



July 1, 2022

The Honorable Seth Galanter
Deputy Assistant Secretary for Civil Rights
U.S. Department of Education
Office for Civil Rights
400 Maryland Avenue, SW Washington, DC 20202-1100

Dear Deputy Assistant Secretary Galanter:

The Consortium for Constituents with Disabilities (CCD) is the largest coalition of national organizations working together to advocate for federal public policy that ensures the self-determination, independence, empowerment, integration and inclusion of children and adults with disabilities in all aspects of society, free from racism, ableism, sexism, and xenophobia, as well as LGBTQ+ based discrimination and religious intolerance. In support of CCD's overall mission, the Education Task Force advocates for federal legislation, regulations, and guidance that protect civil rights, ensure high expectations, and address the educational, as well as the social and emotional needs of infants, children and youth with disabilities and their families. In this work, we focus on the Individuals with Disabilities Education Act (IDEA), the Every Student Succeeds Act (ESSA), Section 504 of the Rehabilitation Act, the Americans with Disabilities Act (ADA), and other applicable laws. The CCD Rights Task Force also joins this letter. The Rights Task Force is committed to assuring that Section 504 is interpreted and enforced in a robust manner to secure the equal rights and opportunities of Black, Indigenous, People of Color (BIPOC) disabled people, LGBTQ+ disabled people, people living with HIV, and all other individuals with disabilities. We are pleased to provide the Department of Education's Office of Civil Rights (OCR) recommendations about how best to improve the current regulations regarding Section 504.

Section 504 is a foundational federal law designed to protect the rights of individuals with disabilities in programs and activities that receive financial assistance from the U.S. Department of Education (ED). Section 504 provides: "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" Furthermore, the current Section 504 regulations require a school district to provide a "free appropriate public education" (FAPE) to each qualified student with a disability who is in the school district's jurisdiction, regardless of the nature or severity of the disability.

In December 2021, the CCD Education Task Force formally requested¹ that OCR take actions to address district and school compliance with Section 504. Chief among our concerns was a recent analysis of the 2017-2018 Civil Rights Data Collection² (CRDC) presented in the Center

¹ See: Consortium of Constituents with Disabilities, Education Task Force, *Letter on 504 Recs*, (2021), at: https://www.c-c-d.org/fichiers/CCD-Education-TaskForce-Letter-on-504-Recs-12_18.pdf

² See: U.S. Department of Education, Office for Civil Rights, *2018-2018 Civil Rights Data Collection*, Enrollment Section 504 Only, (2018), at: <https://ocrdata.ed.gov/assets/downloads/2017-2018/Student-Enrollment/All-Enrollment/Enrollment-Section-504-only.xlsx>

for Civil Rights Remedies (CCRR) report, *Disabling Inequity: The Urgent Need for Race-Conscious Resource Remedies*,³ which revealed that thousands of school districts fail to identify even one student as eligible under Section 504. The CCRR report found 3,434 districts (roughly 20% of all districts) serving over 1.8 million students identified **zero** 504-only eligible students. These data strongly suggest that thousands of districts across the U.S. are failing to implement the requirements of Section 504. While strengthening the Section 504 regulations is an important step towards preventing discrimination in education against students with disabilities, addressing issues related to inaccurate data reporting, inaccurate data collection, and noncompliant 504 implementation is critical to ensuring students with disabilities are able to access an education that appropriately addresses their educational needs.

OCR should also ensure enforceability of the 504 regulations, including through an analysis of how the recent *Cummings v. Premier Rehab Keller, P.L.L.C.*, a recent Supreme Court case, may affect individual remedies. The Supreme Court in *Cummings* determined that damages related to emotional distress are not recoverable in a private action to enforce either the Rehabilitation Act of 1973 (including Section 504 explicitly) or the Affordable Care Act. The case's holding may be particularly significant for students with disabilities and their families. In many disability discrimination cases - including in education - emotional distress is the primary if not the only harm. CCD therefore recommends that DOE consider the extent to which it can use this update of Section 504's regulations to clarify the rights of students with disabilities and the relief available, where consistent with the statute and the ruling in the *Cummings* case.

The Section 504 regulations have a long and storied history in the disability community dating back to the historic 504 sit-ins.⁴ Since then, individuals with disabilities and their allies have fought to ensure these regulations are properly implemented and strictly enforced. In support of that goal, we encourage OCR to consider the following changes, updates, and actions:

1. Align various statutes, regulations, and sub-regulatory guidance with the disability community's current preferred language and ensure the most rigorous protections for students with disabilities;
2. Clarify and strengthen obligations entities have under Section 504;
3. Provide clarity on the requirements of entities to provide FAPE and an education free from discrimination to students with disabilities in childcare, preschool, pre-kindergarten, and head-start; and
4. Clarify the requirements of Institutions of Higher Education (IHE) to prohibit discrimination of students with disabilities in higher education.

