



Appendix 3

Compliance Self-Evaluation

Appendix 3-1

A Checklist for School District Compliance With the ADA and Section 504*

In the wake of the enactment of the Americans with Disabilities Act,¹ school district officials are faced with the issue of determining which parts of the ADA apply to public schools and what, if anything, these parts add to the pre-existing requirements of Section 504.² The provisions in the ADA mandating that each covered entity, including school districts, compile a self-review by January 1993, make these questions timely and significant.

In the September 27, 1991 issue of the *Special Educator*, I synthesized the requirements of Section 504 for the public schools into a convenient checklist.³ The following version updates the checklist to include the applicable requirements of the ADA, which are based on subchapters, or titles, I (Employment) and II (Public Services) and which are highlighted in bold print. The relevant regulations are cited in brackets after each item.⁴ Overall, this analysis reveals that the ADA largely reinforces Section 504, confirming and to some extent clarifying some of the pre-existing requirements. Readers who use the checklist are advised to carefully examine the ADA regulations, with emphasis on the sections cited herein with local counsel.⁵

* Written by Perry A. Zirkel for *The Special Educator*, Vol. 8, Iss. 3, 1992 LRP Publications.

¹ 42 U.S.C. Sec. 12101 et seq. (1990).

² Other sources provide more general information without focusing specifically on this issue. See, eg., Coupe, Ness & Sheetz, *The Department of Justice's Final Regulation Implementing Title III of the Americans with Disabilities Act*, 71 ED. Law 353 (1992); Miles, Russo & Gordon, *The Reasonable Accommodations Provisions of the Americans with Disabilities Act*, 69 ED, Law 1 (1991); Wilson, *Defense to Discrimination Actions Filed under Americans with Disabilities Act*, 42 LAB L.J. 732 (1991). For a more focused view but in higher education, see Note, *Americans with Disabilities Act of 1990: Significant Overlap with Section 504 for Colleges and Universities*, 18 I.C.U.L. 389 (1992)

³ Zirkel, *Section 504 Compliance: A Checklist for School Districts*, THE SPECIAL EDUCATOR, Vol 7, Iss, 2, 1991 LRP Publications.

⁴ See AMERICANS WITH DISABILITIES ACT: LAW, REGULATIONS AND INTERPRETIVE GUIDANCE (1992) (LRP Publications).

⁵ See also B. TUCKER & B. GOLDSTEIN, LEGAL RIGHTS OF PERSONS WITH DISABILITIES: AN ANALYSIS OF FEDERAL LAW (1992) (LRP Publications).

**Section 504 and Americans with Disabilities Act
Policy/Procedures Checklist**

Does your school district provide, via policy or procedures:

- | | Yes | No |
|--|--------------------------|--------------------------|
| 1. an up-to-date self evaluation , including an opportunity for persons with disabilities, their advocacy organizations, and other interested individuals, to submit comments? (28 CFR Sec. 35.105) ⁶ | <input type="checkbox"/> | <input type="checkbox"/> |
| 2. a) continuing public notice that your district does not discriminate on the basis of disability with regard to admission, access to services, treatment or employment in your programs and activities? | <input type="checkbox"/> | <input type="checkbox"/> |
| b) continuing internal notice (i.e., to staff and students) to the same effect? (See 34 CFR Sec. 104.8 and 104.32(b); 28 CFR Sec. 35.106 ⁷) | <input type="checkbox"/> | <input type="checkbox"/> |
| 3. identification in those notices of a Section 504 coordinator and an ADA coordinator? ⁸ [See 34 CFR Sec 104.7(a) and 104.8; 28 CFR Sec. 35.107(a)] | <input type="checkbox"/> | <input type="checkbox"/> |
| 4. a grievance procedure for disability discrimination complaints that: | | |
| a) incorporates appropriate due process standards? | <input type="checkbox"/> | <input type="checkbox"/> |
| b) provides for the prompt and equitable resolution of those complaints? [See 34 CFR Sec. 104.7(b); 28 CFR Sec. 35.107(b)] | | |
| 5. reasonable accommodation for qualified applicants and employees with disabilities, such as each of the following, unless it demonstrably would impose an “undue hardship” ⁹ on the operation of the program: | <input type="checkbox"/> | <input type="checkbox"/> |
| a) making facilities used by employees readily accessible to and usable by handicapped persons? | | |

