



Helping Schools Make the Grade

by Catherine D. Anderle

Practical steps for providing children with disabilities a free, appropriate education in Michigan's public schools from the U.S. Department of Education's Office for Civil Rights

This article highlights key requirements of Section 504 of the Rehabilitation Act of 1973 and its implementing regulation (Section 504). Section 504 is a civil rights statute that prohibits discrimination against people with disabilities on the basis of their disability by recipients of federal financial assistance, such as public elementary and secondary schools.¹ One of the primary purposes of Section 504 is to ensure that children are not excluded from the educational opportunities and benefits afforded by public schools because of their disabilities.² To that end, this article outlines practical steps that will enable public schools to provide appropriate educational services to children with disabilities at no cost to parents in accordance with Section 504 requirements.

The Office for Civil Rights (OCR) is the office within the United States Department of Education charged with enforcing Section 504 and other federal civil rights laws to ensure that all children, including children with disabilities, have equal access to public education.³ OCR has 12 enforcement offices nationwide and a headquarters office in Washington, D.C. The OCR Cleveland office is responsible for civil rights enforcement in the states of Michigan and Ohio. Approximately 60 percent of OCR Cleveland's work consists of responding to complaints, approximately 60 percent of which involve disability issues. OCR also provides technical assistance to school districts, parents, and organizations and conducts proactive compliance reviews of selected institutions.

OCR's goal is to resolve complaints as soon as possible through a variety of different mechanisms. In some circumstances, OCR will act as a facilitator be-

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tween the parties to enable them to reach a resolution of the complainant's concerns.⁴ In addition, OCR will negotiate agreements with schools to resolve potential compliance concerns that are identified as the result of a complaint and will monitor the implementation of such agreements. Although the majority of complaints received by OCR are

amicably resolved, in cases where a resolution cannot be voluntarily achieved, OCR will issue a violation letter of findings. If a resolution still cannot be achieved after issuance of a violation letter, OCR will proceed to enforcement, either through an administrative hearing or by asking the United States Department of Justice to initiate a lawsuit to correct the violation. At all times, however, OCR will continue to attempt to achieve voluntary compliance.

Over the past several years, typical complaints of discrimination based on disability against elementary and secondary schools in Michigan include allegations that the child's school failed to conduct a timely evaluation to determine the student's eligibility for special education and/or related aids and services, that the school failed to implement the student's educational plan, and that the school disciplined the student without following required procedures. Other typical complaints have involved exclusion of students with disabilities from participation in field trips and concerns by parents that they are being retaliated against by school personnel for asserting their rights under Section 504.

In resolving these complaints, OCR has found that problems generally are attributable to a lack of familiarity with Section 504's requirements by either the parent or the school or to a breakdown in communication between the parties. This lack of familiarity may be due to a school's lack of a clear policy outlining Section 504's requirements and/or a lack of sufficient training for staff.



Children With Disabilities Covered Under Section 504

Section 504 requires that school districts⁵ provide a "free appropriate public education" (FAPE) to resident children with disabilities who are of elementary and secondary school age, regardless of the nature or severity of their disability.⁶ The Section 504 regulation contains requirements that are similar but not identical to those of the Individuals with Disabilities Education Act (IDEA), another federal statute that requires that FAPE, as defined by IDEA be made available to children with disabilities in mandatory age ranges and also provides federal funds to assist school districts in this endeavor.⁷ Under Section 504, a child is considered to have a disability if the child has a physical or mental impairment that substantially limits one or more major life activities.⁸

In contrast to Section 504's functional definition of who has a disability, the IDEA contains a more specific definition of who is eligible to receive services. Children can be found eligible for services under IDEA if they have one or more of 13 enumerated impairments and require special education and related services because of an impairment.⁹ Thus, although most IDEA-eligible children also are likely to be covered by Section 504, the reverse is not necessarily true if the child does not need special education under IDEA. Although some students with certain disabilities, such as attention deficit disorder or attention deficit hyperactivity disorder, HIV positive status, and serious chronic or acute illnesses like asthma, diabetes, and rheumatoid arthritis, may be covered only under Section 504. Students with these impairments could be found eligible for services under IDEA if found to need special education and related services.¹⁰

Free Appropriate Public Education (FAPE)

FAPE under Section 504 consists of the provision of regular or special education and related aids and services that are designed to meet the individual educational needs of the child with a disability as adequately as the needs of a child without a disability are met.¹¹ In addition, FAPE must be based on compliance with Section 504's educational setting, evaluation, placement, and procedural safeguard requirements, which will be discussed later in this article.