We offer more detailed explanation below, and we look forward to serving as a resource for the Department as you prepare to propose regulatory language. Please do not hesitate to reach out to discuss any of the following points:

1. **Align various statutes, regulations, and sub-regulatory guidance with the disability community's current preferred language and ensure the most rigorous protections for students with disabilities.**

Disability terminology as used in the law can influence the way people with disabilities

³ See: Center for Civil Rights Remedies, *Disabling Inequity: The Urgent Need for Race-Conscious Resource Remedies*, (2021) at: <https://www.civilrightsproject.ucla.edu/news/press-releases/2021-press-releases/national-analysis-details-troubling-levels-of-pre-existing-education-inequities-for-students-with-disabilities>

⁴ See: Disability Rights Education & Defense Fund, Short History of the 504 Sit-In, at: <https://dredf.org/504-sit-in-20th-anniversary/short-history-of-the-504-sit-in/>

are viewed and view themselves, and can lead to marginalization and exclusion when associated with negative connotations. Additionally, many agencies and Departments (including OCR) have published sub-regulatory guidance, supplementing existing statutes and regulations, to clarify the current protections for students with disabilities in schools. Many of these can and should be aligned in updates to the Section 504 regulations to ensure consistency and strong protections for students across the board. OCR should:

- **Recommendation: Align Section 504 definitions with those found in the ADA.**

Rationale: The Americans with Disabilities Amendments Act of 2008 replaced the use of the word “handicap” with “disability” and updated the definition of a person with a disability that is meant to be constructed broadly in favor of expansive coverage and includes a non-exhaustive list of major life activities.⁵ The use of the word “handicap” should be removed from Section 504 regulations and updated to be in alignment with the definition of “disability” found in the ADA. The term “handicapped” is largely obsolete as a term for “disability” in law and regulation and it is often seen as pejorative. “Person with a disability” is an example of person-first language. Person-first language is intended to promote inclusion and equality by emphasizing individuals as people first rather than defining them by their disability. With respect to specific communities, many in the disability community prefer the use of identity-first language such as “Deaf person” or “autistic person” which allows the individual to claim the disability as part of their own identity and determine its meaning, rather than permitting others (e.g., authors, educators, researchers) to define the meaning of that disability for them. Updating the definitions in the regulations not only brings the regulations into harmony with other relevant civil rights laws but also gives individuals the opportunity to choose and define for themselves how they identify with their disability.

Additionally, Rosa’s Law (P.L. 111-256) amended sections of the Rehabilitation Act of 1973 by replacing outmoded terminology for people with “intellectual disability” or “intellectual disabilities.” Subsequently, the Department of Education (ED) made additional changes to its regulations to better align them with Rosa’s Law.⁶ Congress and ED have a precedent, most notably through Rosa’s law, of updating statutory and regulatory language to be more inclusive and in line with modern disability terminology, and so it would be appropriate for ED to replace the use of the word “handicap” in the Section 504 regulations.

- **Recommendation: Review the guidance issued on ensuring FAPE for students with ADHD.**

Rationale: Students with ADHD are sometimes incorrectly identified as 504-only when IDEA services may be more appropriate, leading to inadequate supports and unequal access at school. Due to a significant number of widespread complaints filed with OCR alleging discrimination against students with ADHD,

⁵ See: Americans with Disabilities Amendments Act Regulations, (2008) at: https://www.ada.gov/regs2016/final_rule_adaaa.html

⁶ See: U.S. Department of Education, Office of the Secretary, *Rosa’s Law*, (2017), at: <https://www.federalregister.gov/documents/2017/07/11/2017-14343/rosas-law>

OCR published in 2016 a *Dear Colleague Letter and Resource Guide on Students with ADHD*⁷ with the intent of providing clear guidance to schools on their obligations to these students under Section 504. The document also laid out procedural safeguards for students and families. The guidance is applicable to the disability community at large – not just those with ADHD – as evidenced in recent years since its publication. To the greatest extent possible, the provisions outlined in the letter and Resource Guide should be codified in the 504 regulations, so that structured, consistent methods for 504 implementation are readily accessible and unambiguous to educators and families.

