



Advocates for Children of New York

Protecting every child's right to learn since 1971

August 4, 2022
BY EMAIL

U.S. Department of Education
Office for Civil Rights
Lyndon Baines Johnson Department of Education Building
400 Maryland Avenue, SW
Washington DC 20202-1100

Re: Amendments to the department's regulations at 34 C.F.R. pt. 104, implementing Section 504 of the Rehabilitation Act of 1973

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On behalf of Advocates for Children of New York (AFC), we are writing to respond to the Office for Civil Rights' call for comments in anticipation of amending the Department's regulations at 34 C.F.R., pt. 104, implementing Section 504 of the Rehabilitation Act of 1973 (Section 504).

Every year, for the past 50 years, AFC staff has helped thousands of families navigate the special education system in New York City by providing technical assistance, in-depth advocacy, policy advocacy, and legal representation at impartial hearings and in large-scale litigation in pursuit of a quality education for all NYC students, including those with disabilities. As such, we regularly observe the protections afforded to students under Section 504. Based on our experience helping students with disabilities and their families access needed support and accommodations, we think it is important to have clear and specific regulations to help schools understand their legal obligations under Section 504. More detailed regulations would be particularly helpful in cases where students meet the definition of having a disability under Section 504 but not under the Individuals with Disabilities Education Act (IDEA), as well as cases involving students attending the growing number of charter schools, especially in states like New York where charter schools have legal obligations under Section 504 while the public school district of residence is the local educational agency for purposes of the IDEA.

While your office has clarified much over the years in guidance and letters, we recommend codifying rights laid out in those subsequent memoranda – specifically those around: Child Find, parent participation in 504 team meetings, and the provision of a Free and Appropriate Public Education (FAPE) specially where independent evaluations are warranted and in cases where Manifest Determination Reviews (MDRs) are warranted.



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1. **Rules of Construction and Definition of Disability**

Section 504's use of the term "handicapped person" is outdated and offensive. In amending the Section 504 Regulations, we urge you to adopt the rules of construction and definitions for an "individual with a disability" contained in the regulations interpreting Title II, § 35.108 of the Americans with Disabilities Act (ADA).

2. **Child Find**

Similar to the Individuals with Disabilities Act (IDEA), Section 504 includes a child find requirement. That said, the Section 504 regulations offer less specificity and carry less weight when it comes to identifying students with disabilities who could benefit from modifications and accommodations pursuant to Section 504. While OCR has helped to clarify the standard for Child Find requirements through guidance¹, we strongly urge that these requirements be codified through the upcoming amendments.

3. **Parent participation at 504 meetings**

Under the current regulations to Section 504, decisions about eligibility and the services a student will receive must be made by a group of people who are knowledgeable about the student – generally known as the Multi-Disciplinary Team (MDT) or the Section 504 Team. Currently, parents are not listed as members of that team, but per the regulations they have the right to bring impartial hearings if they disagree with the team's decision. 34 C.F.R. § 104.36. Parents have knowledge about their children that school staff lack and bring an important perspective to the table both about a child's potential eligibility and about accommodations and supports needed in school. In amending the regulations, we encourage you to include the requirement for parents to be members of the team responsible for determining the child's eligibility and the child's 504 plan.

4. **Social-Emotional, Behavioral, and Mental Health Support**

Unmet social-emotional, behavioral, and mental health needs can be related to a disability. However, Section 504 regulations do not specify that school districts need to provide appropriate supports to students when addressing social-emotional, behavioral, and mental health needs that are disability related. Given the mental health crisis for children and youth in our country exacerbated by the pandemic, now more than ever, it is critical to specify the procedural and substantive requirements in the 504 amendments that districts must provide appropriate social-emotional, behavioral, and mental health supports to students who need them to receive a FAPE. The regulations should also state that as part of a district's appropriate response to social-emotional and behavioral challenges, districts must consider conducting a Functional



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Behavior Assessment and creating Behavior Intervention Plan, as specified in the IDEA. Additionally, we urge 504 amendments to require schools and programs to identify and evaluate students for a suspected disability when a student engages in behaviors that impede their learning.

