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## **PART I**

### **OVERVIEW OF SECTION 504 PROCEDURAL SAFEGUARDS**

School Districts are required to comply with Section 504 and provide impartial hearings when requested to resolve issues concerning compliance with Section 504. Although the State of New Hampshire neither enforces Section 504 nor provides impartial hearings pertaining to Section 504, the New Hampshire Department of Education has compiled the following model procedure for Section 504 Impartial Hearings to assist school districts to comply with Section 504.

#### **Background**

Section 504 of the Rehabilitation Act of 1973 ("Section 504") prohibits discrimination against individuals with disabilities in any program or activity that receives federal financial assistance. Public School Districts, institutions of higher education and other state and local education agencies receive federal financial assistance and, therefore, are required to assure that students and prospective students with disabilities have equal access to the educational opportunities and benefits provided to students who do not have disabilities. In addition, school districts are required to provide a free appropriate education to students with disabilities based on their individualized educational needs. The services students with disabilities may receive pursuant to Section 504 include evaluations, modifications to the regular education program to enable the student with a disability to access his or her education, special education and/or related aids and services, such as physical or occupational therapy. Section 504 also provides protections for students with disabilities who are subjected to out of school suspensions for conduct code violations due to behaviors which are a manifestation of the student's disability.

The U.S. Department of Education (ED) enforces Section 504 in programs and activities that receive funds from ED. ED has published a regulation implementing Section 504 (34 C.F.R. Part 104) and maintains an Office for Civil Rights (OCR), with 12 enforcement offices and a headquarters office in Washington, D.C., to enforce Section 504 and other civil rights laws that pertain to recipients of federal funds. The contact information for the OCR enforcement office that serves New Hampshire is as follows:

Office for Civil Rights, Boston Office  
U.S. Department of Education – 8<sup>th</sup> Floor  
5 Post Office Square  
Boston, MA 02109-3921  
Telephone: (617) 289-0111  
Facsimile: (617) 289-0150  
E-mail: [OCR.Boston@ed.gov](mailto:OCR.Boston@ed.gov)

### **Complaints to the Office for Civil Rights (OCR)**

At any time, a parent or any individual may file a complaint with OCR if he or she believes that the District has violated any provision or regulation of §504. The filing of a complaint does not affect the hearing process or the time lines set forth above. OCR addresses §504 complaints separately and independently of the local hearing process, in accordance with the guidelines set forth in OCR's Complaint Processing Manual. Note that typically OCR may not investigate the same allegations that are pending in a hearing.

### **34 CFR 104.36 Procedural safeguards**

Under Section 504 and its implementing regulations, school districts are required to provide procedural safeguards, including notice of any action (or refusal) proposed by the school district, an opportunity for the student's parent or guardian to examine relevant records, an impartial hearing that includes an opportunity for parents or guardian and an attorney for the student to participate, and, a procedure to review the outcome of the impartial hearing. Parents/guardians are entitled to impartial hearings to determine issues regarding the identification, evaluation or educational placement, including the services and accommodations requested or recommended for the student, the denial of an educational placement and any proposed change in placement as a result of a disciplinary action concerning students who, because of disability, need or are believed to need special instruction or related services. In addition, a parent has a right to request a hearing to resolve a disagreement with their school regarding the provision of a free appropriate public education ("FAPE"). Under Section 504, appropriate education is the provision of regular or special education and related aids and services that are designed to meet individual educational needs of students with disabilities as adequately as the needs of non-handicapped persons are met and are based upon adherence to procedures that satisfy the requirements of 34 CFR 104.34, 104.35, and 104.36.

## **Disability under Section 504**

Under Section 504, a recipient who operates a public elementary or secondary education program shall provide a free appropriate public education to each qualified student with a disability (or child with a disability) who is in the recipient's jurisdiction, regardless of the nature or severity of the person's disability. 34 CFR 104.33.

