. Designation of responsible employee and adoption of grievance procedures

(a) Designation of responsible employee

A recipient that employs fifteen or more persons shall designate at least one person to coordinate its efforts to comply with this part.

(b) Adoption of grievance procedures

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

104.8. Notice

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

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

104.9. Administrative requirements for small recipients

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

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

(a) The obligation to comply with this part is not obviated or alleviated by the existence of

any state or local law or other requirement that, on the basis of handicap, imposes prohibitions or limits upon the eligibility of qualified handicapped persons to receive services or to practice any occupation or profession.

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

SUBPART D PRESCHOOL, ELEMENTARY, AND SECONDARY EDUCATION

104.31. Application of this subpart

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

104.32. Location and notification

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

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

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

104.33. Free appropriate public education

(a) General

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

(b) Appropriate education

(1) For the purpose of this subpart, the provision of an appropriate education is the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of 104.34, 104.35, and 104.36.

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

(3) A recipient may place a handicapped person 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 placed or referred.

(c) Free education

(1) General

For the purpose of this section, the provision of a free education is the provision of educational and related services without cost to the handicapped person or to his or her parents or guardian, except for those fees that are imposed on non-handicapped persons or their parents or

guardian. It may consist either of the provision of free services or, if a recipient places a handicapped person in or refers such person to a program not operated by the recipient as its means of carrying out the requirements of this subpart, of payment for the costs of the program. Funds available from any public or private agency may be used to meet the requirements of this subpart. Nothing in this section shall be construed to relieve an insurer or similar third party from an otherwise valid obligation to provide or pay for services provided to a handicapped person.

(2) Transportation

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

(3) Residential placement

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

(4) Placement of handicapped persons by parents

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

(d) Compliance

A recipient may not exclude any qualified handicapped person from a public elementary or secondary education after the effective date of this part. A recipient that is not, on the effective date of this regulation, in full compliance with the other requirements of the preceding paragraphs of this section shall meet such requirements at the earliest practicable time and in no event later than September 1, 1978.

104.34. Educational setting

(a) Academic setting

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

(b) Nonacademic settings

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

(c) Comparable facilities

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

104.35. Evaluation and placement

(a) Preplacement evaluation

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

(b) Evaluation procedures

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

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

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

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

(c) Placement procedures

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

(d) Reevaluation

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

104.36. Procedural safeguards

A recipient that operates a public elementary or secondary education program shall establish and implement, with respect to actions regarding the identification, evaluation, or educational placement of persons who, because of handicap, need or are believed to need special instruction or related services, a system of procedural safeguards that includes notice, an opportunity for the parents or guardian of the person to examine relevant records, an impartial hearing with opportunity for participation by the person's parents or guardian and representation by

counsel, and a review procedure. Compliance with the procedural safeguards of Sec. 615 of the Education of the Handicapped Act is one means of meeting this requirement.

104.37. Nonacademic services

(a) General

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

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

(b) Counseling services

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

(c) Physical education and athletics

(1) In providing physical education courses and athletics and similar programs and activities to any of its students, a recipient to which this subpart applies may not discriminate on the basis of handicap. A recipient that offers physical education courses or that operates or sponsors interscholastic, club, or intramural athletics shall provide to qualified handicapped students an equal opportunity for participation in these activities.

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

104.38. Preschool and adult education programs

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

104.39. Private education programs

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

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

(c) A recipient to which this section applies that operates special education programs shall

operate such programs in accordance with the provisions of 104.35 and 104.36. Each recipient to which this section applies is subject to the provisions of 104.34, 104.37, and 104.38.

APPENDIX A TO PART 104 ANALYSIS OF FINAL REGULATION

Subpart A General Provisions

Definitions:

1. "Recipient"

Sec. 104.23 contains definitions used throughout the regulation.

One comment requested that the regulation specify that nonpublic elementary and secondary schools that are not otherwise recipients do not become recipients by virtue of the fact their students participate in certain federally funded programs. The Secretary believes it unnecessary to amend the regulation in this regard, because almost identical language in the Department's regulations implementing title VI and title IX of the Education Amendments of 1972 has consistently been interpreted so as not to render such schools recipients. These schools, however, are indirectly subject to the substantive requirements of this regulation through the application of 104.4(b)(iv), which prohibits recipients from assisting agencies that discriminate on the basis of handicap in providing services to beneficiaries of the recipients' programs.

2. "Federal financial assistance"

In 104.3(h), defining federal financial assistance, a clarifying change has been made: procurement contracts are specifically excluded. They are covered, however, by the Department of Labor's regulation under Sec. 503. The Department has never considered such contracts to be contracts of assistance; the explicit exemption has been added only to avoid possible confusion.

The proposed regulation's exemption of contracts of insurance or guaranty has been retained. A number of comments argued for its deletion on the ground that Sec. 504, unlike title VI and title IX, contains no statutory exemption for such contracts. There is no indication, however, in the legislative history of the Rehabilitation Act of 1973 or of the amendments to that Act in 1974, that Congress intended Sec. 504 to have a broader application, in terms of federal financial assistance, than other civil rights statutes. Indeed, Congress directed that Sec. 504 be implemented in the same manner as titles VI and IX. In view of the long established exemption of contracts of insurance or guaranty under title VI, we think it unlikely that Congress intended Sec. 504 to apply to such contracts.

3. "Handicapped person"

Sec. 104.3(j), which defines the class of persons protected under the regulation, has not been substantially changed. The definition of handicapped person in paragraph (j)(1) conforms to the statutory definition of handicapped person that is applicable to Sec. 504, as set forth in Sec. 111(a) of the Rehabilitation Act Amendments of 1974, Pub. L. 93-516.

The first of the three parts of the statutory and regulatory definition includes any person who has a physical or mental impairment that substantially limits one or more major life activities. Paragraph (j)(2)(i) further defines physical or mental impairments. The definition does not set forth a list of specific diseases and conditions that constitute physical or mental impairments because of the difficulty of ensuring the comprehensiveness of any such list. The term includes, however, such diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, and, as discussed below, drug addiction and alcoholism.

It should be emphasized that a physical or mental impairment does not constitute a handicap for purposes of Sec. 504 unless its severity is such that it results in a substantial limitation of one or more major life activities. Several comments observed the lack of any definition in the

proposed regulation of the phrase "substantially limits." The Department does not believe that a definition of this term is possible at this time.

A related issue raised by several comments is whether the definition of handicapped person is unreasonably broad. Comments suggested narrowing the definition in various ways. The most common recommendation was that only "traditional" handicaps be covered. The Department continues to believe, however, that it has no flexibility within the statutory definition to limit the term to persons who have those severe, permanent, or progressive conditions that are most commonly regarded as handicaps. The Department intends, however, to give particular attention in its enforcement of Sec. 504 to eliminating discrimination against persons with the severe handicaps that were the focus of concern in the Rehabilitation Act of 1973.

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

In paragraph (j)(2)(i), physical or mental impairment is defined to include, among other impairments, specific learning disabilities. The Department will interpret the term as it is used in Sec. 602 of the Education of the Handicapped Act, as amended. Paragraph (15) of Sec. 602 uses the term "specific learning disabilities" to describe such conditions as perceptual handicaps, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia.

Paragraph (j)(2)(i) has been shortened, but not substantively changed, by the deletion of clause (C), which made explicit the inclusion of any condition which is mental or physical but whose precise nature is not at present known. Clauses (A) and (B) clearly comprehend such conditions.

