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117 LRP 103

Frequently Asked Questions about the Rights of Students with Disabilities in Public Charter Schools under Section 504 of the Rehabilitation Act of 1973

Office for Civil Rights

N/A

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Related Index Numbers

63. CHARTER SCHOOLS

405.030 Discrimination

405.010 Application of Section 504 Generally

405.015 Athletics/Extracurricular Activities

Judge / Administrative Officer

Catherine E. Lhamon, Assistant Secretary for Civil Rights

See related guidance at 116 LRP 53782 and 117 LRP 97

Ruling

OCR issued an FAQ addressing the Section 504 obligations of charter schools to students with disabilities. In discussing charter schools' admissions and recruitment practices, OCR stated that charter school LEAs and districts with charter schools may violate Section 504 if they counsel or otherwise encourage a student to not apply to a charter school because the student has a disability.

Meaning

If a district or charter school LEA believes it's necessary to place a current charter school student with a disability in a setting other than the charter school, its best bet for avoiding engaging in discrimination under Section 504 is to comply with Section 504's placement and evaluation procedures, including providing required procedural safeguards. In no circumstances should the district or school attempt to influence the student to transfer elsewhere solely because the student has a disability or because of the cost of providing the student FAPE.

Case Summary

In an FAQ addressing discrimination in charter schools' admission and recruitment practices, among other topics, OCR specifically pointed to the practice of "counseling out" as prohibited conduct under Section 504. It is discriminatory for a charter school to encourage a student with a disability to not enroll in the school or to transfer out of the school because the student has a disability, OCR wrote. OCR explained that the practice of counseling out generally is understood to mean that a school tries to influence a student or parent to not apply or enroll in a particular charter school solely because the student has a disability. Such an action, the agency stated, constitutes prohibited different treatment. "For example, Section 504 prohibits a recipient charter school, like any other public school, from counseling a prospective student against applying to or enrolling in the school because the student has a current IEP or Section 504 plan, or because the recipient does not want to incur costs that are necessary to provide FAPE to a prospective student with a disability, or because the recipient believes, correctly or incorrectly, that the student has a disability," OCR Assistant Secretary Catherine E. Lhamon wrote. However, a placement decision made consistent with Section 504 is not the same as counseling out, OCR observed, even where the decision results in placement in a setting other than the charter school. Such decisions ensure that the LEA maintains its obligation to provide the student services necessary to receive FAPE as well as access to Section 504's procedural safeguards. Similarly, OCR stated, Section 504 prohibits the practice of influencing students with disabilities who already are enrolled to voluntarily transfer out of a charter school. "Counseling out, in such a situation, is recipient action that is prohibited because it is designed to urge, intimidate, or coerce the student on the basis of disability to withdraw or transfer from school," the agency wrote.

Full Text

U.S. Department of Education, Office for

**Civil Rights, Frequently Asked Questions
About the Rights of Students With
Disabilities in Public Charter Schools
Under Section 504 of the Rehabilitation
Act of 1973 (December 28, 2016)**

**Rights of Public Charter School Students
With Disabilities: Nondiscrimination
Required**

1. Which laws enforced by the U.S. Department of Education's (ED) Office for Civil Rights (OCR) protect charter school students and prospective students from discrimination based on disability?

Section 504 of the Rehabilitation Act of 1973 and ED's Section 504 regulations prohibit disability discrimination by recipients of Federal financial assistance.¹ Such recipients are responsible for compliance with Section 504 in all of their operations.²

Local educational agencies (LEAs) that receive Federal financial assistance either directly from ED or indirectly, e.g., through a State educational agency (SEA), must comply with the requirements of Section 504.³

Section 504 prohibits Federally-assisted LEAs, including both traditional LEAs (i.e., traditional school district LEAs) and charter school LEAs (i.e., public charter schools that operate as LEAs under State law) from discriminating against current and prospective students on the basis of disability.⁴

Section 504 requires all Federally-assisted LEAs to ensure that all their public schools (including charter schools that are part of a traditional LEA) are operated in compliance with Section 504.⁵

In addition, Title II of the Americans with Disabilities Act and the Title II regulations prohibit disability discrimination by State and local government entities in all their operations, regardless of whether they receive Federal funding.⁶ Because all LEAs, including charter school LEAs, are public entities subject to Title II, Title II prohibits them from discriminating against current and prospective charter school students on the basis of disability, and requires

them to ensure that all their public schools (including charter schools that are part of a traditional LEA) are operated in compliance with Title II.

This document explains Section 504 requirements that are applicable to charter school LEAs, the obligations of LEAs that include charter schools among their schools, and the obligations of those charter schools that are part of a traditional LEA.⁷

For the sake of simplicity, this document generally addresses specific requirements of Section 504 without also referencing corresponding Title II requirements. Violations of Section 504 that result from a public entity's failure to meet the obligations identified in this document also generally constitute violations of Title II. To the extent that Title II provides additional or greater protection than Section 504, entities covered by Title II also must comply with Title II's substantive requirements.⁸

OCR also enforces laws that protect students, including charter school students, from discrimination on the basis of race, color, national origin, sex, and age, in Federally-assisted programs or activities.⁹ These statutes and their corresponding regulations apply to students with disabilities as well as other students, but this document addresses only rights and requirements related to disability.

2. Does OCR enforce or administer the IDEA?

No. OCR does not enforce or administer the Individuals with Disabilities Education (IDEA).¹⁰ ED's Office of Special Education and Rehabilitative Services (OSERS) administers the IDEA. For this reason, this document does not address the rights of students with disabilities under the IDEA. A separate document, *Frequently Asked Questions about the Rights of Students with Disabilities in Public Charter Schools under the Individuals with Disabilities Education Act*, issued by OSERS concurrently with this document, addresses the rights of charter school students with disabilities under the IDEA.¹¹

3. Why have ED's OCR and OSERS issued separate guidance documents about the rights of

students with disabilities in charter schools?

In recent years, stakeholders have advised OCR and OSERS of a need for more information about the Federal rights of students with disabilities who are enrolled in, or wish to enroll in, charter schools.¹²

In some instances, the interest has been based on distinct features or procedures commonly shared by charter schools, such as nondiscrimination requirements applicable to admissions. In other instances, the interest has been based on whether nondiscrimination requirements applicable to all other public elementary and secondary schools, such as the obligation to provide programs that are accessible to students with disabilities, also apply to charter schools, and, if so, what are the requirements.

In addition, the Government Accountability Office (GAO) recommended that ED issue guidance about the obligations charter schools have related to the enrollment of students with disabilities.¹³ This document, particularly the portions that address the rights of students with disabilities in connection with policies, practices, procedures, and criteria for recruitment, applications, admissions, and enrollment, responds to that recommendation.

In considering how best to address this need, OCR and OSERS determined that the laws for which the respective offices are responsible are sufficiently different in terms of purposes, definitions of the populations of students covered, and requirements, that two coordinated, but separate, documents are necessary to outline with clarity the rights of students with disabilities in charter schools under the respective laws. For this reason, OCR and OSERS have, in coordination, issued separate guidance documents addressing the rights of students with disabilities in charter schools under these complementary, but different, laws.

4. Does OCR's enforcement of Section 504 cover students who are eligible for services under the IDEA, as well as other students with disabilities who are not IDEA-eligible?

Yes. Students with disabilities who are

IDEA-eligible receive special education and related services in accordance with an Individualized Education Program (IEP) developed in accordance with section 614(d) of the IDEA. These students are also protected from disability discrimination under Section 504.¹⁴ OCR enforces the Section 504 rights of students with disabilities who are IDEA-eligible, as well as the Section 504 rights of students with disabilities who are not IDEA-eligible (often called "504-only" students).¹⁵

5. Is there any difference in the Section 504 nondiscrimination rights of students with disabilities in charter schools as compared to students with disabilities in other schools in traditional LEAs?

No. Charter school students with disabilities, including current and prospective charter school students with disabilities, have the same rights under Section 504 as other current and prospective public school students with disabilities at the elementary and secondary school level.¹⁶

For example, under Section 504 a student with a disability is entitled to a free appropriate public education (FAPE). Though not explicitly required by the ED's Section 504 regulations, LEAs often document the elements of an individual student's FAPE under Section 504 in a document, typically referred to as a "Section 504 Plan." A written plan is often a useful way to document that the traditional LEA or charter school LEA engaged in a process to identify and address the needs of a student with a disability and to communicate, to school personnel, the information needed for successful implementation.

Despite the distinct features or procedures commonly shared by charter schools, the specific protections of Section 504 are just as applicable for students with disabilities in charter schools as they are for students with disabilities in other public schools in traditional LEAs. For example, there is often a difference between how students enroll in schools in traditional LEAs and how students are recruited, apply and are admitted to, and thus enrolled in charter schools. For schools in traditional LEAs, the basis for

enrollment in the district is generally residence that falls within the attendance boundaries of the school and LEA. While these are matters governed by State or local laws, enrollment procedures might only require proof of residency, vaccination records, consent forms, and contact information. Under Section 504, prospective students of traditional LEAs are entitled to nondiscrimination on the basis of disability in the enrollment process, as well as nondiscriminatory treatment when enrolled in the school.

For charter schools, the basis for enrollment is generally through a process of application and admission and the specific procedures and timelines may vary. Depending upon State law, a charter school may be required to use a lottery as part of the admission process if the number of applicants exceeds the number of available spaces.¹⁷ Regardless of the procedures used, under Section 504, prospective charter school students are entitled to nondiscrimination on the basis of disability in that process -- including the recruitment, application, and admission parts of the process -- as well as nondiscriminatory treatment when enrolled.¹⁸

6. Is it appropriate to rely upon existing OCR guidance applicable to the rights of public elementary and secondary school students with disabilities to understand the rights of charter school students with disabilities?

Yes. OCR has issued guidance and provided other information over the years to explain the requirements of Section 504 applicable to the rights of students with disabilities in public elementary or secondary schools.¹⁹

Charter schools are public schools and, therefore, there is no difference between the Section 504 rights of students with disabilities who are enrolled in charter schools and those who are enrolled in other public elementary or secondary schools. This document is not intended to be a stand-alone, comprehensive resource on the Section 504 rights of students with disabilities. Rather, it provides some key information about the Section 504 rights of

students with disabilities in specific circumstances.

OCR encourages parents, students, and charter school staff and leaders to review OCR's existing guidance, as well as relevant guidance that OCR may issue in the future, when seeking information about the rights of students with disabilities in charter schools.²⁰ OCR's existing guidance is available through OCR's website and, as it is issued, future guidance will be available through OCR's website.²¹

7. Is there any difference in the Section 504 rights of students with disabilities if a charter school is a virtual or online school?

No. There is no difference in the Section 504 rights of charter school students with disabilities who seek to enroll in and who are enrolled in a charter school that is a virtual school as compared to those who seek to enroll in and are enrolled in a charter school that is a brick-and-mortar school.²²

Because virtual schools rely heavily on technology, e.g., information conveyed by means of the school's website and the internet, to provide aid, benefits, services, or opportunities to students, they must, among other things, ensure that the technology is accessible to students with disabilities.²³ This means that the technology must be accessible to students with disabilities when their disabilities affect their use of the school's technology, e.g., students who are blind or have visual impairments, students with learning disabilities, and students with physical disabilities.

8. Which charter school students are protected by Section 504?

Section 504 protects all qualified students with disabilities in charter schools. Under Section 504, a student with a disability is a person who: (1) has a physical or mental impairment that substantially limits a major life activity; (2) has a record of such an impairment; or (3) is regarded as having such an impairment.²⁴

In addition to meeting one or more of the three prongs described above, a student must also be qualified in order to be protected under Section 504.²⁵

For students with disabilities at the public elementary and secondary school level, being qualified under Section 504 is based primarily on whether these students are a certain age. Specifically, a student is qualified if the student is of an age at which: (i) students without disabilities are provided elementary and secondary educational services; or (ii) it is mandatory under State law to provide elementary and secondary educational services to students with disabilities.²⁶ A student is also qualified if he or she is a student with a disability to whom a State is required to provide a free appropriate public education (FAPE) under the IDEA.²⁷

9. How do the requirements of Section 504 apply in situations in which multiple recipients and/or non-recipient entities are involved in activities such as developing, authorizing or approving, operating, or managing charter schools, or educating and serving charter school students with disabilities?