5. **Due Process Rights**

While parents have due process rights when they disagree with their district's recommendations under Section 504, those rights could and should be strengthened to explicitly include the right to an independent evaluation at school expense when the district fails to conduct an evaluation or provides an evaluation with which the parent disagrees, the right to pendency or status quo during due process, and various rights around discipline.

a. **Right to Independent Evaluations**

Current regulations do not specifically mention the right to an independent evaluation at school expense. However, OCR has indicated that parents have the right to request a hearing to challenge the district's evaluation or their refusal or failure to conduct an evaluation.² We recommend amending the regulations to include the right to an independent evaluation when the district fails to conduct an evaluation or provides an evaluation with which the parent disagrees.

b. **Right to pendency or status quo during due process**

OCR has also determined outside of the regulations that the impartial hearing process must include "status quo" or the right to continued services during an appeal.³ This important protection should be explicitly included in the amended regulations.

c. **Rights around Discipline**

Also, like the IDEA, Section 504 includes various protections for students with disabilities facing disciplinary proceedings. Policy memoranda and decisions have emphasized and enhanced those protections over the years. However, the regulations do not yet reflect those critical protections.

i. **Manifestation Determination Hearing**



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Similar to the IDEA's prohibition against removals for more than 10 days of students for behavior that is a manifestation of their disabilities, *see* 20 U.S.C. § 1415(K)(1)(E), the regulations implementing Section 504 require that prior to imposing "any subsequent significant change in placement" of an individual that "needs or is believed to need special education or related services," a school is required to "conduct an evaluation . . ." 34 C.F.R. 104.35(a). The United States Department of Education Office for Civil Rights has interpreted this requirement to mean that prior to a disciplinary removal of a student with a disability for ten consecutive days or ten cumulative days in a school year "under circumstances constituting a pattern of exclusion", a school district must conduct a Manifestation Determination Review ("MDR"). *See, e.g.*, Letter of Finding re: Case No. 01-14-1238 Worcester Public Schools, U.S. Dep't of Ed. Office of Civil Rights (Aug. 24, 2016); *see also* Loleta Union Elementary School District, OCR Complaint # 09-14-1111, at 24 (Nov. 22, 2017); Letter of Finding Re: OCR Docket #15-15-1375, U.S. Dep't of Ed. Office of Civil Rights (Mar. 4, 2016); Letter of Finding re: OCR Docket # 15-14-1071, U.S. Dep't of Ed. Office of Civil Rights (Aug. 13, 2014); Letter of Finding re: OCR Complaint No. 11-13-1266, U.S. Dep't of Ed. Office of Civil Rights (Mar. 11, 2014). In amending the regulations, we ask that OCR include expressly the requirement for an MDR, including the procedures for MDRs required under the IDEA.

ii. Reduction of the use of restraint and seclusion

Over the years, OCR has articulated a number of guiding principles around the use of restraint and seclusion of students through decision and in policy guidance. Most pointedly, in 2016, in a Dear Colleague Letter and accompanying Q&A on the topic, OCR laid out ways that 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."⁴ That guidance laid out protections for students not yet identified as having a disability and those already identified and possessing 504 plans. We would urge that OCR explicitly include all the protections included in that guidance in the regulations soon to be amended.

iii. Bullying

OCR has also articulated guidance around bullying and harassment of students with disabilities and how a school district's inappropriate response could constitute a violation of Section 504⁵. In particular, in 2014, OCR disseminated guidance articulating schools' obligations to address disability-based harassment and how



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schools' obligations to respond to bullying on any basis of a student with a disability can result in the denial of FAPE that must be remedied under Section 504.⁶ We urge OCR to specifically include all the protections in its guidance on bullying and harassment in the 504 amended regulations.

Thank you for considering our comments. We look forward to the upcoming changes to the regulations rendering them more protective of the rights of students with disabilities and their families in school settings.

If you have any questions, please do not hesitate to contact us.

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