The second part of the statutory and regulatory definition of handicapped person includes any person who has a record of a physical or mental impairment that substantially limits a major life activity. Under the definition of "record" in paragraph (j)(2)(iii), persons who have a history of a handicapping condition but no longer have the condition, as well as persons who have been incorrectly classified as having such a condition, are protected from discrimination under Sec. 504. Frequently occurring examples of the first group are persons with histories of mental or emotional illness, heart disease, or cancer; of the second group, persons who have been misclassified as mentally retarded.

The third part of the statutory and regulatory definition of handicapped person includes any person who is regarded as having a physical or mental impairment that substantially limits one or more major life activities. It includes many persons who are ordinarily considered to be handicapped but who do not technically fall within the first two parts of the statutory definition, such as persons with a limp. This part of the definition also includes some persons who might not ordinarily be considered handicapped, such as persons with disfiguring scars, as well as persons who have no physical or mental impairment but are treated by a recipient as if they were handicapped.

4. Drug addicts and alcoholics

As was the case during the first comment period, the issue of whether to include drug addicts and alcoholics within the definition of handicapped person was of major concern to many commenters. The arguments presented on each side of the issue were similar during the two comment periods, as was the preference of commenters for exclusion of this group of persons. While some comments reflected misconceptions about the implications of including alcoholics and drug addicts within the scope of the regulation, the Secretary understands the concerns that underlie the comments on this question and recognizes that application of Sec. 504 to active alcoholics and drug addicts presents sensitive and difficult questions that must be taken into account in interpretation and enforcement.

The Secretary has carefully examined the issue 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 Sec. 7(6) of the Rehabilitation Act of 1973, as amended, and that drug addicts and alcoholics are therefore handicapped for purposes of Sec. 504 if their impairment substantially limits one of their major life activities. The Secretary therefore believes that he is without authority to exclude these conditions from the definition. There is a medical and legal consensus that alcoholism and drug addiction are diseases, although there is disagreement as to whether they are primarily mental or physical. In addition, while Congress did not focus specifically on the problems of drug addiction and alcoholism in enacting Sec. 504, the committees that considered the Rehabilitation Act of 1973 were made aware of the Department's long-standing practice of treating addicts and alcoholics as handicapped individuals eligible for rehabilitation services under the Vocational Rehabilitation Act.

The Secretary wishes to reassure recipients that inclusion of addicts and alcoholics within the scope of the regulation will not lead to the consequences feared by many commenters. It cannot be emphasized too strongly that the statute and the regulation apply only to discrimination against qualified handicapped persons solely by reason of their handicap. The fact that drug addiction and alcoholism may be handicaps does not mean that these conditions must be ignored in determining whether an individual is qualified for services or employment opportunities. On the contrary, a recipient may hold a drug addict or alcoholic to the same standard of performance and behavior to which it holds others, even if any unsatisfactory performance or behavior is related to the person's drug addiction or alcoholism. In other words, while an alcoholic or drug addict may not be denied services or disqualified from employment solely because of his or her condition, the behavioral manifestations of the condition may be taken into account in determining whether he or she is qualified.

With respect to the employment of a drug addict or alcoholic, if it can be shown that the addiction or alcoholism prevents successful performance of the job, the person need not be provided the employment opportunity in question. For example, in making employment decisions, a recipient may judge addicts and alcoholics on the same basis it judges all other applicants and employees. Thus, a recipient may consider for all applicants including drug addicts and alcoholics past personnel records, absenteeism, disruptive, abusive, or dangerous behavior, violations of rules and unsatisfactory work performance. Moreover, employers may enforce rules prohibiting the possession or use of alcohol or drugs in the work-place, provided that such rules are enforced against all employees.

With respect to other services, the implications of coverage, of alcoholics and drug addicts are two-fold: first, no person may be excluded from services solely by reason of the presence or history of these conditions; second, to the extent that the manifestations of the condition prevent the person from meeting the basic eligibility requirements of the program or cause substantial interference with the operation of the program, the condition may be taken into consideration. Thus, a college may not exclude an addict or alcoholic as a student, on the basis of addiction or alcoholism, if the person can successfully participate in the education program and complies with the rules of the college and if his or her behavior does not impede the performance of other students.

Of great concern to many commenters was the question of what effect the inclusion of drug addicts and alcoholics as handicapped persons would have on school disciplinary rules prohibiting the use or possession of drugs or alcohol by students. Neither such rules nor their application to drug addicts or alcoholics is prohibited by this regulation, provided that the rules are enforced evenly with respect to all students.

5. "Qualified handicapped person"

Paragraph (k) of 104.3 defines the term "qualified handicapped person." Throughout the regulation, this term is used instead of the statutory term "otherwise qualified handicapped person."

The Department believes that the omission of the word "otherwise" is necessary in order to comport with the intent of the statute because, read literally, "otherwise" qualified handicapped persons include persons who are qualified except for their handicap, rather than in spite of their handicap. Under such a literal reading, a blind person possessing all the qualifications for driving a bus except sight could be said to be "otherwise qualified" for the job of driving. Clearly, such a result was not intended by Congress. In all other respects, the terms "qualified" and "otherwise qualified" are intended to be interchangeable.

Sec. 104.3(k)(1) defines a qualified handicapped person with respect to employment as a handicapped person who can, with reasonable accommodation, perform the essential functions of the job in question. The term "essential functions" does not appear in the corresponding provision of the Department of Labor's Sec. 503 regulation, and a few commenters objected to its inclusion on the ground that a handicapped person should be able to perform all job tasks. However, the Department believes that inclusion of the phrase is useful in emphasizing that handicapped persons should not be disqualified simply because they may have difficulty in performing tasks that bear only a marginal relationship to a particular job. Further, we are convinced that inclusion of the phrase is not inconsistent with the Department of Labor's application of its definition.

Certain commenters urged that the definition of qualified handicapped person be amended so as explicitly to place upon the employer the burden of showing that a particular mental or physical characteristic is essential. Because the same result is achieved by the requirement contained in paragraph (a) of 104.13, which requires an employer to establish that any selection criterion that tends to screen out handicapped persons is job-related, that recommendation has not been followed.

Sec. 104.3(k)(2) defines qualified handicapped person, with respect to preschool, elementary, and secondary programs, in terms of age. Several commenters recommended that eligibility for the services be based upon the standard of substantial benefit, rather than age, because of the need of many handicapped children for early or extended services if they are to have an equal opportunity to benefit from education programs. No change has been made in this provision, again because of the extreme difficulties in administration that would result from the choice of the former standard. Under the remedial action provisions of 104.6(a)(3), however, persons beyond the age limits prescribed in 104.3(k)(2) may in appropriate cases be required to be provided services that they were formerly denied because of a recipient's violation of Sec. 504.

Sec. 104.3(k)(2) states that a handicapped person is qualified for preschool, elementary, or secondary services if the person is of an age at which nonhandicapped persons are eligible for such services or at which State law mandates the provision of educational services to handicapped persons. In addition, the extended age ranges for which recipients must provide full educational opportunity to all handicapped persons in order to be eligible for assistance under the Education of the Handicapped Act generally, 3-18 as of September 1978, and 3-21 as of September 1980 are incorporated by reference in this paragraph.

Sec. 104.3(k)(3) defines qualified handicapped person with respect to postsecondary educational programs. As revised, the paragraph means that both academic and technical standards must be met by applicants to these programs. The term "technical standards" refers to all nonacademic admissions criteria that are essential to participation in the program in question.

6. General prohibitions against discrimination

Sec. 104.4 contains general prohibitions against discrimination applicable to all recipients of assistance from this Department.

