



SECTION 504: Keys to Implementation in Virginia's Schools




Division of Special Education and Student Services
<http://www.doe.virginia.gov/VDOE/sess/>



Section 504: Laws and Regulations

- ◆ **Section 504 is part of *Rehabilitation Act of 1973, as amended***
 - Federal regulations implementing the Rehabilitation Act include § 504 – Part 104 (education section)
 - The Rehabilitation Act, 1992 Amendments
 - Did not revise § 504 – Part 104
 - Replaced “handicap” with “disability”

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New Laws and Regulations Affecting § 504

- ◆ **Americans with Disabilities Act (ADA) Amendments Act of 2008** – effective 1/1/2009 - ADAAA
- ◆ **Proposed ADA Titles II and III Regulations** – U.S. Department of Justice – June 2008 (Pending)
- ◆ The Office for Civil Rights (OCR) is reviewing ADAAA to determine if regulatory changes or other guidance is appropriate (2009)


Note: VDOE Superintendent's Memo, #008-09, January 23, 2009, "Section 504 Guidance Following the ADA Amendments Act of 2008"

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What is Section 504?






General Information

- ◆ **Section 504** - Broad statutory prohibition.
- ◆ **Section 504 Implementing regulations** – Very specific requirements that school divisions must follow.



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General Requirements

- ◆ Recipients of federal monies must provide FAPE
- ◆ Must provide regular or special education
- ◆ LEA must appoint a “504 Coordinator”
- ◆ LEA must develop & implement Section 504 policies and procedures
 - LEAs may adopt IDEA procedures for 504.

See Supts. Memo, No. 22, January 27, 2006

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General Requirements

- ◆ **Schools must provide equal opportunities**
 - to obtain the same result,
 - to gain the same benefit, or
 - to reach the same level of achievement



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Section 504 and IDEA: Similarities and Differences





Child Find

Section 504 requirements similar to IDEA

- ◆ Annually, school divisions must:
 - Undertake to identify every qualified disabled person residing in the jurisdiction who is not receiving a public education; and
 - Take appropriate steps to notify disabled persons and their parents/guardians of the school division's duty under the regulations.

[34 CFR § 104.32]

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Disability Categories

IDEA provides a specific list of categories

- ◆ Autism
- ◆ Deaf-Blindness
- ◆ Deafness
- ◆ Emotional Disturbance (emotional disability)
- ◆ Hearing Impairment
- ◆ Mental Retardation (intellectual disability)
- ◆ Multiple Disabilities
- ◆ Orthopedic Impairment
- ◆ Other Health Impaired
- ◆ Specific Learning Disability
- ◆ Speech/Language Impairment
- ◆ Traumatic Brain Injury
- ◆ Visual Impairment (including blindness)

**Developmental Delay

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Disability Categories

§ 504: No categories with strict eligibility criteria. Impairments may include:


- ◆ ADD
- ◆ ADHD
- ◆ Allergies
- ◆ Diabetes
- ◆ Multiple Chemical Sensitivity
- ◆ Obesity
- ◆ Pregnancy
- ◆ Social Maladjustment
- ◆ Specific Learning Disability

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Evaluations

- ◆ **Both IDEA and Section 504** require testing of children with disabilities.
- ◆ **Both** require that tests be:
 - Validated (appropriate for intended use).
 - Administered by trained personnel.
 - More than general IQ tests.
 - Administered so that the handicapping condition does not impair test accuracy.

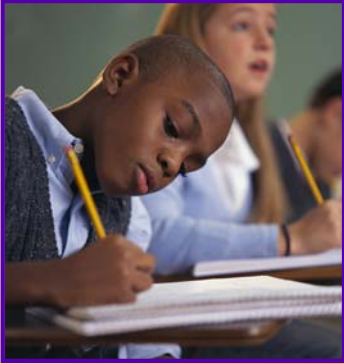


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Evaluations

- ◆ **Section 504** does not use phrase “triennial” but indicates “frequent.”
- ◆ Courts have interpreted “frequent” to mean every three years.





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Student Education Plans


- ◆ IEP is not specifically required by §504 regulations; however, its functional equivalent is required.
- ◆ May meet special education requirements under § 504 through IDEA's IEP process.






Committee/Team

- ◆ **IDEA:**
 - Composition of the IEP Team is defined in the implementing regulations.
- ◆ **Section 504:**
 - Not as prescriptive
 - The team must be a group of persons, including those knowledgeable about the child, the meaning of evaluation data, and the placement options.




