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Dear Colleague Letter: Access by Students with Disabilities to Accelerated Programs

OFFICE OF THE ASSISTANT SECRETARY

DEC 26, 2007

Dear Colleague:

I am writing to advise you of an issue involving students with disabilities seeking enrollment in challenging academic programs, such as Advanced Placement and International Baccalaureate classes or programs (accelerated programs). Specifically, it has been reported that some schools and school districts have refused to allow qualified students with disabilities to participate in such programs. Similarly, we are informed of schools and school districts that, as a condition of participation in such programs, have required qualified students with disabilities to give up the services that have been designed to meet their individual needs. These practices are inconsistent with Federal law, and the Office for Civil Rights (OCR) in the U.S. Department of Education will continue to act promptly to remedy such violations where they occur.

As you know, OCR is responsible for enforcing two Federal laws that protect qualified individuals with disabilities from discrimination. OCR enforces Section 504 of the *Rehabilitation Act of 1973* (Section 504) and its implementing regulations at 34 CFR Part 104, which prohibit discrimination on the basis of disability in programs or activities receiving Federal financial assistance. OCR is also responsible, in the education context, for enforcing Title II of the *Americans with Disabilities Act of 1990* (Title II) and its implementing regulations at 28 CFR Part 35, which prohibit discrimination on the basis of disability by entities of State and local government. Although this letter discusses aspects of the Section 504 regulation, Title II provides no lesser protections than does Section 504. Also relevant are the requirements of the *Individuals with Disabilities Education Act* (IDEA), which is administered by the Department's Office of Special Education Programs (OSEP). The *IDEA* provides funds to States and school districts in order to assist them in providing special education and related services to eligible children with disabilities. The *IDEA's* implementing regulations are located at 34 CFR Part 300. OCR consulted with OSEP in drafting this letter.¹

As an initial matter, I want to commend the efforts so many of you have made to ensure that placement decisions for all students are based on each student's individual academic abilities regardless of the presence, nature, or severity of a disability. I want to ensure that all of you are aware of the Federal civil rights requirements discussed below.

PROHIBITION AGAINST DISABILITY-BASED DISCRIMINATION IN ACCELERATED PROGRAMS

The practice of denying, on the basis of disability, a qualified student with a disability the opportunity to participate in an accelerated program violates both Section 504 and Title II. Discrimination prohibited by these laws includes, on the basis of disability, denying a qualified individual with a disability the opportunity to participate in or benefit from the recipient's aids, benefits, or services, and affording a qualified individual with a disability with an opportunity to participate in or benefit from the aid, benefit or service in a manner that is not equal to that offered to individuals without disabilities. 34 CFR 104.4(a), (b)(1)(i), (b)(1)(ii); 28 CFR 35.130(a), (b)(1)(i), (b)(1)(ii).

Under Section 504 and Title II, a recipient may not utilize criteria or methods of administration that have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability. 34 CFR 104.4(b)(4) and 28 CFR 35.130(b)(3). A public entity also may not impose or apply eligibility criteria that screen out 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 such criteria can be shown to be necessary for the provision of the service, program, or activity being offered. 28 CFR 35.130(b)(8). Public school students with disabilities who require special education and/or related services receive them either through implementation of an individualized education program (IEP) developed in accordance with Part B of the *IDEA* or a plan developed under Section 504. 34 CFR 104.33. It is unlawful to deny a student with a disability

admission to an accelerated class or program solely because of that student's need for special education or related aids and services², or because that student has an IEP or a plan under Section 504. The practice of conditioning participation in an accelerated class or program by a qualified student with a disability on the forfeiture of special education or of related aids and services to which the student is legally entitled also violates the Section 504 and Title II requirements stated above.

Please note that nothing in Section 504 or Title II requires schools to admit into accelerated classes or programs students with disabilities who would not otherwise be qualified for these classes or programs. Generally, under Section 504, an elementary or secondary school student with a disability is a qualified individual with a disability if the student is of compulsory school age. However, schools may employ appropriate eligibility requirements or criteria in determining whether to admit students, including students with disabilities, into accelerated programs or classes. Section 504 and Title II require that qualified students with disabilities be given the same opportunities to compete for and benefit from accelerated programs and classes as are given to students without disabilities. 34 CFR 104.4(b)(1)(ii) and 28 CFR 35.130(b)(1)(ii).