1. To qualify for Section 504's protections an individual must either have a physical or mental impairment which substantially limits one or more major life activities, have a record of such impairment, or be regarded as having such an impairment. 34 CFR 104.3(j).
2. Under Section 504, "Physical or mental impairment" means (A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine; or (B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. 34 CFR 104.3 (j)(2)(i)
3. The physical or mental impairment must substantially limit one or more "Major life activities". "Major life activities" means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. 34 CFR 104.3 (j)(2)(ii).
4. A student currently engaging in the use of illegal drugs is not considered a student with a disability under Section 504, when the LEA's action is based on the student's use of illegal drugs.

(This list is not exclusive: many other "major life activities may be covered by Section 504)

### **Child with a disability.**

(A) In general. The term "child with a disability" means a child with mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance(referred to in this title as "emotional disturbance"), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and who, by reason thereof, needs special education and related services. 20 USC 1401(3)

The State of New Hampshire also has it's own definition of "Child with a disability". See New Hampshire Rules for the Education of Children with Disabilities at Ed 1102.01 (r).

Therefore it is important to recognize that the persons eligible for a FAPE under Section 504 may be different from the persons eligible for services under the Individuals With Disabilities Education Act, 20 USC 1400. Under the IDEA, a student must be found to have one of the specific disabilities listed in that law, and by reason thereof, to need special education and related services.

Generally speaking, the physical or mental impairments covered under Section 504 are much broader than the disability categories under the IDEA, and the major life activities which can be affected by an impairment under Section 504 are also very broad.

It is therefore important to determine at the outset whether the student in question has an issue to be addressed under the IDEA or under Section 504. This model policy applies to the Section 504 issues.

School Districts are required to comply with Section 504 and provide impartial hearings when requested to resolve issues concerning compliance with Section 504. Although the State of New Hampshire neither enforces Section 504 nor provides impartial hearings pertaining to Section 504, the New Hampshire Department of Education has compiled the following model procedure for Section 504 Impartial Hearings to assist school districts to comply with Section 504.

## **PART 2**

### **SECTION 504 IMPARTIAL HEARING PROCEDURE**

#### **MP 1 Conducting Section 504 Impartial Hearings.**

Section 504 impartial hearings are conducted in compliance with applicable state and federal laws and regulations, including 34 CFR 104.36.

- (a) "Days" – means calendar days
- (b) "Parents" means parents or legal guardians
- (c) "Placement" means the program, including special education, related services, accommodations, modifications as well as physical location in which a student with a disability may receive his or her educational program.

#### **MP 2 Sequence of a Section 504 Impartial Hearing.**

The sequence of a hearing is as follows:

- (a) A request for a hearing is to be filed with the local school district 504 coordinator or other individual assigned by the school district's chief administering officer to respond to section 504 impartial hearing requests as detailed in MP 5.
- (b) A prehearing conference will be held within 10 days after the request for a hearing is received or the date that the parties agree to in writing.
- (c) A hearing will be held within 14 days after the conclusion of the prehearing conference.
- (d) A hearing officer's decision will be issued within 10 days after the hearing.

#### **MP 3 Filing a Section 504 Impartial Hearing Request.**

- (a) A parent(s)/guardian(s) or local school district (hereinafter "LEA") may file a hearing request to resolve any disagreement regarding: the identification, evaluation, accommodations and/or modifications, provision of FAPE, educational services, including placement, or determination of causality in a disciplinary matter resulting in out of school suspension for a student with a disability.
- (b) Parents of a student with, or suspected of, having a qualifying disability have the right to review all relevant records regarding the student. Records may be reviewed at the student's school or LEA office. The parents may obtain copies of the student's records (school may charge a reasonable fee for copies)

**MP 4 Initiation of Section 504 Impartial Hearing.**

The local school district 504 coordinator or other individual assigned by the school district's chief administering officer to respond to section 504 impartial hearing requests, will make available to parent(s)/guardian(s) a model form that may be used to initiate a written request for a hearing. Although the parent is not required to use this form the request for hearing should contain enough information so that the issues to be addressed are reasonably clear.

**MP 5 Commencement of Section 504 Impartial Hearing Process.**

The hearing process will commence on the date the section 504 coordinator or other individual assigned by the school district's chief administering officer to respond to section 504 impartial hearing requests receives notice of a hearing request in accordance with MP 4, unless the request is withdrawn as provided in MP 7.