Paragraph (b)(1)(i) prohibits the exclusion of qualified handicapped persons from aids, benefits, or services, and paragraph (ii) requires that equal opportunity to participate or benefit be provided. Paragraph (iii) requires that services provided to handicapped persons be as effective as those provided to the nonhandicapped. In paragraph (iv), different or separate services are prohibited except when necessary to provide equally effective benefits.

In this context, the term "equally effective," defined in paragraph (b)(2), is intended to encompass the concept of equivalent, as opposed to identical, services and to acknowledge the fact that in order to meet the individual needs of handicapped persons to the same extent that the corresponding needs of nonhandicapped persons are met, adjustments to regular programs or the provision of different programs may sometimes be necessary. This standard parallels the one established under title VI of Civil Rights Act of 1964 with respect to the provision of educational services to students whose primary language is not English. See *Lau v. Nichols*, 414 U.S. 563 (1974). To be equally effective, however, an aid, benefit, or service need not produce equal results; it merely must afford an equal opportunity to achieve equal results.

It must be emphasized that, although separate services must be required in some instances, the provision of unnecessarily separate or different services is discriminatory. The addition to paragraph (b)(2) of the phrase "in the most integrated setting appropriated to the person's needs" is intended to reinforce this general concept. A new paragraph (b)(3) has also been added to 104.4, requiring recipients to give qualified handicapped persons the option of participating in regular programs despite the existence of permissibly separate or different programs. The requirement has been reiterated in 104.38 and 104.47 in connection with physical education and athletics programs.

Sec. 104.4(b)(1)(v) prohibits a recipient from supporting another entity or person that subjects participants or employees in the recipient's program to discrimination on the basis of handicap. This section would, for example, prohibit financial support by a recipient to a community recreational group or to a professional or social organization that discriminates against handicapped persons. Among the criteria to be considered in each case are the substantiality of the relationship between the recipient and the other entity, including financial support by the recipient, and whether the other entity's activities relate so closely to the recipient's program or activity that they fairly should be considered activities of the recipient itself. Paragraph (b)(1)(vi) was added in response to comment in order to make explicit the prohibition against denying qualified handicapped persons the opportunity to serve on planning and advisory boards responsible for guiding federally assisted programs or activities.

Several comments appeared to interpret 104.4(b)(5), which proscribes discriminatory site selection, to prohibit a recipient that is located on hilly terrain from erecting any new buildings at its present site. That, of course, is not the case. This paragraph is not intended to apply to construction of additional buildings at an existing site. Of course, any such facilities must be made accessible in accordance with the requirements of 104.23.

7. Assurances of compliance

Sec. 104.5(a) requires a recipient to submit to the Assistant Secretary an assurance that each of its programs and activities receiving or benefiting from Federal financial assistance from this Department will be conducted in compliance with this regulation. Many commenters also sought relief from the paperwork requirements imposed by the Department's enforcement of its various civil rights responsibilities by requesting the Department to issue one form incorporating title VI, title IX, and Sec. 504 assurances. The Secretary is sympathetic to this request. While it is not feasible to adopt a single civil rights assurance form at this time, the Office for Civil Rights will work toward that goal.

8. Private rights of action

Several comments urged that the regulation incorporate provision granting beneficiaries a private right of action against recipients under Sec. 504. To confer such a right is beyond the authority of the executive branch of Government. There is, however, case law holding that such a right exists. *Lloyd v. Regional Transportation Authority*, 548 F. 2d 1277 (7th Cir. 1977); see *Hairston v. Drosick*, Civil No. 75-0691 (S.D. W. Va., Jan. 14, 1976); *Gurmanin v. Castanzo*, 411 F. Supp. 982 (E.D. Pa. 1976); cf. *Lau v. Nichols*, supra.

9. Remedial action

Where there has been a finding of discrimination, 104.6 requires a recipient to take remedial action to overcome the effects of the discrimination. Actions that might be required under paragraph (a)(1) include provision of services to persons previously discriminated against, reinstatement of employees and development of a remedial action plan. Should a recipient fail to take required remedial action, the ultimate sanctions of court action or termination of Federal financial assistance may be imposed.

Paragraph (a)(2) extends the responsibility for taking remedial action to a recipient that exercises control over a noncomplying recipient. Paragraph (a)(3) also makes clear that handicapped persons who are not in the program at the time that remedial action is required to be taken may also be the subject of such remedial action. This paragraph has been revised in response to comments in order to include persons who would have been in the program if discriminatory practices had not existed. Paragraphs (a) (1), (2), and (3) have also been amended in response to comments to make plain that, in appropriate cases, remedial action might be required to redress clear violations of the statute itself that occurred before the effective date of this regulation.

10. Voluntary action

In 104.6(b), the term "voluntary action" has been substituted for the term "affirmative action" because the use of the latter term led to some confusion. We believe the term "voluntary action" more accurately reflects the purpose of the paragraph. This provision allows action, beyond that required by the regulation, to overcome conditions that led to limited participation by handicapped persons, whether or not the limited participation was caused by any discriminatory actions on the part of the recipient. Several commenters urged that paragraphs (a) and (b) be revised to require remedial action to overcome effects of prior discriminatory practices regardless of whether there has been an express finding of discrimination. The self-evaluation requirement in paragraph (c) accomplishes much the same purpose.

11. Self-evaluation

Paragraph (c) requires recipients to conduct a self-evaluation in order to determine whether their policies or practices may discriminate against handicapped persons and to take steps to modify any discriminatory policies and practices and their effects. The Department received many comments approving of the addition to paragraph (c) of a requirement that recipients seek the assistance of handicapped persons in the self-evaluation process. This paragraph has been further amended to require consultation with handicapped persons or organizations representing them before recipients undertake the policy modifications and remedial steps prescribed in paragraphs (c) (ii) and (iii).

Paragraph (c)(2), which sets forth the recordkeeping requirements concerning self-evaluation, now applies only to recipients with fifteen or more employees. This change was made as part of an effort to reduce unnecessary or counterproductive administrative obligations on small recipients. For those recipients required to keep records, the requirements have been made more specific; records must include a list of persons consulted and a description of areas examined, problems identified, and corrective steps taken. Moreover, the records must be made available for public inspection.

12. Grievance procedure

Sec. 104.7 requires recipients with fifteen or more employees to designate an individual responsible for coordinating its compliance efforts and to adopt a grievance procedure. Two changes were made in the section in response to comment. A general requirement that appropriate due process procedures be followed has been added. It was decided that the details of such procedures could not at this time be specified because of the varied nature of the persons and entities who must establish the procedures and of the programs to which they apply. A sentence was also added to make clear that grievance procedures are not required to be made

available to unsuccessful applicants for employment or to applicants for admission to colleges and universities.

The regulation does not require that grievance procedures be exhausted before recourse is sought from the Department. However, the Secretary believes that it is desirable and efficient in many cases for complainants to seek resolution of their complaints and disputes at the local level and therefore encourages them to use available grievance procedures.

A number of comments asked whether compliance with this section or the notice requirements of 104.8 could be coordinated with comparable action required by the title IX regulation. The Department encourages such efforts.

13. Notice

Sec. 104.8 (formerly 84.9) sets forth requirements for dissemination of statements of nondiscrimination policy by recipients.

It is important that both handicapped persons and the public at large be aware of the obligations of recipients under Sec. 504. Both the Department and recipients have responsibilities in this regard. Indeed the Department intends to undertake a major public information effort to inform persons of their rights under Sec. 504 and this regulation. In 104.8 the Department has sought to impose a clear obligation on major recipients to notify beneficiaries and employees of the requirements of Sec. 504, without dictating the precise way in which this notice must be given. At the same time, we have avoided imposing requirements on small recipients (those with fewer than fifteen employees) that would create unnecessary and counterproductive paper work burdens on them and unduly stretch the enforcement resources of the Department.

