



Section 504: Improving Current Regulations

Thank you for the opportunity to submit comments on how to improve the current Section 504 regulations for education. I am writing on behalf of the National Center for Parent Leadership, Advocacy, and Community Empowerment (National PLACE), to indicate recommendations based on the experience of our members in supporting families and youth with disabilities to advocate for needed supports and services under Section 504. This document provides an overview of the recommendations of the National Center for Parent Leadership, Advocacy, and Community Empowerment (National PLACE) focused on CFR Part 104 Subpart D – Preschool, Elementary, and Secondary Education.

National PLACE and our 75 local, state and national member organizations are committed to ensuring that families and family-led organizations are at the table when decisions regarding children and families are being made, and that our diverse voices, experiences, and perspectives gleaned from both lived experience and interactions with millions of families with lived experience meaningfully influence those decisions. Our primary goal is to strengthen the voice of families and family-led organizations at decision-making tables on issues impacting our nation’s children and families, especially those who face the greatest challenges and have the poorest outcomes, including children with disabilities and special healthcare (including mental health) needs, children of color, immigrant children, low-income children, and LGBTQ+ children, and their families. All of our members – who include Parent Centers, Family to Family Health Information Centers, Federation of Families (for Children’s Mental Health) chapters, and Parent to Parent USA affiliates, serve families who have been directly and negatively impacted by the “family glitch.” We have reviewed the current regulations and developed these comments after facilitating a national call with our membership to solicit their experiences and recommendations.

OVERALL RECOMMENDATION

National PLACE urges the US Department of Education to explicitly integrate into the Section 504 regulations the protections and interpretations covered by its numerous Q&A Documents, Dear Colleague Letters, and Case Resolutions. Only with this explicitness will families and students know their rights and schools, districts, and states know their obligations.

Further, National PLACE strongly recommends that the Department revise the terminology used in the regulations from “handicap” or “handicapping condition” to “disability” and other outdated language.

Our specific recommendations are outlined below under the categories of Covered Entities, Identification and Evaluation, and protections and obligations. Please note that we also support the recommendations of the Consortium for Constituents with Disabilities.

COVERED ENTITIES (WHO MUST COMPLY)

- ***Charter schools***

National PLACE strongly recommends that the regulations explicitly identify that all public schools, including public charter schools, public virtual schools, and typical public schools, as well as any non-public schools that receive federal financial assistance directly or indirectly, are bound by the provisions of Section 504, and that students with disabilities (and those seeking to attend) in these institutions have the same Section 504 rights as other public school students with disabilities. See, for example,

www2.ed.gov/about/offices/list/ocr/docs/dcl-factsheet-201612-504-charter-school.pdf

- ***Non-public schools***

Further to the above, there is wide spread misunderstanding that private schools are exempt from Section 504. To address this, revised regulations should make clear that non-public schools, such as private schools including religious schools, that accept ANY form of federal financial assistance are required to adhere to Section 504. Federal financial assistance includes such funds as free and reduced lunch program, any funding program under the ESEA (Title I, etc.). Providing non-exhaustive lists helps further understanding.

- ***Online/Remote/Virtual Instruction (§104.34)***

National PLACE urges the Department to include specific language that Section 504 should not prevent any school from offering educational programs through distance instruction. See www2.ed.gov/about/offices/list/ocr/frontpage/faq/rr/policyguidance/Supple%20Fact%20Sheet%203.21.20%20FINAL.pdf

Further, National PLACE strongly recommends that the regulations explicitly identify that Section 504 applies to a public online school operated statewide by a public school district via contract with a private entity. See *Quillayute Valley (WA) School District*, 49 IDELR 293 (OCR 11/26/07); see also *Elkhart (KS) Unified School District 218*, 51 IDELR 51 (OCR 3/26/08) (Online school operated by school district and available to students across the country required to inform students of the procedures to request accommodations and should be able to provide, at a minimum, modifications to the regular education program including test taking and assignment deadlines).

- ***Juvenile Justice facilities***

National PLACE strongly recommends that the regulations explicitly identified that all juvenile justice residential facilities and any other entities that receive Federal funds from the Departments—either directly or indirectly through another State or local agency—and that provide educational services in such facilities are subject to Federal civil rights laws including Section 504. See

www2.ed.gov/about/offices/list/ocr/letters/colleague-residential-facilities-201412.pdf

- ***Before and after-school programs & summer programs***

National PLACE urges the Department to include in the regulations specific language indicating that before and after-school and summer programs operated by, and/or on functioning on the premises of, and/or advertised by a school or district as the school or district's before and after-school or summer program, are bound by Section 504 even if they are run by a non-district entity and even if that entity itself does not receive federal financial dollars. The regulations must specify to districts that districts may not provide significant assistance to outside entities such as before and after-school programs and summer programs if those entities discriminate, even if that outside entity is not covered under Section 504.

