

MONDAY, AUGUST 14, 1978
PART II



**DEPARTMENT OF
HEALTH,
EDUCATION, AND
WELFARE**

Office of the Secretary



**NONDISCRIMINATION
IN FEDERALLY ASSISTED
PROGRAMS**

Policy Interpretations

Registered
Order

[4110-12]

**DEPARTMENT OF HEALTH,
EDUCATION, AND WELFARE**

Office of the Secretary

**NONDISCRIMINATION IN FEDERALLY ASSISTED
PROGRAMS**

Policy Interpretations

INTRODUCTION

The following four policy interpretations are issued by the Office for Civil Rights under the procedures announced in the FEDERAL REGISTER on May 1, 1978, 43 FR 18630. They interpret the Department's regulation issued under section 504 of the Rehabilitation Act of 1973.

DAVID S. TATEL,
Director,
Office for Civil Rights.

AUGUST 8, 1978.

**SECTION 504 OF THE REHABILITATION
ACT OF 1973**

POLICY INTERPRETATION NO. 3

Subject: "Program Accessibility" Requirements.

Policy Interpretation: A recipient is not required to make structural modifications to its existing facilities if its services can be made effectively available to mobility impaired persons by other methods. In selecting from among other methods, recipients must give priority to those that offer handicapped and nonhandicapped persons programs and activities in the same setting. Because of the administrative impossibility of continually determining, on an up-to-date basis, whether mobility impaired individuals will be entitled to services by a given recipient, and for other reasons set forth below, the absence of mobility impaired persons residing in an area cannot be used as the test of whether programs and activities must be made accessible.

Discussion: The Department has been asked by recipients conducting modest programs (e.g., libraries in rural areas, small welfare offices, day care centers and senior citizens centers): (1) Whether they must make structural changes to their buildings to accommodate persons who are mobility impaired; and (2) whether they must make their services accessible to mobility impaired persons even if no such persons are known to live in their service area.

The Section 504 regulation was carefully written to require "program accessibility" not "building accessibility," thus allowing recipients flexibility in selecting the means of compliance. For example, they may arrange for the delivery of their services at al-

ternative sites that are accessible or use aides or deliver services to persons at their homes. The regulation does not require that all existing facilities or every part of an existing facility be made accessible; structural changes are not necessary if other methods are effective in making the recipient's services available to mobility impaired persons. For example, a library building in a rural area with one room and an entrance with several steps can make its services accessible in several ways. It may construct a simple wooden ramp quickly and at relatively low cost. Mobility impaired persons may be provided access to the library's services through a bookmobile or by special messenger service or clerical aid or any other method that makes the resources of the library "readily accessible." However, recipients are required to give priority to methods that offer handicapped and nonhandicapped persons programs and activities in the same setting.

There is an additional option for recipients that have fewer than 15 employees and that provide health, welfare, or other social services. If such a recipient finds, after consulting with a handicapped person seeking services, that only a significant alteration to its existing facilities will make its program accessible, the recipient may refer the handicapped person to another provider of the same services that is accessible. The referring recipient has the obligation to determine that the other provider is accessible and is willing to provide the services.

The section 504 regulation does not condition the requirement of "program accessibility" upon handicapped persons residing in the recipient's service area. Such a condition would be administratively unworkable. It would require the establishment of arbitrary geographic boundaries for each recipient's service area, the identification of all handicapped persons in that area and periodic surveys to determine whether handicapped persons have moved into or out of the service area. It would also ignore the needs of those persons who temporarily become mobility impaired or those mobility impaired persons who visit a service area. Moreover, mobility impaired persons may decide not to settle in a community because its services are not accessible.

The Department concludes, as it did when the section 504 regulation was adopted, that because the "standard (for program accessibility) is flexible" the regulation "does not allow for waivers" (See "Authority" section below).

Coverage: This policy interpretation applies to any public or private institution, person, or other entity that receives or benefits from HEW financial

assistance. For further information, see definition of "recipient" at 45 CFR section 84.3(f).

Authority: Regulation issued under section 504 of the Rehabilitation Act of 1973, 45 CFR § 84.22 and appendix A.

Section 84.22:

(a) *Program accessibility* A recipient shall operate each program or activity to which this part applies so that the program or activity, when viewed in its entirety, is readily accessible to handicapped persons. This paragraph does not require a recipient to make each of its existing facilities or every part of a facility accessible to and usable by handicapped persons.

(b) *Methods.* A recipient may comply with the requirements of paragraph (a) of this section through such means as redesign of equipment, reassignment of classes or other services to accessible buildings, assignment of aides to beneficiaries, home visits, delivery of health, welfare, or other social services at alternate accessible sites, alteration of existing facilities and construction of new facilities in conformance with the requirements of § 84.23, or any other methods that result in making its program or activity accessible to handicapped persons. A recipient is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with paragraph (a) of this section. In choosing among available methods for meeting the requirement of paragraph (a) of this section, a recipient shall give priority to those methods that offer programs and activities to handicapped persons in the most integrated setting appropriate.