[34 CFR §104.35 (c)(3)]

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Committee/Team

- ◆ **Section 504:**
 - Parents are not required members.
 - However, best practice supports their involvement.
 - No maximum number of persons.
 - To date, no guidance on the level of knowledge required by the members.




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Least Restrictive Environment

- ◆ **Section 504** requires a child to be placed:
 - with nondisabled children to “**maximum extent appropriate to the need of the handicapped person.**”
 - in a “**regular environment**” unless satisfactory education cannot be achieved with supplemental aids/services.
- ◆ Similarly, **IDEA** requires that
 - To maximum extent appropriate, children with disabilities are educated with children without disabilities.
- ◆ **Both** IDEA and Section 504 require a continuum of alternative placements.

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Procedural Safeguards

- ◆ **IDEA** provides extensive procedural protections.
- ◆ **Section 504** is less specific, but recognizes procedural safeguards from initial evaluation through an impartial hearing with right to counsel.

Reminder: LEAs may adopt IDEA requirements to comply with Section 504.

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Parental Consent

- ◆ **Section 504:** Required for initial evaluation but not for initial placement, unless local policy states otherwise.



- 1995 OCR response letter: Consent required for both. In 1997, OCR reversed itself. No change since then.

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FAPE


- ◆ **IDEA:** FAPE means *special education and related services*
- ◆ **Section 504:** FAPE means regular or special education and related aids and services designed to meet the individual educational needs of persons with disabilities as adequately as the needs of nondisabled persons are met. (Equal Access)

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FAPE

On June 25, 2000, OCR and OSEP issued a Joint Letter. “Disability Harassment” is a FAPE investigative entity.




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Educational Benefit

◆ **IDEA:**

- Follows U.S. Supreme Court’s Rowley standard.
- School divisions must provide an educational program *reasonably calculated to provide benefit*.
- Appropriate education need not maximize the child’s potential.



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Equal Opportunity

◆ **Section 504:**

- Sets a higher standard than Rowley.
 - *equal opportunity*
- Focused on opportunity, not results.
- Schools must meet educational needs of disabled students “as adequately as the needs of nonhandicapped persons.”

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Medication Administration

OCR considers administration of medication a placement decision.

◆ **Consider:**


- The purpose of the medication, as determined by the student's doctor.
- Who will administer the medication.
- Whether staff training is needed for medication administration.
- The protocol if there is an emergency involving the student and his/her medicine.
- Pertinent medical information provided by the parent.

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Physical Setting

- ◆ **IDEA:** Directly controls the physical setting in which the education takes place.
 - NOTE: *Standards of Accrediting Public Schools in Virginia* and FAPE definition in special education regulations
- ◆ **Section 504:** Requires significantly more protection.




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Nonacademic and Extracurricular Services/Activities



- ◆ **IDEA and Section 504:** Both require “an equal opportunity” for participation in nonacademic and extracurricular activities.
- ◆ **Section 504:**
 - If a service is provided to nondisabled students, the services must also be provided to children with disabilities.
 - Guidance and placement counselors for students with disabilities cannot counsel them toward more restrictive career objectives as a result of their disability.

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Compliance

- ◆ **IDEA:** Failure to comply with the requirements can result in withdrawal of special education funding.
- ◆ **Section 504:** As a general civil rights act, failure to comply carries a potentially higher penalty – the withholding of all federal funds.




Concurrent Placement in IDEA and Section 504

- ◆ A school division may not opt to provide services and accommodations under § 504 when a student is IDEA-eligible. See *Yankton Sch. Dist. V. Shramm*, 24 IDELR 704, 8th Circuit, 1996
- ◆ OCR has held that it is impermissible for a student's parent to refuse to accept IDEA services and require the school division to develop a § 504 Plan instead. A rejection of the services offered under the IDEA amounts to a rejection of services offered under § 504. *Letter to McKethan*, 25 IDELR 295, OCR 1996
- ◆ Remember that funding for § 504 services is 100% locally-driven.

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Who Qualifies for Protections under Section 504?



- ◆ A “**Qualified Handicapped Individual**” is a person who:
 - Has a physical or mental impairment which substantially limits one or more major life activities;
 - Has a record of such an impairment; or
 - Is regarded as having such an impairment.
- ◆ Until the issuance of ADAAA, the U.S. Supreme Court:
 - required a “demanding standard” for establishing Section 504 qualification; and
 - held that “substantially limits” meant an impairment must “severely restrict” a major life activity.