An appropriate education may take several forms. For example, a student may be able to be in the regular education classroom without any additional services or in the regular class with supplementary aids and services, such as a student notetaker, seating at the front of the class, or extended time on tests.¹² In addition, a student might require

some special education or related services, such as school health services. In giving technical assistance presentations, OCR has discovered that schools often are under the misimpression that they do not have to consider specialized services for students with a disability under Section 504 who have been found ineligible to receive such services under IDEA.¹³

Locating Children With Disabilities

Under Section 504, public schools have an obligation to take steps to identify all qualified children with a disability who reside in the school's jurisdiction but are not receiving a public education.¹⁴ Once such children are identified, the school then must notify such persons of the school's obligations under Section 504.¹⁵ Schools may use a variety of methods to meet this obligation, such as consulting demographic studies and reports from public health and social service agencies to identify children with disabilities among the general school-aged population; requiring school personnel to identify any child whom they believe to be in need

of special education or related services; encouraging community service organizations to refer individuals with disabilities who may need special education or related services to the school; and using a variety of dissemination methods, such as poster displays at public buildings, public service announcements on local radio and television programs, newspaper advertisements, mass mailings, and/or dissemination of newsletters or pamphlets.¹⁶

Duty to Evaluate

Section 504 requires recipients to establish and follow standards for the evaluation and placement of students who need or are believed to need special education or related services.¹⁷ The evaluation must be conducted before taking any action with respect to the initial placement of the student in a regular or special education program or before any subsequent significant change in the student's placement.¹⁸ If a school teacher, counselor, administrator, or other appropriate person suspects that the student may have a disability as defined by Section 504, the student should be referred for an evaluation.



While an evaluation is pending, or before any suspicion that a student's difficulties are the result of a disability, schools have the discretion to explore various intervention strategies. A student's parent also may request an evaluation. If an evaluation is requested, a school has two choices: the school may either (1) evaluate the student within a reasonable period of time or (2) decline to evaluate the student, because the school does not believe that the student has a disability within the meaning of Section 504. In the latter case, the school must explain to the parents the reason for the refusal and that they have a right to challenge the school's refusal to evaluate the student by requesting a due process hearing.¹⁹ A school also must periodically reevaluate students who are receiving special education or related services under Section 504.²⁰ Under this provision, a school should generally review the student's eligibility for services at least once every three years under Section 504.²¹

Evaluation Procedures

The Section 504 regulation at Section 104.35 contains standards that school recipients must follow to determine if a student has a disability under Section 504 and, therefore, is eligible to receive FAPE. An evaluation to determine coverage under Section 504 should consist of tests and other evaluation materials, including those designed to assess specific areas of educational need and not just provide a single general intelligence quotient. Such assessments must be validated for the specific purpose for which they are used and administered by trained personnel in a manner that ensures that the test results accurately reflect the student's aptitude or achievement level or whatever other factors the test is designed to measure and not the student's impaired skills, unless measuring such skills is the purpose of the test.²²

Using the same procedures that a school uses to determine eligibility under IDEA would be one means of complying with these Section 504 evaluation requirements; however, under Section 504 the analysis needs to focus on whether the child's physical or mental impairment substantially limits one or more major life activities. In interpreting evaluation data and in making placement decisions, information from a variety of sources, such as "aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior" must be gathered.

Information obtained from all of these sources must be carefully considered and documented.²³ OCR has been asked in the past whether students who do not have learning problems but who have medical problems (such as students with diabetes who need assistance in monitoring blood glucose levels) require a complete educational evaluation. In such circumstances, OCR generally advises that an evaluation that considers all information relevant to a student's disabling condition would likely be consistent with the regulation.²⁴ Furthermore, if a school determines based on the facts and circumstances in an individual case that a medical assessment by a licensed physician is necessary to make an appropriate evaluation consistent with 34 CFR 104.35(a) and (b), the medical assess-

ment must be provided by the school district at no cost to the parents as part of the school's obligation to provide FAPE under Section 504.