The overriding requirement is that, as a condition of receiving Federal financial assistance, every recipient, including both a charter school LEA and traditional LEA, is responsible for compliance with Section 504 in all its operations.²⁸ This requirement includes the key operations in the charter school context addressed in this document, e.g., recruitment and admission, treatment of students in academic and nonacademic and extracurricular activities, and providing FAPE and accessible programs and facilities.

State charter school laws vary with respect to the different types of entities that are required to, or permitted to, perform different functions related to charter schools. For example, certain entities might be authorizers, responsible for authorizing and approving charter schools, while other entities might be involved in developing, operating, or managing charter schools, or educating, serving, and carrying out FAPE requirements for charter school students with disabilities. In many instances, the entities identified by State charter school laws to perform certain functions are recipients of ED financial assistance, e.g., SEAs, traditional LEAs, or charter school LEAs.

In some instances recipients contract with, or make other arrangements with, other entities in carrying out the recipient's non-discrimination responsibilities.²⁹ This document does not specifically discuss the Section 504 obligations of each type of recipient with respect to each type of potential function under State charter school law. Instead, below are some examples that outline Section 504 responsibilities in a recipient that commonly arise in this context.

- If a charter school authorizer is a recipient (e.g., an SEA or a traditional LEA), it is subject to the requirements of Section 504 in all of its operations, including carrying out activities to authorize charter schools.³⁰ Accordingly, a charter school authorizer, for example, in authorizing the charter or contract that enables a charter school to exist under State law, cannot include in the charter or contract, a provision that would require, authorize, or permit actions by the charter school that would constitute discrimination against prospective or current charter school students with disabilities or their parents.³¹

- Separately, Section 504 prohibits recipients, such as a charter school LEA, from contracting, or making some other arrangement, with any entity, including a charter school authorizer or charter management organization (CMO), that would result in violations of Section 504 with respect to prospective or current charter school students with disabilities or their parents.³² (See Q&A 10 for a discussion of the responsibility of a recipient when it contracts, or makes other arrangements, with a non-recipient.)

- If a management organization that manages the day-to-day operations of a charter school, for example, a nonprofit CMO, is a recipient, it is subject to the requirements of Section 504 in all of its operations.³³ (See Q&A 10 for a discussion of the responsibility of a recipient when it contracts, or makes other arrangements, with a non-recipient.)

10. If a recipient contracts with, or otherwise arranges for, a non-recipient entity to carry out all or some of the recipient's obligations in the operation of a charter school, is the recipient still responsible for

Section 504 compliance?

Yes. Although Section 504 does not prohibit a recipient from contracting with, or otherwise arranging for, a non-recipient entity to carry out all or some of the recipient's responsibilities in the operation of a charter school, the contractual relationship or other arrangement with a non-recipient does not affect the recipient's obligations to ensure nondiscrimination for charter school students with disabilities. The ultimate Section 504 legal responsibility for the recipient's charter school students remains with the recipient.

The recipient is prohibited from taking an action, or failing to take an action, indirectly by contractual or other arrangement that would constitute disability discrimination if the recipient directly engaged in the same action or failure to act.³⁴ This means that the recipient must ensure that any non-recipient entity with which it contracts or otherwise has an arrangement complies with Section 504 in carrying out responsibilities under the recipient's program.³⁵ Thus, if the non-recipient's action or failure to take action constitutes disability discrimination against charter school students, the recipient is responsible for redressing the discrimination. This responsibility would include remedial action appropriate to the individual circumstances, such as stopping the discrimination, preventing its recurrence, remedying its effects, and, where necessary to ensure nondiscrimination, revising or ending the contractual relationship or other arrangement.³⁶

For example, Section 504 does not prohibit a recipient charter LEA or traditional LEA from contracting with a non-recipient for-profit educational management organization (EMO); however, when doing so, the recipient's Section 504 compliance responsibilities remain with the recipient.

Similarly, a recipient charter school LEA may contract with a private agency to provide physical therapy services for students with disabilities as part of the charter LEA's provision of FAPE. If the contractor fails to provide the services or provides the services in a manner that does not comport with the

student's needs (as determined by a group of knowledgeable persons as reflected in the student's Section 504 plan), the recipient charter school LEA remains responsible under Section 504 for ensuring that its students receive such services, regardless of what State law remedies the recipient charter school LEA and the students might have against the private contractor. (See Q&As 19-22 and 24-25 for information about FAPE.)

A recipient's compliance responsibilities for its non-recipient contractors or other entities with which it has arrangements also apply in contexts other than FAPE, such as nonacademic services and extracurricular activities. For example, where a recipient charter school LEA contracts with an aftercare provider to provide after school day care services for all students, the recipient would remain responsible under Section 504 for ensuring that its students with disabilities who participate in the aftercare program receive those services in the most integrated setting appropriate to their needs and could not use an aftercare provider who could not meet that requirement.³⁷

11. How do the requirements of Section 504 apply to SEA policies, practices, and procedures that address other recipients and/or non-recipient entities involved in activities such as developing, authorizing or approving, operating, or managing charter schools, or providing services to charter school students with disabilities?

Each SEA, as a recipient, is responsible for ensuring that its policies, practices, and procedures governing charter schools do not directly cause, or indirectly result in, discrimination on the basis of disability by LEAs, their charter schools, or other entities.³⁸ A variety of recipients and non-recipients might be involved in developing, authorizing or approving, operating, or managing charter schools, or providing services to charter school students with disabilities in a particular State. As such, an SEA must ensure that its policies, practices, and procedures that address the responsibilities of recipients and non-recipients comply with Section 504 requirements

with respect to charter school students with disabilities.³⁹

Nondiscrimination Required in All Recruitment and Other Activities Related to Admission and Enrollment: Recruitment, Application, Applicant Pool Assembly, Admission, Enrollment and Disenrollment Activities

12. How does Section 504 apply to recruitment of students to charter schools?

Section 504 prohibits public charter schools and other recipients from discriminating, on the basis of disability, against persons with disabilities in recruiting prospective students.⁴⁰ This prohibition applies to the content of recruitment materials and to all recruitment activities, including formal presentations to, and informal conversations with, parents of prospective students. Additionally, all recipients must ensure that recruitment materials include a notice that the recipient does not discriminate on the basis of disability in violation of Section 504 in, among other things, the admission and treatment of students.⁴¹ (See Q&A 27 for a further discussion about notice.)

13. What are some examples of recruitment information that would or would not comply with Section 504?

Recruitment information of any type must not indicate or signal that a charter school refuses admission generally to any applicant with a disability, or applicants with a particular type of disability, or that it otherwise discriminates against persons with disabilities.⁴² Statements indicating discrimination in recruitment would include those:

- Based directly on disability (e.g., "students with an intellectual disability will not be accepted");

- Based indirectly on disability (e.g., "all students are required to be present at school at least 170 of the 180 school days per year without exception" would indicate discrimination under Section 504 against prospective students with a disability that causes them to miss more than ten

school days per year);

- Based on noncompliance with an obligation that is required of the recipient under Section 504 (e.g., "students with a current or previous IEP or Section 504 plan will not be admitted" or "students who require a sign language interpreter will not be admitted").⁴³

Where a charter school is chartered to serve students with a specific disability, e.g., autism, it is permitted to include that information in its recruitment information, with related information such as the school has had success in the past with students with the disability served by the school or that it has teachers trained to work with such students.⁴⁴ These statements are permitted so long as they cannot be reasonably understood to discourage students with other types of disabilities from applying, e.g., a school chartered to serve students with autism is prohibited from discouraging applications from students with autism who are deaf.

14. What are recruitment and application practices that comply with Section 504?

In addition to ensuring that the content of recruitment information is nondiscriminatory, recipients must ensure that charter school recruitment activities and application procedures are available on an equal basis to persons with a disability, including prospective students and their parents, so that persons with a disability have an equal opportunity to participate and apply.⁴⁵ For example, recruitment activities must utilize meeting sites that are accessible to persons with mobility impairments and recipients must provide, upon reasonable advance request, auxiliary aids and services, such as sign language interpreters for persons who are deaf, to enable persons with disabilities to participate in recruitment meetings.⁴⁶

In the application process, recipients must take appropriate steps to ensure that hard-copy applications are accessible to and usable by applicants with disabilities, for example, by offering a large print application for persons with low vision and ensuring

that web-based application materials can be accessed by persons who use screen reader technology so that, for example, persons who are blind or have low vision can access and use them.⁴⁷ This requirement means that if persons without disabilities have the opportunity to fill out an application online, persons with disabilities who use screen reader software also need to have the opportunity to fill out the application online with their screen reader software. (OCR also enforces Title VI of the Civil Rights Act of 1964 and ED's Title VI regulations, which require, among other things, that recipients operating public elementary and secondary schools, including charter schools, provide the language assistance necessary to ensure meaningful communication with limited English proficient (LEP) parents (such as translations and interpretation) and communicate information provided to other parents to LEP parents in a language they can understand.⁴⁸)

15. How does Section 504 apply to admissions and enrollment-related activities, including assembling the applicant pool for charter school admissions decisions; admitting and enrolling students in, charter schools; and dis-enrolling students from charter schools?

Section 504 applies to all of the operations of a recipient, including all of its admissions- and enrollment-related activities, such as the assembly of the applicant pool for admission to a charter school, the charter school selection and admissions process, and enrollment in charter schools.⁴⁹ Section 504 also applies to all of a charter school's disenrollment policies, practices, procedures, and criteria, such as expulsions and other involuntary permanent removals of a student from a school.⁵⁰ For ease in reading, three questions and answers that follow address related aspects of this issue.

15[A]. How do Section 504's prohibitions against discrimination on the basis of disability apply in connection with admissions and enrollment-related activities in charter schools and with dis-enrolling students from charter schools?

Section 504 prohibits treating qualified

individuals with disabilities differently than individuals without disabilities on the basis of disability, unless the different treatment is necessary to provide the individual with a disability with aids, benefits, or services that are as effective as those provided to others.⁵¹

Section 504, thus, prohibits a charter school from having a policy that explicitly excludes students with disabilities (e.g., "persons with autism are not admitted" or "this school is not appropriate for students with autism") or engaging in such a practice (even if no written policy exists).

Section 504 also prohibits a charter school from having a policy or practice that, while not referencing disabilities, excludes any student because the student needs special education or related aids and services in order to ensure FAPE.⁵² For example, if a student with a disability requires transportation as a related service to receive FAPE under Section 504, it would be disability discrimination for a charter school to decline to admit or enroll that student because the school does not currently provide transportation as a related service to any current students, or because the school does not want to incur the cost of providing transportation.

Section 504 further prohibits a charter school from having a policy or practice that, while not referencing disabilities, excludes any student because the student needs reasonable accommodation, for example, to participate in the school's interscholastic athletics program.⁵³

There is, however, a critical distinction between a prohibited policy or practice that excludes applicants on the basis of disability in connection with admission to, or enrollment in, a charter school and a placement decision about a particular student with a disability that complies with the FAPE requirements of Section 504. The latter, an individualized placement decision that satisfies the Section 504 FAPE requirements, is legally permissible, whereas the former, a policy or practice that excludes applicants on the basis of disability, is not.

As described in Q&As 16 and 17, a recipient that is not already responsible for ensuring the provision of FAPE to a particular student for the purposes of Section 504 becomes responsible for ensuring FAPE when that student enrolls in its charter school.⁵⁴ Among other FAPE requirements, as described in Q&A 21, a group of persons who are knowledgeable about the student, the meaning of the evaluation data, and the placement options (sometimes called a Section 504 team) is responsible for making placement decisions pursuant to Section 504 FAPE requirements.⁵⁵ Where appropriate, Section 504 permits a recipient to place a particular student with a disability in an educational program other than the charter school regular education classes if that placement is needed to provide the student with FAPE.⁵⁶ The placement decision is not made by the charter school's admissions staff, however, and is not made prior to admission. Section 504 prohibits staff responsible for admissions and enrollment from substituting their judgment for a decision of the group responsible for placement under Section 504.⁵⁷

Different treatment also occurs when a school has a policy that is neutral on its face (meaning the language of the policy does not differentiate between students based on whether they have a disability), but the school administers the policy in a discriminatory manner on the basis of disability.