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◆ **ADAAA 2008 greatly reduced the bar for Section 504 qualification.**

- It underscores Congress' express intent that "the question of whether an individual's impairment qualifies as a disability should not demand extensive analysis." (P.L. 110-325, § 2(b))
- An impairment can be a disability even if episodic or in remission.
 - E.g., epilepsy or cancer.
 - Each case must be considered individually to determine if it meets the "substantially limits" standard when the impairment is active. (P.L. 110-325, § 4)

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◆ **New "Major Life Activities" were added:**

- bending, reading, and communicating.
- a revised list of major bodily functions - functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.


◆ **Record of an impairment.**

◆ **"Regarded" as having an impairment:**

- An impairment does not have to limit or be perceived to limit a major life activity in order for the child to meet the "regarded as having an impairment" definition.




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Disability determinations must be made without considering mitigating measures.


- ◆ “Mitigating measures”: measures that help correct or ameliorate an individual’s physical or mental condition.
 - Examples: medication, medical supplies, and equipment, low vision and hearing devices, prosthetics, use of assistive technology and reasonable accommodations.
 - Exception: ordinary corrective lenses that “fully correct visual acuity or eliminate refractive error,” as distinguished from low vision devices that “magnify, enhance, or otherwise augment a visual image.” (P.L. 110-325, § 4)


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Who is Excluded?

- ◆ ADA 2008 clarifies that minor and transitory impairments are not protected disabilities.
 - Transitory: actual or expected duration of 6 months or less
 - Minor: e.g., broken arm






◆ **Review on a case-by-case basis**

- A student may need a § 504 plan for assessments
 - **HOWEVER**, the school divisions should ask:
 - ❖ Is there another means of providing the child with a broken arm the state assessment?
 - ❖ Is there another testing window at a later date? If so, test the child then.
- Remember Virginia's requirement that accommodation must be provided in classroom to qualify for testing accommodations.

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Who is Excluded?

- ◆ Persons who are current drug users – OCR Senior Staff Memorandum, 17 EHLR 609 (1991)
- ◆ Additional exclusions - OCR Senior Staff Memorandum, 19 IDELR 869 (1993)
 - Transvestitism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders
 - Compulsive gambling, kleptomania, or pyromania
 - Psychoactive substance use disorders resulting from current use of illegal drugs

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When should school staff consider Section 504 protections?



Section 504 Eligibility is NOT Automatic, but may be considered IF:


- ◆ Suspension or expulsion is being considered and you don't have a basis to consider eligibility under IDEA;
- ◆ Retention is being considered;
- ◆ A student shows a pattern of not benefiting from the instruction being provided;
- ◆ A student is referred for evaluation but it is determined not to do an evaluation under IDEA; OR when a student is evaluated and is found ineligible under IDEA;
- ◆ A parent requests evaluation for a Section 504 plan;

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- ◆ A student is chronically absent due to medical/health issues;
- ◆ A student develops a medical condition that may need help, especially a chronic health condition;
- ◆ A student requires more time for homework and in-school assignments;
- ◆ The student has substantial difficulty organizing, planning, and completing assignments;
- ◆ The student is identified as “at risk” or exhibits the potential for dropping out of school;
- ◆ A disability of any kind is suspected; or
- ◆ A new building or remodeling is being considered.

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Classroom and Building Accommodations

- ◆ The intent of Section 504 is to “accommodate” for differences within the regular education environment.
- ◆ All staff should be provided awareness activities and specific information on the school division’s policies and procedures for implementing Section 504.



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**How can Section 504
be successfully
addressed in the
regular education
environment?**



Communication


- ◆ There may be a need to modify:
 - Parent / student / teacher communications (i.e., Journals, meetings, duplicate sets of texts.)
 - Staff communications (i.e., Building team meetings, network with other staff, identify resource staff)
 - School / community agency communication (i.e., assist in agency referrals)

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Organization / Management

- ◆ There may be a need to modify:
 - Instructional day (i.e., allow more time to pass in the hall; modify class schedule)
 - Classroom organization/structure (i.e., adjust student's placement in classroom; reduce external stimuli; change classroom management style)




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Policies and Procedures

- ◆ There may be a need to modify the school policies & procedures to:
 - Allow additional excused absences for health reasons.
 - Adjust transportation, parking arrangements.
 - Approve early dismissal for service agency appointments.

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Teaching Strategies

- ◆ There may be a need to modify:
 - Teaching methods (i.e., Adjust testing procedures; individualize assignments; use technology)
 - Teaching materials (i.e., Use materials that address student's learning style; adjust reading level of assignments)




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Student Precautions

- ◆ There may be a need to modify:
 - Classroom/building climate for health purposes (i.e., use air purifier; control temperature; accommodate specific allergies)
 - Classroom/building to accommodate equipment needs (i.e., develop evaluation plan for students who use wheelchairs; schedule classes in accessible areas)




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Student Precautions

- ◆ There may be a need to modify building health and safety procedures. For example:
 - To accommodate special diets; and
 - To administer medication appropriately.