IDENTIFICATION AND EVALUATION

- ***Child Find ((104.32))***

This is a critical area for regulatory strengthening. Data from the Civil Rights Data Collection (CRDC) indicate a serious lack of compliance with Child Find (§104.32). Disability advocates have attempted to highlight the evidence of serious violations as indicated by the CRDC. See https://c-c-d.org/fichiers/CCD-Education-TaskForce-Letter-on-504-Recs-12_18.pdf, www.civilrightsproject.ucla.edu/news/press-releases/2021-press-releases/national-analysis-details-troubling-levels-of-pre-existing-education-inequities-for-students-with-disabilities.

The current regulatory language is too cursory to provide sufficient information to families, students, schools and districts of the requirements for identification/child find under Section 504: “A recipient that operates a public elementary or secondary education program or activity shall **annually**: (a) Undertake to identify and locate every qualified handicapped person residing in the recipient's jurisdiction who is not receiving a public education; and (b) Take appropriate steps to notify handicapped persons and their parents or guardians of the recipient's duty under this subpart.” In addition, this language could be interpreted to mean that a school or district only has to identify and locate potentially eligible students, or notify students with disabilities and their parents of their duty to do so, only once a year. To address this problem, the regulations must contain stronger language regarding the obligation of districts and schools to identify all potentially eligible children. Information about Section 504 and how to ask for 504 services must be shared in multiple ways with parents and on an ongoing basis. All staff must be aware of their obligations to identify all potentially eligible students. Section 300.111 of the Individuals with Disabilities Education Act (IDEA) regulations provide some guidance for this language: “The State must have in effect policies and procedures to ensure that – all children with disabilities residing in the State, including children with disabilities who are homeless children or are wards of the State...regardless of the severity of their disability...are

identified, located, and evaluated; and a practical method is developed and implemented to determine which children are currently receiving needed special education and related services...Child find also must include – children who are suspected of being a child with a disability...and in need of special education, even though they are advancing from grade to grade; and highly mobile children, including migrant children.” Note: Since the obligation for child find under Section 504 rests with the school/district, “State” in the above example should be replaced with “school and LEA.”

- ***Parent Consent for initial evaluation***

National PLACE supports the interpretation of the Office for Civil Rights (OCR) that Section 504 requires informed parental consent for the initial evaluation, and this interpretation must be included in the regulations. In addition, National PLACE strongly recommends that the regulations require such parental consent to be in writing, as well as any district notification regarding evaluation. If the regulations require informed, written parental consent for an initial evaluation, National PLACE neither supports nor opposes OCR’s interpretation that, if a parent refuses consent for an initial evaluation and a recipient school district suspects a student has a disability, Section 504 allows school districts to use due process hearing procedures to seek to override the parents’ denial of consent. See Parent and Educator Resource Guide to Section 504: www2.ed.gov/about/offices/list/ocr/docs/504-resource-guide-201612.pdf

- ***Requirements for evaluations***

National PLACE strongly recommends that the regulations include detailed information on (a) the need for qualified evaluators to do the evaluations, (b) the requirement for a timely evaluation (with a reasonable timeframe), (c) the right of parents to be part of the team that determines whether an evaluation will be conducted and if so what it will entail, (d) the need to ensure that evaluations use tools and are conducted in ways that do not result in inappropriate identification or disproportionality, (e) that all evaluations must be conducted at no cost to the families and that families cannot be required to fund/produce their own evaluations, and (f) that any information, evaluations, etc. that parents bring to the Section 504 meeting must be reviewed and considered as part of the evaluation. In terms of evaluation timelines, the regulations should specify that the LEA’s 504 standards and procedures must include an evaluation timeline that requires that evaluations be done “within a reasonable time,” such as 30 days.

National PLACE also recommends that the regulations address the right to an independent educational evaluation at public expense including frequency, etc.

ELIGIBILITY

OCR guidance indicates that, if a child is not eligible under IDEA, the school/district must consider potential eligibility under Section 504. This should be explicitly included in the regulations, as should OCR guidance that a district may not simply refuse to evaluate a child.

Regulations should also make clear that schools/districts should consider providing 504 services for students with health conditions rather than providing such students with “health plans” which do not provide the same level of protection and procedural safeguards.

Further, the regulations should specify that parents may reject IDEA services for their child with a disability and still be able to access services under Section 504 if their child meets the eligibility criteria for Section 504.