The following hypothetical example about an admissions policy addresses a finding that OCR would make if the circumstances set out in the example were present:

OCR receives a complaint from the parent of a charter school applicant with a disability alleging that her child was denied admission to a charter school of a traditional LEA on the basis of her disability. The complaint alleges that the recipient admitted applicants without disabilities to the same grade after the recipient denied the applicant admission.

OCR finds that the charter school has a written policy of admitting only students who reside within the attendance boundaries of the LEA and the applicant with a disability lived outside the attendance

boundaries of the LEA.

If OCR found that all the students admitted to the charter school, including students with and without disabilities, lived within the LEA's attendance boundaries, and that all students who lived outside the attendance boundaries were not admitted, OCR would likely not find the reason pretextual (and unlawful different treatment on the basis of disability). But if OCR found that the charter school did admit students who lived outside the LEA's attendance boundaries during the same application cycle, OCR could find that the otherwise neutral policy was applied in a discriminatory way against the applicant with a disability on the basis of disability.

Determining whether a school has engaged in discrimination on the basis of disability in the administration of a facially-neutral policy will be based on the facts and circumstances surrounding the particular incident and will take into account direct and, if needed, circumstantial evidence. Direct evidence might include remarks, testimony, or admissions by school officials revealing discrimination based on disability. Absent direct evidence of different treatment on the basis of disability, OCR examines circumstantial evidence to evaluate whether discrimination has occurred. Circumstantial evidence is evidence that allows OCR to infer discriminatory intent from the facts of the investigation as a whole, or from the totality of the circumstances.

15[B]. How do Section 504's prohibitions against criteria and methods of administration that have discriminatory effects apply in connection with admissions and enrollment-related activities in charter schools and with dis-enrolling students from charter schools?

Section 504 also prohibits schools from using criteria, policies, practices, and procedures that are neutral in language and are evenhandedly implemented with respect to students with and without disabilities, but nonetheless have the effect of discriminating against students on the basis of disability or defeating or substantially impairing

accomplishment of the objectives of the school's program or activity with respect to persons with disabilities.⁵⁸ This prohibition applies even when schools adopt the criteria, policies, practices, and procedures without the intent to discriminate. This prohibition applies to charter school admissions, enrollment, and disenrollment criteria, policies, practices, and procedures.

In determining whether this type of criterion, policy, practice, or procedure has the effect of discriminating on the basis of disability, OCR will consider:

(1) Does the admission, enrollment, or disenrollment criterion, policy, practice, or procedure deny meaningful access to, or otherwise discriminate against, students with disabilities?⁵⁹ For example, does it have the effect of excluding, defeating or substantially impairing accomplishment of the objectives of the program or activity, or otherwise discriminating against, qualified persons with disabilities? If there is insufficient evidence of such an adverse effect, then OCR would not find a Section 504 violation on this basis.

(2) If, however, OCR finds that the criterion, policy, practice, or procedure has a discriminatory effect on students with disabilities, OCR will consider whether there is sufficient evidence to show that the criterion, policy, practice, or procedure is necessary to advance the school's legitimate, nondiscriminatory educational goal.⁶⁰ In this context, OCR will consider both the importance of the school's articulated goal and the tightness of the fit between that goal and the means the school has adopted to achieve that goal. If OCR determines that the criterion, policy, practice, or procedure is not necessary to advancement of a legitimate, nondiscriminatory goal, then OCR would find a Section 504 violation. (If OCR determined that the criterion, policy, practice, or procedure is a pretext for disability discrimination, then OCR would find a violation of Section 504. See the discussion of different treatment discrimination in Q&A 15[A] for more information.)

(3) If there is evidence that the criterion, policy,

practice, or procedure is generally necessary to advance a legitimate, nondiscriminatory educational goal, then OCR would determine if there is a comparably effective alternative available that would advance the recipient's legitimate educational goal with a less discriminatory effect on persons with disabilities. If not, then OCR would not find a Section 504 violation. But if there is such an alternative, then OCR would find the recipient's criterion, policy, practice, or procedure to be discriminatory in violation of Section 504, and, in that case, Section 504 would require the recipient to either use the alternative or eliminate the discriminatory practice.⁶¹

The following hypothetical example about an admissions policy addresses a finding that OCR would make if the circumstances set out in the example were present:⁶²

OCR receives a complaint from a charter school applicant with a disability alleging that a charter school LEA uses a lottery to select students, and she was excluded from participation in the lottery because she had been absent for 21 days in the previous school year. The student provided documentation that all her absences were due to her disability, brain cancer, for treatment and related recuperation. OCR learns in investigation that the charter school has a policy that excludes any student who has had 20 or more absences during the previous school year from the applicant pool for its charter school lottery. OCR finds that the charter school evenhandedly applied its policies to all students, both those with and without disabilities. But OCR also finds that the policy resulted in the exclusion of this applicant, and a number of other applicants with disabilities, from the applicant pool because of absences caused by their disabilities.

Based on these facts and circumstances, at the initial step of the analysis OCR would find that the attendance criterion has the effect of discriminating against students with disabilities. OCR would find that this was discrimination on the basis of disability because the effect is a result of the application of the admissions policy to absences that are a result of the

students' disabilities, e.g., absences that are required due to treatment or recuperation because of the student's brain cancer. Based on this finding, OCR would proceed to the next step of the analysis to determine if the admissions criterion is justified. Unless OCR finds that this attendance qualification is a necessary means for advancing a legitimate, nondiscriminatory educational goal, the policy is prohibited and a violation of Section 504.

Moreover, even if the school demonstrated that the attendance qualification was generally necessary for students without disabilities, OCR could still find the school's policy violated Section 504 if OCR could identify a comparably effective alternative policy that would achieve the school's legitimate goal with a less adverse effect on students with disabilities. For example, OCR might find that the charter school could still achieve its educational goal by modifying its attendance policy to count only those absences that are not involuntary or not medically excused.⁶³

OCR would apply this same analysis to complaints alleging that other facially neutral, evenly applied charter school admissions and enrollment criteria, policies, practices, and procedures have the effect of subjecting qualified persons with disabilities to discrimination on the basis of disability. For example, OCR would use this analysis for a complaint alleging that a charter school's policy excluding from the selection pool for its admission lottery prospective students with a low score on a particular standardized assessment in reading discriminates against students with dyslexia.⁶⁴

15[C]. Is there an obligation to make reasonable accommodations in policies, practices, or procedures in connection with admissions, enrollment, and disenrollment-related activities in charter schools?

Yes. Traditional LEAs and charter school LEAs have an obligation under Section 504 to make reasonable modifications to criteria, policies, practices, or procedures of general applicability, when the modifications are necessary to avoid discrimination on the basis of disability.⁶⁵ The obligation to make reasonable accommodation is not

limited to the admissions context, but generally applies when necessary to avoid discrimination on the basis of disability in the program or activity.⁶⁶ A reasonable modification could include, for example, the waiver of a particular admissions criterion, when necessary to avoid disability discrimination against a person with a disability or a class of persons with disabilities.⁶⁷

16. During the charter school application process, is it permissible for school personnel to ask whether a prospective charter school student has a disability? Can school personnel ask about a disability after a charter school accepts a student for admission and upon the student's enrollment in the school?

Summary. During the application and admission process and before enrollment in the charter school, it is generally not permissible under Section 504 to ask a prospective student whether the student has a disability.⁶⁸ The exceptions to this prohibition, as discussed below, apply where the charter school is using that information solely to enhance the chances for a student with a disability to be admitted or enrolled for required remedial action or permissible voluntary action, or where a school is chartered to serve the educational needs of students with a specific disability and the school asks prospective students if they have that specific disability.⁶⁹ Although the same standard would apply to a traditional LEA, as described below, the process of applying and being admitted to a charter school is generally distinguishable from filling out paperwork necessary to enroll in a traditional LEA where enrollment is based only on residence and age.

Upon enrollment, it is permissible for the charter school to ask a student whether he or she has a disability in order to ensure that the school provides FAPE. Such information is protected under the Family Educational Rights and Privacy Act (FERPA).⁷⁰

Application process. Prospective students seeking admission to or enrollment in a charter school typically must follow a specific application process. Charter school LEAs and charter schools that are part

of traditional LEAs typically condition admission and enrollment of students on a process that involves submission and acceptance of an application filled out by the parents of prospective students. Such charter schools might have fewer open slots than applicants, and sometimes engage in a pre-admissions process that involves acceptance or rejection of students' applications (e.g., screening of applicants). As noted above (Q&A 15[A], [B], and [C]), recipients are prohibited from discriminating on the basis of disability in the application process, including through use of criteria that screen out or tend to screen out applicants with disabilities.⁷¹

Absent an exception as detailed below, in which case a student's disability is relevant to a charter school's admissions process, there is generally no legitimate reason to ask about or consider a student's disability in the process of initially accepting or rejecting applications or in admitting students to a charter school. For this reason, any pre-enrollment inquiry about disability during the charter school application and admissions process is generally prohibited as unnecessary different treatment on the basis of disability.⁷² The exceptions discussed below recognize situations in which there is a legitimate reason for asking about disability during the charter school application and admissions process, i.e., the inquiry about disability is necessary to provide students with disabilities with benefits, services, or opportunities that are as effective as those provided to others.⁷³

Examples of impermissible pre-enrollment inquiries include a direct pre-enrollment inquiry about disability (such as a question about disability on an application) or an indirect inquiry about the results of a disability (such as a request about other circumstances that result from a disability or disability-related needs, e.g., whether the student has an IEP, has a 504 plan, needs transportation as a related service) or an inquiry that elicits disability-related information (such as a request that the student's current IEP or Section 504 plan be submitted with the application). Another example is

an informal pre-enrollment inquiry (such as an inquiry about disability or IEPs or Section 504 plans by charter school staff in formal interviews or informal conversations with prospective students or their parents).

Pre-enrollment inquiry exceptions in the charter school admissions process. Section 504 does permit pre-enrollment inquiries in the charter school admissions process where necessary to provide students with disabilities benefits, services, and opportunities as effective as those provided to others.⁷⁴ Such a pre-enrollment inquiry about disability can be necessary to provide students with disabilities benefits, services, and opportunities as effective as those provided to others when: (1) the recipient is taking remedial action after OCR found that the recipient discriminated on the basis of disability; (2) a recipient is taking voluntary action to overcome the effects or conditions that resulted in limited participation in the recipient's program by qualified persons with disabilities;⁷⁵ or (3) a charter school that is chartered to serve the educational needs of students with a particular disability asks prospective students if they have that specific disability.⁷⁶

Under circumstances where a school is engaging in required remedial action or in voluntary action permitted under Section 504, a school that seeks to increase the percentage of students with disabilities admitted can ask applicants whether they have a disability to favor them, such as in a weighted lottery.⁷⁷ A school must ensure that it does not use this information to discriminate against the student in admission to and enrollment in the charter school. This includes discrimination against subsets of students with particular types of disabilities. For example, a school chartered to provide services to students with autism can inquire about whether an applicant has autism, but, unless its inquiry is for the purposes of remedial or voluntary action, as described above, it cannot inquire about whether an applicant with autism has other disabilities, and if it has information that an applicant with autism has an

additional disability, it is prohibited from using that information to discriminate on the basis of that disability.

Enrollment in traditional LEAs distinguished. Traditional LEAs typically are responsible for educating all students, who, pursuant to State law, are in the LEA's jurisdiction based on residence, and who are eligible for educational services based on age. To the extent that a traditional LEA enrolls all such students, enrollment is generally not conditioned upon an application and admissions process (assuming that residence and age criteria are met), and, thus, the traditional LEA can inquire about disability consistent with its responsibility to provide FAPE to enrolled students with disabilities.⁷⁸ If the traditional LEA includes a charter school with an admission process, however, the charter school cannot inquire about disability in connection with admission to the school, unless the information is intended to provide the student with a disability aid, benefit or service to ensure equal opportunity, i.e., unless one of the exceptions applies.