See: Specialized Health Care Procedures, Virginia Department of Health and Virginia Department of Education.



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Section 504 and Discipline



The same protections available to students with disabilities under IDEA are available to students qualified under Section 504.




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Exceptions

- ◆ Students who are disabled solely by virtue of alcoholism or drug addiction.
 - These students are excluded from Section 504 consideration if they are current users.
- ◆ **BUT** -- Persons who have completed or are participating in a supervised rehabilitation program and continue to refrain from abuse may be qualified for Section 504.


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◆ An LEA may discipline a Section 504 student without applying due process procedures if:

- The school is disciplining the student with respect to the use or possession of illegal drugs or alcohol; and
- The student is currently engaged in the use of illegal drugs or alcohol; and
- The disciplinary action taken with respect to the disabled student is the same as those taken with nondisabled students in similar situations.

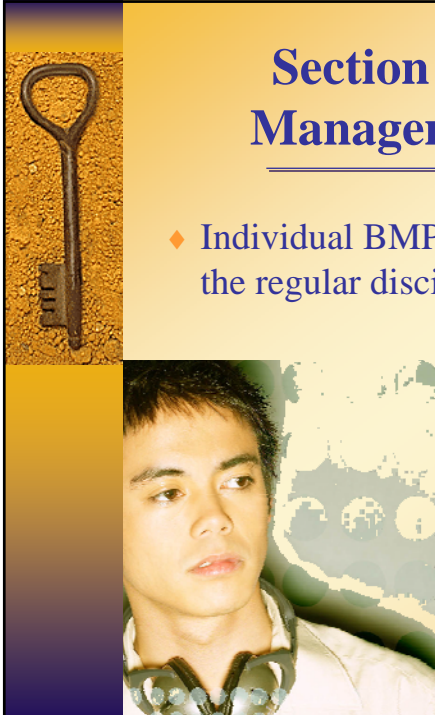
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Understanding this Provision

- ◆ “Currently engaging in use” is quite narrow.
- ◆ In such cases, parents cannot resort to a due process hearing under Section 504 to contest the disciplinary action.
- ◆ **NOTE:** OCR distinguishes between use and possession. “Possession” of illegal drugs or alcohol at school does not automatically equate with “current use” of drugs or alcohol.


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Section 504 and Behavior Management Plans (BMPs)

- ◆ Individual BMP provisions supplant the use of the regular discipline code.
- ◆ Failure to discipline students in accordance with his/her BMP constitutes a failure to properly implement the Section 504 plan, which is a denial of FAPE.

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Section 504 and Behavior Management Plans (BMPs)

- ◆ A Behavioral Management Plan ensures that a student with a disability is able to maintain successfully the placement that has been determined to appropriately meet his educational needs.


- *Elk Grove (CA) Unified School District, 25 IDELR 759, OCR 1996.*

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Section 504 and Behavior Management Plans (BMPs)

- ◆ A BMP is considered a related service under Section 504 according to the 6th Circuit Court of Appeals.
- See *Morgan v. Chris L.*, 25 IDELR 227, 6th Cir. 1997.



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Functional Behavioral Assessments (FBA)

- ◆ Neither Section 504 implementing regulations or guidance from OCR mandates a FBA.
- ◆ However, if a school division has adopted IDEA provisions to meet Section 504 requirements, then the school division will follow the IDEA regulations.



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Functional Behavioral Assessments (FBA)

- ◆ Nothing prevents a hearing officer from ordering the school division to conduct an FBA under Section 504.
 - See *Lunenberg School District*, 22 IDELR 290, SEA VT 1994.



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Manifestation Determination Review (MDR) Hearing

- ◆ The school division must conduct a MDR before suspending a student with a disability for more than 10 days.
- ◆ Such a disciplinary action is considered a significant change in placement, triggering the re-evaluation requirements.
 - 34 C.F.R. § 104.35(a); OCR Staff Memorandum, 16 EHLR 491, OCR 1989; *Broward County (FL) Sch. Dist.*, 36 IDELR 159 (OCR 2001).

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Manifestation Determination Review (MDR) Hearing

- ◆ Factors to consider when determining if there is a “pattern” or removals:
 - Length of each suspension;
 - Proximity of the suspensions to each other;
 - Total time the student is excluded from school.

[Alachua County (FL) School District, 27 IDELR 961, OCR 1997].