(c) *Small health, welfare, or other social service providers.* If a recipient with fewer than 15 employees that provides health, welfare, or other social services finds, after consultation with a handicapped person seeking its services, that there is no method of complying with paragraph (a) of this section other than making a significant alteration in its existing facilities, the recipient may, as an alternative, refer the handicapped person to other providers of those services that are accessible.

Appendix A—Section-by-Section Analysis, Subpart C—Program Accessibility.

Several commenters expressed concern about the feasibility of compliance with the program accessibility standard. *The Secretary believes that the standard is flexible enough to permit recipients to devise ways to make their programs accessible short of extremely expensive or impractical physical changes in facilities. Accordingly, the section does not allow for waivers.* The Department is ready at all times to provide technical assist-

ance to recipients in meeting their program accessibility responsibilities. For this purpose, the Department is establishing a special technical assistance unit. Recipients are encouraged to call upon the unit staff for advice and guidance both on structural modifications and on other ways of meeting the program accessibility requirements * * *. (Emphasis added.)

Further, it is the Department's belief, after consultation with experts in the field, *that outside ramps to buildings can be constructed quickly and at a relatively low cost.* Therefore, it will be expected that such structural additions will be made promptly * * *. (Emphasis added.)

SECTION 504 OF THE REHABILITATION ACT OF 1973

POLICY INTERPRETATION NO. 4

Subject: Carrying Handicapped Persons to Achieve Program Accessibility.

Policy Interpretation: Carrying is an unacceptable method for achieving program accessibility for mobility impaired persons except in two cases. First, when program accessibility can be achieved only through structural changes, carrying may serve as an expedient until construction is completed. Second, carrying will be permitted in manifestly exceptional cases if carriers are formally instructed on the safest and least humiliating means of carrying and the service is provided in a reliable manner.

Discussion: The section 504 regulation requires that federally assisted programs and activities be "readily accessible" to handicapped persons. A program or activity will be judged "readily accessible" only if it is conducted in a building and room that mobility impaired persons can enter and leave without assistance from others. Carrying requires such assistance and is therefore unacceptable.

Carrying may also be undependable (e.g., when college students or employees are expected to volunteer and often hazardous (e.g., when carriers are untrained or when the carrying is to occur on poorly illuminated or narrow stairs). It may humiliate the handicapped person by dramatizing his or her dependency and creating a spectacle. Its use is therefore inconsistent with section 504's critical objective of encouraging handicapped persons to participate in programs and activities.

The Department recognizes that carrying may be necessary in the following cases:

(1) The section 504 regulation requires "program accessibility" for handicapped persons and suggests a variety of methods for attaining compliance that can be implemented within 60 days. However, if "program accessibility" can be achieved only

through "alterations of existing facilities (or) construction of new facilities," the construction must be completed "as expeditiously as possible," but in no event, later than June 3, 1980. Although recipients are not required to provide "program accessibility" during the period of construction, the Department encourages recipients to develop an interim expedient that may be carrying.

(2) Carrying is also acceptable in manifestly exceptional cases. For example, a university has properly maintained that the structural changes and devices necessary to adapt its oceanographic vessel for use by mobility impaired persons are prohibitively expensive or unavailable. Carrying, under this exception, must be provided in a manner that attempts to overcome its shortcomings. For example, carriers must be formally instructed on the safest and least humiliating means of carrying and the service must be provided in a reliable manner.

Coverage: This policy interpretation applies to any public or private institution, person, or other entity that receives or benefits from HEW financial assistance. For further information, see definition of "recipient" at 45 CFR § 84.3(f).

Authority: Regulation issued under section 504 of the Rehabilitation Act of 1973, 45 CFR §§ 84.22 (a), (b) and (d).

Section 84.22:

(a) *Program Accessibility.* A recipient shall operate each program or activity to which this part applies so that the program or activity, when viewed in its entirety, is readily accessible to handicapped persons. This paragraph does not require a recipient to make each of its existing facilities or every part of a facility accessible to and usable by handicapped persons.

(b) *Methods.* A recipient may comply with the requirement of paragraph (a) of this section through such means as redesign of equipment, reassignment of classes or other services to accessible buildings, assignment of aides to beneficiaries, home visits, delivery of health, welfare, or other social services at alternate accessible sites, alteration of existing facilities and construction of new facilities in conformance with the requirements of § 84.23, or any other methods that result in making its program or activity accessible to handicapped persons. A recipient is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with paragraph (a) of this section. In choosing among available methods for meeting the requirement of paragraph (a) of this section, a recipient shall give priority to those methods that offer programs and activities to handicapped persons

in the most integrated setting appropriate.

(d) *Time period.* A recipient shall comply with the requirement of paragraph (a) of this section within 60 days of the effective date of this part except that where structural changes in facilities are necessary, such changes shall be made within 3 years of the effective date of this part, but in any event as expeditiously as possible.

SECTION 504 OF THE REHABILITATION ACT OF 1973

POLICY INTERPRETATION NO. 5

Subject: Participation of Handicapped Students in Contact Sports.