Furthermore, a recipient's provision of necessary special education and related aids and services to qualified students with disabilities in accelerated classes or programs must be consistent with the Section 504 and Title II requirements regarding free appropriate public education (FAPE).

FREE APPROPRIATE PUBLIC EDUCATION

In general, conditioning participation in accelerated classes or programs by qualified students with disabilities on the forfeiture of necessary special education or related aids and services amounts to a denial of FAPE under both Part B of the *IDEA* and Section 504.

Section 504 requires a recipient that operates a public elementary or secondary education program or activity to provide FAPE to each qualified person 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(a). Under Section 504, the provision of an appropriate education is the provision of regular or special education and related aids and services that satisfy certain procedural requirements and that are designed to meet the individual education needs of persons with disabilities as adequately as the needs of persons without disabilities are met. 34 CFR 104.33(b)(1)(i). School districts may create a plan or other document to provide students with disabilities with FAPE pursuant to Section 504. The Section 504 FAPE requirement may also be met through the implementation of an IEP developed in accordance with Part B of the *IDEA*. 34 CFR 104.33(b)(2).

Part B of the *IDEA* requires that FAPE be made available to eligible students with disabilities in certain age ranges. The *IDEA* defines FAPE as special education and related services that: are provided free of charge; meet State standards; include an appropriate preschool, elementary school, or secondary school education; and are provided in conformity with a properly developed IEP. 20 USC § 1401(a)(9); 34 CFR 300.17.³

Participation by a student with a disability in an accelerated class or program generally would be considered part of the regular education or the regular classes referenced in the Section 504 and the *IDEA* regulations. Thus, if a qualified student with a disability requires related aids and services to participate in a regular education class or program, then a school cannot deny that student the needed related aids and services in an accelerated class or program. For example, if a student's IEP or plan under Section 504 provides for Braille materials in order to participate in the regular education program and she enrolls in an accelerated or advanced history class, then she also must receive Braille materials for that class. The same would be true for other needed related aids and services such as extended time on tests or the use of a computer to take notes.

Conditioning enrollment in an advanced class or program on the forfeiture of needed special education or related aids and services is also inconsistent with the principle of individualized determinations, which is a key procedural aspect of the *IDEA*, Section 504 and Title II. As noted above, under Section 504, the provision of FAPE is based on the student's individual education needs as determined through specific procedures--generally, an evaluation in accordance with Section 504 requirements. 34 CFR 104.35. An individualized determination may result in a decision that a qualified student with a disability requires related aids and services for some or all of his regular education classes or his program. Likewise, the *IDEA* contains specific procedures for evaluations and for the development of IEPs that require individualized determinations. See 34 CFR 300.301 through 300.328. The requirement for individualized determinations is violated when schools ignore the student's individual needs and *automatically* deny a qualified student with a disability needed related aids and services in an accelerated class or program.

I urge you to use the information provided in this letter to continue to evaluate whether your school district is in compliance with these anti-discrimination requirements. OCR remains willing to continue supporting you in

these efforts. We provide technical assistance to entities that request assistance in voluntarily complying with the civil rights laws that OCR enforces. If you need additional information or assistance on these or other matters, please do not hesitate to contact the OCR enforcement office that serves your state or territory. The contact information for each office is available online at: <http://wdcrobcolp01.ed.gov/CFAPPS/OCR/contactus.cfm>. I thank you in advance for your cooperation and assistance in this important matter.

Sincerely yours,

Stephanie Monroe
Assistant Secretary for Civil Rights

1 You may contact OSEP to address any issues that relate specifically to the requirements of *IDEA*. Contact information for OSEP is available online at: <http://www.ed.gov/policy/speced/guid/idea/monitor/state-contact-list.html>.

2 The term "related aids and services" as used here is intended to include both the Section 504 requirements at 34 CFR 104.33(c) and the equivalent requirements under the *IDEA*, i.e. related services, supplementary aids and services, program modifications and supports for school personnel. See 34 CFR 300.34, 300.42, and 300.320(a)(4).

3 Among other things, an IEP must contain a statement of the special education and related services and supplementary aids and services to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided to enable the child to advance appropriately toward attaining the annual goals; to be involved in and make progress in the general education curriculum and to participate in extracurricular and other nonacademic activities; and to be educated and participate with other children with disabilities and those without disabilities. An IEP also must contain an explanation of the extent, if any, to which the child will not participate with children without disabilities in the regular class and in these activities. 34 CFR 300.320(a)(4)-(5).

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Last Modified: 12/26/2007