⁶ The self evaluation must be completed by January 26, 1993 and, if the school district has more than 49 employees, must be on file for public inspection at least until January 26, 1996, See 28 CFR Sec. 35.105(a) and (c). This requirement applies to policies and procedures not included in the district’s Section 504 evaluation. Id. Sec. 35.105(d).

⁷ The forms of notice may include publication on newspapers and magazines, placement of notices in district publications, posting of notices, and distribution, of memoranda. 34 CFR Sec. 104.8(a). Further, this notification must be included in district recruitment materials and general publications. 34 CFR Sec 104.8(b).

Separately, there is a requirement of annual notices as part of the obligation to identify and locate eligible handicapped persons in the district who are not receiving a public education. 34 CFR Sec. 104.32

⁸ The ADA coordinator requirement applies to school districts with more than 49 employees. For such entities, the regulations specify that the coordinator’s name, office address, and telephone number shall be made available to all interested individuals. 28 CFR Sec. 35.107(a).

⁹ Relevant factors include the overall size of the school district, the composition and structure of the workforce, and the nature and cost of the accommodation. 34 CFR Sec. 104.12(b); 29 CFR Sec 1630.2.

- | | | |
|---|--------------------------|--------------------------|
| b) modifications or adjustments to the job application process that enable a qualified applicant with a disability to be considered? | <input type="checkbox"/> | <input type="checkbox"/> |
| c) modifications of adjustments in the work environment that enable a qualified individual with a disability to perform the essential function of that position? | <input type="checkbox"/> | <input type="checkbox"/> |
| d) appropriate adjustment or modification of examinations, training materials, or polices? | <input type="checkbox"/> | <input type="checkbox"/> |
| e) job restructuring and part time or modified work schedules? | <input type="checkbox"/> | <input type="checkbox"/> |
| f) reassignment to a vacant position | <input type="checkbox"/> | <input type="checkbox"/> |
| g) acquisition or modification of equipment or devices? | <input type="checkbox"/> | <input type="checkbox"/> |
| h) the provision of readers or interpreters or other similar actions?
[See 34 CFR Sec. 104.12; 29 CFR Sec 1630.2 and 1630.9] | <input type="checkbox"/> | <input type="checkbox"/> |
| 6. not using employment tests ¹⁰ or other selection criteria that tend to screen out persons with disabilities unless these criteria are demonstrably job related and unless effective alternatives are not available? ¹¹ [See 34 CFR Sec. 104.13(a); 29 CFR Sec. 1630.10] | <input type="checkbox"/> | <input type="checkbox"/> |
| 7. not making preemployment inquiries as to whether the applicant is an individual with a disability ? ¹² [See 34 CFR Sec. 104.14(a); 29 CFR Sec.1630.13] | <input type="checkbox"/> | <input type="checkbox"/> |
| 8. readily accessible to individuals with disabilities to each of your programs and activities when viewed in its entirety? ¹³ [See 34 CFR Sec. 104.22; 28 CFR Sec. 35.150] | <input type="checkbox"/> | <input type="checkbox"/> |
| 9. an individualized evaluation (in the native language) ¹⁴ for any student who is believed to (a) have a physical or mental impairment which substantially limits one or more major life activities, (b) have | <input type="checkbox"/> | <input type="checkbox"/> |

¹⁰ For other special restrictions on employment testing, see 34 CFR Sec. 104.13(b); **29 CFR Sec. 1630.11. The effective data for the employment part of the ADA is July 26, 1992 for employers with more than 25 employees and July 26, 1994 for employers with 15-24 employees.**

¹¹ **The ADA employment regulations include a business necessity requirement and do not specify an available alternative requirement. 29 CFR Dec 1630.11. However, they do provide a caveat that unless provided otherwise, these regulations “do not apply a lesser standard than the standards applied under [Sec. 504.” Id. Sec. 1630.1(c).**

¹² For limited exceptions relating to preemployment inquires and special rules as to preemployment medical examinations, see 34 CFR Sec. 104.14(a)-(d); 29CFR Sec. 1630.14.