REQUIREMENTS AND PROTECTIONS

Non-Discrimination/Access

- ***Access to Accelerated Programs***

National PLACE members frequently hear from the families and students we serve that students with disabilities are routinely denied the opportunity to participate in an accelerated program. OCR’s Dear Colleague Letter indicates that the practice of denying, on the basis of disability, a qualified student with a disability the opportunity to participate in an accelerated program violates Section 504; this must be explicitly addressed in the regulations. See <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-20071226.pdf>

- ***Access to Electronic Book Readers***

National PLACE urges OCR to explicitly include language about the need to provide access to assistive technology including electronic book readers among other AT devices and tools in the regulations. See <https://www2.ed.gov/about/offices/list/ocr/docs/dcl-ebook-faq-201105.html>

- ***Access to Extracurricular Athletics***

National PLACE strongly supports OCR’s interpretation of Section 504 that students with disabilities to have an equal opportunity for participation in nonacademic and extracurricular services and activities and urges that they be explicitly included in the regulations. See <https://www2.ed.gov/about/offices/list/ocr/docs/dcl-factsheet-201301-504.html>

- ***Building Accessibility***

The regulations must be amended to clarify that building accessibility must meet the ADA accessibility requirements, keeping in mind the post-1977 construction standards that buildings must, to the maximum extent feasible, be readily accessible to and usable by persons with disabilities including not only students but families and staff.

- ***Access to an education during Public Health Emergencies***

School officials have an obligation to avoid discrimination on the basis of disability under Title II and Section 504, while cooperating with public health authorities to ensure that students with disabilities have access to the school’s education program. This should be addressed in the regulations. See www2.ed.gov/about/offices/list/ocr/docs/ocr-coronavirus-fact-sheet.pdf

Discrimination due to Bullying and Harassment

- ***Bullying & Harassment***

National PLACE recommends that OCR explicitly indicate in the regulations that bullying of a student on the basis of his or her disability may result in a disability-based harassment violation under Section 504. See www2.ed.gov/about/offices/list/ocr/letters/colleague-bullying-201410.pdf

Compensatory Services

- ***Compensatory Services Under Section 504***

National PLACE recommends that OCR make clear in revised regulations that compensatory services can be awarded under Section 504. See <https://www2.ed.gov/about/offices/list/ocr/docs/fape-in-covid-19.pdf>

Discipline

- ***Discipline protections: Manifestation determination, functional behavioral assessment, positive behavior support, limitations on exclusions (consecutive or a series of short-term)***

Clarify requirements to conduct manifestation determination reviews and also to identify exclusion from school for more than 10 consecutive school days or for a series of short-term removals if the total days are more than 10 school days and there is a “pattern” of exclusion. OCR considers an exclusion from the educational program (for example, an out-of-school suspension) of more than 10 consecutive school days to be a significant change in placement. OCR also considers a series of short-term exclusions (each 10 school days or fewer) from the educational program to be a significant change in placement, if the short-term exclusions total more than 10 school days and create a pattern of removal; this is not explicitly in the regulations. See Parent and Educator Guide to Section 504:

<https://www2.ed.gov/about/offices/list/ocr/docs/504-resource-guide-201612.pdf>

In Springfield School District #186, 55 IDELR 206 (OCR June 29, 2010), the Office for Civil Rights determined that a school district violated Section 504 when it expelled a student with a 504 Plan without conducting a manifestation determination.

- <https://disabilitylawco.org/resources/ability-law-blog/remember-504-requires-manifestation-determinations-students-even-though>
- www.pacer.org/parent/php/PHP-c286.pdf
- www2.ed.gov/about/offices/list/ocr/docs/crdc-exclusionary-school-discipline.pdf

- ***Restraint and Seclusion of Students with Disabilities***

National PLACE urges the Department to specifically address the use of restraint and seclusion by school districts as behavior/actions that may result in discrimination against students with disabilities, thereby violating Section 504. In many states, the only students who are allowed to be restrained or secluded are students with disabilities which on its face should be discrimination and a violation of Section 504. See

- www2.ed.gov/about/offices/list/ocr/docs/dcl-factsheet-201612-504-restraint-seclusion-ps.pdf
- www2.ed.gov/about/offices/list/ocr/docs/investigations/more/11195022-a.pdf

Disclosure of Disability

- ***Disclosure Of Disability on Report Cards and Transcripts for Students with Disabilities Attending Public Elementary And Secondary Schools***
<https://www2.ed.gov/about/offices/list/ocr/letters/colleague-qa-20081017.html>

Section 504 Plans

- ***Section 504 Plans***

National PLACE strongly recommends that the Department include in the regulations language indicating that all Section 504 plans and all communication related to Section 504 plans, such as notice of 504 meetings, must be in writing. Currently, OCR has indicated its position that schools may incorporate a 504 plan into a written document but are not required to do so. See Parent Educator Resource Guide, www2.ed.gov/about/offices/list/ocr/docs/504-resource-guide-201612.pdf.

