This is in response to your letter of June 28, 1993, in which you expressed concern regarding the policy of the Office of Civil Rights (OCR) with regard to school districts' substantive obligations under Section 504 of the Rehabilitation Act of 1973 (Section 504). The questions you pose focus on the Department of Education (Department) regulation implementing Section 504, specifically 34 C.F.R. § 104.33(a).

(a) General. A recipient that operates a public elementary or secondary education program shall provide a free appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction, regardless of the nature or severity of the person's handicap.

The key question in your letter is whether OCR reads into that Section 504 regulatory requirement for a free appropriate public education (FAPE) a "reasonable accommodation" standard; or, another similar limitation. The clear and unequivocal answer to that is no. Section 104.33(a) guarantees all qualified individuals with disabilities FAPE, which consists of regular or special education and related aids and services that are designed to meet the individual educational needs of qualified persons with disabilities as adequately as the individual educational needs of other persons are met and that are designed and delivered in accordance with the Department's regulation. 34 C.F.R. § 104.33(b)(1).

The Section 504 regulation was originally promulgated by the Department of Health, Education, and Welfare (HEW) and received thorough public scrutiny, with opportunities for written comment as well as for participation in 22 public meetings prior to publication in the Federal Register on May 4, 1977. The regulation became effective on June 3, 1977, following congressional review that failed to enact any objection. The regulation was adopted without change by the newly created Department of Education and published in the Federal Register on May 9, 1980. Thus, I believe that the FAPE requirement in the Section 504 regulation does reflect congressional intent.

Since that time there have been no actions by the Congress, the Federal courts, or the agencies and administrative tribunals of the executive branch that would require OCR to modify § 104.33, or its interpretation thereof, to allow for some limitation of the FAPE guarantee.

The regulation establishes different compliance standards for different educational contexts. A reasonable accommodation limitation on the responsibilities of recipients is contained in Subpart B of the regulation, which covers employment. See 34 C.F.R. § 104.12. Subpart B, which covers postsecondary and vocational education, contains a similar limitation on the recipient's obligation to modify its academic requirements to ensure that they do not discriminate on the basis of disability. If a recipient can demonstrate that an academic requirement is essential to the program of instruction being pursued by the student with a disability or to a directly related licensing requirement, failure to modify the requirement will not be regarded as discriminatory. See 34 C.F.R. § 104.44. Such limitations are not contained in Subpart D, covering elementary and secondary education. We conclude therefore that the regulation writers intended to create a different standard for elementary and secondary students than for employees or postsecondary/vocational students.

You have cited two particular Supreme Court cases as suggesting your position that Section 504 was intended to re quire only reasonable accommodation for elementary and secondary students with disabilities. OCR's position is that § 504 is not in any way inconsistent with the U.S. Supreme Court's interpretation of Section 504 and its implementing regulations. I will address each of these cases in turn to explain their inapplicability to the FAPE requirement.

In Southeastern Community College v. Davis, 442 U.S. 397 (1979), the Court considered the appeal of Frances Davis, a woman who was considered an incompetent by the courts. The college's refusal to admit her to a program did not violate Title II of the Civil Rights Act of 1964. The Court's decision was based on the fact that Davis was not a handicapped person as defined in 504, 28 C.F.R. § 36.104. The Department's implementing regulations are based on OCR's role in the interpretation of Section 504. The section of the regulation states that with respect to postsecondary and vocational education services, a qualified handicapped person is a handicapped person who meets the academic and technical standards required for admission to or participation in the recipient's education program or activity. Davis was not a qualified individual with a disability because she did not meet the "technical standards" required for admission to the college's program. The balance of the court's opinion was devoted to whether the physical qualifications of a hearing aid was necessary "technical standard." Thus, the court was addressing modifications unrelated to the educational process covered by 34 C.F.R. ¶ 104.33. The children covered by 34 C.F.R. ¶ 104.33 have already been determined to be qualified handicapped persons under the definition of "handicapped" contained in 34 C.F.R. ¶ 104.3(b).

