Appendix 4:

Laws and Policies

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The following is a brief description of Laws and Policies that give a foundation for the components of assistive technology for individuals with disabilities.

I. The Rehabilitation Act

The Rehabilitation Act of 1973 prohibits discrimination on the basis of disability in programs conducted by Federal agencies, in programs receiving Federal financial assistance, in Federal employment, and in the employment practices of Federal contractors.

Section 504

Section 504 of the Rehabilitation Act states that "No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance..."

Aids, benefits and services provided to children with disabilities must be equal to those afforded to others and must be as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement. The 504 regulations define an 'appropriate education' as "the provision of regular or special education and related aids and service that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of non-handicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of 104.34"(34 CFR§ 104.33).

The Americans with Disabilities Act (ADA)

The Americans with Disabilities Act of 1990 (ADA), amended in 2008 as the ADA Amendments Act (ADAAA) (P.L. 110-325), went into effect on January 1, 2009. In March of 2011, the Equal Employment Opportunity Commission (EEOC) released the ADAAA Regulations for Titles II and III (29 CFR § 1630) that went into effect on May 24, 2011.The ADA Amendments Act of 2008 and the subsequent regulations prohibit discrimination on the basis of disability. To be protected by the ADA, one must have a disability (a person who has a physical or mental impairment that substantially limits one or more major life activities, a person who has a history or record of such an impairment, or a person who is regarded by others as having such an impairment) or have a relationship or association with an individual with a disability. The Act also has a civil rights statute to protect the rights of persons with disabilities in almost every facet of their lives, including school, work and recreation.

In regards to the area of assistive technology, a student or young child with a disability may also be entitled to assistive technology as a reasonable accommodation to his or her disability under the ADA. Students and young children (0–21) with disabilities who are not eligible for special education under the IDEA may have a right to assistive technology under Section 504 of the Rehabilitation Act, and either Title II or Title III of the ADA.

ADA Title II: State and Local Government Activities

Title II of the ADA, which reinforces many of the requirements of Section 504 of the Rehabilitation Act of 1973 (as amended, 29 U.S.C. § 794), covers state

and local government services regardless of whether these entities receive Federal financial assistance. It prohibits discrimination against qualified individuals with disabilities from discrimination on the basis of disability in services, programs, and activities provided by State and local government entities (28 CFR Part 35). Public entities include school systems and publicly operated preschool programs and other instrumentalities of state and local governments.

The regulations of Title II of the ADA state that: "No qualified individual with a disability shall, on the basis of disability, be excluded from participation in or be denied the benefits of the services, programs or activities of a public entity, or be subjected to discrimination by the public entity (28 CFR §35.130(a)".

State and local governments are required to follow specific architectural standards and transportation provisions. They are required to make reasonable modifications to policies, practices, and procedures where necessary to avoid discrimination, unless they can demonstrate that doing so would fundamentally alter the nature of the service, program, or activity being provided.

In order to comply with the Title II discrimination prohibitions, school systems may be required to make reasonable modifications in policies, practices and procedures or to provide "auxiliary aids and services" to the student with a disability (28 CFR §35.130(b)(7). Auxiliary aids and services" include assistive technology devices such as tape recorders, computers, and listening devices. In addition, the terminology includes assistive technology services, such as the acquisition or modification of equipment (28 CFR §35.104).

ADA Title III: Public Accommodations

Title III covers businesses and nonprofit service providers that are public accommodations, privately operated entities offering certain types of courses and examinations, privately operated transportation, and commercial facilities. Public accommodations are private entities who own, lease, lease to, or operate facilities such as restaurants, retail stores, hotels, movie theaters, private schools, convention centers, doctors' offices, homeless shelters, transportation depots, zoos, funeral homes, day care centers, and recreation facilities including sports stadiums and fitness clubs. Transportation services provided by private entities are also covered by Title III.

Title III of the ADA prohibits places of public accommodation from discriminating against persons with disabilities. Places of public accommodation are privately owned entities such as a nursery school, or elementary and secondary private schools (42 U.S.C. §1218(7)(J). The general prohibition of discrimination under Title III states that "no individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation..." (27 CFR §86.201(a). Public accommodations must comply with basic nondiscrimination requirements that prohibit exclusion, segregation, and unequal treatment.