Sec. 104.8(a), as simplified, requires recipients with fifteen or more employees to take appropriate steps to notify beneficiaries and employees of the recipient's obligations under Sec. 504. The last sentence of 104.8(a) has been revised to list possible, rather than required, means of notification. Sec. 104.8(b) requires recipients to include a notification of their policy of nondiscrimination in recruitment and other general information materials.

In response to a number of comments, 104.8 has been revised to delete the requirements of publication in local newspapers, which has proved to be both troublesome and ineffective. Several commenters suggested that notification on separate forms be allowed until present stocks of publications and forms are depleted. The final regulation explicitly allows this method of compliance. The separate form should, however, be included with each significant publication or form that is distributed.

Sec. 104 which prohibited the use of materials that might give the impression that a recipient excludes qualified handicapped persons from its program, has been deleted. The Department is convinced by the comments that this provision is unnecessary and difficult to apply. The Department encourages recipients, however, to include in their recruitment and other general information materials photographs of handicapped persons and ramps and other features of accessible buildings.

Under new 104.9 the Assistant Secretary may, under certain circumstances, require recipients with fewer than fifteen employees to comply with one or more of these requirements. Thus, if experience shows a need for imposing notice or other requirements on particular recipients or classes of small recipients, the Department is prepared to expand the coverage of these sections.

14. Inconsistent State laws

Sec. 104.10(a) states that compliance with the regulation is not excused by State or local laws limiting the eligibility of qualified handicapped persons to receive services or to practice an occupation. The provision thus applies only with respect to state or local laws that unjustifiably differentiate on the basis of handicap.

Paragraph (b) further points out that the presence of limited employment opportunities in a particular profession, does not excuse a recipient from complying with the regulation. Thus, a law

school could not deny admission to a blind applicant because blind lawyers may find it more difficult to find jobs than do nonhandicapped lawyers.

Subpart D Preschool, Elementary, and Secondary Education

Subpart D sets forth requirements for nondiscrimination in preschool, elementary, secondary, and adult education programs and activities, including secondary vocational education programs. In this context, the term "adult education" refers only to those educational programs and activities for adults that are operated by elementary and secondary schools.

The provisions of Subpart D apply to state and local educational agencies. Although the subpart applies, in general, to both public and private education programs and activities that are federally assisted, 104.32 and 104.33 apply only to public programs and 104.39 applies only to private programs; 104.35 and 104.36 apply both to public programs and to those private programs that include special services for handicapped students.

Subpart B generally conforms to the standards established for the education of handicapped persons in *Mills v. Board of Education of the District of Columbia*, 348 F. Supp. 866 (D.D.C. 1972), *Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania*, 344 F. Supp. 1257 (E.D. 1971), 343 F. Supp. 279 (E.D. Pa. 1972), and *Lebanks v. Spears*, 60, F.R.D. 135 (E.D. La. 1973), as well as in the Education of the Handicapped Act, as amended by Pub. L. 94-142 (the EHA).

The basic requirements common to those cases, to the EHA, and to this regulation are (1) that handicapped persons, regardless of the nature or severity of their handicap, be provided a free appropriate public education, (2) that handicapped students be educated with nonhandicapped students to the maximum extent appropriate to their needs, (3) that educational agencies undertake to identify and locate all unserved handicapped children, (4) that evaluation procedures be improved in order to avoid the inappropriate education that results from the misclassification of students, and (5) that procedural safeguard be established to enable parents and guardians to influence decisions regarding the evaluation and placement of their children. These requirements are designed to ensure that no handicapped child is excluded from school on the basis of handicap and, if a recipient demonstrates that placement in a regular educational setting cannot be achieved satisfactorily, that the student is provided with adequate alternative services suited to the student's needs without additional cost to the student's parents or guardian. Thus, a recipient that operates a public school system must either educate handicapped children in its regular program or provide such children with an appropriate alternative education at public expense.

It is not the intention of the Department, except in extraordinary circumstances, to review the result of individual placement and other educational decisions, so long as the school district complies with the "process" requirements of this subpart (concerning identification and location, evaluation, and due process procedures). However, the Department will place a high priority on investigating cases which may involve exclusion of a child from the education system or a pattern or practice of discriminatory placements or education.

22. Location and notification

Sec. 104.32 requires public schools to take steps annually to identify and locate handicapped children who are not receiving an education and to publicize to handicapped children and their parents the rights and duties established by Sec. 504 and this regulation. This section has been shortened without substantive change.

23. Free appropriate public education

Under 104.33(a), a recipient is responsible for providing a free appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction. The word "in"

encompasses the concepts of both domicile and actual residence. If a recipient places a child in a program other than its own, it remains financially responsible for the child, whether or not the other program is operated by another recipient or educational agency. Moreover, a recipient may not place a child in a program that is inappropriate or that otherwise violates the requirements of Subpart D. And in no case may a recipient refuse to provide services to a handicapped child in its jurisdiction because of another person's or entity's failure to assume financial responsibility.

Sec. 104.33(b) concerns the provision of appropriate educational services to handicapped children. To be appropriate, such services must be designed to meet handicapped children's individual educational needs to the same extent that those of nonhandicapped children are met. An appropriate education could consist of education in regular classes, education in regular classes with the use of supplementary services, or special education and related services. Special education may include specially designed instruction in classrooms, at home, or in private or public institutions and may be accompanied by such related services as developmental, corrective, and other supportive services (including psychological, counseling, and medical diagnostic services). The placement of the child must however, be consistent with the requirements of 104.34 and be suited to his or her educational needs.

The quality of the educational services provided to handicapped students must equal that of the services provided to nonhandicapped students; thus, handicapped student's teachers must be trained in the instruction of persons with the handicap in question and appropriate materials and equipment must be available. The Department is aware that the supply of adequately trained teachers may, at least at the outset of the imposition of this requirement, be insufficient to meet the demand of all recipients. This factor will be considered in determining the appropriateness of the remedy for noncompliance with this section. A new 104.33(b)(2) has been added, which allows this requirement to be met through the full implementation of an individualized education program developed in accordance with the standards of the EHA.

Paragraph (c) of 104.33 sets forth the specific financial obligations of a recipient. If a recipient does not itself provide handicapped persons with the requisite services, it must assume the cost of any alternate placement. If, however, a recipient offers adequate services and if alternate placement is chosen by a student's parent or guardian, the recipient need not assume the cost of the outside services. (If the parent or guardian believes that his or her child cannot be suitably educated in the recipient's program, he or she may make use of the procedures established in 104.36.) Under this paragraph, a recipient's obligation extends beyond the provision of tuition payments in the case of placement outside the regular program. Adequate transportation must also be provided. Recipients must also pay for psychological services and those medical services necessary for diagnostic and evaluative purposes.

If the recipient places a student, because of his or her handicap, in a program that necessitates his or her being away from home, the payments must also cover room and board and nonmedical care (including custodial and supervisory care). When residential care is necessitated not by the student's handicap but by factors such as the student's home conditions, the recipient is not required to pay the cost of room and board.

Two new sentences have been added to paragraph (c)(1) to make clear that a recipient's financial obligations need not be met solely through its own funds. Recipients may rely on funds from any public or private source including insurers and similar third parties.