In Alexander v. Choate, 469 U.S. 287 (1985), the Court relied in part on its opinion in Davis to find that the reduction of annual inpatient hospital days that the state hospital could require for admission of all Medicaid recipients was not discriminatory. The medical recipients who had challenged the cutback had argued that individuals with disabilities were disproportionately affected by the agency decision. Setting aside the clear distinctions between the health and education contexts, this decision still does not support limitations on the provision of FAPE as mandated by 34 C.F.R. § 104.33(b).

The Court cites Davis as support for the principle that "[s]uch a fundamental alteration in the nature of the program's attendance was far more reasonable than the modifications the statute or the regulations required." Alexander, 469 U.S. at 300, quoting Davis, 442 U.S. at 410. Section 504 of the statute does not, despite the statements of the Choate Court, speak to what modifications are or are not necessary. The regulation originally limited to by the Department of Health, Education, and Welfare, which states that a recipient shall modify its academic requirements as necessary to ensure that they do not discriminate or have the effect of discriminating on the basis of disability—unless the recipient can demonstrate that such requirements are essential to the program of instruction or to any directly related licensing requirement. This regulation is identical to 34 C.F.R. § 104.44, enforced by OCR.

The Choate Court, in effect, interprets the mandate of Section 504 in a manner that supports the language of the postsecondary/vocational education portion of the regulation: "fundamental alterations referred to by the Court are defined as any significant difference between postsecondary/vocational and elementary/secondary education, beginning with the voluntary nature of the former. States, on the other hand require elementary and secondary education for children between specified ages, and those children, whatever or not they have disabilities, must attend.

The lower court cases that cite that do not require, or even suggest, any need for alteration of the FAPE regulation. Those cases that determine what a school district must provide to an elementary or secondary student with a disability under Section 504 restate the Davis interpretation: Section 504 is a statute that prohibits discrimination, rather than requiring affirmative action to overcome a student's disability. If particular educational services requested by the plaintiffs in those cases are denied by the courts, it is almost uniformly because the courts found that discrimination was not occurring: that is, those services requested were not necessary to prevent or eliminate discrimination because the services currently being provided were not discriminatory. This coincides with OCR's interpretation set forth above that the FAPE regulation requires school districts to meet the individual needs of students who have disabilities and to ensure that services provided are appropriate to their needs. See 34 C.F.R. § 104.44.

In summary, the FAPE regulation states that "[t]he interpretation of the extent to which a public entity must comply with the requirements of section 504 is not to be determined by reference to any or all of the federal laws, including Section 504 of the Rehabilitation Act of 1973." 34 C.F.R. § 104.34(c).

The Department's decision in the Alexander case to interpret the reasonable accommodation requirement to be equivalent to the "technical standards" of the Davis court to interpret the reasonable accommodation requirement in the context of postsecondary education is not supported by law and is contrary to the intent of Congress. OCR's interpretation is consistent with the intent of Congress and with the four corner provisions of Section 504. Section 504 is clear in its intent to provide a FAPE that is not discriminatory and not to discriminate.

The Department of Justice's implementation of Section 504, as set forth in 28 C.F.R. § 35.130(b)(7), is a specific application of the requirement under the general prohibition of discrimination that public entities make reasonable modifications in policies, practices, or procedures where necessary to avoid discrimination on the basis of disability. [The House Judiciary Committee Report directs the Attorney General to include those specific requirements in the regulatory text in the extent they do not conflict with the regulations implementing section 504. 28 C.F.R. § 130(b)(7) and 28 C.F.R. ch. I, pt. 35, app. A, at 490 (1992).] Since the Department has adopted the specific FAPE standard for compliance for elementary and secondary schools under Section 504, the Title II regulation in this instance is not intended to be applied to weaken the existing Section 504 standards.

OCR has and continues to enforce the Section 504 regulation as it has promulgated and reflective of congressional intent and the courts have not found otherwise. One of OCR's missions is to promote equitable educational access for all children. Defending the civil rights of children with disabilities as intended by Congress can never impair our integrity or our impact—and will only bring greater credibility to our efforts on behalf of all those served by this country's public schools.