If there is a situation, however, where the school district can identify alternative assessment methods, such as a psychological evaluation, that meet the evaluation criteria set forth in the Section 504 regulation and yield the relevant information necessary to make evaluation and placement decisions,



the use of such methods would be permissible, if provided at no cost to the parents.²⁵ Parental consent is required for evaluations under Section 504.²⁶

If the result of the evaluation is that the student is not eligible to receive services under Section 504, the parents must be timely and effectively notified of this determination and of their right to challenge the determination in a due process hearing.²⁷ Typically, notice of the determination and of applicable due process rights should be provided in writing. If the student is found to have a disability under Section 504, the next step is to convene the placement group, as described below. One of the functions of that group is to develop an educational program for the student to ensure that

the student receives FAPE in accordance with Section 504 requirements.

Placement/Educational Program

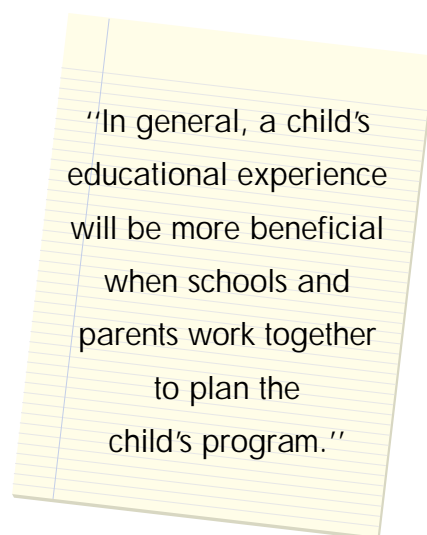
The procedures a school must follow to determine a student's placement are found at 34 CFR 104.35(c). Section 104.35 is designed to ensure that a recipient has sufficient information about a student's disability and his or her individual needs to provide educational services designed to meet those needs. The procedures also are designed to avoid the inappropriate education that results from misclassification of students.²⁸

A determination of what is necessary to provide a student with FAPE under Section 504 must be made by a group of people "knowledgeable about the child, the meaning of the evaluation data, and the placement options."²⁹ The Section 504 regulation does not specify which people (for example, the regular education teacher) must attend placement meetings. As a practical matter, however, many of those identified as individual education plan (IEP) team participants in the IDEA regulations will comprise part of the "knowledgeable" group required to make placements under Section 504.

It is important that the school district or agency representative has the authority to commit resources and be able to ensure that whatever services are set out in the plan actually will be provided. In addition, OCR views the child's parents as people uniquely knowledgeable about their child's behavior and disability and, therefore, who should be given a meaningful opportunity to provide input into placement decisions. Parental participation at the placement meeting is a practical and effective method of obtaining the information required by Section 104.35(c). School districts should make reasonable efforts to invite parents to

placement meetings and must obtain parental input if one or both parents are unable to attend. In general, a child's educational experience will be more beneficial when schools and parents work together to plan the child's program.³⁰

In addition, both the Section 504 regulation and IDEA require that students with disabilities be educated with students without disabilities to the "maximum extent appropriate." In that vein, the Section 504 regulation contains an "educational setting" provision, which is similar to the IDEA's "least restrictive environment" requirement.³¹ The Section 504 provision requires school recipients to educate students with disabilities with students



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without disabilities, unless it can be demonstrated that a student with a disability cannot be satisfactorily educated in the regular education environment with the use of supplementary aids and services.³²

The Section 504 regulation on non-academic settings also provides that with regard to the provision of non-academic and extracurricular services and activities, such as recess, counseling services, and field trips, a recipient must ensure that children with disabilities participate in such services and activi-

ties with children without disabilities to the maximum extent appropriate to the needs of the disabled child. Thus, where a student with a disability may not be able to be educated in a regular education classroom, the placement group still should consider other avenues for interaction with the student's nondisabled peers, such as lunch, recess, recreational athletics, or art.³³

Although the Section 504 regulation does not explicitly require a written plan describing the specific services to be provided to the student because of the student's disability, it is difficult to imagine how school personnel and parents can be clear about their responsibilities without a written plan. Schools that avoid drafting a written Section 504 plan may encounter compliance problems, especially with ensuring full implementation of the plan and the provision of services necessary to provide covered students with FAPE under Section 504. OCR does not require a written plan or a specific format for such a plan. The Section 504 regulation provides, however, that one way a recipient may comply with the Section 504 requirement that the educational needs of students with disabilities are met as adequately as the needs of non-disabled students are met is the implementation of an IEP for the student, developed in accordance with IDEA.³⁴