¹³ The detailed rules are found at 34 CFR Sec. 104.22-104.23; **28CFR Sec. 35.150-35.151. In general, the requirements are more rigorous for new construction and alterations than for existing facilities. Id. For detailed accessibility standards, see 36 CFR Parts 1190-1191.**

¹⁴ Appendix A of the Sec 504 regulations cross-refers to the requirement in the Title VI regulations that recipients provide and administer evaluation materials in the native language. In slight contrast, the IDEA regulations has the same requirement “unless not clearly feasible to do so.” 34 CFR Sec. 300.53(a).

- a record of such impairment, or (c) be regarded as having such an impairment?¹⁵ [See 34 CFR Sec. 104.35 and 104.3(j)]¹⁶
10. for each student meeting any of the criteria in item #9, an “appropriate education,” which is defined as regular or special education and related aids and services that are designed to meet his/her individual needs as adequately as the needs of non handicapped persons are met and that are based upon procedures referred to in item #11?¹⁷ [See 34 CFR Sec. 104.33]
11. parental notice (in the native language)¹⁸ of the rights to:
- a) have an individualized evaluation (item #9)
- b) examine relevant records?
- c) demand an impartial hearing with the opportunity to be represented by counsel?
- d) obtain a subsequent review? [See 34 CFR Sec 104.36]
12. if separate classrooms for special education, that they be comparable facilities to those for regular education?¹⁹ [See 34 CFR Sec. 104.34(c)]
13. nonacademic and extracurricular services and activities so as to provide handicapped persons with an equal opportunity for participation? [See 34 CFR Sec. 104.37]

¹⁵ **The ADA expands the protection of nondiscrimination to individuals (including students) who have relationship or association with a person with a known disability. 29 CFR Sec. 135.130(g). At the same time, the ADA amended Sec. 504 to exclude students (and other individuals) who are currently engaging in the illegal use of drugs. 29 U.S.C. Sec. 706(8)(C). The amendment also provided a more limited exclusion applicable to discipline of students currently engaged in the use of alcohol or the use or possession of illegal drugs or alcohol Id.**

¹⁶ 34 CFR Sec. 104.35(c)(3) mirrors the IDEA in requiring that the placement decision be made by “persons knowledgeable about the child, the meaning of the evaluation data, and the placement options”; however, the IDEA specifically requires that the evaluation be done by “a multi-disciplinary team or group with at least one teacher or person with knowledge of the area of suspected disability”. See 34 CFR Sec 300.532. Subsection (d) only requires “periodic” reevaluation, whereas the IDEA specifically requires reevaluation at least very three years. See 34 CFR Sec. 300.534(b). Finally, the Sec. 504 regulations do not specify the IDEA requirement of parental consent for preplacement evaluation. Id. Sec 35.504(b).

¹⁷ The “appropriate education” need not be in the form of an IEP (nor result from meetings with the parent), although that is one means of showing compliance with this requirement. See 34 CFR Sec. 104.33(b)(2).

¹⁸ This requirement has been inferred from 34 CFR Sec. 104.4(b)(i). (ii) and 34 CFR Sec. 104.36. See e.g., Coachella Valley (CA) Unified School Dist. EHLR 311:42 (OCR 1985); Dawson (TX) Indep. School Dist., EHLR 257:603 (OCR 1984); Dysart (AZ) Unified School Dist. No. 89, EHLR 311:32 (OCR 1983).

¹⁹ For special rules as to “least restrictive environment” (LRE). See 34 CFR Sec. 104.33 generally.