Individuals with disabilities may not be denied these goods and services because of disability. They may not be required to accept goods and services that are unequal or separate from those provided to non-disabled individuals.

II. Connecticut's Assistive Technology Lemon Law

In June of 1997, Connecticut enacted Public Act 97-100, An Act Concerning the Security of Assistive Technology Devices, to protect consumers with respect to

nonconforming assistive technology devices purchased or leased on or after January 1, 1998. Nonconforming devices are defined as "any condition, malfunction or defect that substantially impairs the use, value or safety of the device" or that is covered by a warranty on the device (CGS Sec. 1(10). The law also helps device owners enforce either the warranty or lease guarantees associated with a device. Manufacturers or authorized repair dealers have 10 business days to complete the repair; if repair takes more than ten days or if the nonconformity has occurred on at least two previous occasions, the manufacturer must reimburse the consumer a reasonable per day cost for using an alternative device. The law also spells out specific consequences for devices that have been out of service for over thirty days or that have had to be brought in for repair three times within the warranty period or two years (whichever is longer). In those cases, replacement or refund is required. This law does not apply to hearing aids. (See appendix B for a full copy of the Lemon Law statutes.)

III. Family Educational Rights and Privacy Act (FERPA)

The Family Educational Rights and Privacy Act (FERPA) regulations apply to educational agencies and institutions that receive federal funds and protect the privacy of parents and students. The FERPA regulations concern access to and the disclosure, release, and transfer of educational records and can be found in Title 34 of the Code of Federal Regulations, Part 99 (34 CFR 99). The FERPA Regulations are important because they set forth the basic federal records retention and destruction requirements.

Protection under FERPA transfers to students at age 18 (34 C.F.R. §99.3(a)(5)) or when a student reaches age of majority, the rights accorded to, and consent required of, parents under FERPA transfer from the parents to the student in most instances. (FERPA § 99.31(a)). In the case of a divorce, separation or custody dispute, both parents retain their FERPA rights unless a court order or other legally binding document that revokes these rights is presented (34 C.F.R. §99.4).

Parents, guardians or eligible students may request an amendment to the student's records if they believe that information in them is inaccurate, misleading or violates the student's right to privacy. If the district refuses, it must inform the parties seeking the amendment of their right to a hearing. If the hearing officer rules in favor of the parties requesting the amendment, the district must amend the records accordingly and inform the party of the amendment; otherwise, the parties may place a statement concerning the contested information in the record and this statement must be disclosed along with the records under the disclosure provisions of the law (34 C.F.R. §99.21). This applies to parental concerns about the AT information in their child's record.

The law gives parents or guardians and eligible students the right to inspect and review the student's education records or to receive a copy of the requested records if circumstances effectively prevent them from inspecting or reviewing the records (34 C.F.R. §99.10). Connecticut regulations entitle these individuals to one free copy of the requested records that the school must send within 5 school days of a written request for the copy (RCSA 10-76d-18(b)(2). Except in certain circumstances, before a school can disclose personally identifiable information from a student's record, it must secure written consent from the parents, guardian or eligible student (34 C.F.R. §99.30). One exception permits disclosure to school officials, including teachers who have been determined by the district to have legitimate educational interests

(34 C.F.R. §99.31). Another concerns the transfer of student records when a student enrolls in a new district, the new district has notified the former district and the parents or guardian have not given written permission for the records transfer (C.G.S. Sec.10-220h). In this circumstance, the sending district must notify the parents or guardian that it has transferred the records. The records transfer must occur no later than 10 calendar days after the new district notifies the former district of the student's enrollment. Timely transfer of the education records of a child using AT is critical to that youngster's educational progress and may affect his or her safety and well-being.

IV. The Elementary and Secondary Education Act (ESEA)

The Elementary and Secondary Education Act (ESEA) flexibility process (also known as the ESEA waiver) has been offered by the U.S. Department of Education for each State educational agency (SEA) to request flexibility regarding specific requirements of the No Child Left Behind Act of 2001 (NCLB); in exchange for a rigorous and comprehensive State-developed plan designed to improve educational outcomes for all students, close achievement gaps, increase equity, and improve the quality of instruction. In May 2012, the U.S. Department of Education approved Connecticut's flexibility request (or waiver), allowing the State to establish a new accountability system to assess school performance.