Whether or not a school chooses to use an IEP format for students covered by Section 504, some general principles are recommended to avoid later disputes over the plan: put the plan in writing; ensure that the plan is the product of a group process, which includes the parents; be as specific as possible in terms of the type and amount of services to be provided and the staff responsible for providing the services; identify services based on the individual needs of the child; and obtain written acknowledgement from the parents

that their procedural safeguards were provided and explained to them.

Because many of the complaints filed with OCR alleging discrimination on the basis of disability involve allegations that a school failed to implement an education plan, the importance of making sure that school personnel understand their obligations to implement such plans for children with disabilities once the plans have been developed cannot be overemphasized. OCR has found that complaints of this type are often the result of either the student's teachers and other staff being unaware that a plan exists or the plan being so vaguely worded that the parties are unclear or disagree about what the plan requires.³⁵

Procedural Safeguards/ Due Process Rights

Parents are entitled to receive effective notice regarding a school's decisions involving the identification, evaluation, and educational placement of their child under Section 504. Additional procedural safeguards to which parents are entitled include an opportunity to examine relevant records, an impartial hearing with opportunity for participation by the parents and representation by counsel, and a review procedure.³⁶ Compliance with IDEA due process procedures is one way of fulfilling these Section 504 requirements, and OCR recommends the IDEA procedures as a model.³⁷

When a hearing is requested, the school district must use a hearing officer who is impartial and knowledgeable about Section 504. The state's list of impartial hearing officers is a good resource for identifying possible hearing officers. OCR has taken the position that employees of the involved school district are not "impartial" and cannot serve as hearing officers.³⁸ Moreover,

the school's Board of Education cannot serve as the appeal authority.³⁹

Discipline of Students with Disabilities Under Section 504

It is the position of this administration that our schools must be safe, disciplined, and drug free to ensure a positive school climate that encourages learning. Federal law provides a number of options to schools for disciplining students with disabilities under Section 504 while ensuring that essential rights and protections afforded to such students and their parents are safeguarded. Although short-term removals for students with disabilities who are a danger to themselves or others are appropriate, proposals for long-term removals, as defined below, must be accompanied by certain procedural protections.

OCR's policy is that when the exclusion of a child with a disability is permanent (expulsion) or for an indefinite period or for more than 10 consecutive school days, the exclusion constitutes a "significant change in placement" under Section 104.35(a) of the regulation.⁴⁰ In addition, a series of suspensions that are each 10 or fewer school days in duration but exceed 10 school days in the aggregate may create a pattern of exclusions that would constitute a significant change in placement.⁴¹

The determination of whether a series of suspensions creates a pattern of exclusions that constitutes a significant

change in placement must be made on a case-by-case basis. Among the factors that should be considered in determining whether a series of suspensions has resulted in a significant change in placement are the length of each suspension, the proximity of the suspensions to one another, and the total amount of time the child is excluded from school.⁴² Before implementing an exclusion that constitutes a significant change in placement, a recipient must conduct a reevaluation of the child. OCR policy requires that a school conduct a manifestation determination to determine,



using appropriate evaluation procedures that conform with the Section 504 regulation, whether the misconduct is caused by the child's disability.⁴³

The group must have available to it information that competent professionals would require, such as psychological evaluation data related to behavior, and the relevant information must be recent enough to afford an understanding of the child's current behavior.⁴⁴ If the group determines that the child's misconduct is caused by the child's disabling condition, the group must determine what, if any, modifications to the child's educational placement are necessary, and the child may not be expelled

or suspended for more than 10 consecutive school days at a time.⁴⁵ If the group determines that the conduct is not caused by the child's disability, the child may be disciplined in the same manner as similarly situated children without disabilities would be disciplined.⁴⁶ For students eligible to receive services under IDEA, school districts must comply with the discipline procedures of IDEA.