14. **integrated** settings to the maximum extent appropriate to the needs of **qualified individuals with disabilities**?²⁰ [See 34 CFR Sec 104.34; **28 CFR Sec. 35.130(d)**]
15. reasonable access to your programs or activities, if any, of:
- a) preschool education?
- b) day care?
- c) adult education?
- [See 34 CFR Sec. 104.38]
16. **furnishing auxiliary aids and services**²¹ to employees, students, parents, and member of the public who have disabilities to the extent necessary for communications with them to be equally effective as communications with other persons, such as:
- a) **telephone communications devices for the deaf (TDDs)?, or**
- b) **signage with international symbol for accessibility? Unless it would result in an undue burden or a fundamental alternation in the program.**²² [See 28 CFR Sec. 35.160-35.164]
17. **reasonable modifications generally in policies, practices, and procedures when necessary to avoid disability based discrimination unless the district can prove that the modification would fundamentally alter the nature of the service, program or activity.** [See 28 CFR Sec. 35.130(b)(7)]²³

²⁰ The Sec. 504 regulations largely mirror the LRE language of the IDEA (34 CFR Sec 300.550-300.553), which is targeted to both academic settings and non academic settings. The ADA regulation uses the term “integrate setting” and applies it to services, programs and activities generally.

²¹ **For a definition and illustrative listing of “auxiliary aids and services,” (e.g. wheelchairs); individually prescribed devices (e.g. hearing aids); readers for personal use or study; or services of a personal nature (e.g. assistance in toileting). Id. 28 CFR Sec. 35.135. The Sec. 504 school regulations do not expressly refer to transportation. The extensive ADA regulations for transportation vehicles have an express exemption for public schools. 49 CFR Sec. 37.27.**

²² This requirement includes providing meaningful access for parents or guardians with disabilities to school initiated activities incident to the academic and/or disciplinary aspects of their child’s education. See, eg., *Rothschild v. Grottenthaler*, 16 EHLR 1020 (2d Cir. 1990) (sign language interpreter for hearing impaired parents): **29 CFR Appendix A. Comment to Sec 35.102. Where the district shows that such actions would be an undue hardship or fundamental alternation, it must come as close as feasible. 28 CFR Sec. 35.164.**

²³ **Although this general reasonable accommodation requirement is largely inferable in the case law and CCR letters of findings under Sec. 504, it is more direct and complete as codified in the ADA regulations.**

Appendix 3-2

Risk Audit- The Americans with Disabilities Act of 1990

One key to avoiding potential liability under the ADA is having adequate documentation. Having a system of documentation and teaching school officials how to employ the system will make you well prepared in the event that a lawsuit arises. School officials should be trained to document in writing their reasons for deciding not to hire, promote, transfer, or accommodate in any manner, an individual who has covered disability. These documented reasons may simply be that the individual was not qualified for the position or could not perform the essentials functions of the position (as determined by the written job descriptions/classification). In the attempting to avoid liability under the ADA by improving your training and documentation, you should consider the following:

- Do you provide a detailed written job description for all positions within the school system?
- Does this written job description include a list of essentials and incidental functions which must be performed?
- Have you developed your job description, detailing, the essentials and nonessential or incidental duties, by consulting with employees who currently perform the job and/or performed it in the past, discussing with these individuals the nature of their daily and weekly duties, the length of time spent doing each task, the requirements, i.e. strength, manual, dexterity, concentration of each task as well as any potential limitations they fell would impede their ability to do the job?

- Have you considered the terms of collective bargaining agreement?
- Does this description include the academic, vocational, and other training which the individual desiring the job must have in order to be considered?
- Does you school have a written policy regarding the illegal use of drugs or alcohol in the work place?
- Does your policy on the use of illegal drugs and/or alcohol also provide for the types of actions the school may take against an individual found using these drugs?