- **Recommendation: Ensure that recipients of federal financial assistance procure, design, maintain, and use websites, information and communication technologies (ICT), and other forms of communication that are accessible to and usable by the widest range of people with disabilities possible.**

Rationale: Recipients of federal financial assistance are becoming more and more dependent on information and communication technology to provide goods and services and to share information. For people with disabilities, accessibility of websites and other information and communication technology (ICT) is a necessity—not a luxury or a convenience—that fosters independence, economic self-sufficiency, and active, meaningful participation in civic life. These issues are not limited to those with sensory disabilities; many individuals with other disabilities, such as those who use augmentative and alternative communication (AAC) devices, those with intellectual and developmental disabilities, and many more find that they are unable to access online systems that are integral to modern daily life. This phenomenon became overwhelmingly clear during the pandemic when federally funded educational programs and activities moved to digital platforms. OCR should explicitly clarify that the nondiscrimination provisions in Section 504 also apply to iCT. Inaccessible ICT, websites, applications, and communications exclude students, parents, and others with disabilities from equal participation in and deny the benefits of many aids, services, programs, and benefits funded by the Department of Education. Furthermore, OCR should coordinate with other agencies, including the Department of Justice and the Department of Health and Human Services to develop clear and enforceable accessibility and usability standards. We encourage the agencies to consider aligning the standards with Section 508 and to reference the internationally accepted Web Content Accessibility Guidelines (WCAG) 2.1 Levels A and AA in such a way that these standards can be updated as the industry standard evolves.

- **Recommendation: Expand access to NIMAS-derived materials for students served by Section 504.**

Rationale: Accessible-format educational materials created from National Instructional Materials Accessibility Standard (NIMAS)-derived sources currently require a beneficiary to be eligible for services under IDEA. A large number of Blind/Visually Impaired students receive accommodations under Section 504 and are not considered IDEA-eligible. Consequently, IDEA eligibility is the sole

⁷ See: U.S. Department of Education, Office for Civil Rights, *Dear Colleague Letter and Resource Guide on Students with ADHD*, (2016), at: <https://sites.ed.gov/idea/files/OCR-letter-07-26-2016.pdf>

limiting factor denying access to accessible curriculum materials for the very group of beneficiaries whose needs it was originally designed to address. Both the Marrakesh Treaty Implementation Act (MTIA)⁸ and its associated Senate report⁹ document Congressional intent to maximize access to “Accessible Formats” by all qualified individuals with disabilities. Providing access to NIMAS-derived materials to Section 504-eligible students would greater fulfill that intent.

- **Recommendation: The 504 regulations must assure the accessibility needs of students with intellectual and developmental disabilities (IDD) are fully addressed and incorporate the principles of Universal Design for Learning.**

Rationale: Students with IDD have unique cognitive, and communicative needs that must be accommodated. The updated Section 504 regulations can help mitigate issues related to accessibility for students with IDD by promoting the use of Universal Design for Learning¹⁰ (UDL) in all communications, stipulating the use of plain language in written communications and allowing for advocacy supports to be made available to students with IDD when needed.

- **Recommendation: 504 must include updates for Accessible Communication consistent with the 2014 joining guidance from ED and the Department of Justice (DOJ) on Effective Communication for Students with Hearing, Vision, or Speech Disabilities in Public Elementary and Secondary Schools.¹¹**

Rationale: OCR must use the DOJ guidance as a model for increased regulations on effective and accessible communication. The existing Section 504 regulations make some references to concepts that underlie effective communication, see e.g. 34 C.F.R. § 104.52(c) & (d), but these are inadequate to articulate the appropriate obligation of recipients to ensure effective communication. The revised regulations should track the effective communication standards set out in the DOJ’s regulations implementing Title II of the ADA (see 28 C.F.R. § 35.160 to 35.164). We further urge ED to safeguard and assure the effective communication rights of the estimated 5 million people in this country who cannot rely on speech alone to be heard and understood. Such individuals instead must rely on AAC. Those who rely on AAC frequently use multiple means of expression and are diverse in terms of race, disability, age of onset, primary language, geography, and other socioeconomic factors. Additionally, the research also indicates Black, Indigenous, People of Color, and people whose primary language is not English are more at-risk for disabilities and conditions that might require them to use AAC and face greater bias, discrimination, and disparities, when accessing AAC.