The EHA requires a free appropriate education to be provided to handicapped children "no later than September 1, 1978," but Sec. 504 contains no authority for delaying enforcement. To resolve this problem, a new paragraph (d) has been added to 104.33. Sec. 104.33(d) requires recipients to achieve full compliance with the free appropriate public education requirements of 104.33 as expeditiously as possible, but in no event later than September 1, 1978. The provision also makes clear that, as of the effective date of this regulation, no recipient may exclude a qualified handicapped child from its educational program. This provision against exclusion is

consistent with the order of providing services set forth in Sec. 612(3) of the EHA, which places the highest priority on providing services to handicapped children who are not receiving an education.

24. Educational setting

Sec. 104.34 prescribes standards for educating handicapped persons with nonhandicapped persons to the maximum extent appropriate to the needs of the handicapped person in question. A handicapped student may be removed from the regular educational setting only where the recipient can show that the needs of the student would, on balance, be served by placement in another setting.

Although under 104.34, the needs of the handicapped person are determinative as to proper placement, it should be stressed that, where a handicapped student is so disruptive in a regular classroom that the education of other students is significantly impaired, the needs of the handicapped child cannot be met in that environment. Therefore, regular placement would not be appropriate to his or her needs and would not be required by 104.34.

Among the factors to be considered in placing a child is the need to place the child as close to home as possible. A new sentence has been added to paragraph (a) requiring recipients to take this factor into account. As pointed out in several comments, the parents' right under 104.36 to challenge the placement of their child extends not only to placement in special classes or separate schools but also to placement in a distant school and, in particular, to residential placement. An equally appropriate educational program may exist closer to home; this issue may be raised by the parent or guardian under 104.34 and 104.36.

New paragraph (b) specified that handicapped children must also be provided nonacademic services in as integrated a setting as possible. This requirement is especially important for children whose educational needs necessitate their being solely with other handicapped children during most of each day. To the maximum extent appropriate, children in residential settings are also to be provided opportunities for participation with other children.

Sec. 104.34(c) requires that any facilities that are identifiable as being for handicapped students be comparable in quality to other facilities of the recipient. A number of comments objected to this section on the basis that it encourages the creation and maintenance of such facilities. This is not the intent of the provision. A separate facility violates Sec. 504 unless it is indeed necessary to the provision of an appropriate education to certain handicapped students. In those instances in which such facilities are necessary (as might be the case, for example, for severely retarded persons), this provision requires that the educational services provided be comparable to those provided in the facilities of the recipient that are not identifiable as being for handicapped persons.

25. Evaluation and placement

Because the failure to provide handicapped persons with an appropriate education is so frequently the result of misclassification or misplacement, 104.33(b)(1) makes compliance with its provisions contingent upon adherence to certain procedures designed to ensure appropriate classification and placement. These procedures, delineated in 104.35 and 104.36, are concerned with testing and other evaluation methods and with procedural due process rights.

Sec. 104.35(a) requires that an individual evaluation be conducted before any action is taken with respect either to the initial placement of a handicapped child in a regular or special education program or to any subsequent significant change in that placement. Thus, a full reevaluation is not required every time an adjustment in placement is made. "Any action" includes denials of placement.

Paragraphs (b) and (c) of 104.35 establishes procedures designed to ensure that children are not misclassified, unnecessarily labeled as being handicapped, or incorrectly placed because of inappropriate selection, administration, or interpretation of evaluation materials. This problem has been extensively documented in "Issues in the Classification of Children," a report by the Project on Classification of Exceptional Children, in which the HEW Interagency Task Force

participated. The provisions of these paragraphs are aimed primarily at abuses in the placement process that result from misuse of, or undue or misplaced reliance on, standardized scholastic aptitude tests.

Paragraph (b) has been shortened but not substantively changed. The requirement in former subparagraph (1) that recipients provide and administer evaluation materials in the native language of the student has been deleted as unnecessary, since the same requirement already exists under title VI and is more appropriately covered under that statute. Paragraphs (1) and (2) are, in general, intended to prevent misinterpretation and similar misuse of test scores and, in particular, to avoid undue reliance on general intelligence tests. Subparagraph (3) requires a recipient to administer tests to a student with impaired sensory, manual, or speaking skills in whatever manner is necessary to avoid distortion of the test results by the impairment. Former subparagraph (4) has been deleted as unnecessarily repetitive of the other provisions of this paragraph.

Paragraph (c) requires a recipient to draw upon a variety of sources in the evaluation process so that the possibility of error in classification is minimized. In particular, it requires that all significant factors relating to the learning process, including adaptive behavior, be considered. (Adaptive behavior is the effectiveness with which the individual meets the standards of personal independence and social responsibility expected of his or her age and cultural group.) Information from all sources must be documented and considered by a group of persons, and the procedure must ensure that the child is placed in the most integrated setting appropriate.

The proposed regulation would have required a complete individual reevaluation of the student each year. The Department has concluded that it is inappropriate in the Sec. 504 regulation to require full reevaluations on such a rigid schedule. Accordingly, 104.35(c) requires periodic reevaluations and specifies that reevaluations in accordance with the EHA will constitute compliance. The proposed regulation implementing the EHA allows reevaluation at three-year intervals except under certain specified circumstances.

Under 104.36, a recipient must establish a system of due process procedures to be afforded to parents or guardians before the recipient takes any action regarding the identification, evaluation, or educational placement of a person who, because of handicap, needs or is believed to need special education or related services. This section has been revised. Because the due process procedures of the EHA, incorporated by reference in the proposed Sec. 504 regulation, are inappropriate for some recipients not subject to that Act, the section now specifies minimum necessary procedures: notice, a right to inspect records, an impartial hearing with a right to representation by counsel, and a review procedure. The EHA procedures remain one means of meeting the regulation's due process requirements, however, and are recommended to recipients as a model.

26. Nonacademic services

Sec. 104.37 requires a recipient to provide nonacademic and extracurricular services and activities in such manner as is necessary to afford handicapped students an equal opportunity for participation. Because these services and activities are part of a recipient's education program, they must, in accordance with the provisions of 104.34, be provided in the most integrated setting appropriate.

Revised paragraph (c)(2) does permit separation or differentiation with respect to the provision of physical education and athletics activities, but only if qualified handicapped students are also allowed the opportunity to compete for regular teams or participate in regular activities. Most handicapped students are able to participate in one or more regular physical education and athletics activities. For example, a student in a wheelchair can participate in regular archery course, as can a deaf student in a wrestling course.

Finally, the one-year transition period provided in a proposed section was deleted in response to the almost unanimous objection of commenters to that provision.

27. Preschool and adult education

Sec. 104.38 prohibits discrimination on the basis of handicap in preschool and adult education programs. Former paragraph (b), which emphasized that compensatory programs for disadvantaged children are subject to Sec. 504, has been deleted as unnecessary, since it is comprehended by paragraph (a).

28. Private education

Sec. 104.39 sets forth the requirements applicable to recipients that operate private education programs and activities. The obligations of these recipients have been changed in two significant respects: first, private schools are subject to the evaluation and due process provisions of the subpart only if they operate special education programs; second, under 104.39(b), they may charge more for providing services to handicapped students than to nonhandicapped students to the extent that additional charges can be justified by increased costs.

Paragraph (a) of 104.39 is intended to make clear that recipients that operate private education programs and activities are not required to provide an appropriate education to handicapped students with special educational needs if the recipient does not offer programs designed to meet those needs. Thus, a private school that has no program for mentally retarded persons is neither required to admit such a person into its program nor to arrange or pay for the provision of the person's education in another program. A private recipient without a special program for blind students, however, would not be permitted to exclude, on the basis of blindness, a blind applicant who is able to participate in the regular program with minor adjustments in the manner in which the program is normally offered.