**MP 6 Scheduling of Prehearing Conference, and Impartial Hearing.**

The scheduling shall allow for the following:

- (a) A prehearing conference; and
- (b) An Impartial hearing

**MP 7 Parental Withdrawal of Section 504 Impartial Hearing Request.**

The party making the request for Section 504 Impartial Hearing may withdraw such request at any time during the proceeding.

**MP 8 Local Education Agency Responsibilities when a Section 504 Impartial Hearing Request is Filed.**

The LEA will:

- (a) Provide parent(s)/guardian(s) with the procedural safeguards notice as required by 34 CFR 104.36 with respect to actions regarding identification, evaluation, program, etc.
- (b) Inform the parent(s)/guardian(s) of any low-cost legal services and other relevant services available in the area.
- (c) Within three (3) days of the receipt of the request for a Section 504 hearing, Superintendent of Schools, or his/her designee will select an impartial hearing officer. The selected impartial hearing officer, pursuant to MP 16, will be an attorney or an individual with knowledge of Section 504 law and not be employed by the school district or relevant SAU nor representing the school district or relevant SAU at an impartial hearing.

(d) At least seven (7) days before the date of the pre-hearing conference, the hearing officer will notify the parties in writing of:

- (1) The time and place of the prehearing conference;
- (2) The time, place, and nature of the hearing;
- (3) Legal authority under which the hearing is to be held;
- (4) The particular sections of the statutes and rules involved, including a copy of those sections;
- (5) A short and plain statement of the issues involved;
- (6) The party's right to have an attorney present to represent the party at the party's expense; and
- (7) The name of the impartial hearing officer who will conduct the hearing.
- (8) Contact information for the impartial hearing officer.

**MP 9 Voluntary Production of Information.**

- (a) Each party will attempt in good faith to make a complete response to requests, as soon as practicable, for the voluntary production of information.
- (b) When a dispute between parties arises concerning a request for the voluntary production of information, releases or documents, any party may file a motion with the hearing officer to compel the release of the requested information.

**MP 10 Motion to Compel Production of Information.**

- (a) Any party may file a motion requesting that the hearing officer order the parties to comply with information requests. The motion will be filed as soon as possible after receiving the notice of hearing. Any objection to the motion to compel will be filed within 5 days of the date receipt of the motion.
- (b) The moving party's motion will:
  - (1) Set forth in detail those factors which it believes justify its request for information; and
  - (2) List with specificity the information it is seeking to discover.
- (c) When a party has demonstrated that such requests for information are relevant to the issues described in the hearing notice and are necessary for a full and fair

presentation of the evidence at the hearing, the hearing officer will grant the motion to compel.

**MP 11 Prehearing Procedures.**

A prehearing conference will be conducted by a hearing officer and governed by the following:

- (a) Parties will be prepared to discuss the issues described in the request for hearing.
- (b) Parties will exchange, and provide to the hearing officer, at the time of the prehearing, a preliminary list of the witnesses and the documents they intend to use at the hearing.
- (c) Parties may exchange a list of facts which expand upon the facts contained in the hearing request, and shall exchange such a list if ordered by the hearing officer.
- (d) Parties will exchange, and provide hearing officer with, a final witness list and documents they intend to present at the hearing 5 days before the hearing.

**MP 12 Hearing Procedures.**

The hearing will be conducted by an impartial hearing officer, governed by the following:

- (a) The party that has requested the hearing will present its case first unless the hearing officer determines that changing the order of presentation would not materially prejudice any party's right to a full and fair hearing, and:
  - (1) The hearing would proceed in a more timely manner if the party responding to the hearing request presents their case first; or
  - (2) The hearing would proceed in a more efficient manner if the party responding to the hearing request presents their case first.
- (b) All hearings will be electronically recorded by the hearing officer or the hearing officer's designee. The hearing officer recording will be the official record of the hearing unless a party requests and pays for stenographic recording of such hearing. If a party requests and pays for a stenographic recording of the hearing, the stenographic record will be under the control of the hearing officer and will be the official record.
- (c) Any party to a hearing will have the right to:
  - (1) Be accompanied and advised by and advised by an attorney, or by individuals with special knowledge or training with respect to 34 CFR 104.36;