Prohibition against discrimination in charter school admissions process includes any discriminatory use of information about disability. A recipient might legitimately know that a student has a disability prior to a prospective student's selection for admission to and enrollment in a charter school. This could occur, for example, because the charter school is a school of a traditional LEA and the student currently is enrolled in another school of the LEA and has an IEP. In such a case, the recipient must not use information about the student's disability to discriminate against the student in admission to and enrollment in the charter school. Similarly, Section 504 would not prohibit a parent from volunteering unsolicited information about a prospective student's disability prior to a decision about admission, but Section 504 would prohibit the school from using the information about the student's disability to discriminate against the student.

Enrolled students. A recipient is responsible for determining if there are enrolled students with

disabilities who are entitled to FAPE under Section 504.⁷⁹ Therefore, after a charter school admits and enrolls a student, a charter school can inquire about a student's disability and request relevant records. (See Q&As 19-22 and 24-25, which outline a recipient's Section 504 FAPE obligations.)

17. Is it permissible for a charter school to counsel a prospective student (or the student's parents) against applying to or enrolling in a charter school because of the student's disability (a practice commonly referred to as counseling out)? Once enrolled, is it permissible for a charter school to counsel out a student because the student has a disability?

The answer to both questions is no. The practice of counseling out, a practice that is commonly understood to mean that a recipient tries to influence a prospective student with a disability not to apply to or enroll in a charter school because the prospective student has a disability, constitutes unnecessary different treatment of a prospective student on the basis of disability and is prohibited discrimination.⁸⁰ For example, Section 504 prohibits a recipient charter school, like any other public school, from counseling a prospective student against applying to or enrolling in the school because the student has a current IEP or Section 504 plan, or because the recipient does not want to incur costs that are necessary to provide FAPE to a prospective student with a disability, or because the recipient believes, correctly or incorrectly, that the student has a disability.⁸¹

If a student with a disability is already in the jurisdiction of a recipient LEA, the recipient is already responsible for FAPE under Section 504; otherwise, upon enrollment of a student with a disability in a recipient's charter school, the recipient is responsible for taking actions to ensure Section 504 FAPE is provided, including a placement that complies with Section 504.⁸² (See Q&As 19-22 and 24-25, which outline a recipient's Section 504 FAPE obligations.)

A decision about placement of a particular student with a disability, consistent with Section 504

FAPE requirements, is distinguishable from the prohibited practice of counseling out on the basis of disability. That is, even though a placement decision can, in some instances, result in the provision of services to a particular student with a disability at a setting (location) other than the charter school, placement through the Section 504 process ensures that the recipient maintains responsibility for the student's education, including provision of services needed to ensure FAPE and access to procedural safeguards.⁸³ Counseling out, on the other hand, is intended to exclude a prospective student because of the student's disability.

Similarly, the practice of counseling out enrolled students with disabilities because of their disabilities by encouraging them to voluntarily transfer from the charter school is also prohibited discrimination.⁸⁴ As indicated above, charter schools must make decisions about the placement of a particular student with a disability consistent with the FAPE requirements.⁸⁵ If the school believes a currently enrolled student needs additional evaluations or services in order to receive FAPE, the school must follow Section 504 evaluation and placement procedures. Although an appropriate placement decision can, in some instances, result in the provision of services to the student with a disability in a setting other than the charter school setting, that placement decision must be made in compliance with Section 504 FAPE requirements, including procedural safeguards.⁸⁶ Counseling out, in such a situation, is recipient action that is prohibited because it is designed to urge, intimidate, or coerce the student on the basis of disability to withdraw or transfer from the school, perhaps to the school of another recipient. The result could be that a recipient disenrolls a student without taking further responsibility for the provision of FAPE, including those FAPE requirements applicable to disenrollment.⁸⁷

Section 504 Nondiscrimination Requirements for Students: Rights to FAPE and Nonacademic and Extracurricular Services and Activities

18. What are the Section 504 rights to nondiscrimination applicable to enrolled charter school students?

Charter school students with disabilities must not be excluded from participation in, be denied access to or limited in, or otherwise subjected to discrimination on the basis of disability in a charter school's provision of aid, benefits, services, or opportunities.⁸⁸ Charter school students with disabilities have a right to equal treatment regardless of their disability and to aid, benefits, services, or opportunities equal to, and as effective as, those the charter school provides to students without disabilities.⁸⁹

Section 504 permits recipients to provide charter school students with disabilities different or separate aid, benefits, or services only when that action is necessary to provide aid, benefits, or services that are as effective as those the charter school provides to others.⁹⁰ For aid, benefits, or services to be equally effective, charter school students with disabilities must be afforded an 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 a particular student's needs.⁹¹ A key component of nondiscrimination in public elementary and secondary education is that students with disabilities, including charter school students with disabilities, are entitled to FAPE regardless of the nature or severity of the student's disability.⁹²

In addition, a recipient, including a charter school LEA, must ensure that any agency or organization to which it provides significant assistance, including private entities, does not discriminate on the basis of disability against students in the recipient's program or activity.⁹³ Also, recipients are prohibited from, directly or through contractual or other arrangements, utilizing criteria, policies, practices, procedures, or other methods of administration that have the effect of discriminating against qualified students with disabilities on the basis of disability, or that have the purpose or effect of defeating or impairing accomplishment of the objectives of the recipient's program or activity with

respect to students with disabilities.⁹⁴

19. Does a charter school student with a disability have the same right to FAPE under Section 504 as a student with a disability enrolled in a traditional public school?

Yes. The right of a charter school student with a disability to FAPE under Section 504, whether the charter school is a charter school LEA or within a traditional LEA, is the same as the right of a student with a disability enrolled in a traditional public elementary or secondary school in a traditional LEA. A recipient with a public elementary or secondary charter school has the same responsibility under Section 504 that a recipient with a traditional public elementary or secondary school has to ensure that students with disabilities in its jurisdiction who are eligible to receive FAPE are provided FAPE.⁹⁵

For the purposes of Section 504 FAPE, free means that the recipient must provide educational and related services to a charter school student with a disability without cost to that student or that student's parents, except for those fees that are imposed on students without disabilities or their parents.⁹⁶ An example of the exception would be a charge assessed on all students for admission to a museum as part of a class field trip.

For the purposes of Section 504 FAPE, an appropriate public education consists of two elements.⁹⁷ The first is that the recipient must provide a charter school student with a disability regular or special education and related aids and services that are designed to meet the student's individual educational needs as adequately as the needs of students without disabilities are met.⁹⁸ A recipient's implementation of an IEP developed in accordance with the IDEA is one means of meeting the Section 504 FAPE standard for IDEA-eligible students.⁹⁹

The second is that the recipient must provide a charter school student the rights, outlined in Q&As 20-22 and 24-25, to evaluation and placement, educational setting, and procedural safeguards.¹⁰⁰

This document addresses only the right to FAPE

provided by, and FAPE requirements imposed by, Section 504. While OCR enforces the Section 504 rights of students with disabilities who are IDEA-eligible, this document does not address IDEA FAPE rights of children with disabilities, or requirements pertaining to IDEA FAPE, imposed by the IDEA. For information about IDEA FAPE rights and requirements in the context of charter schools, see OSERS' Frequently Asked Questions about the Rights of Students with Disabilities in Public Charter Schools under the Individuals with Disabilities Education Act, issued concurrently with this document.¹⁰¹

20. What is the right of a charter school student with a disability with respect to evaluations related to FAPE under Section 504?

The right of a charter school student with a disability with respect to evaluations required in connection with Section 504 FAPE is the same as any other public elementary or secondary school student with a disability.

Under Section 504, if a charter school student needs, or the recipient believes the student needs, special education or related aids or services because of a disability, the recipient must conduct an evaluation prior to an initial placement of the student in regular or special education and prior to any subsequent significant change of placement.¹⁰²

For example, even though a charter school student receives reading instruction that has been effective for his or her age and grade peers, that student is experiencing difficulties in learning to read. Where school personnel have reason to suspect that these difficulties are the result of a disability and that special education or related services might be required to enable the student to learn to read and to otherwise access the charter school's education program, the recipient must ensure that the student is evaluated pursuant to the requirements of Section 504.¹⁰³

Recipient charter school LEAs and traditional LEAs must establish standards and procedures for

initial evaluations and periodic reevaluations of all students, including charter school students, who because of disability, need or are believed to need special education and/or related aids and services.¹⁰⁴ These procedures must incorporate the requirements applicable to evaluations, including requirements applicable to tests and other evaluation materials used in such evaluations.¹⁰⁵

Although a parent does not have an absolute right to a Section 504 evaluation upon request, a recipient must ensure the evaluation of a charter school student if it has reason to believe the student is in need of special education or related services because of disability.¹⁰⁶ A recipient cannot ignore a parent's request for evaluation; it must respond in a timely manner.¹⁰⁷ If the recipient does not agree to evaluate a charter school student pursuant to a parent request because the recipient does not believe that the student needs special education or related aids and services because of a disability, the recipient must inform the parent of his or her right to challenge the decision not to evaluate, including the right to procedural safeguards.¹⁰⁸ (See Q&A 22 on procedural safeguards.) A recipient violates Section 504 when it knows or has reason to suspect that a student has a disability, and needs special education or related services, but the recipient fails to initiate the evaluation process or unreasonably delays conducting an evaluation.¹⁰⁹

In most instances, a charter school's proposal to disenroll an enrolled student with a disability constitutes a significant change in placement and triggers the recipient's duty to conduct a reevaluation; the recipient must comply with Section 504 FAPE requirements regarding placement and procedural protections.¹¹⁰ (See Q&As 21-22.) In situations where the disenrollment is based on a charter school's closure, additional factors would be relevant in determining whether there is a significant change in placement. For example, if a charter school LEA closes and no longer exists, the student would have to transfer to a new LEA and the new LEA could elect to provide the same special education and related

services in a similar program as was provided by the previous LEA.

21. What are the rights of a charter school student with a disability with respect to educational setting and placement related to FAPE under Section 504?

The same rights apply to charter school students with disabilities that apply to other public elementary or secondary school students with disabilities pertaining to educational setting and placement under Section 504.

Under Section 504 FAPE, students with disabilities, including charter school students, have the right to be educated with students without disabilities to the maximum extent appropriate to the needs of the student with a disability.¹¹¹ A charter school student with a disability is entitled, under Section 504 FAPE, to be placed in the charter school regular educational environment operated by the recipient unless the recipient demonstrates that education of that student cannot be achieved satisfactorily, even with the use of supplementary aids and services, in the charter school's regular educational environment.¹¹²

For example, a student with a disability might exhibit behavior caused by or related to the student's disability, and the group of knowledgeable persons responsible for this student's placement would first consider if there are supplementary aids and services that would address the student's educational needs, including the student's disruptive behavior so that the behavior would not impede the student's own education and would not significantly impair the education of the other students in the regular education environment.¹¹³ Only if the group determined that there were no appropriate supplementary aids and services to address the student's needs, including the student's behavioral needs, in the regular educational environment, could they determine that placement in the regular classroom was not appropriate to the needs of the student with a disability; and if so, a regular education placement would not be required by Section 504 in

this instance.¹¹⁴

Educational placement decisions are individualized decisions about what educational and related aids and services will provide FAPE to a particular student with a disability for the purposes of Section 504. Recipients must ensure that procedures are in place so that placement decisions for students with disabilities are informed by the evaluation data, and that interpretations of the evaluation data draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior.¹¹⁵ Under Section 504, educational placement decisions must be made by a group of persons knowledgeable about the student, the meaning of the evaluation data, and the placement options.¹¹⁶ For example, it would be a violation of Section 504 for a charter school administrator to make an initial educational placement decision, or to make a unilateral change of placement.¹¹⁷

When charter schools, like any other public school, make an educational placement decision about a student with a disability, the decision must be made in compliance with the Section 504 FAPE requirements.¹¹⁸ Section 504 requires schools to consider, and select, services and placement options that are effective for eligible students, rather than limiting options to free or low cost services.¹¹⁹ Those services can be as varied and as comprehensive as are necessary to meet a student's need.¹²⁰

For the vast majority of students with disabilities, their educational needs can be met in a regular educational environment with additional educational supports and services. Where the group responsible for placement for a charter school student with a disability has determined that the student's educational needs can be met in a regular educational environment with additional educational supports and services, a charter school that operates a regular educational environment is responsible for meeting the student's educational needs by providing or contracting for the provision of needed special

education and related aids and services (e.g., specialized math instruction, physical therapy, speech and language therapy, or occupational therapy).