APPENDIX E

SUMMARY OF CASE LAW RELEVANT TO SECTION 504

Brennan v Stewart, 834 F. 2nd 1248 (1988)

~Otherwise qualified a question of fact since reasonable accommodations are decided as an assurance of fact

Brookhart v Illinois State Board of Education, 697 F.2nd 179 (1993)

~Section 504 does not require tests be altered

Darlene L. v Illinois State Board of Education, 568 F. Supp 1340 (1983)

~Section 504 a greater duty (than IDEA) to the state to provide educational services for the handicapped

Franklin v Gwinnett County Public School, 112 S.Ct 1028

~Award appropriate relief for damages under Title IX

Goss v Lopez, 95 S.Ct. 729 (1975)

~Student has an opportunity to be heard before being punished

Lyons v Smith, 829 F.Supp 414

~Attention Deficit Hyperactive Disorder child that does not qualify for special education under IDEA can qualify under 504

Manecke v School Board of Pinellas County, 553 F.Supp. 787 (1982)

~Section 504 does not require developing a "new" program

Nassau County School Board v Arline, 107 S. Ct 1123 (1987)

~Reasonable accommodations under section 504 is "fact specific"

Patsel V District of Columbia Board of Education 530 F. Supp. 660 (1982)

~ Court rule all review procedures for placement should include mechanism for hearing

Southeastern Community College v Davis, 99 S.Ct. 2361 (1979)

~Section 504 does not require fundamental alteration

Turillo v Tyson, 535 F Supp 577 (1982)

~504 not affirmative action

United States v Cabrini Medical Center, 639 F. 2d 908 (2d Cir 1981)

~ The District Court concluded it was not (limited language of Title VI), basing its decision on congressional intent to provide broad protection for the disabled

Urban v Jefferson County School District, 21 IDELR 985 (D.Colo. 1994)

~504 does not require placement in neighborhood school

APPENDIX F

SUMMARIES OF OCR FINDINGS AND MEMORANDUMS

Beecher City (IL) Community School District (1984)

~When the district has sufficient information for an interim placement, it must do so and not use the testing and placement process as a delay.

Brittan (CA) Elementary School District (1990)

~Failure to evaluate a student with ADHD for possible eligibility violates 504

Calcasieu Parish (LA) Public School District (1993)

~District may not delay evaluation for ADHD because the personnel lacked sufficient training

Cocke County School District (TN), (1988)

~Failure to evaluate ADHD student violates 504

Davenport (IA) Community School District

~Failed to evaluate in a timely manner

~Notice to parents over telephone acceptable means of notification

Fairfield-Suisan Unified School District, (OCR 1989)

~Child with ADHD considered a qualified handicapped person under section 504

Farmington (MI) Public School District (1991)

~Failure to evaluate a student with ADHD for possible eligibility violates 504

Garden City (NY) Union Free School District (1989)

~District must conduct evaluations in a timely manner and must periodically reevaluate all students with disabilities

Gaston County School District (NC) (1990)

~A student with learning deficit which does not constitute a specific learning disability may be protected under section 504

~Failed to identify, evaluate and provide FAPE for a child with ADD

Grosse Isle (MI) Township Schools (1991)

~Failure to evaluate a student with ADHD for possible eligibility violates 504

Kensal (ND) Public Schools (1991)

~Assessing the effect of ADHD on learning may be restricted to standardized test

Lake Washington (WA) School District (1993)

~District had no obligation to evaluate a student who was making satisfactory progress (Bs, Cs, D, & F) even though he was diagnosed with ADHD

Lemon Grove (CA) Unified School District (1993)

~OCR does not make curricular judgements

Letter to Zirkel (1994)

~Fair due process would constitute waiting for a decision before making the change in placement

Letter to Canner (1995)

~Placement and evaluation decision made by group of individuals

Livingston Parish (LA) School Board (1993)

~Failed to evaluate ADHD child in a timely manner

Lunenburg School District

~3 months to long to wait for an evaluation

Nash County (NC) School District (1985)

~ Failure to draw upon or consider a variety of sources or ensure that the placement decision was made by persons knowledgeable about child in determining appropriate educational placement violates 504

Newport News (VA) Public Schools (1991)

~ADHD is covered under 504 if that disorder substantially limits learning

OCR Senior Staff Memorandum (1992)

~The "record of" and "regarded as" prongs rarely apply to elementary and secondary student cases, and they cannot serve as the basis of FAPE under 504

OCR Memorandum (1993)

~District may but is not required to have different evaluation process for 504 than for IDEA

OCR Memorandum (1992)

~Receive FAPE if you currently have a disabling condition, not a record of having a disability

OCR Senior Staff Memorandum (1988)

~504 coverage applies to all qualified handicapped persons while EHA limited to those who need special education and related services

OCR Staff Memorandum (1992)

~Record of an impairment, unless the individual presently has the impairment does not require accommodations

Paradise Valley (AZ) Unified School District (1991)

~Failure to evaluate a student with ADHD for possible eligibility violates 504

Pembina (ND) Public School District (1991)

~ADHD is covered under 504 if that disorder substantially limits learning

Peoria (AZ) Unified School District (1993)

~Previously eligible under IDEA no longer eligible under 504

Philadelphia (PA) School District (1992)

~Delays from 61 to 185 days in completing student evaluations violates 504

Portland (ME) Public Schools (1993)

~School district not required to convene its pupil evaluation solely on parents request

Response to Veir (1993)

~Student found ineligible under IDEA is not necessarily eligible under 504

Response to Randall (1994)

~ADA incorporates due process rights of 504

Response to Zirkel (1993)

~FAPE under 504 is not bound by a cost-sensitive standard such as reasonable accommodations

Rochester School District (VT) School District (1991)

~Failure to further evaluate a special education student for ADHD violated 504

Sachem (NY) Central School District (1987)

~District must conduct timely evaluations

San Diego (CA) School District (1989)

~Prescreening procedures used to identify possible disabled students must comply with 504 procedural safeguards

School District of River Falls (WI) (1993)

~Student whose allergies affect only behavior not health is not protected by 504

School Administrative Unit (NH) (1990)

~ADHD is covered under 504 if that disorder substantially limits learning

South Harrison (IN) Community Schools Cooperation (1993)

~Mere receipt of a medication prescription specifying a child has ADHD, without request for evaluation does not trigger 504 obligation.

Ventura (CA) Unified School District (1991)

~ADHD is covered under 504 if that disorder substantially limits learning

Winston County (AL) School District (1985)

~ District violated 504 by failing to ensure

1. Test and evaluation materials were valid for purpose used
2. Tests were correctly administered
3. Students were provided individual evaluations tailored to meet their needs
4. Information from a variety of sources was considered and documented prior to placement
5. Placement decisions were made by a group of persons knowledgeable about student and meaning of evaluation data and placement options

APPENDIX G

Appendix G: Summary of Documentation on Section 504

	Law	Legislative History	Regulations 34 CFR 104	Case Law	OCR Findings
<p>What is the purpose of Section 504?</p>	<p>PL 93-112</p>	<p>Civil Rights Act of 1964</p>	<p>34 CFR 104.1</p>	<p>Turillo v Tyson US v Cabrini Med Center</p>	
<p>What assessment is used to identify a child as disabled frs Section 504/ADHD?</p>	<p>Not addressed</p>	<p>Not addressed</p>	<p>34 CFR 104.3(i) 34 CFR 104.35(b)</p>		<p>~Barlow ~Brittan ~Calcasieu Parish ~Cocke Co. ~Davenport ~Fairfield-Suisan ~Gaston ~Livingston Parish ~OCR Memorandum, 1991 ~Nash Co ~San Diego ~South Harrison ~Winston Co</p>