Policy Interpretation: Students who have lost an organ, limb, or appendage but who are otherwise qualified, may not be excluded by recipients from contact sports. However, such students may be required to obtain parental consent and approval for participation from the doctor most familiar with their condition. If the school system provides its athletes with medical care insurance for sickness or accident, it must make the insurance available without discrimination against handicapped athletes.

Discussion: The Department has received several complaints that students have been denied an opportunity to participate in contact sports solely because they have lost an organ, limb, or appendage. The regulation's requirement that handicapped students be provided an equal opportunity to participate in physical education and athletics programs extends to contact sports. The exclusion from contact sports of students who have lost an organ, limb, or an appendage (e.g. a kidney, leg, or finger) but who are otherwise qualified is a denial of equal opportunity. It denies participation not on the basis of ability but because of a handicap.

A recipient cannot assume that such a child is too great a risk for physical injury or illness if permitted to participate in contact sports. However, a child may be required to obtain parental consent and approval for participation from the doctor most familiar with his or her condition.

If the recipient provides its athletes with medical care insurance for sickness or accident, it must make the insurance available without discrimination against handicapped athletes.

Coverage: This policy interpretation applies to any public or private institution, person, or other entity that receives or benefits from HEW financial assistance. For further information see definition of "recipient" at 45 CFR § 84.3(f).

Authority: Regulation issued under section 504 of the Rehabilitation Act of 1973, 45 CFR § 84.37(c)(1).

Section 84.37(c)(1):

(c) *Physical education and athletics.*
 (1) In providing physical education courses and athletics and similar programs and activities to any of its students, a recipient to which this subpart applies may not discriminate on the basis of handicap. A recipient that offers physical education courses or that operates or sponsors interscholastic, club, or intramural athletics shall provide to qualified handicapped students an equal opportunity for participation in these activities.

SECTION 504 OF THE REHABILITATION
 ACT OF 1973

POLICY INTERPRETATION NO. 6

SUBJECT: School board members as hearing officers.

POLICY INTERPRETATION: School board members may not serve as hearing officers in proceedings conducted to resolve disputes between parents of handicapped children and officials of their school system.

DISCUSSION: The section 504 regulation requires school districts to establish a "system of procedural safeguards" to protect against errors in the educational programs developed for handicapped students. One requirement of that system is an "impartial hearing" and a review procedure through which a parent may contest the evaluation and placement of his or her child.

Recipients have asked whether school board members may serve as the hearing or reviewing authority in their own school district. The Department has concluded that this practice is inconsistent with the regulation's requirement of "impartial" proceed-

ings. School board members have a clear interest in the outcome of the hearing. For example, determinations adverse to the parents will often avoid additional expenditures by the board. Also, the school board has hired, and therefore expressed confidence in, the judgment of the professionals challenged in the hearing. Moreover, since the Department will generally not review individual placement and other educational decisions of a school district if the "system of procedural safeguards" is in place, every precaution must be taken to ensure that those procedures operate fairly.

This interpretation is also supported by our commitment to coordinate section 504 procedural safeguards with those established by the Office of Education under the Education of the Handicapped Act. The regulations issued under that statute, as interpreted by the Office of Education, bar school board members from serving as hearing officers in their school system.

COVERAGE: This policy interpretation applies to any public or private institution, person, or other entity that receives or benefits from HEW financial assistance. For further information, see definition of "recipient" at 45 CFR 84.3(f).

AUTHORITY: Regulation issued under section 504 of the Rehabilitation Act of 1973, 45 CFR 84.36 and Appendix A thereto.

Section 84.36: A recipient that operates a public elementary or secondary education program shall establish and implement, with respect to actions regarding the identification, evaluation, or educational placement of persons who, because of handicap, need or are believed to need special instruction or related services, a system of procedural safeguards that includes notice, an

opportunity for the parents or guardian of the person to examine relevant records, an impartial hearing with opportunity for participation by the person's parents or guardian and representation by counsel, and a review procedure. Compliance with the procedural safeguards of section 615 of the Education of the Handicapped Act is one means of meeting this requirement.

Appendix A, Subpart D (Fifth Paragraph): It is not the intention of the Department, except in extraordinary circumstances, to review the result of individual placement and other educational decisions, so long as the school district complies with the "process" requirements of this subpart (concerning identification and location, evaluation, and due process procedures) * * *

Regulations Issued Under the Education of the Handicapped Act, 45 CFR 121a.507 and Appendix A Thereto

Section 121a.507: (a) A hearing may not be conducted:

- (1) By a person who is an employee of a public agency which is involved in the education or care of the child, or
- (2) By any person having a personal or professional interest which could conflict with his or her objectivity in the hearing.

(b) A person who otherwise qualifies to conduct a hearing under paragraph (a) of this section is not an employee of the agency solely because he or she is paid by the agency to serve as a hearing officer

Appendix A, Subpart E ("Response" to "Comment" on Section 121a.507): [A] parent of the child in question and school board officials are disqualified under § 121a.507.

[FR Doc. 78-22612 Filed 8-11-78; 8:45 am]