For example, when the group of knowledgeable persons determines that a particular student with a disability can be educated at the charter school with regular or special education and related aids and services, and the related aids and services needed to provide FAPE to this student include speech therapy as well as other interventions, the charter school is responsible for implementing the student's IEP or Section 504 plan.¹²¹ The charter school may not fail to implement the plan with respect to speech therapy simply because the charter school does not currently have a speech therapist on staff or on contract or because the charter school does not want to incur the cost of hiring or contracting for the services of a speech therapist.¹²²

Section 504 permits a recipient to place a charter school student with a disability in a setting other than the regular education classroom of the charter school only if the recipient: (1) has complied with the applicable Section 504 FAPE procedural protections (including evaluation, placement, and procedural safeguards); (2) can demonstrate that education of a particular charter school student with a disability in the charter school's regular educational environment with the use of supplementary aids and services cannot be achieved satisfactorily; and (3) can demonstrate that the student's placement in a setting other than the charter school's regular educational environment is in compliance with the requirement that the particular student with a disability be educated with students without disabilities to the maximum extent appropriate to the needs of the student with a disability.¹²³ The third requirement applies regardless of the nature of the charter school's student population, i.e., regardless of whether the charter school serves primarily students with disabilities or primarily students without disabilities, the recipient must engage in the same inquiry to determine whether the school provides the particular student with a disability an education where he or she

participates with students without disabilities to the maximum extent appropriate to the needs of that student.¹²⁴

The Section 504 regulations provide that the recipient remains responsible for ensuring that FAPE requirements are met for any student with a disability so placed or referred.¹²⁵ The requirement that a recipient is responsible for ensuring FAPE does not address the issue of ultimate responsibility for payment of FAPE costs in any given situation. A recipient's responsibility for ensuring that FAPE is provided is not determined by what entity ultimately pays FAPE costs. (See also Q&As 9-11.)

22. What procedural safeguards are applicable to the right to Section 504 FAPE of a charter school student with a disability (and the student's parents)?

Charter school students with disabilities (and their parents) have the same rights to procedural safeguards under Section 504 as students with disabilities who are enrolled in a traditional public elementary or secondary school (and their parents). Specifically, they are entitled to a system of procedural safeguards to have notice about and to challenge the recipient's actions regarding the identification, evaluation, or educational placement of students who, because of disability, need or are believed to need special education or related aids and services.¹²⁶

The system of procedural safeguards must also include an opportunity for the parents of the person with a disability to examine relevant records, an impartial hearing with opportunity for participation by the student's parents and representation by counsel, and a review procedure.¹²⁷ Compliance with the procedural safeguards of IDEA is one means for a recipient to meet this Section 504 requirement.¹²⁸

23. What are the rights of a charter school student with a disability regarding nonacademic and extracurricular services and activities?

Under Section 504, public school students with disabilities, including charter school students with disabilities, are entitled to equal treatment and

nondiscrimination in nonacademic and extracurricular services and activities. The recipient must provide nonacademic and extracurricular services and activities in a manner that affords students with disabilities an equal opportunity for participation.¹²⁹ Examples of such services and activities include counseling services, transportation, health services, recreational activities, special interest groups or clubs sponsored by the recipient, and activities related to employment of students.¹³⁰ The Section 504 nondiscrimination requirements also apply to interscholastic, club, or intramural athletics.¹³¹

24. Is a charter school student with a disability entitled to transportation?

The rights of charter school students with disabilities to transportation under Section 504 are the same as other public elementary and secondary school students with disabilities. If a recipient is providing transportation to other charter school students, a student with a disability is entitled to transportation services in a manner that is necessary to provide equal opportunity to the student.¹³²

Even if a recipient is not providing transportation to other charter school students, a particular charter school student with a disability is entitled to transportation if the group responsible for the student's placement determines that transportation is a related service necessary to provide FAPE, as required by Section 504, to the student.¹³³

25. Do Section 504 rights affect a recipient's actions to discipline charter school students with disabilities?

Yes. With regard to disciplinary actions, including suspension or expulsion, the Section 504 rights of charter school students with disabilities are the same as other public elementary and secondary school students with disabilities. Section 504 prohibits charter schools from unnecessarily treating students differently on the basis of disability, including disciplining students with disabilities more harshly than students without disabilities for the same type of behavior.¹³⁴ In addition, the Section 504

FAPE rights of charter school students with disabilities extend to disciplinary actions that constitute a significant change in placement, and charter schools must comply with applicable legal requirements.¹³⁵ When addressing discipline for students with disabilities, it is important that charter schools comply with applicable legal requirements governing the discipline of a child for misconduct caused by, or related to, the child's disability.¹³⁶

Nondiscrimination Requires Accessibility of Charter School Programs and Facilities

26. Must charter school programs and facilities be accessible to and usable by persons with disabilities?

Yes. Section 504 requires that all recipients make their programs and facilities accessible.¹³⁷ For example, schools must ensure that students and other persons with disabilities, including parents, are not denied access to programs and services because of inaccessible facilities, including academic buildings, walkways, restrooms, athletic facilities, and parking spaces.¹³⁸

Section 504 incorporates specific physical accessibility requirements that apply to facilities constructed or altered by, on behalf of, or for the use of a recipient if the construction or alteration commenced after June 3, 1977.¹³⁹ These requirements apply to recipients with respect to charter school facilities in the same manner that they apply to other recipients and other facilities. (Title II incorporates specific accessibility requirements that apply to facilities constructed or altered by, on behalf of, or for the use of a public entity if the construction or alteration commenced after January 26, 1992.¹⁴⁰)

Regardless of when a charter school's facilities were built or altered, a recipient must ensure that qualified persons with disabilities are not discriminated against or excluded from participation in its program or activity because facilities are inaccessible to or unusable by persons with disabilities.¹⁴¹ Examples of possible means for complying with this requirement include, but are not

limited to, reassignment of classes and other services to an accessible floor of the charter school facility, alteration of existing charter school facilities, and construction of new charter school facilities that meet applicable accessibility requirements.

A recipient, in selecting facilities for charter schools, including facilities to rent, is prohibited from selecting a facility if: (1) it would have the effect of excluding persons with disabilities from the recipient's program, denying persons with disabilities the benefits of the recipient's program, or otherwise discriminating against persons with disabilities; or (2) it would have the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the service, program, or activity for persons with disabilities.¹⁴²

The requirements, that a recipient ensure that qualified persons with disabilities are not discriminated against or excluded from participation in its program or activity because facilities are inaccessible to or unusable by persons with disabilities, are not limited to facilities owned by a recipient, but also extend to rented facilities. At a minimum, therefore, a recipient must not use a rented facility for a charter school if the facility is inaccessible to or unusable by persons with disabilities such that it results in the exclusion of persons with disabilities from participation in the recipient's program or other discrimination against persons with disabilities.¹⁴³ If a recipient (or public entity) rents a facility for a charter school, and alterations or new construction are made to the facility by, on behalf of, or for the use of the recipient (or public entity), the specific accessibility requirements applicable under Section 504, based on the date the alteration or construction commenced, apply.¹⁴⁴

Administrative Requirements

27. Does Section 504 impose administrative requirements to ensure the rights of charter school students with a disability are protected?

Yes. Under Section 504, a recipient that employs

15 or more persons is required to comply with the requirements outlined below.¹⁴⁵ The same requirements apply regardless of whether the recipient's program includes charter schools, traditional public schools, or both. These requirements are:

- Designate at least one person to coordinate its efforts to comply with Section 504 and identify the person responsible for coordination in publications and materials pursuant to the notification requirements outlined in this answer.¹⁴⁶ (Schools often refer to these individuals as "Section 504 coordinators.") Section 504 requires the recipient to take steps so that the notification reaches participants, beneficiaries, applicants, and employees, such as, in this situation, students, parents, and the public.¹⁴⁷

- 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 Section 504.¹⁴⁸ (These grievance procedures apply to any action prohibited by Section 504, and are separate from the procedural safeguards discussed in Q&A 22.)

- Take initial and continuing steps to notify current and prospective students and their parents, employees, and unions or professional organizations holding collective bargaining or professional agreements with the recipient that it does not discriminate on the basis of disability in violation of Section 504.¹⁴⁹ Section 504 identifies requirements pertaining to the content and distribution of the notice.¹⁵⁰ For example, with respect to content, charter school recruitment materials must indicate that the recipient does not discriminate against people with disabilities in charter school admission or other treatment of students. A recipient must include its nondiscrimination notices in its publications containing general information and in its recruitment materials so that charter school applicants and students can easily find this information.¹⁵¹ This notice requirement applies, for example, to general information or recruitment materials that the recipient publishes in printed materials or on its website.

A recipient charter school LEA or traditional LEA must comply with these administrative requirements. If, on the other hand, a charter school is not a recipient, for example, it is a school of a recipient LEA and is not a recipient itself, it is sufficient for the purposes of Section 504 for the school to use the services of the LEA's Section 504 coordinator for its students, to use the LEA's grievance procedures for its students, and to use the LEA's nondiscrimination notice in its publications and postings.

28. Are charter school LEAs required to report information to OCR's Civil Rights Data Collection (CRDC)?

Yes. ED requires recipient LEAs, including charter school LEAs, to report to the CRDC information related to compliance by the charter school LEAs and their charter schools with Section 504 and other civil rights laws that OCR enforces.¹⁵² Traditional LEAs also have the obligation to report to the CRDC information related to compliance with the civil rights laws by the LEAs and their schools, including their charter schools.¹⁵³

OCR uses the information in its enforcement efforts, and other ED offices and Federal agencies and the public, including policymakers and researchers, also use CRDC information in their work. Recipient LEAs can use the information they report to the CRDC to monitor their compliance with the civil rights laws, including identification of potential civil rights problems for resolution, as appropriate.

Prohibition Against Retaliation

29. Are charter school students with a disability and their parents protected from retaliation for exercising, or seeking to exercise, rights to nondiscrimination?

Yes. The same protections against retaliation that apply to other public school students and their parents apply to charter school students and their parents. That is, recipients are prohibited from retaliating against any person for the purpose of interfering with any right or privilege under Section 504, or because

the person has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under Section 504.¹⁵⁴

Resources

30. What resources are available from ED for more information about the Section 504 rights of charter school students with a disability, including how to file a complaint of disability discrimination?

Students, prospective students, parents, traditional and charter school LEAs, charter schools, charter school authorizers, or any other person or organization interested in the rights of charter school students with disabilities, and how to ensure those rights, may contact the OCR office serving their State. Technical assistance about the requirements of Section 504 and other laws enforced by OCR is available, upon request, from the OCR enforcement office for the State in which a particular recipient or public entity is located. Contact information for these offices and for OCR's Customer Service Office is available at wdcrobcolp01.ed.gov/CFAPPS/OCR/contactus.cfm. Alternatively, interested persons may contact OCR's Customer Service Office by phone at 1-800-421-3481; TDD: 1-800-877-8339.

OCR's website, www.ed.gov/ocr, also provides information on a variety of topics related to the rights of persons with disabilities and the obligations of recipients under Section 504 and public entities under Title II.

Information about how to file a complaint of discrimination is on OCR's website at www.ed.gov/ocr.

¹29 U.S.C. § 794; 34 C.F.R. pt. 104; 34 C.F.R. § 104.2 (application); 34 C.F.R. § 104.3(f) (defining recipient); 34 C.F.R. § 104.3(h) (defining Federal financial assistance). Unless otherwise indicated, for purposes of this document Section 504 refers to the requirements of both the statute and ED's Section 504 regulations.

²29 U.S.C. § 794(b); 34 C.F.R. § 104.3(k). Section 504 prohibits discrimination in any

Federally-assisted program or activity and defines program or activity to mean all of the operations of the entities described. This includes all of the operations of a local educational agency (LEA). 29 U.S.C. § 794(b)(2)(B); 34 C.F.R. § 104.3(k)(2)(ii).