Appendix G con't	Law	Legislative History	Regulations 34 CFR 104	Case Law	OCR Findings
<p>What eligibility criteria are used to qualify a child as disabled under section 504?</p>	<p>Not addressed</p>	<p>Not addressed</p>	<p>34 CFR 104.33(a) 34 CFR 104.33(B) 34 CFR 104.34(a) 34 CFR 104.35(c)</p>	<p>Lyons v Smith</p>	<p>~Beecher City ~Fairfield-Suisan ~Farmington ~Garden City ~Grosse Isle ~Kensal Lake Washington ~Letter to Canner ~Livingston Parish ~Lunenburg ~Newport News ~Northshore ~OCR Memorandum 1992 & 1993 ~Paradise Valley ~Pembina ~Peoria ~Philadelphia ~Portland ~Response to Veir ~River Falls ~Rochester ~Sachem ~School Admin Unit ~Ventura ~Winston Co</p>

Appendix G con't	Law	Legislative History	Regulations 34 CFR 104	Case Law	OCCR Findings
<p>What services are provided for a child deemed disabled under Section 504?</p>	<p>Not addressed</p>	<p>Not addressed</p>	<p>34 CFR 104.3 (k) 34 CFR 104.12 34 CFR 104.33(a) 34 CFR 104.33(b) 34 CFR 104.34 34 104.35(d)</p>	<p>~Lyons v Smith ~Urban v Jefferson County Sch Dist ~Brennan v Stewart ~Brookhart v IL St Board of ED ~Darlene L v IL St Board of ED ~Manecke V Sch Board of Pinellas Co ~Nassau Co v Airline ~Southwestern v Davis ~Urban v Jefferson</p>	<p>~Lemon Grove ~OCR memorandum, 1991</p>
<p>What due process rights does a child have under section 504?</p>	<p>Not addressed</p>	<p>Not addressed</p>	<p>34 CFR 104.7(b) 34 CFR 104.36</p>	<p>Goss v Lopez ~Franklin v Gwinnett ~Patsel v DC Board of Ed</p>	<p>~Davenport ~Letter to Zirkel ~Response to Randall</p>

Appendix G con't	Line	Legislative History	Regulations 34 CFR 104	Case Law	OCR Findings
How has cost been factored in?	Not addressed	Not addressed	34 CFR 104.35(b)	Franklin v Gwinnett County Public School	

APPENDIX H

Appendix H (1): Summary of Informal Interviews with Federal Personnel

	OCR Tech assist	OCR Analyst	Staff Present
The history of Section 504	I'm not sure	Not sure	OCR has Title VI, made perfect sense to add handicapped to their responsibilities
The goals of Section 504	Eliminate discrimination for disabled	Prevent further discrimination against the handicapped	Open access for disabled
Assessment necessary for ADHD/Section 504	Assessment tools appropriate to the disability		If they are handicapped they qualify
Eligibility criteria	Based on the three criteria of the law	Based on the law	Obviously if they are handicapped
Plans provided	Accommodations so they benefit from education	Whatever is necessary	I guess whatever they need to have access to education
Cost	~Cost not an issue in educational purposes ~Can lose all federal funding for discriminat-ing	~ave to have a plan to eliminate barriers - all new buildings must be accessible ~They can lose all federal funding for not complying	Ensure that federal monies be used in a non-discriminating fashion

Appendix H (2): Summary of Informal Interviews with Federal Personnel

	Disabilities Rights	CH.A.D.D Federal Liaison	CH.A.D.D General Council
The history of 504	<ul style="list-style-type: none"> ~Transportation was one issue ~Handicapped accessibility to public buildings ~Handicap accessibility to public restrooms 	For ADHD the emphasis came as a result of ADHD not being added as a disability category in IDEA	ADHD not being a disability category under IDEA and the sudden public awareness of the disability
The goals of Section 504	Equal rights for the handicapped	Another access for ADHD children to have equal access to education	Provide an avenue for disabled children (ADHD) to receive an appropriate education
Assessment	By definition	A variety of acceptable assessments, as long as it is done by a qualified individual	Don't know
Eligibility criteria	Being handicapped	Look for an educational need	I assume if they are handicapped they qualify
Plans	Whatever is necessary for handicapped child to have access to education	Don't know	Don't know
Cost	Should not be a factor		School can lose all their federal funds if they discriminate on the basis of disability

APPENDIX I

QUESTIONS ASKED STATE DEPARTMENT OF EDUCATION

Section 504

1. What guidance has the federal government given you in regards to section 504 of the Rehabilitation Act? I'm only interested in relation to General Provisions (Subpart A) and Preschool, Elementary, and Secondary Education (Subpart D).

~ i. e. directives, memos, inservice training, ...(get documentation)

* If nothing, find out why not

2. What guidance have you given the Local Education Agencies in regards to section 504? (Get a copy)

Specifically -

~Have you given guidance on what assessments to use for a student who might be disabled under Section 504?

~Have you developed eligibility criteria for Section 504?

~Have you developed or given guidance on what kind of plan to develop for a child who qualifies as disabled under Section 504?

~What Due Process do you recommend your LEAs use?

3. Does the DOE keep any records/count on section 504 and/or ADHD students in the state?
4. Have you given LEAs guidance about ADHD and Section 504?
5. Do you distinguish between ADD and ADHD in your directives?

QUESTIONS ASKED LEA SECTION 504 COMPLIANCE OFFICER

1. What guidance has the SEA given you about section 504 and ADHD?
2. Who is your state contact person for ADHD? Section 504?
3. What guidance have you given your administrators?
4. What assessment do you use for identifying children as ADHD for section 504?
5. What eligibility criteria do you have for qualifying an ADHD child for section 504?
6. What type of plan do you use for children identified as ADHD under section 504?
7. What due process rights do you give parents of children who qualify for section 504?
8. Is there a cost factor? How do you cover the costs?
9. What guidance has the federal government (OCR) given you on section 504 ?
10. Number of section 504 plans in the district

QUESTIONS ASKED LOCAL ADMINISTRATORS

Hello, my name is Patricia Devitt, I'm a doctoral candidate at Virginia Tech and I'm working on a dissertation on section 504 and Attention Deficit Hyperactivity Disorder.

I wondered if you might take a few minutes to answer a few questions.

(Possible responses.....I don't know anything about it, that's not my job, etc. ... That's alright this isn't a knowledge quiz, I'm just looking for the dissemination of information. It will only take a few minutes.

1. In the information you've received from the SEA on Attention Deficit, is there a distinction between ADD and ADHD?
2. What is the purpose of section 504?
3. Who is the section 504 compliance person in your district?
4. What assessment is used for children suspected of ADHD for section 504?
5. What eligibility criteria are used for ADHD children for section 504?
6. What kind of plan do you use for children identified as ADHD for section 504?
7. What due process rights do you give the parents? Do you give them a copy of their rights? At what stage of the process do you do that?
8. Have you had inservices on section 504? Who did the inservice?
9. Do you have a copy of your districts section 504 policy?

QUESTIONS ASKED TEACHERS

1. Does your school district have a section 504 policy?
2. Why would you refer a child for section 504?
3. How would you go about referring a child for section 504 that you suspected of having Attention deficit Hyperactivity Disorder (ADHD/ADD)?
4. Have you had any children on a 504 plan? Was the child an ADHD child?
5. What kind of modifications or accommodations did you make for the child?