- (2) Present evidence and confront, cross-examine, and compel the attendance of witnesses. (The school district, in its policies, should describe a process for subpoenas and attendance of witnesses.)
  - (3) Request that the hearing officer prohibit the introduction of any evidence at the hearing that has not been disclosed to that party at least 5 days before the first day of the scheduled hearing;
  - (4) Obtain an electronic verbatim record of the hearing, at any point during the hearing or afterwards;
  - (5) Obtain a decision of the hearing officer that sets forth the factual findings and legal conclusions; and
  - (6) Record the hearing.
- (d) A parent involved in a hearing has the right to open the hearing to the public. However, if a hearing is open to the public, the hearing officer will seat the members of the public and position their equipment in such a way that the public and equipment do not interfere with the proceedings.
  - (e) Each party will have one day to present its case, unless additional time is necessary for a full, fair disclosure of the facts necessary to arrive at a conclusion.
  - (f) The hearing officer may limit examination of a witness by either party to avoid redundant, cumulative, or irrelevant testimony.

**MP 13 Hearing Officer Decision.**

- (a) Requests for findings of fact will be limited to those facts necessary to support the decision, and the terms of their submission is within the discretion of the Hearing Officer.
- (b) Requests for rulings of law will be limited to those central issues of law, if any, which are contested or essential, and the terms of their submission is within the discretion of the Hearing Officer.
- (c) The hearing officer will render a decision, including findings of facts and rulings of law consistent with RSA 541-A:35.
- (d) The hearing officer will ensure that not later than 10 days after the hearing:
  - (1) A final decision is reached in the hearing; and
  - (2) A copy of the decision is sent to each of the parties.

**MP 14 Review Procedure - Appeal of Decision of Hearing Officer.**

If not satisfied by the decision of the Hearing Officer, a parent may seek review of the hearing decision in a court of competent jurisdiction, generally the closest federal district court.

**MP 15 Post-hearing Matters.**

The decision of a hearing officer will be implemented immediately, unless a delay is agreed to in writing by both parties, and one party files a timely appeal to a court of competent jurisdiction. Unless an appeal to court is filed by either party, or a delay is agreed to, the hearing officer's decision shall be fully implemented within 30 days.

**MP 16 Hearing Officers.**

- (a) The Superintendent of Schools, or his/her designee, will maintain a list of persons who serve as hearing officers. This list shall include a statement of the qualifications of each of those persons.
- (b) Hearing officers appointed by the LEA will be attorneys who have been admitted to the practice of law in at least one jurisdiction or other individuals with knowledge of state and federal special education law and not be attorneys employed by the LEA nor represent the LEA at an impartial hearing.
- (c) The LEA will enter into contracts with attorneys or other individuals with knowledge of Section 504 law to serve as impartial due process hearing officers at administrative due process hearings.
- (d) Such hearings shall not be conducted:
  - (1) By a person who is an employee of the LEA which is involved in the education or care of the child;
  - (2) By any person having a personal or professional interest which would conflict with his or her objectivity in the impartial hearing; or
  - (3) By any elected member of a local school board.
- (e) No person who is currently representing a client in a Section 504 matter in New Hampshire may serve as a hearing officer.
- (f) No person will serve as a hearing officer who has served as a state or local school board official or a school administrator, including a special education administrator, Section 504 coordinator, or as an advocate for students with educational disabilities or their parents, in New Hampshire or in any other state within the immediately preceding 12-month period.

(g) No attorney or other individuals with knowledge of Section 504 law will preside as a hearing officer in any hearing in which there is a party:

(1) Whom the attorney or other individuals with knowledge of Section 504 law has represented in any matter within the immediately preceding 12-month period;  
or

(2) By whom the hearing officer has been employed during the immediately preceding 3-year period.