³*Id.* ED defines LEA, 34 C.F.R. § 77.1, to mean: "(a) A public board of education or other public authority legally constituted within a State for either administrative control of or direction of, or to perform service functions for public elementary or secondary schools in: (1) A city, county, township, school district, or other political subdivision of a State; or (2) Such combination of school districts or counties a State recognizes as an administrative agency for its public elementary or secondary schools; or (b) Any other public institution or agency that has administrative control and direction of a public elementary or secondary school. (c) As used in 34 C.F.R. parts 400, 408, 525, 526 and 527 (vocational education programs), the term also includes any other public institution or agency that has administrative control and direction of a vocational education program."

Examples of ED's Federal financial assistance in public elementary and secondary education include funds under the Individuals with Disabilities Education Act, Title I of the Elementary and Secondary Education Act, and the Charter Schools Program. The requirements of Section 504 apply to a recipient's charter schools regardless of whether the recipient receives funds under the ED's Charter Schools Program. 34 C.F.R. §§ 104.2, 104.3(f), (h).

For ease in reading, this document refers to traditional LEAs and charter school LEAs because they are the most common types of recipient LEAs to operate charter schools. Traditional LEAs generally include multiple schools within a defined geographic area. Depending upon State charter school law, traditional LEAs may include charter schools. Section 504 requires that any such recipient of Federal financial assistance comply in all of its operations. 34 C.F.R. § 104.2.

⁴34 C.F.R. §§ 104.2, 104.3(f), (k).

⁵*Id.*

⁶42 U.S.C. § 12132; 28 C.F.R. pt. 35. The Title II statutory language "services, programs, or activities" means all of the public entity's operations. The U.S. Department of Justice (DOJ) issued the Title II regulation, and, pursuant to a delegation by the Attorney General of the United States, OCR shares in the enforcement of Title II in, among other entities, public elementary and secondary education systems and institutions. 28 C.F.R. § 35.190(b)(2). This includes, for example, charter school LEAs and charter schools. For more information about Title II, see www.ada.gov. Unless otherwise indicated, for purposes of this document Title II refers to the requirements of both the statute and the Title II regulations.

⁷For purposes of this document, the term charter school means public charter school and these terms are used interchangeably. As a general matter, a charter school is a public school operated under a contract or charter pursuant to State law. For the purposes of receiving Federal financial assistance under ED's Charter School Program, 20 U.S.C. §§ 7221-7225g, public charter school is defined at 20 U.S.C. § 7221i(1).

⁸42 U.S.C. § 12201(a)-(b); 28 C.F.R. § 35.103(a)-(b).

⁹Title VI of the Civil Rights Act of 1964 and ED's Title VI regulations prohibit discrimination on the basis of race, color, or national origin in Federally-assisted programs or activities. 42 U.S.C. §§ 2000d-2000d-7; 34 C.F.R. pt. 100. Title IX of the Education Amendments Act of 1972 and ED's Title IX regulations prohibit discrimination on the basis of sex in Federally-assisted education programs or activities. 20 U.S.C. §§ 1681-1688; 34 C.F.R. pt. 106. The Age Discrimination Act of 1975 and ED's regulations implementing this statute prohibit discrimination on the basis of age in Federally-assisted programs and activities. 42 U.S.C. §§ 6101-6107; 34 C.F.R. pt. 110. See generally OCR, *Dear Colleague Letter: Charter Schools* (May 14, 2014),

www.ed.gov/ocr/letters/colleague-201405-charter.pdf. Also, some children are both students with disabilities and English Learners, and some students have parents with limited proficiency in English. For more information about these Title VI issues, see OCR and DOJ, *Dear Colleague Letter: English Learner Students and Limited English Proficient Parents* (Jan. 7, 2015), www.ed.gov/ocr/letters/colleague-el-201501.pdf.

¹⁰20 U.S.C. §§ 1401, 1411-1419; 34 C.F.R. pt. 300.

¹¹www.ed.gov/policy/spced/guid/idea/memosdcltrs/faq-idea-charter

¹²For the purposes of this document, enrolled in a charter school refers to the status of a student who has been accepted by a charter school and whose parents have provided the paperwork and other documentation necessary for the student to attend the charter school. Enrollment of a student with a disability in a charter school generally occurs months before the first day of school.

Where a recipient does not already have an obligation with respect to the provision of a free appropriate public education (FAPE) to a particular student with a disability, enrollment of a student with a disability in a charter school triggers a recipient's responsibilities with respect to the provision of FAPE, discussed in Q&As 19-22 and 24-25.

¹³See U.S. Government Accountability Office, GAO-12-543, *Charter Schools: Additional Federal Attention Needed To Help Protect Access For Students With Disabilities*, 19, 21-22 (2012), www.gao.gov/assets/600/591435.pdf. The GAO found that charter schools enrolled a lower percentage of students with disabilities than traditional LEAs for school years 2008-2009 (7.7 percent as compared to 11.3 percent) and 2009-2010 (8.2 percent as compared to 11.2 percent), but did not identify a cause for the disparity. *See id.* at 6-7, 21.

¹⁴For more information about the requirements of the IDEA and charter schools, see OSERS, *Frequently Asked Questions about the Rights of Students with Disabilities in Public Charter Schools*

under the Individuals with Disabilities Education Act (Dec. 28, 2016), www.ed.gov/policy/speced/guid/idea/memosdcltrs/faq-idea-3-0-charter-school.pdf.

¹⁵In some instances compliance with a requirement of the IDEA for an IDEA-eligible student will satisfy a requirement of Section 504. For example, implementation of an IEP developed in compliance with the IDEA is one means of satisfying the Section 504 requirement that a recipient LEA provide a student with a disability with special education and related aids and services that are designed to meet the student's individual educational needs as adequately as the needs of students without disabilities are met. 34 C.F.R. § 104.33(b)(1)(i) and (2). This means, for example, that OCR will investigate an allegation under Section 504 that a student's IEP was not implemented because the allegation is that the school has violated Section 504.

Implementation of an IEP developed in compliance with the IDEA does not necessarily satisfy the school's obligations under Title II. See, e.g., OCR, OSERS and DOJ, *Dear Colleague Letter: Effective Communication* (Nov. 12, 2014), www.ed.gov/ocr/letters/colleague-effective-communication-201411.pdf and OCR, OSERS and DOJ, *Frequently Asked Questions on Effective Communication for Students with Hearing, Vision, or Speech Disabilities in Public Elementary and Secondary School* (Nov. 12, 2014), www.ed.gov/ocr/docs/dcl-faqs-effective-communication-201411.pdf.

¹⁶34 C.F.R. §§ 104.2, 104.4, 104.21-104.37.

¹⁷A charter school receiving a grant under ED's Charter Schools Program must use a lottery if more students apply for admission to the school than can be admitted. 20 U.S.C. § 7221i(2)(H)(i).

¹⁸As stated in footnote 12, enrolled in a charter school refers to the status of a student who has been accepted by a charter school and whose parents have provided the paperwork and other documentation necessary for the student to attend the charter school.

¹⁹www.ed.gov/ocr.

²⁰For the purposes of this document, all references to a parent or parents of a person with a

disability include a guardian or guardians.

²¹OCR's website is www.ed.gov/ocr. See Q&A for more information.

²²See also OSERS, *Dear Colleague Letter Regarding Education of Children with Disabilities Attending Public Virtual Schools* (Aug. 5, 2016) (addressing the requirement for SEAs and LEAs to ensure the provision of FAPE under the IDEA of students with disabilities attending public virtual schools),

www.ed.gov/policy/speced/guid/idea/memosdcltrs/dcl--virtual-schools-

²³34 C.F.R. §§ 104.4(b)(1)(i)-(v), (vii), 104.33(a)-(b). For information about the requirements of Title II, Section 504, and the IDEA regarding effective communication, see OCR, OSERS and DOJ, *Dear Colleague Letter: Effective Communication* (Nov. 12, 2014),

www.ed.gov/ocr/letters/colleague-effective-communication-201411.pdf

and OCR, OSERS and DOJ, *Frequently Asked Questions on Effective Communication for Students with Hearing, Vision, or Speech Disabilities in Public Elementary and Secondary School* (Nov. 12, 2014), www.ed.gov/ocr/docs/dcl-faqs-effective-communication-201411.pdf.

²⁴For information about the requirements of Section 504 and Title II in connection with emerging technologies, see OCR, *Dear Colleague Letter* (May 26, 2011), www.ed.gov/ocr/letters/colleague-201105-ese.pdf,

Frequently Asked Questions about the June 29, 2010, Dear Colleague Letter (May 26, 2011), www.ed.gov/ocr/docs/dcl-ebook-faq-201105.pdf.

²⁴29 U.S.C. § 705(9)(B), (20)(B) (as amended by the Americans with Disabilities Act Amendments Act of 2008); 34 C.F.R. § 104.3(j). For additional information on the broadened meaning of disability after the effective date of the 2008 Amendments Act, see OCR, *Dear Colleague Letter: ADA Amendments Act of 2008 and Students with Disabilities Attending Public Elementary and Secondary Schools* (Jan. 19, 2012),

www.ed.gov/ocr/letters/colleague-201109.html, and OCR, *Questions and Answers on the ADA Amendments Act of 2008 for Students with*

Disabilities Attending Public Elementary and Secondary Schools (Jan. 19, 2012), www.ed.gov/ocr/docs/dcl-504faq-201109.pdf.

²⁵34 C.F.R. §§ 104.4(a), 104.3(l)(2).

²⁶34 C.F.R. § 104.3(l)(2).

²⁷34 C.F.R. § 104.3(l)(2)(iii).

²⁸34 C.F.R. §§ 104.2, 104.3(k)(1)-(4), 104.4(a), (b)(1)(i)-(v), (vii), (4).

²⁹34 C.F.R. § 104.3(k)(1)-(4).

³⁰State charter school laws provide authority for a public entity or entities, such as an SEA, LEA, or other type of public entity identified in the State law, to authorize or approve a charter school in that State. Under ED's Charter Schools Program, these entities are referred to as authorized public chartering agencies. 20 U.S.C. § 7221i(4). For the purposes of this document, for ease in reading, entities that authorize or approve charter schools are referred to as charter school authorizers. Charter school authorizers do not manage the day-to-day operations of the charter schools they authorize or approve.

³¹34 C.F.R. § 104.4(a)-(b).

³²*Id.*

³³34 C.F.R. § 104.3(k)(1)-(4).

³⁴34 C.F.R. § 104.4(b)(1).

³⁵*Id.*

³⁶34 C.F.R. § 104.6(a)(1)-(3).

³⁷34 C.F.R. § 104.4(b)(2); *see also id.* § 104.37.

³⁸34 C.F.R. § 104.4(a), (b)(1)(i)-(v), (vii), (4).

³⁹*Id.*

⁴⁰*Id.*

⁴¹34 C.F.R. § 104.8(a)-(b).

⁴²34 C.F.R. § 104.4(a), (b)(1)(i)-(v), (vii), (4); *see* 28 C.F.R. § 35.130(a), (b)(1)(i)-(v), (vii), (3), (8). This prohibition applies to information provided on a website, at recruitment meetings, or in response to student or parental inquiries.

⁴³*Id.*

⁴⁴34 C.F.R. § 104.4(b)(1)(iv); *see also id.* §

104.34.

⁴⁵34 C.F.R. § 104.4(b)(1)(i)-(iv), (vii).

⁴⁶*See* requirements pertaining to accessibility of programs and facilities in Q&A 26. *See also* footnote 23. Also, with respect to the provision of auxiliary aids and services for recruitment meetings, the meeting notice must specify that auxiliary aids are available upon reasonable advance request and provide information about how to make such a request. 34 C.F.R. § 104.22(f).

⁴⁷28 C.F.R. § 35.160. *See* footnote 23.

⁴⁸For more information, *see* OCR and DOJ, *Dear Colleague Letter: English Learner Students and Limited English Proficient Parents* (Jan. 7, 2015), www.ed.gov/ocr/letters/colleague-el-201501.pdf.