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Cessation of Services

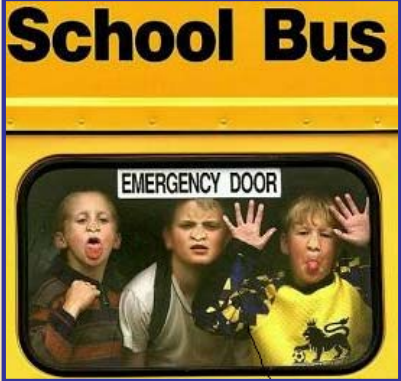
- ◆ Section 504 does not impose an obligation to provide continuing services for properly expelled students.
 - However, it is discriminatory to not provide services if services are provided in these instances to nondisabled students.
 - If the school division has adopted IDEA requirements to comply with Section 504, IDEA directs the school division's obligations.

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Bus Suspensions

- ◆ Section 504 parallels IDEA provisions that a bus suspension counts as a removal if FAPE is interrupted.
- ◆ According to OCR, only the school's offer to provide alternative transportation erases the removal.




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Bus Suspensions

- ◆ If the student comes to school on his/her own, or the parent brings the student, and the school does not offer an alternative (reimbursement or alternative form of transportation), OCR considers the student removed from his placement that day even if the student is there.
 - See OCR 1991 Mobile County (AL) Sch. Dist. 18 IDELR 70


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Interim Alternative Education Setting


- ◆ Section 504 regulations do not address IAES and OCR has not published any guidance on this matter
 - However, if the LEA has adopted IDEA provisions to meet Section 504 requirements, the LEA must follow IDEA regulations regarding IAES.
 - OCR cases since IDEA '97 amendments have reviewed alternative placements and IAES from a discrimination perspective.

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Interim Alternative Education Setting

- ◆ *Harford County (MD) Public Schools, 28 IDELR 623, OCR 1997.*
- ◆ *Metropolitan Nashville (TN) Public Schools, 28 IDELR 887, OCR 1997.*



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- ◆ **ADA (Titles II and III) - Revised Regulations were completed by the U.S. Dept. of Justice.**
 - They are awaiting review. Amendments to Section 504 may be forthcoming.
- ◆ **HIGHLIGHTS:**
 - Defines “wheelchair” to include manually and power-driven wheelchairs, mobility scooters, and “other power-driven mobility devices.”
 - Proposes parameters for when these devices must be accommodated.




HIGHLIGHTS cont.:

- ◆ Removes certain species of animals to be considered “service animals” for students with disabilities:
 - wild animals, including nonhuman primates born in captivity; reptiles; rabbits; farm animals, including any breed of horse, miniature horse, pony, pig, or goat; ferrets; amphibians; and rodents.
- ◆ Distinguishes between “comfort animals” and “psychiatric service animals.”




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HIGHLIGHTS cont.:

- ◆ Adopts the 2004 ADA Accessibility Guidelines; defining “existing facility” as a facility in existence on any given date prior to 2004.
- ◆ Adopts a “safe harbor” provision that will exempt certain facilities that currently are in compliance with existing accessibility standards from having to comply with the revised standards.

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HIGHLIGHTS cont.:

- ◆ Requires public entities to take appropriate steps to ensure that communications with individuals with disabilities, including applicants, participants, members of the public, and their companions, are as effective as communications with others.
 - This would require providing auxiliary aids to individuals who need them during IEP, Section 504, and other parent meetings.
- ◆ Adds examples of “auxiliary aids”: Braille displays, screen reader software, magnification software, optical readers, secondary auditory programs, and accessible electronic and information technology.

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Websites of Interest

- ◆ The SECTION 504 REGULATIONS (34 C.F.R. Part 104):
http://www.access.gpo.gov/nara/cfr/waisidx_06/34cfr104_06.html
- ◆ OFFICE for CIVIL RIGHTS (OCR)- Frequently Asked Questions about Section 504 and the Education of Children with Disabilities:
<http://www.ed.gov/about/offices/list/ocr/504faq.html>
- ◆ OFFICE for CIVIL RIGHTS - OCR Complaint Process:
<http://www.ed.gov/about/offices/list/ocr/complaintprocess.html>
- ◆ OFFICE for CIVIL RIGHTS – Publications regarding Section 504 of The Rehabilitation Act of 1973:
<http://www.ed.gov/about/offices/list/ocr/publications.html#Section504>
- ◆ Additional information regarding ADAAA 2008:
<http://dataserver.lrp.com/DATA/servlet/DataServlet?fname=ADAAA2008.pdf>

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