APPENDIX J

APPENDIX J: Results of Survey from SEA to LEA

Appendix J (1): DELAWARE

State's Input:

Gave guidance to LEAs on Section 504
Distributed OCR Memorandum on Section 504/ADHD
Did not notify LEAs of their obligation to have a Section 504 Policy

LEAs' Input:

	504 Compliance Officer			Administrators				Teachers aware of Section 504	
	Cost Factor	Policy	Guidance to Staff	Guidance on Section 504		Have a Copy of Policy		YES	NO
				YES	NO	YES	NO		
LEA 1	YES	YES	YES	1	1	2		2	
LEA 2	NO	NO	NO	1	1	1	1	1	1
LEA 3	YES	YES	YES	2		1	1	1	1
LEA 4	YES	NO	NO	2		2			2
LEA 5	YES	YES	YES	2		2		1	1
LEA 6	YES	YES	YES	2		2		1	1

Appendix J (2): KENTUCKY

State's Input:

Gave Guidance to LEAs on Section 504
Distributed OCR Joint Memorandum of Section 504/ADHD
Developed a Section 504 Policy for LEAs
Notified LEAs of their obligation to have a Section 504 Policy

LEAs' Input:

	504 Compliance Officer			Administrators				Teachers aware of Section 504	
	Cost Factor	Policy	Guidance to Staff	Guidance on Section 504		Have a Copy of Policy		YES	NO
				YES	NO	YES	NO		
LEA 1	YES	NO	NO		2		2	1	1
LEA 2	YES	YES	YES		2	2			2
LEA 3	YES	YES	YES	2		2		2	
LEA 4	YES	NO	YES	2			2		2
LEA 5	YES	YES	YES		2	2		1	1
LEA 6	YES	YES	YES		2	1	1	2	

Appendix J (3): MARYLAND

State's Input:

Gave no guidance to LEAs on Section 504
Distributed OCR Joint Memorandum on Section 504/ADHD
Notified LEAs of their obligation to have a Section 504 Policy

LEAs' Input:

	504 Compliance Officer			Administrators				Teachers aware of Section 504	
	Cost Factor	Policy	Guidance to Staff	Guidance on Section 504		Have a Copy of Policy		YES	NO
				YES	NO	YES	NO		
LEA 1	YES	YES	YES	2		2		2	
LEA 2	YES	YES	YES	2		2		2	
LEA 3	YES	YES	YES	2		2		2	
LEA 4	YES	YES	YES	2		2		2	
LEA 5	YES	YES	YES	2		1	1	2	
LEA 6	YES	YES	YES	2		2		1	1

Appendix J (4): NORTH CAROLINA

State's Input:

Gave guidance to LEAs on Section 504
Distributed OCR Joint Memorandum on Section 504/ADHD
Notified LEAs of their obligation to have a Section 504 Policy

LEAs' Input:

	504 Compliance Officer			Administrators				Teachers aware of Section 504	
	Cost Factor	Policy	Guidance to Staff	Guidance on Section 504		Have a Copy of Policy		YES	NO
				YES	NO	YES	NO		
LEA 1	YES	YES	YES		2	1	1		2
LEA 2	YES	YES	YES	2		2		2	
LEA 3	YES	YES	YES	2		2		2	
LEA 4	YES	YES	YES	2		2		2	
LEA 5	YES	NO	YES	2		1	1	2	
LEA 6	YES	YES	YES	2		2		2	

Appendix J (5): SOUTH CAROLINA

State's Input:

Gave guidance to LEAs on Section 504
Distributed OCR Joint Memorandum on Section 504/ADHD
Notified LEAs of their obligation to have a Section 504 Policy

LEAs' Input:

	504 Compliance Officer			Administrators				Teachers aware of Section 504	
	Cost Factor	Policy	Guidance to Staff	Guidance on Section 504		Have a Copy of Policy		YES	NO
				YES	NO	YES	NO		
LEA 1	YES	YES	YES	2		2		2	
LEA 2	YES	YES	YES	2		2		1	1
LEA 3	NO	NO	YES	2			2	1	1
LEA 4	YES	YES	YES	2		2		2	
LEA 5	YES	YES	NO	2		2			2
LEA 6	NO	YES	YES	2		1	1	1	1

Appendix J (6): TENNESSEE

State's Input:

Gave guidance to LEAs on Section 504
Distributed OCR Joint Memorandum on Section 504/ADHD
Notified LEAs of their obligation to have a Section 504 Policy

LEAs' Input:

	504 Compliance Officer			Administrators				Teachers aware of Section 504	
	Cost Factor	Policy	Guidance to Staff	Guidance on Section 504		Have a Copy of Policy		YES	NO
				YES	NO	YES	NO		
LEA 1	NO	NO	NO		2		2	2	
LEA 2	NO	NO	YES	2		1	1	1	1
LEA 3	YES	YES	YES	1	1	2			2
LEA 4	YES	YES	YES	2		2			2
LEA 5	YES	NO	NO	2			2	1	1
LEA 6	YES	YES	YES	1	1	2		1	1

Appendix J (7): VIRGINIA

State's Input:

Gave guidance to LEAs on Section 504
Distributed OCR Joint Memorandum on Section 504/ADHD
Notified LEAs of their obligation to have a Section 504 Policy

LEAs Input:

	504 Compliance Officer			Administrators				Teachers aware of Section 504	
	Cost Factor	Policy	Guidance to Staff	Guidance on Section 504		Have a Copy of Policy		YES	NO
				YES	NO	YES	NO		
LEA 1	YES	YES	YES	1	1	1	1	2	
LEA 2	YES	YES	YES	1	1	2			2
LEA 3	YES	YES	YES	2		2		2	
LEA 4	YES	NO	YES		2		2		2
LEA 5	YES	YES	NO	2		1	1	1	1
LEA 6	YES	YES	YES	2		2		1	1

Appendix J (8): WEST VIRGINIA

State's Input:

Gave guidance to LEAs on Section 504
Distributed OCR Joint Memorandum on Section 504/ADHD
Notified LEAs of their obligation to have a Section 504 Policy

LEAs Input:

	504 Compliance Officer			Administrators				Teachers aware of Section 504	
	Cost Factor	Policy	Guidance to Staff	Guidance on Section 504		Have a Copy of Policy		YES	NO
				YES	NO	YES	NO		
LEA 1	NO	YES	YES		2	1	1	1	1
LEA 2	NO	NO	YES		2		2		2
LEA 3	YES	YES	YES	2		2		1	1
LEA 4	YES	YES	YES	1	1	2		1	1
LEA 5	YES	YES	YES		2	2			2
LEA 6	YES	YES	YES	2		2		1	1

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- Curriculum Supervisor, Special Education, Augusta County Schools
- 19 years experience Department of Defense Stateside Schools

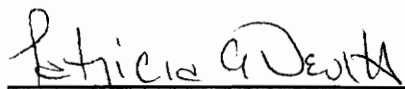
PROFESSIONAL EXPERIENCE

Special Education

- Teacher for Resource Room, kindergarten to third grade, learning disabled, mentally retarded, developmentally delayed, and emotionally disturbed.
- Teacher for Resource Room, Middle School, learning disabled, mentally retarded, emotionally disturbed, and other health impaired
- Teacher for Resource Room, fourth, fifth, and sixth grade, learning disabled and mentally retarded.
- Teacher for Resource Room, kindergarten to sixth grade, orthopedically impaired, hearing impaired, learning disabled, and language impaired.
- Itinerant teacher for students with Learning Disabilities kindergarten to twelfth grade

General Education Teacher

- Second grade, two years
- Third grade, one year
- Fourth - fifth split class, one year
- Fifth grade, two years



Patricia A. Devitt, Ed.D.