Program Accessibility

In addition to complaints regarding the provision of educational services, OCR also handles complaints that a student is being denied access to a school's programs and activities due to physical barriers, such as steps, lack of accessible parking, or inaccessible restrooms, or due to other barriers to children with impaired sensory abilities, such as lack of a visual alarm system. The program accessibility requirements of the Section 504 implementing regulation are found at 34 CFR 104.21–104.23. Section 104.21 provides generally that no qualified individual with a disability shall, because a school district's facilities are inaccessible to or unusable by disabled

individuals, be excluded from participation in, be denied the benefits of services, programs, or activities of, or be subjected to discrimination by the school district. A "facility" means not only the school building and its interior but encompasses outdoor areas as well, such as stadiums and playgrounds.⁴⁷ Different program accessibility standards will apply depending upon whether the facility in question is determined to be an "existing facility" or "new construction" under Section 504 and/or Title II.⁴⁸

Disability Harassment

Another area of discrimination against individuals with disabilities involves harassment based on disability. To highlight the importance of this issue and the ability of such harassment to interfere with a child's equal access to educational programs and activities and/or FAPE, OCR, and the Office of Special Education and Rehabilitative Services jointly issued a Dear Colleague Letter on July 25, 2000, to remind recipients of their legal and educational responsibilities to prevent and appropriately respond to disability harassment and to offer technical assis-

tance. A copy of this letter may be obtained by contacting an OCR office or from OCR's website.

How to Contact OCR for Technical Assistance

For additional information regarding Section 504 requirements or other civil rights issues in education, please contact the OCR Cleveland office for technical assistance. The main telephone numbers for the OCR Cleveland office are (216) 522-4970 and (216) 522-4944 (TTY). The OCR Cleveland address is 600 Superior Avenue, East, Bank One Center, Suite 750, Cleveland, Ohio 44114. OCR policy guidance and other information is available through OCR's website at www.ed.gov/offices/OCR ♦

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FOOTNOTES

1. Section 504, as amended, is codified at 29 USC 794, *et seq.* Its implementing regulation is found at 34 CFR 104.
2. Charter schools, known as public school academies in Michigan, are responsible for complying with several federal civil rights laws, based on their status as recipients of federal financial assistance and as public entities. Under Section 504 and Title II, students with disabilities who attend charter schools, like those attending other public schools, are entitled to a free appropriate public education, including the substantive and procedural requirements discussed in this article. For more information regarding the applicability of Section 504, Title II, and other federal civil rights laws to public charter schools, please see recent OCR guidance entitled, "Applying Federal Civil Rights Laws to Public Charter Schools" (May 2000), available on OCR's website at www.ed.gov/offices/OCR/charindex.html
3. OCR also enforces Title II of the Americans with Disabilities Act of 1990, 42 USC 12131, and its implementing regulation at 28 CFR pt. 35, which prohibits discrimination on the basis of disability by public entities, including public elementary and secondary schools, regardless of whether they receive federal financial assistance from the United States Department of Education. Because Title II contains similar requirements to Section 504 with regard to children attending public schools and because OCR will apply the Section 504 requirements in such circumstances, this article focuses on Section 504.