⁴⁹To the extent that a recipient uses criteria to include or exclude prospective students from the applicant pool, e.g., a lottery, from which a charter school selects students, the criteria are subject to Section 504.

As stated in footnote 12, enrolled in a charter school refers to the status of a student who has been accepted by a charter school and whose parents have provided the paperwork and other documentation necessary for the student to attend the charter school.

⁵⁰As discussed in connection with FAPE (*see* Q&As 20 and 25), proposed significant changes in placement are subject to FAPE requirements pertaining to notice and evaluation. 34 C.F.R. §§ 104.35(a), 104.36. A proposed dis-enrollment of a student with a disability from a charter school is an example of a proposed action that is most likely a proposed significant change in placement.

⁵¹34 C.F.R. § 104.4(b)(1)(i)-(v), (vii); 28 C.F.R. § 35.130(b)(1)(i)-(v), (vii), (8). As discussed in connection with requirements related to FAPE and reasonable modifications (*see* Q&As 19-22 and 24-25 regarding FAPE and Q&A 15[C] regarding reasonable modifications), in some situations providing an equal opportunity requires different treatment for a student with a disability.

⁵²*Id.* Depending on the facts, e.g., where a student is already in the jurisdiction of the recipient, it is also a violation of FAPE requirements. 34 C.F.R. §§ 104.33-104.36. See Q&As 19-22 and 24-25 regarding FAPE requirements. See also Q&A 13 regarding discriminatory statements in recruitment information.

⁵³*Southeastern Cmty. Coll. v. Davis*, 442 U.S. 397, 408-09 (1979) (stating that Section 504 regulations require recipients to make modifications in their programs to accommodate persons with disabilities unless the requested modifications would cause a fundamental alteration in the nature of the program). Outside of this limitation, courts generally have interpreted the obligation to provide reasonable accommodation under Section 504 consistently with the obligation to provide reasonable modifications under Title II. See, e.g., *Forest City Daly Hous., Inc. v. Town of N. Hempstead*, 175 F.3d 144, 151 (2d Cir. 1999) (analyzing reasonable accommodations in the same way under the ADA and Section 504); *Super v. J. D'Amelia & Associates, LLC*, No. 3:09CV831 SRU, 2010 WL 3926887 (D. Conn. Sept. 30, 2010) ("The relevant portions of the ... ADA ... and Section 504 offer the same guarantee that a covered entity ... must provide reasonable accommodations in order to make the entity's benefits and programs accessible to people with disabilities."). For the purposes of this document, the term reasonable accommodation incorporates the obligation to provide reasonable modifications of policies, practices, and procedures unless those changes pose a fundamental alteration to the program or pose an undue financial and administrative burden, and, for this reason, the document uses the terms reasonable accommodation and reasonable modification interchangeably. The fundamental alteration and undue burden defenses do not apply to an LEA's obligation to provide FAPE. 34 C.F.R. § 104.33. See also footnote 65.

⁵⁴34 C.F.R. § 104.33(a). As discussed in Q&As 9-11, some State charter school laws assign or delegate charter school functions that affect the Section 504 rights of charter school students with

disabilities such that more than one recipient (e.g., charter school LEAs, traditional LEAs, SEAs) may have responsibilities under Section 504, including in connection with ensuring FAPE to charter school students.

This can include situations where State law assigns or delegates FAPE responsibility under the IDEA for charter school students. For more information about such assignment or delegation, see OSERS, Frequently Asked Questions about the Rights of Students with Disabilities in Public Charter Schools under the Individuals with Disabilities Education Act (Dec. 28, 2016), www.ed.gov/policy/speced/guid/idea/memosdcltrs/faq-idea-charter-sch. In situations where State law assigns or delegates FAPE responsibility to another recipient under the IDEA, the recipient where the student is enrolled must take appropriate actions to ensure that the provisions of FAPE occurs consistent with that assignment or delegation and consistent with its responsibility under 34 C.F.R. § 104.33(a). If OCR were to receive a complaint alleging that an IDEA-eligible student with a disability who attended a particular charter school LEA was denied FAPE and that State law assigned FAPE responsibility under the IDEA to that student's traditional LEA of residence, OCR could open complaints against the charter school LEA, the traditional LEA of residence, and the SEA to determine if there has been a violation of Section 504.

⁵⁵34 C.F.R. § 104.35(c).

⁵⁶34 C.F.R. §§ 104.33(b)(3), 104.34(a), 104.35(c).

⁵⁷34 C.F.R. § 104.35(c)(3) ("ensure that the placement decision is made by a group of person, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options. ").

⁵⁸34 C.F.R. § 104.4(b)(4); see also 28 C.F.R. § 35.130(b)(8).

⁵⁹34 C.F.R. § 104.4(b)(4); see *Alexander v. Choate*, 469 U.S. 287, 292-94 (1985). See also 28

C.F.R. § 35.130(b)(8), which specifically prohibits public entities from using eligibility criteria that screen or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any service, program or activity unless the criteria can be shown to be necessary for the provision of the service, program, or activity offered.

⁶⁰*Id.*; see 53 Fed. Reg. 10,808, 10,811 (1988) (similar provision in another ED 504 regulation prohibits "nonessential policies and practices that are neutral on their face, but deny individuals with handicaps an effective opportunity to participate").

⁶¹34 C.F.R. § 104.4(b)(4). OCR's analysis of this provision is consistent with the analysis of the analogous Section 504 regulatory provision regarding discriminatory effects on the basis of disability in employment. 34 C.F.R. § 104.13.

⁶²OCR would also use this analysis to evaluate complaints of disability discrimination about charter school disenrollment policies, practices, procedures, and criteria, such as an allegation of a discriminatory disenrollment policy based on incidents of discipline. Additional important considerations apply in the case of the proposed disenrollment of an enrolled charter school student who is determined to be entitled to FAPE. See Q&As 19-22 and 24-25 for a discussion of FAPE.

⁶³Even if OCR were to find that an admissions policy was necessary and no alternative general policy was available, the charter school would need to consider reasonable accommodations to the policy, such as exempting a student with a disability from the policy, if necessary to avoid discrimination on the basis of disability. See Q&A 15[C].

⁶⁴This example is limited to illustrating the requirements of 34 C.F.R. § 104.4(b)(4). Allegations of discrimination in testing and assessment will generally raise additional Section 504 compliance issues that are beyond the scope of this document.

⁶⁵34 C.F.R. § 104.4(b). This obligation applies under both Section 504 and Title II, but the obligation

is most clearly stated in the Title II regulations. These regulations require reasonable modifications in policies, practices, or procedures when necessary to avoid disability discrimination unless the traditional LEA or charter LEA can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity. 28 C.F.R. § 35.130(b)(7). Courts have interpreted Section 504 regulations similarly. See *Choate*, 469 U.S. at 300-01 (stating that Section 504 regulations require recipients to make reasonable modifications in their programs to ensure that persons with disabilities have access to the benefits of the program, unless the modifications would cause a fundamental alteration in the nature of the program); *Southeastern Cmty. Coll.*, 442 U.S. at 408-09 (stating that Section 504 regulations require recipients to make modifications in their programs to accommodate persons with disabilities unless the requested modifications would cause a fundamental alteration in the nature of the program). The fundamental alteration defense, however, does not apply to an LEA's obligation to provide FAPE. 34 C.F.R. § 104.33; see, e.g., OCR, *Dear Colleague Letter: Equal Access to Extracurricular Athletics for Students with Disabilities* (Jan. 25, 2013), www.ed.gov/ocr/letters/colleague-201301-504.pdf. See also footnote 53.

⁶⁶34 C.F.R. § 104.4(b); 28 C.F.R. § 35.130(b)(7).

⁶⁷See, e.g., *Crowder v. Kitagawa*, 81 F.3d 1480, 1484-85 (9th Cir. 1996) (holding that although Hawaii's quarantine requirement applies equally to all persons entering the State with a dog, it discriminates on the basis of disability in violation of Title II because its enforcement burdens persons with visual impairments who are uniquely dependent upon guide dogs and effectively denies this class of persons with disabilities meaningful access to State services, programs and activities that are accessible to others, and that in this case the State had an obligation to comply with the Title II requirement, 28 C.F.R. § 35.130(b)(7), to make reasonable modifications to the policy to avoid discrimination on the basis of

disability).

⁶⁸34 C.F.R. §§ 104.4(b)(1)(ii), (iv), (4). As stated in footnote 12, enrolled in a charter school refers to the status of a student who has been accepted by a charter school and whose parents have provided the paperwork and other documentation necessary for the student to attend the charter school; among other things, that enrollment generally occurs months before the first day of school.

Charter schools can also have attendance area boundaries that affect eligibility for admission, based, for example, on location of residence. As long as the attendance boundaries are not based on disability or utilized in a manner that results in disability discrimination, the requirements of Section 504 are not implicated.

⁶⁹34 C.F.R. §§ 104.4(b)(1)(ii), (iv), 104.6(a)-(b), 104.33-104.36.

⁷⁰20 U.S.C. 1232g and 34 C.F.R. pt. 99. For IDEA-eligible students, IDEA's confidentiality of information provisions also apply. See generally 20 U.S.C. § 1417(c); 34 C.F.R. §§ 300.610-300.626.

⁷¹34 C.F.R. § 104.4(b)(1)(i)-(iv), (vii), (4); 28 C.F.R. § 35.130(b)(8).

⁷²34 C.F.R. § 104.4(b)(1)(ii), (iv). In addition, asking about disability on a charter school application, except where such an inquiry is necessary to provide students with disabilities benefits, services, or opportunities that are as effective as those provided to others, could also be a policy or procedure that has the effect of subjecting students with disabilities to discrimination on the basis of disability because it could discourage parents of students with disabilities from filing an application. 34 C.F.R. § 104.4(b)(4).

⁷³34 C.F.R. § 104.4(b)(1)(ii). See also 34 C.F.R. § 104.42(b)(4), which generally prohibits pre-admission inquiries about disability in the context of postsecondary education.

⁷⁴34 C.F.R. § 104.4(b)(1)(iv).

⁷⁵34 C.F.R. § 104.6(a)-(b). See also the Section 504 regulations applicable to admissions in the

postsecondary education context, which generally prohibit pre-admission inquiries and recognize exceptions for remedial or voluntary action pursuant to 34 C.F.R. § 104.6(a) or (b). 34 C.F.R. § 104.42(b)(4) (general prohibition), § 104.42(c) (exception to general prohibition).

⁷⁶34 C.F.R. § 104.4(b)(1)(iv). In some instances different treatment of students with disabilities can be necessary to provide students with disabilities aid, benefits, or services that are as effective as those provided to others. Section 504 permits placement of students with disabilities in special purpose schools for students with a particular disability if all relevant Section 504 requirements, including Section 504 FAPE requirements, are met. 34 C.F.R. §§ 104.4(b), 104.33-104.36.

⁷⁷For information on how ED's Charter Schools Program grantees can implement weighted lotteries, see the Elementary and Secondary Education Act, as amended by the Every Student Succeeds Act, 20 U.S.C. § 7221b(c)(3)(A).

⁷⁸34 C.F.R. §§ 104.32-104.36. See Q&As 19-22 and 24-25.

⁷⁹34 C.F.R. §§ 104.33(a)-(b), 104.35(a).

⁸⁰34 C.F.R. § 104.4(b)(1)(i)-(ii).

⁸¹34 C.F.R. § 104.4; 104.33.

⁸²34 C.F.R. § 104.33(a).

⁸³34 C.F.R. §§ 104.33-104.36.

⁸⁴34 C.F.R. §§ 104.4(b)(1)(i)-(ii), 104.33-104.36.

⁸⁵34 C.F.R. §§ 104.33-104.36.

⁸⁶See, e.g., Q&As 21 and 22 for information about placement determinations and procedural safeguards. For example, where a charter school proposes to change the placement of a student with a disability to a setting other than the charter school setting for the entire school day, this would be a proposed significant change in placement subject to FAPE requirements pertaining to evaluation and notice.