⁸ See: United States Copyright Office, *Understanding the Marrakesh Treaty Implementation Act*, (2020), at https://www.copyright.gov/legislation/2018_marrakesh_faqs.pdf

⁹ See: United States Senate, *Report on the Marrakesh Treaty Implementation Act*, (2018), at: <https://www.govinfo.gov/content/pkg/CRPT-115srpt261/html/CRPT-115srpt261.htm>

¹⁰ See: CAST, UDL Guidelines, (2018), at: <https://udlguidelines.cast.org/>

¹¹ See: U.S. Department of Justice, Civil Rights Division, and U.S. Department of Education, Office for Civil Rights and Office of Special Education and Rehabilitative Services, *Frequently Asked Questions on Effective Communication for Students with Hearing, Vision, or Speech Disabilities in Public Elementary and Secondary Schools*, (2014) at: <https://www2.ed.gov/about/offices/list/ocr/docs/dcl-faqs-effective-communication-201411.pdf>

- **Recommendation: Clarify that 504-eligible students must be provided accessible educational services when their disability prevents them from attending schools in person.**

Rationale: During the pandemic, medically vulnerable students who could not attend schools in person were provided with a small fraction of the educational services and minutes provided to their peers. States relied on the IDEA's LRE requirement to argue they could not provide a full spectrum of virtual educational services to these students. OCR clarified that services must be provided and updated regulations must do the same.

- **Recommendation: Clarify that individuals are subjected to discrimination if such decision is tied to severity of disability (34 CFR Part 100).**

Rationale: Section 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. 29 U.S.C.S. § 794. The Individuals with Disabilities Education Act, 20 U.S.C.S. § 1400 et seq., guarantees individually tailored educational services, whereas Title II of the Americans with Disabilities Act, 42 U.S.C.S. § 12131 et seq., and § 504, 29 U.S.C.S. § 794, promise non-discriminatory access to public institutions, specifically aiming to root out disability-based discrimination, enabling each covered person to participate equally to all others in public facilities and federally funded programs. Courts recognize that there is often some overlap in coverage across these statutes and that the same conduct might violate all three statutes.

See: *JS v. Houston* 877 F.3d 979 (11th Cir. 2017) (student who was removed by his aide daily (he was dependent upon for mobility, academics, materials, etc.) from the general education classroom was subjected to discrimination based on the removal/segregation from other students.)

- **Recommendation: Clarify within the prohibited discriminatory actions (Section 104.4) that discrimination based on disability can occur in instances of bullying and harassment, restraint and seclusion, and corporal punishment.**

Rationale on bullying recommendation: Beginning in 2000 OCR and OSERS issued joint guidance informing schools that disability-based harassment may deny a student equal educational opportunities under Section 504 and Title II. In 2010, OCR issued a Dear Colleague Letter on Harassment and Bullying¹² that provided further guidance concerning when a school's inappropriate response to bullying or harassment of a student based on disability constitutes a disability-based harassment violation under Section 504 and Title II. Finally, in 2014 OCR issued additional guidance¹³ that "explains that the bullying of a student with a disability on *any* basis can similarly result in a denial of FAPE under Section 504

¹² See: U.S. Department of Education, Office of Civil Rights, *Dear Colleague Letter on Bullying and Harassment*, (2010), at: <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf>

¹³ See: U.S. Department of Education, Office of Civil Rights, *Dear Colleague Letter on Bullying and Harassment*, (2014), at: <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-bullying-201410.pdf>

that must be remedied; it also reiterates schools' obligations to address conduct that may constitute a disability-based harassment violation and explains that a school must also remedy the denial of FAPE resulting from disability-based harassment." These standards should be adopted and inform changes to 504, and the definition of discrimination.

Rationale on restraint and seclusion recommendation: The CRDC data are clear that the majority of students who are restrained and/or secluded in schools are disproportionately students with disabilities and students of color. The 2016 Dear Colleague Letter (DCL)¹⁴ provides the road map to ensuring that these discriminatory practices cease for students in schools. OCR and the Department of Justice have been proactive in several school and district investigations regarding the discriminatory use of restraint and seclusion.¹⁵ OCR completed an investigation into Huron Valley Schools, Michigan in January 2022 and, among other findings, found that the restraint and/or seclusion were used *only* on students with disabilities.¹⁶ In December 2016, OCR issued a Dear Colleague Letter (DCL)¹⁷ and an accompanying Q&A/Fact sheet on restraint and seclusion in schools whose purpose was to inform school districts on ways in which the use of restraint and seclusion may result in discrimination against students with disabilities, thereby violating Section 504 and Title II of the Americans with Disabilities Act of 1990 (Title II) amended). CCD strongly suggests that OCR use this DCL as a guide and use language similar to the following: ...such as "need to assure complete data," "need to analyze data and monitor for compliance with district's own policy," "need to determine whether a re-evaluation needs to occur," "need to hold a team meeting," and "clarify how to calculate make-up and missed educational and related services during periods of restraint and seclusion."