According to the SDE website, the new performance measurement system improves the State's ability to provide more accurate and appropriate interventions, support and recognition to local schools. Connecticut's new accountability system improves upon the old one in several ways. The new system:

- Recognizes and values improvement in student achievement at all performance levels unlike the old system, which only recognized movement of students from 'not proficient' to 'proficient';
- Raises expectations by setting the target that all students perform at the 'goal' level on the majority of tests they take rather than just perform at the 'proficient' level, as in the old system;
- Integrates all tested subjects, encouraging schools to improve instruction not only in Mathematics and Reading (as under No Child Left Behind), but also in Science and Writing;
- Includes graduation rates as important indicators of high school success;
- Identifies schools with struggling student subgroups, which in the past, may have been less visible to parents and educators; and
- Enables schools to be classified into new categories, including Turnaround, Review and Focus, Transitioning, Progressing and Excelling Schools, that will enable districts and the State to provide tailored support to individual schools.

You may view further information on the on the Department's updated ESEA flexibility web page:

- "The Opportunity of ESEA Flexibility" (brochure)
- "Protecting School and Student Accountability" (fact sheet)
- "Advancing Accountability and Graduation Rates" (fact sheet)
- "Continuing to Expose and Close Achievement Gaps" (fact sheet)
- "Turning Around the Lowest-Performing Schools" (fact sheet)
- "Supporting Teachers, Leaders, and Local Innovation" (fact sheet)

V. Question and Answers

Q. Describe the differences between medically necessary and educationally necessary assistive technology.

A. IDEA 2004 and its regulations added an important exclusion to the definition of related services – a medical device that is surgically implanted, the optimization of that device's functioning, or the replacement of that device and services that apply to children with these devices (e.g., mapping for cochlear implants).

The Supreme Court decision in Cedar Rapids Community School District v. Garret F. [25 IDELR 439] provides a clear test for purposes of determining whether or not a school district is responsible for providing a device or service which may be considered medical and therefore an excluded service. The Supreme Court ruled that a "bright line" distinction exists between those devices/services which can be excluded from school responsibility as a medical treatment or service and those which cannot and therefore must be provided as a related service under the IDEA. Under the bright line test, the inquiry focuses on who must deliver the device or service, not on the nature of the service to be provided. If a physician must deliver the device or service, it is not a related service, and may be excluded as a medical service or treatment. The school is not responsible for providing the device or service. If individuals other than a physician can provide or deliver the device or service, including but not limited to nurses, physical therapists, occupational therapists, speech/language pathologists, audiologists, trained teachers or other trained school staff, it cannot be excluded as a medical service or treatment. The school will need to provide the device or service if the planning and placement team determines that the child needs the service or device as a related service in order for the child to benefit from the educational program.

Q. Explain what the law says about devices that are used exclusively for the "personal use" of school-aged children.

A. IDEA and Section 504 do not provide for exemption of responsibility for "personal use" assistive technology devices. Examples of personal use devices include items such as customized wheelchairs, augmentative communication devices used exclusively by and programmed for an individual student, text readers for personal use or study, or services of a personal nature including assistance in eating, toileting or dressing. In cases such as these, if the device is part of the IEP or meets the requirements set forth under Section 504, the school is responsible for providing the device (10 IDELR 1216 SEILER (1993).

On a very limited basis, and under unique circumstances based on the individual needs of a student with disabilities, personal use devices such as hearing aids and eye glasses may also be considered assistive technology. An OSEP policy letter answering this specific issue stated that "the relationship that must be present is between the educational needs of the child and the assistive technology device and/or service (22 IDELR 629 BACHUS (1995). The only exception to this is when the devices are determined to be "medical" and not "educational," as described in the previous section.

Individuals who qualify for assistive technology under the American with Disabilities Act (ADA) are subject to exclusion for personal devices. ADA regulations primarily address those technologies which ensure public access and accommodation.