This approach makes it virtually impossible for families to participate effectively in the process, or even to know what is contained in the 504 plan and how to ensure that it is being implemented. It is also unrealistic to expect teachers and other school staff to be able to implement a plan that is not in writing.

National PLACE also strongly recommends that the Department include in the regulations the requirement for parent participation in the development, updating, and/or revision to the 504 plan, and a requirement for at least annual review and revision, as necessary, of the 504 plan. Currently, OCR “urges” schools to allow for parental participation when considering any change in the student’s Section 504 provision of FAPE, including location of services, but does not require it. This minimizes the critical role of parents in the decision-making process and makes it less likely that the decisions that are made, including the contents of the 504 plan, will be appropriate and meet the needs of the student with a disability. National PLACE further urges the Department to require the participation of the student with a disability starting no later than transition age and certainly when the student becomes an adult. We also recommend that Institutes of Higher Education be required to accept 504 plans from secondary schools. See <https://www.nclد.org/news/policy-and-advocacy/bi-partisan-rise-act-opens-new-doors-for-students-with-disabilities/>

Provision of a Free, Appropriate Public Education (FAPE)

National PLACE urges the Department to include in the regulations explicit language that will address a major and significant misunderstanding among states, districts and schools that only accommodations can be provided under Section 504, and that Section 504 does not require the

provision of a free, appropriate public education to students with disabilities. Such language should specify that both regular (please use the word “general” as opposed to “regular” education) and special education services and related services as well as accommodations and nonacademic and extracurricular activities available to students with disabilities are available under Section 504 and at no cost to families except to the extent that there are fees that are imposed on all students and families including those without disabilities

Transition - Legal Rights and Responsibilities of Students with Disabilities as They Transition from High School to Institutions of Postsecondary Education

National PLACE urges the Department to incorporate requirements regarding the critical transition from school to adult life in the 504 regulations, including a requirement for schools to coordinate and collaborate with state and local adult service providers/systems and assisting students to get connected with those adult services providers/systems. This will help to avoid the current situation where students with disabilities who are not covered under IDEA are not aware of their potential eligibility for Section 504 protections in post-secondary education or the availability of adult services from agencies such as vocational rehabilitation.

<https://www2.ed.gov/about/offices/list/ocr/letters/colleague-20070316.pdf>

<https://www2.ed.gov/about/offices/list/ocr/letters/parent-20070316.pdf>

PROCEDURAL SAFEGUARDS

- ***Impartial hearing/complaints***

National PLACE recommends revised regulations should make clear that 504 eligible students maintain their current placement during the pendency of any impartial hearings requested by the parents (i.e., stay-put).

- ***Burden of proof***

National PLACE urges the Department to include in the regulations language indicating that the burden of proof to demonstrate compliance with the requirements of Section 504 is on the school/district and not the parent, as the school/district is the entity that has access to all the documents needed to show compliance, and further, the district commits to complying with Section 504 as part of its receipt of federal dollars.

- ***Parent participation in decision-making***

As noted above, National PLACE strongly recommends significant strengthening of the procedural safeguards in the Section 504 regulations, including requiring informed, written parental consent for evaluations and at least the initial 504 plan; written notification of parental rights including the right to participate in all meetings related to Section 504 eligibility, evaluation and identification, and plan development and revision.

REMEDIES

National PLACE recommends that the Department explicitly consider the impact of the US Supreme Court's decision in *Cummings v. Premier Rehab Keller, P.L.L.C.* in which the Supreme Court 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. Although the case involves health care, the Supreme Court's ruling impacts the remedies available for discrimination for violations of the Act in all contexts, including education. 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. For example, the primary harm when a student in a wheelchair cannot get down the stairs in their own school, or cannot understand what is being said in class, is neither financial nor physical, but in the pain and humiliation faced by the student. Some cases will become impossible to pursue because the only harm *was* emotional distress. In other cases, otherwise interested lawyers may be discouraged from taking on the case if damages cannot be recovered. In all of these situations, it is students and their families who have the most to lose, by being either unable to enforce their rights or unable to find an attorney who will take their case. National PLACE therefore recommends that the Department 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.

OTHER

- ***ADA Amendments***

The ADA Amendments must be explicitly integrated into the Section 504 regulations. Require institutions to give "considerable weight" to past documentation of both disability and the auxiliary aids and services provided, and expand to non-examination contexts such as course, eligibility, and school services.