Rationale on corporal punishment recommendation: We also remain concerned about the continued use of corporal punishment in schools. This practice is disproportionately used against students of color and students with disabilities. The practice is emotionally and physically abusive towards children, dangerous, and provides no educational benefit.¹⁸ The continued disproportionality at a minimum raises serious concerns about whether corporal punishment is being used in a discriminatory manner in violation of Section 504. We urge ED in its updated 504 regulations to work to curtail its use.

¹⁴ See: U.S. Department of Education, Office of Civil Rights, *Dear Colleague Letter: Restraint and Seclusion of Students with Disabilities*, (2016), at: <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201612-504-restraint-seclusion-ps.pdf>

¹⁵ See: U.S. Department of Justice, Civil Rights Division, *Investigation of Frederick County Public Schools and Related Findings*, (2021), at <https://www.justice.gov/opa/press-release/file/1452626/download> Frederick County (MD) Public Schools; <https://www.justice.gov/opa/press-release/file/1452626/download>

¹⁶ See: U.S. Department of Education, Office for Civil Rights, OCR Docket No. 15-19-5002, (2022), at: <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/15195002-a.pdf>

¹⁷ See: U.S. Department of Education, Office of Civil Rights, *Dear Colleague Letter: Restraint and Seclusion of Students with Disabilities*, (2016), at: <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201612-504-restraint-seclusion-ps.pdf>

¹⁸ See: Council of Parent Attorneys & Advocates, *Unsafe in the Schoolhouse: Abuse of Children with Disabilities 5-12* (2009), at: http://www.copaa.org/resource/collection/662B1866-952D-41FA-B7F3-D3CF68639918/UnsafeCOPAAMay_27_2009.pdf.

2. **Clarify and strengthen obligations entities have under Section 504.**

OCR must further work to clarify the entities' obligation to provide education free from discrimination and ensure they are properly resourced and trained to do so. While updates to these decades-old regulations are certainly necessary to protect students with disabilities from discrimination in education, it is also necessary for OCR to provide support to entities responsible for adhering to these regulations. In a time when schools are understaffed and under-resourced, it is imperative that OCR and ED are providing the coordination and support necessary to implement these regulations with fidelity.

- **Recommendation: Reiterate criteria and methods of administration and the obligation of federally funded programs to provide reasonable modifications.**

Rationale: OCR should reiterate that Section 504, like the ADA, prohibits methods of administration that have the effect of disability discrimination. Furthermore, OCR should clarify that Section 504's antidiscrimination protections extend to discrimination that may be labeled unintentional and employ a proximate-cause framework.

The Supreme Court has recognized the obligation of federally funded programs to provide reasonable modifications under Section 504 since 1985, but the requirement does not appear in ED's Section 504 regulations. The revised regulations should track the reasonable modification requirement as set out in the DOJ's regulations implementing Title II of the ADA, see 28 C.F.R. §35.130(b)(7).

- **Recommendation: Require 504 plans to be written documents that are created through the consultation of a group of school professionals and a legal parent or guardian.**

Rationale: It is currently unclear whether 504 plans are required to be written documents of record, leading to implementation issues and potentially posing problems for students served by Section 504 in higher education (see higher education commentary below). Requiring plans to be written will promote understanding of their legal operability and ultimately increase overall accountability.

Furthermore, the regulations should make clear the rights, roles, and responsibilities of parents and guardians as critical members of a student's school support or "504 team." Parents' and guardians' roles – as well as a district's obligation to inform and meaningfully include parents and guardians – must be clear for each component of the 504 educational process, from assessment and eligibility to the determination, provision, and evaluation of appropriate services and accommodations. Parents and guardians must be given the opportunity to exercise informed consent throughout the entire process.

- **Recommendation: Ensure any evaluation conducted under Section 504 must be conducted timely.**

Rationale: Section 504 does not currently require a specific timeline for evaluation; case law¹⁹ and previous OCR guidance²⁰, however, indicate that evaluation must take place within a reasonable timeframe. Some states, such as Florida, have proactively established timelines for 504 evaluations to help districts streamline processes and meet their obligations under the law.²¹ In the interest of consistency and accountability, all SEAs and LEAs should be held to the same standard of evaluation procedures under the updated regulations, and that standard must be reasonable.