4. OCR refers to this process as a "resolution between the parties" or "RBP." An RBP can occur at any time during a complaint investigation. OCR is not a signator to the agreement between the parties and does not monitor such resolutions.
5. Throughout this article the term school districts, schools, and recipients are used interchangeably in place of the formal language from the Section 504 regulation, which calls them recipients who operate an elementary or secondary education program.
6. See 34 CFR 104.33(a) and 34 CFR 104.3(k)(2).
7. See the IDEA at 20 USC 1400, *et seq.*, and its implementing regulations at 34 CFR pt. 300. For students who are also eligible under the IDEA, school districts must follow the specific requirements of IDEA.
8. 34 CFR 104.3(j). See the Title II implementing regulation at 28 CFR 35.104 (examples of a "major life activity" include learning, caring for one's self, walking, and breathing).
9. 34 CFR 300.7. In addition, under paragraph (b) of that definition, children ages three through nine may be found eligible for services under IDEA under a developmental delay designation if the state and the LEA choose to adopt the designation.
10. 34 CFR 300.7(c)(9). See also Memorandum from the Office of Special Education and Rehabilitative Services, the Office for Civil Rights and the Office of Elementary and Secondary Education to Chief State School Officers, "Clarification of Policy to Address the Needs of Children With Attention Deficit Disorders Within General and/or Special Education" (Sept. 16, 1991).
11. 34 CFR 104.33(b).
12. 34 CFR pt. 104, app. A, subpt. D, para. 23.
13. See, OCR Questions and Answers Handout, entitled, "OCR Facts: Coverage of Children with ADD" (October 31, 1991), indicating that special education services are required under Section 504 if the student is determined to need such services in order to receive an appropriate education, even if the student is not eligible under IDEA.
14. 34 CFR 104.32(a).
15. 34 CFR 104.32(b).
16. OCR Technical Assistance Presentation on "School Districts' Obligations Under Section 504 to Identify and Locate Homeless Children and Youth Who are Handicapped" (1991).
17. 34 CFR 104.35(a)-(c).
18. 34 CFR 104.35(a).
19. 34 CFR 104.36; see also OCR Policy Memorandum entitled, "Clarification of School Districts' Responsibilities to Evaluate Children with Attention Deficit Disorders (ADD)" (April 29, 1993).
20. 34 CFR 104.35(d).
21. Although the Section 504 regulation does not define what "periodic" means, the regulation at 34 CFR 104.35(d) provides that compliance with IDEA is one means of meeting this requirement. *Id.* IDEA requires that an individual education plan be annually reviewed and that a reevaluation be conducted if conditions warrant or the child's teacher or parent requests one, but at least once every three years. 34 CFR 300.343(c) and 300.536.
22. 34 CFR 104.35(b)(1)-(3).
23. 34 CFR 104.35(c)(1)-(2).
24. OCR Region V Technical Assistance Letter by John R. Fry, Chief Regional Attorney (April 24, 1990). [A copy of any OCR letter, memorandum, or other document referenced in this article may be obtained by contacting the OCR Cleveland office at (216) 522-4970. Such requests will be processed in accordance with the Freedom of Information Act (FOIA).]
25. Letter to Michele Williams, 21 IDELR 73 (OCR 1994).
26. OCR Senior Staff Memorandum (May 29, 1992).
27. 34 CFR 104.36.
28. 34 CFR pt. 104, app. A, subpt. D, para. 25.
29. 34 CFR 104.35(c)(3).
30. OCR Pamphlet on "Families and Schools as Partners."
31. 34 CFR 104.34.
32. 34 CFR 104.34(a).
33. 34 CFR 104.34(b) and 34 CFR 104.37(a). See, e.g., OCR Cleveland Letter of Findings, #15-95-1130 (1995) (involving exclusion of a child with a disability from field trips).
34. 34 CFR 104.33(b)(1)(i) and 34 CFR 104.33(b)(2).
35. See, e.g., OCR Cleveland Letter of Findings, #15-94-1069 (May 6, 1994).
36. 34 CFR 104.36.
37. 34 CFR pt. 104, app. A, subpt. D, para. 25.
38. See OCR Policy Interpretation No. 6, 43 Fed. Reg. 36036, EHLR 132:03 (August 14, 1978) and OCR Cleveland Letters of Findings, # 15-95-1072 (February 8, 1996) and # 15-98-1089 (April 26, 2000).
39. *Id.*
40. Memorandum from LeGree S. Daniels, Assistant Secretary for Civil Rights to OCR Senior Staff, "Long Term Suspension or Expulsion of Handicapped Students" (October 28, 1988).
41. *Id.*
42. *Id.*; see also 34 CFR 300.519(b) (final IDEA 1999 regulations adopting these factors).
43. *Id.*
44. See Memorandum from William L. Smith, Acting Assistant Secretary for Civil Rights, to OCR Senior Staff, "Suspension of Handicapped Students—Deciding Whether Misbehavior Is Caused by a Child's Handicapping Condition" (November 13, 1989).
45. OCR October 1988 Memorandum, p 2.
46. *Id.*
47. See, OCR San Francisco Letter of Findings, # 09-95-1061 (March 25, 1997) (involving playground accessibility).
48. For Section 504 and Title II regulations involving existing and new facilities, see 34 CFR 104.22-104.23 and 28 CFR 35.150-151. For additional background information, see Uniform Federal Accessibility Standards; Americans with Disabilities Act Accessibility Guidelines, American National Standards Institute A117.1-1961 (R 1971), and "Applying Federal Civil Rights Laws to Public Charter Schools" (May 2000).