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- If you provide drug testing, do you also specify in the job descriptions that employees are subject to drug tests (specifying the job classifications and reasons why these individuals are in safety sensitive positions warranting drug testing?)
- Do you only drug test after a conditional offer of employment has been tendered?
- If you screen out individuals who impose a direct threat or significant risk to the health and safety of self or others, do you maintain a written list of the diseases and conditions specified by the Department of Public Health as being easily transmitted or contagious?
- Do you document the reasons why these individuals can not be reasonably accommodated to cure the treat of transmission?
- If you deny employment to an individual because they pose a risk to the health and safety of self or others, they cannot perform essential functions of the job because of their mental or physical disability, and/or they test positive for illegal drugs or alcohol, do you document specifically the reasons the individual was denied employment?
- Do you require physical examinations of those to whom you have tendered a conditional offer of employment?
- If you use drug tests or preemployment physicals, do you have a written policy stating that these physicals are required of all applicants for the position and/or job category once a conditional offer of employment is tendered?
- Does your policy detail the method by which the results of the medical exams and drug tests will be kept confidential?
- Do you policies clearly provide that the results of a medical examination may not be used to detriment of the individual and that the ultimate hiring decision be made by the employer, not a doctor?
- Do you provide examining doctors with written job descriptions for the position sought, and also request the doctor to clearly state the jobs the individual cannot perform or cannot perform safely without undue risk of harm to self or others?
- Do you insure the doctor reports only job related information?
- Do you review the report to determine whether reasonable accommodation would enable the individual to perform the essential functions of the job with[out] undue risk to self or others?
- Have you reviewed your school's policies with regard to the standards, criteria, and methods of administration to determine whether they perpetuate or effectuate discrimination (have you considered contacting the school attorney so that he or she may review them as well)?

- Do you train individuals making personnel and employment decisions not to ask whether an applicant has a disability, but rather to ask questions such as, “Are you physically and mentally able, with or without a reasonable accommodation, to perform all of the duties and responsibilities of the position for which you have applied?” and/or ask them to demonstrate?
- Have you reviewed your qualification standards, employment tests, and other selection criteria so as to determine that the tests themselves and the way in which they are administered do not effectuate discrimination?
- Do you post the rights of individuals with disabilities under the Americans With Disabilities Act of 1990 in a place where it is readily accessible to all employees? [This is required by Section 12115 of the Act]
- Do you train school officials who make employment and personnel decisions with regard to the following:
- What constitutes “a physical or mental impairment that substantially limits one or more major life functions?”
- What “having a record of such impairment” means under the Act?
- What “being regarded as having such an impairment” means under the Act?
- Do you train individuals making personnel and employment decisions that they may not discriminate against an individual because of that individual’s relationship with someone who has a disability covered under the Act?
- Does your school have a written policy stating that it will not limit, segregate, or classify an individual based on their disability?
- Does your school have a policy prohibiting it from engaging in contractual relationships which perpetuate or effectuate discrimination?
- Do you investigate any outside agencies to which you send employees for training or seminars to ensure that they do not employ discriminatory practices and allow barrier free access?
- Do you provide training for school employees so that they understand school policies and know who to implement them correctly?

- Have you considered documenting the following:
- the reasons for denying an individual with a disability employment;
- the dates you meet with employees to develop job descriptions and the names of the employees consulted;
- the dates of ADA training;
- the subject and topics of training, and the exact amount of time devoted to each subject;
- the method of instruction (lecture, demonstration, etc.);
- names of all instructors;
- copies of all lesson plans, materials, outlines, and handouts given;
- all audio visual materials used;
- test results of employees at the training sessions; and
- signed attendance lists indicating which employees were present?
- Has your school begun its ADA self-evaluation as required? (Self-evaluation is required of all public entities by January 26, 1993.)
- Have you reviewed all existing policies, practices, procedures and services to determine whether they effectuate discrimination?
- Have you made the necessary modifications in accordance with these findings?
- Do you allow organizations representing disabled individuals to participate in the self-evaluation?
- Do you keep these on file and available for public inspection for three years in accordance with 28 CFR 35.106?