- **Recommendation: Reiterate that “substantial limitation,” as it currently appears in the definition of “handicapped person,” does not require a medical diagnosis.**

Rationale: OCR clarified through its 2012 Dear Colleague Letter²², "while there are no per se disabilities under Section 504 and Title II, the nature of many impairments is such that, in virtually every case, a determination in favor of disability will be made. Thus, for example, a school district should not need or require extensive documentation or analysis to determine that a child with diabetes, epilepsy, bipolar disorder, or autism has a disability under Section 504 and Title II."

- **Recommendation: Clarify the requirements of schools to conduct due diligence on the eligibility of students for services under both the IDEA and Section 504.**

Rationale: It must be clear that schools can – and in many cases should – consolidate IDEA and 504 eligibility meetings to ensure that the student’s needs are being adequately met by whichever services they are found eligible for. The regulations must make clear that when a child is found ineligible for services under IDEA, a district and school team is encouraged to automatically pivot and move from the IDEA eligibility determination meeting to a discussion about the individual’s eligibility under Section 504. Consistent with a previous recommendation provided on parent involvement, this recommendation assumes the team assembled includes any required participants, including the legal parent/guardian. It should also be made clear that there are many instances in which a student can, and should, be found eligible and served under IDEA and Section 504 concurrently.

- **Recommendation: Clarify the obligation of entities to provide the services most appropriate to the student, whether direct or consult services, to ensure the provision of FAPE.**

Rationale: In many instances, students served under Section 504 require direct services (as opposed to consult services only), such as direct instruction from a

¹⁹ See: *Chuhuran v. Walled Lake Consol. Schools*, 839 F. Supp. 465 (E.D. Mich. 1993), at: <https://law.justia.com/cases/federal/district-courts/FSupp/839/465/1444432/>

²⁰ See: U.S. Department of Education, Office for Civil Rights, *Questions and Answers for K-12 Public Schools In the Current COVID-19 Environment*, (2020), at: <https://www2.ed.gov/about/offices/list/ocr/docs/qa-covid-20200928.pdf>

²¹ See: FLDOE, *District Implementation Guide for Section 504*, pg. 22 applies 60 day eval timeline to Section 504, (2011) at: <https://www.fldoe.org/core/fileparse.php/7690/urlt/0070057-sect504.pdf>

²² See: U.S. Department of Education, Office for Civil Rights, *Dear Colleague Letter*, (2012), at: <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201109.html>

teacher or supplemental therapies provided by related professionals, in order to receive their entitlement of FAPE. There has been some confusion from LEAs on whether or not students eligible under Section 504 can and should receive direct services which may look similar to services provided to students with disabilities who receive services under IDEA. OCR must make it clear that it is the obligation of an educational entity to provide whichever services, whether direct or consult, accommodations, and supplemental aids as are necessary in order to best meet the needs of the student and allow them to appropriately access their education.

- **Recommendation: Clarify that 504 requires manifestation reviews.**

Rationale: The regulations state that placement decisions must be based on evaluative data and be made by a group of persons knowledgeable about the student. (See: 34 CFR 104.35(c)). OCR has interpreted this provision as requiring districts to conduct manifestation of disability reviews (MD) before removing students with disabilities for more than 10 days.²³ Because of the lack of regulations under Section 504 as compared to the IDEA, school districts more frequently discipline students with 504 plans for behavior even if it manifests from their disability. The regulations must clarify this conduct violates the law. Additionally, the regulations should explicitly state that schools must conduct a manifestation determination within 10 days of any decision to change the child's placement because of a violation of a code of student conduct (such as for suspension for more than 10 consecutive days or constitute a series of removals that constitute a pattern). The regulations should also clarify that, like under the IDEA, the first ten days of suspension are not "free days," and that frequent use of short-term disciplinary removals of students with disabilities indicates that a child's 504 plan does not appropriately address their behavioral needs, and likely constitutes a denial of FAPE.

3. Provide clarity on the requirements of entities to provide FAPE and an education free from discrimination to students with disabilities in childcare, preschool, pre-kindergarten, and Early Head Start/Head Start settings.