⁸⁷A proposed disenrollment of a student with a

disability would in most instances be a proposed significant change in placement for the purposes of FAPE protections. See Q&As 20 and 25. Also, a charter school's disenrollment procedures must be in compliance with Section 504 prohibitions against different treatment and discriminatory effects and in compliance with Section 504 requirements pertaining to providing reasonable modifications to criteria, policies, practices or procedures. See Q&A 15[A], [B], and [C].

⁸⁸34 C.F.R. § 104.4(a), (b)(1)(i)-(iv), (vii).

⁸⁹34 C.F.R. § 104.4(b)(1)(ii)-(iii).

⁹⁰34 C.F.R. § 104.4(b)(1)(iv). As discussed in connection with requirements related to FAPE and reasonable modifications, in some situations, Section 504 requires different aid, benefits, or services for students with disabilities to ensure equal opportunity.

⁹¹34 C.F.R. § 104.4(b)(2). This provision does not require that the aid, benefits, or services provide the identical result or level of achievement for students with disabilities and students without disabilities. *Id.*

⁹²34 C.F.R. § 104.33.

⁹³34 C.F.R. § 104.4(b)(1)(v). This provision prohibits a recipient from providing significant assistance to another entity that subjects students in the recipient's program to disability discrimination. For example, a recipient might provide significant assistance to a non-profit community organization that offers an after-school program for students at the school. Among the criteria to be considered in each case in determining whether a recipient's support of another entity constitutes significant assistance are the substantiality of the relationship between 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. 34 C.F.R. pt. 104, App. A, ¶ 6. For additional information about significant assistance in the context of Title IX, see OCR, *Dear Colleague Letter: Voluntary Youth Service Organizations* (Dec. 15,

2015),

www.ed.gov/ocr/letters/colleague-201512-voluntary-youth-service-orga

⁹⁴34 C.F.R. § 104.4(b)(4).

⁹⁵Under Section 504 the recipient that operates the program of public elementary or secondary education is responsible for ensuring that these requirements are fulfilled. 34 C.F.R. § 104.33(a). As explained in the text, in Q&As 9-11, Section 504 does not bar the implementation of State laws or policies or recipient delegations or other arrangements by which entities other than the recipient provide services necessary to provide FAPE to charter school students. Services provided by other entities might include, for example, required evaluations for charter school students with disabilities or the provision of certain related services to charter school students.

⁹⁶34 C.F.R. § 104.33(c)(1). Where a school charges students without disabilities a fee, for example, for a field trip, it is prohibited from charging students with disabilities more for the same service or benefit, including for services related to the student's disability, e.g., accessible transportation for field trip. 34 C.F.R. § 104.4(b)(1)(ii).

⁹⁷34 C.F.R. § 104.33(b) (incorporating §§ 104.34-104.36).

⁹⁸34 C.F.R. § 104.33(b)(1).

⁹⁹34 C.F.R. § 104.33(b)(2).

¹⁰⁰34 C.F.R. § 104.33(b) (incorporating §§ 104.34-104.36).

¹⁰¹www.ed.gov/policy/speced/guid/idea/memosdcltrs/faq-idea-cha

¹⁰²34 C.F.R. § 104.35(a). See OCR, *Dear Colleague Letter: Charter Schools* (May 14, 2014) www.ed.gov/ocr/letters/colleague-201405-charter.pdf. Charter school students with disabilities have the same rights as students with disabilities in other public elementary and secondary schools, and the May 14, 2014 letter stated that in addressing discipline (such as suspensions or expulsions) of students with disabilities, charter schools must comply with applicable legal requirements governing discipline for misconduct caused by, or related to, the

child's disability (citing § 34 C.F.R. § 104.35(a) and, generally, 34 C.F.R. §§ 104.4, 104.32-104.36). As explained in the May 14, 2014 letter, the Section 504 nondiscrimination requirements apply to all school discipline of students with disabilities and are not limited to exclusionary discipline, citing, generally, 34 C.F.R. § 104.4.

¹⁰³34 C.F.R. § 104.35(a).

¹⁰⁴34 C.F.R. § 104.35(a)-(b). Section 504 requires procedures for evaluations and placement and for periodic reevaluations, and it provides that a reevaluation procedure that is consistent with the requirements of the IDEA is one means of meeting this requirement. 34 C.F.R. § 104.35(d).

¹⁰⁵34 C.F.R. § 104.35(a)-(b). For more information about the requirements of Section 504 regarding evaluations, see OCR, Protecting Students with Disabilities: Frequently Asked Questions About Section 504 and the Education of Children with Disabilities (last modified Oct. 16, 2015), www.ed.gov/ocr/504faq.html.

¹⁰⁶34 C.F.R. §§ 104.35(a)-(b), 104.36.

¹⁰⁷*Id.*

¹⁰⁸*Id.*

¹⁰⁹*Id.*

¹¹⁰34 C.F.R. §§ 104.35(a)-(d), 104.36.

¹¹¹34 C.F.R. § 104.34(a).

¹¹²*Id.*

¹¹³34 C.F.R. pt. 104, App. A, ¶ 24.

¹¹⁴*Id.*

¹¹⁵34 C.F.R. § 104.35(c).

¹¹⁶For more information about the requirements of Section 504 regarding placements, see OCR, Protecting Students with Disabilities: Frequently Asked Questions About Section 504 and the Education of Children with Disabilities (last modified Oct. 16, 2015), www.ed.gov/ocr/504faq.html.

¹¹⁷This prohibition does not include the situation in which a student with a disability transfers to a charter school in a new traditional LEA or charter

school LEA, when the student has a current Section 504 plan from the former school, and the charter school, after reviewing the plan, determines that that Section 504 plan provides FAPE and adopts the Section 504 plan for the student. In addition, if upon reviewing the plan from the former school, the charter school determines additional evaluation is necessary or that the plan needs to be revised, there is nothing in Section 504 that prohibits the charter school from implementing the current plan while it conducts the evaluation and develops the plan. See OCR, Protecting Students with Disabilities: Frequently Asked Questions About Section 504 and the Education of Children with Disabilities (last modified Oct. 16, 2015), www.ed.gov/ocr/504faq.html. The IDEA has requirements related to IEPs for IDEA-eligible students who transfer to a new traditional LEA or charter LEA as discussed in OSERS' Frequently Asked Questions about the Rights of Students with Disabilities in Public Charter Schools under the Individuals with Disabilities Education Act (Dec. 28, 2016), www.ed.gov/policy/spced/guid/idea/memosdcltrs/faq-idea-charter-sch. Implementation of an IEP in compliance with the IDEA is one means for complying with Section 504 requirements pertaining to FAPE. 34 C.F.R. § 104.33(b)(2).

¹¹⁸34 C.F.R. §§ 104.33-104.36.

¹¹⁹34 C.F.R. § 104.33. For discussion of a traditional LEA's or charter school LEA's obligation to students with disabilities outside of the FAPE requirement, see OCR, *Dear Colleague Letter: Equal Access to Extracurricular Athletics for Students with Disabilities* (Jan. 25, 2013), www.ed.gov/ocr/letters/colleague-201301-504.pdf.

¹²⁰*Cf. Cedar Rapids Community School District v. Garret F.*, 526 U.S. 66 (1999) (despite legitimate financial concerns, a school district is obligated under the IDEA to pay for any related service, like clean intermittent catheterization, in order to ensure equal access for a student with a disability).

¹²¹34 C.F.R. § 104.33.

¹²²*Id.*

¹²³34 C.F.R. §§ 104.33(b)(3), 104.34(a)-(b), and 104.35(c).

¹²⁴34 C.F.R. § 104.34.

¹²⁵34 C.F.R. §§ 104.33(b)(3), 104.34(a)-(b), and 104.35(c).

¹²⁶34 C.F.R. § 104.36.

¹²⁷*Id.*

¹²⁸*Id.*

¹²⁹34 C.F.R. § 104.37(a)-(c).

¹³⁰*Id.*

¹³¹34 C.F.R. § 104.37(c). For more information about the requirements of Section 504 in athletics at the elementary and secondary school level, OCR, *Dear Colleague Letter: Equal Access to Extracurricular Athletics for Students with Disabilities* (Jan. 25, 2013), www.ed.gov/ocr/letters/colleague-201301-504.pdf.

¹³²34 C.F.R. § 104.37(a).

¹³³34 C.F.R. § 104.33(b).

¹³⁴34 C.F.R. § 104.4. See OCR, *Dear Colleague Letter: Charter Schools* (May 14, 2014), www.ed.gov/ocr/letters/colleague-201405-charter.pdf (citing, generally, 34 C.F.R. § 104.4).

¹³⁵34 C.F.R. § 104.35(a). See OCR, *Dear Colleague Letter: Charter Schools* (May 14, 2014) www.ed.gov/ocr/letters/colleague-201405-charter.pdf (citing 34 C.F.R. § 104.35(a) and, generally, §§ 104.32-104.36).

¹³⁶34 C.F.R. § 104.35(a). See generally 34 C.F.R. §§ 104.4, 104.32-36.

¹³⁷34 C.F.R. §§ 104.21-104.23.

¹³⁸34 C.F.R. §§ 104.21-104.23; 28 C.F.R. §§ 35.149-35.151.

¹³⁹34 C.F.R. §§ 104.21, 104.23, and Notice of Interpretation of Section 504 regulations, 77 Fed. Reg. 14,972 (March 14, 2012), regarding construction and alterations commenced on or after September 15, 2010 (notice available at www.gpo.gov/fdsys/pkg/FR-2012-03-14/pdf/2012-6122.pdf).

This Notice references the Title II regulations pertaining to accessibility, 28 C.F.R. §§ 35.149-35.151.

¹⁴⁰28 C.F.R. §§ 35.149, 35.151.

¹⁴¹34 C.F.R. §§ 104.21-104.22; 28 C.F.R. §§ 35.149-35.150.

¹⁴²34 C.F.R. § 104.4(b)(5); 28 C.F.R. § 35.130(b)(4); see 28 C.F.R. pt. 35, App. B ("Paragraph (b)(4) specifically applies the prohibition enunciated in § 35.130(b)(3) to the process of selecting ... existing facilities to be used by the public entity.").

¹⁴³*Id.*; 34 C.F.R. §§ 104.21-104.22. Also, if the landlord that rents out the facility is a recipient (or public entity), depending on the date of construction or alteration of the facility, the facility could be subject to specific requirements applicable to new construction or alterations for which the recipient (or public entity) landlord is responsible. 34 C.F.R. § 104.23; 28 C.F.R. § 35.151.

¹⁴⁴34 C.F.R. § 104.23; 28 C.F.R. § 35.151.

¹⁴⁵34 C.F.R. §§ 104.7-104.8.

¹⁴⁶34 C.F.R. §§ 104.7(a), 104.8(a).

¹⁴⁷34 C.F.R. § 104.8. Section 104.8(a) does not specify that recipient must include the address or telephone number of the Section 504 coordinator. OCR, however, considers that identifying the Section 504 coordinator without information about how to contact that person does not constitute an effective notice. An acceptable non-discrimination notice should provide information on how to contact the responsible employee. See OCR, Notice of Nondiscrimination (Aug. 2010), www.ed.gov/ocr/docs/nondisc.pdf.

¹⁴⁸34 C.F.R. § 104.7(b). Section 504 does not require grievance procedures for complaints from applicants for employment or from applicants for admission to postsecondary educational institutions.

¹⁴⁹34 C.F.R. § 104.8(a).

¹⁵⁰34 C.F.R. § 104.8(a)-(b).

¹⁵¹*Id.*

¹⁵²20 U.S.C. § 3413(c); 34 C.F.R. § 104.61
(incorporating 34 C.F.R. §§ 100.6-100.10).

¹⁵³*Id.*

¹⁵⁴34 C.F.R. § 104.61 (incorporating 34 C.F.R. §
100.7(e)); OCR, *Dear Colleague Letter: Retaliation*
(Apr. 24, 2013),
www.ed.gov/ocr/letters/colleague-201304.pdf.

Statutes Cited

20 USC 1417(c)

Cases Cited

63 IDELR 138

8 GASLD 79

64 IDELR 180

43 NDLR 75

110 LRP 37424

58 IDELR 79

442 U.S. 397

175 F.3d 144

60 IDELR 167