The current regulations on Section 504 as it relates to preschool (§104.38) are cursory, leading to confusion about the obligations of institutions receiving federal financial assistance as it relates to providing FAPE to children in childcare, preschool, pre-kindergarten, and Head Start. Given the vast advancements in the provision of early educational opportunities for preschool-aged students in recent years, more robust regulations are needed to ensure that these programs are free from discrimination for young students with disabilities. OCR should consider taking the following actions:

- Clarifying the age range covered under the 504 regulations and particularly under 104.38 of Subpart D, including that protections against discrimination under 504 begin at birth;
- Clarifying whether these regulations apply to non-LEA community-based public and private programs receiving federal funds including pre-K, child care, Home

²³ See: *OCR Staff Memorandum*, 16 IDELR 491 (OCR 1988). *South Harrison County (MO) R-II Sch. Dist.*, [51 IDELR 110](#) (OCR 2008) (The district here should have considered whether the student's verbal and physical attacks against an employee were a manifestation of her disabilities.)

Visiting, Early Head Start and Head Start OR whether these entities are included solely under the 504 regulations under the Department of Health and Human Services (HHS);

- Examining whether the provisions of Section 504 are consistently being applied across all relevant federal agencies as they relate to young children and to what extent OCR is coordinating with these agencies to ensure that protections are consistent and rigorous across all agencies; and
- Clarifying when a preschool-aged child is attending a community program, such as child care or Head Start, in which the LEA is not the grantee and the entity is receiving federal funds:
 - i. The agency responsible for evaluating a preschool child for eligibility under 504;
 - ii. The entity responsible for the provision of services if the child is found eligible under 504;
 - iii. The requirements of the entity to develop a 504 plan and carry out the obligations of Subpart D; and
 - iv. The agency responsible for providing “aid, benefits or services” for such a preschool child.

4. **Clarify the requirements of Institutions of Higher Education (IHE) to prohibit discrimination of students with disabilities in higher education.**

Section 504 is a critical protection for students with disabilities in higher education, who comprise 19%²⁴ of all students in higher education. This data is an underrepresentation of the true number of students with disabilities enrolled in higher education due to the barriers students with disabilities face when accessing services. These barriers have a chilling effect where many students fail to report their disability and thus are unable to receive aid, benefits, and services they need to succeed. OCR should work to eliminate the barriers for students with disabilities in higher education so that necessary supports and services are more accessible to them.

- **Recommendation: Require IHEs to treat any student with an existing 504 plan or IEP as qualifying for any needed Academic Adjustment in postsecondary education.**

Rationale: Students with disabilities are frequently required to re-document or “reprove” the existence of their disabilities and demonstrate again their need for longstanding accommodations for educational programs, including but not limited to testing accommodations. The revised regulations should track and improve on the DOJ’s regulations regarding testing entities, see 28 CFR §36.309 (covered entity “must give considerable weight to documentation of past modifications, accommodations, or auxiliary aids or services received in response to an Individualized Education Program (IEP) provided under the Individuals with Disabilities Education Act or a plan describing services provided pursuant to section 504 of the Rehabilitation Act of 1973, as amended (often referred as a Section 504 Plan)”), and the DOJ’s guidance regarding testing accommodations.²⁵

²⁴ See: Institute of Education Sciences, National Center for Education Statistics, *Fast Facts: Students with Disabilities*, (2018), at: <https://nces.ed.gov/fastfacts/display.asp?id=60>

²⁵ See: U.S. Department of Justice, Civil Rights Division, Testing Accommodations, at: https://www.ada.gov/regs2014/testing_accommodations.html

OCR must clarify that when a student enrolls in postsecondary education with an existing 504 Plan or IEP, such plan must be accepted as documentation demonstrating that the individual is a person with a disability, and therefore is eligible for academic adjustment (e.g., auxiliary and/or supplementary aids or other benefit) as required under Section 504. As noted, recipients should be required to give “considerable weight” to past documentation of disability and the auxiliary aids and services needed and provided. Accommodations in testing and non-testing contexts should “best ensure” that assessments accurately reflect a student’s aptitude or achievement, and not their disability.

In making this important clarification, ED would alleviate the stress and burden that individuals with disabilities and their families regularly experience when a college or university requires them to “reprove” the existence of a qualifying disability. This process can be intensively time-consuming and financially costly (in the range of \$2,000-\$10,000), and places undue burdens on individuals with disabilities. As such, this requirement directly contributes to the underrepresentation of individuals with disabilities among college graduates and the underreporting of disability in higher education.

Recommendation: Clarify that students with intellectual disabilities in higher education, including students in inclusive postsecondary programs, are “qualified” under Section 504.

Rationale: Students with intellectual disabilities, including students enrolled in Comprehensive Transition and Postsecondary Programs for Students with Intellectual Disabilities (CTPs), are sometimes denied services under Section 504 due to their enrollment in non-degree-bearing programs. The 504 regulations must be clarified so that IHEs understand that students with intellectual disabilities are eligible to receive aid, benefit, and services under Section 504 whether they are enrolled in CTPs or degree programs. CTPs and TPSID-funded programs are increasing in quantity and accessibility across the country with a focus on providing access to higher education for students with intellectual disabilities – in addition to an individual’s right to apply for and access postsecondary education through the same avenues as their nondisabled peers. OCR must clarify that students with intellectual disabilities both in degree-bearing programs and in CTPs are “qualified” students with disabilities and can avail themselves of the full panoply of rights under Section 504.

- **Recommendation: Update and amend the list of auxiliary aids set out in 34 C.F.R. § 104.44(d)(2) to include necessary terms (see edits in bold):**

Auxiliary aids may include **assistive technology devices**, taped texts, **other accessible formats**, interpreters or other effective methods of making orally delivered materials available to students with hearing impairments, **digital** readers in libraries for students with visual impairments, classroom equipment adapted for use by students with manual impairments, and other similar services and actions. **Additional accessible formats may be considered as technological advancements are made.** Recipients need not provide attendants, individually prescribed devices, readers for personal use or study, or other devices or services of a personal nature.

Rationale: To maintain consistency with Title II of the ADA, to update 504, consistent with the National Copyright Act as amended in 2018 by the MTIA (which changed the term ‘specialized formats’ to accessible formats’)²⁶ and to ensure students are provided every opportunity to access the auxiliary aids they need, OCR must add the terms *Assistive Technology Devices*, consistent with the Assistive Technology Act (AT Act) and the Individuals with Disabilities Education Act (IDEA) (See: See: 20 U.S.C. 1401(1)) and the term *accessible formats*. Additionally, digital readers are very common in most educational settings and should be specified. The addition of the new sentence, ‘Additional accessible formats may be considered as technological advancements are made’ is a helpful way to clarify that the list (and availability of updated technology to qualifying individuals) is flexible, and the list is not static, under the law.

We appreciate your consideration of our recommendations. We look forward to working with you to craft updates to the Section 504 regulations that ensure students with disabilities can access education free from discrimination that most appropriately fits their needs. If you have any questions or concerns, please reach out to one of the CCD Education Task Force Co-chairs listed below.

Sincerely,

Access Ready

American Council of the Blind

American Foundation for the Blind

American Music Therapy Association

American Occupational Therapy Association

American Physical Therapy Association

American Psychological Association

American Speech-Language-Hearing Association

Association of University Centers on Disabilities

Autism Society of America

Autism Speaks

Autistic Self Advocacy Network

Autistic Women & Nonbinary Network

Bazelon Center for Mental Health Law

Brain Injury Association of America

Center for Law and Social Policy (CLASP)

Center for Learner Equity

Children and Adults with Attention-Deficit/Hyperactivity Disorder

Council for Learning Disabilities

Council of Parent Attorneys and Advocates

Disability Rights Education and Defense Fund

Division for Learning Disabilities (DLD) of the Council for Exceptional Children (CEC)

Easterseals

Epilepsy Foundation

Family Voices

Learning Disabilities Association of America

Muscular Dystrophy Association

²⁶ United States Copyright Office, *Understanding the Marrakesh Treaty Implementation Act*, (2020), at https://www.copyright.gov/legislation/2018_marrakesh_fags.pdf

National Association of State Directors of Special Education
National Center for Learning Disabilities
National Center for Parent Leadership, Advocacy, and Community Empowerment (National PLACE)
National Disability Rights Network (NDRN)
National Down Syndrome Congress
National Down Syndrome Society
Perkins School for the Blind
RespectAbility
The Advocacy Institute
The Arc of the United States

CCD Education Task Force Co-Chairs:

Bart Devon,
National Down Syndrome Society
bdevon@ndss.org

Laura Kaloi,
Council of Parent Attorneys and Advocates and the Center for Learner Equity
lkaloi@stridepolicy.com

Lindsay Kubatzky
National Center for Learning Disabilities
lkubatzky@ncld.org

Kim Musheno,
Autism Society
kmusheno@autismsociety.org

CCD Rights Task Force Co-Chairs:

Claudia Center
Disability Rights Education & Defense Fund
ccenter@dredf.org

Stephen Lieberman
United Spinal Association
slieberman@unitedspinal.org

Carlean Ponder
The Arc
ponder@thearc.org

Morgan Whitlatch
Center for Public Representation
mwhitlatch@cpr-ma.org