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December 7, 2022

U.S. Department of Education, Office for Civil Rights
Via email: Section504@ed.gov
Re: Disability Discrimination (Section 504 of the Rehabilitation Act of 1973)

**Introduction**

NSBA offers the following in response to the Department's request for written suggestions from the public regarding future proposed amendments to the Department's regulations at 34 C.F.R. Part 104, implementing Section 504 of the Rehabilitation Act of 1973.

When the Office for Civil Rights at the Department of Health, Education and Welfare (HEW) issued its initial Rehabilitation Act regulations nearly 50 years ago, it was taking bold steps to breathe life into a statute that broadly protected people with disabilities at the federal level for the first time. The law and its progeny, the Americans with Disabilities Act, resulted from decades of advocacy work on behalf of disabled Americans, who faced a society unable and often unwilling to allow their full participation. Although the law itself[1] had been enacted three years earlier, it had taken protests in federal buildings and a special hearing before members of Congress to secure implementation.

Congress' policy goals behind the Act were two-fold: first, to increase federal support for vocational rehabilitation, and second, to address the broader problem of discrimination against individuals with disabilities.[2] As the Supreme Court noted a decade later, Congress accomplished the latter by including Section 504, patterned after Title VI of the Civil Rights Act of 1964.[3] The intent of Congress when it passed Section 504 was to prohibit discriminatory practices in a broad range of programs receiving federal financial assistance. The statute itself imposes no affirmative obligations with respect to special educational programs.[4]

[1] Rehabilitation Act of 1973, Pub.L. 93–112, 87 Stat. 355, codified as 29 U.S.C. § 701 *et seq.*
[2] *School Board of Nassau County v. Arline*, 480 U.S. 273, 277 (1987).
[3] *Id.*
[4] The statute prohibits discrimination. "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." Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794.

Two years later, Congress enacted the Education for All Handicapped Children Act (EHA), which did obligate schools to provide special education services, and provided a dedicated federal funding stream to support those services. Congress stated its purpose in passing EHA was "to assure that all handicapped children have available to them…a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of handicapped children and their parents or guardians are protected, to assist States and localities to provide for the education of all handicapped children, [and] to assess and assure the effectiveness of efforts to educate handicapped children." PL 94–142 (S 3(c)), November 29, 1975, 89 Stat 773. EHA became the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400 *et seq*., when it was reauthorized in 1990 and was last reauthorized in 2004.[5]

Now, nearly fifty years after initial regulations implementing Section 504 were issued, over 7.2 million students with disabilities are served in public schools across the nation under IDEA,[6] and another 1.38 million are served under Section 504.[7] Students with disabilities are integrated into the fabric of public school life. And students with disabilities have two federal legal frameworks supporting their substantive and procedural rights to access and to obtain an appropriate education. One, Section 504, ties nondiscrimination requirements to receipt of federal funds. The other, IDEA, provides an individual entitlement to a free appropriate public education (FAPE) in the least restrictive environment, backed by a dedicated federal funding stream.

The Department has a historic opportunity to issue clear guidelines reflecting the current operational challenges faced by public school leaders, staff, students, and their families due to the overlapping, sometimes competing, requirements of these two important statutes. NSBA urges the Department to streamline its Section 504 regulations to make clear that the statute's nondiscrimination mandate is different substantively from IDEA's individual entitlement, and to provide brief, practical guidance for school personnel attempting to serve students with disabilities under the two statutes. By clearly delineating the role of the two statutes, the Department could assist K-12 educators and their attorneys in several areas of difficulty caused by the overlap between

[5] U.S. Department of Education, "A History of the Individuals with Disabilities Education Act," https://sites.ed.gov/idea/IDEA-History.
[6] U.S. Department of Education, Institute of Education Sciences, "Report on the Condition of Education 2022," https://nces.ed.gov/pubs2022/2022144.pdf at p. 13.
[7] U.S. Department of Education, Civil Rights Data Collection, "Section 504 Enrollment" (2017-2018) https://ocrdata.ed.gov/estimations/2017-2018.

the two laws. Finally, we urge the Department to consider the current mental health crisis among K-12 students and offer support for school leaders.

**Articulate a Clear, Strong Nondiscrimination Goal**

A review of the history of Section 504 and the case law indicates that while Section 504 was intended to prohibit discriminatory practices in a broad range of programs receiving federal financial assistance, it imposes no affirmative obligations with respect to special education programs. In contrast, the IDEA specifically requires schools to provide a free appropriate public education to students with disabilities. The 1977 regulations interpret Section 504 to require recipients of federal dollars that operate "a public elementary or secondary education program or activity" to "provide a free appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction, regardless of the nature or severity of the person's handicap." 34 C.F.R. §104.33(a). The language of Section 504 itself does not mention a free appropriate public education, nor has Congress added that term since its passage. In fact, with respect to all other public entities receiving federal financial assistance, the legal nondiscrimination standard is reasonable accommodation.

The term "FAPE," which had appeared in the EHA in 1975, found its way into the Section 504 regulations, but the latter defines FAPE differently from the IDEA and its regulations. The Section 504 regulations define FAPE as the provision of regular or special education and related aids or services that are designed to meet the individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons, and that follow the required procedures. 34 C.F.R. §104.33(b)(l). In other words, the Section 504 regulations require recipients to compare how they meet the educational needs of students with disabilities with how they meet the needs of nondisabled students, while the IDEA and its regulations[8] do not. The 504 regulations also state

[8] 20 U.S.C. §1401(9):
9) Free appropriate public education
The term "free appropriate public education" means special education and related services that--
(A) have been provided at public expense, under public supervision and direction, and without charge;
(B) meet the standards of the State educational agency;
(C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and

that implementation of an Individualized Education Program developed in accordance with the now-IDEA is one means of meeting the Section 504 regulatory FAPE standard. 34 C.F.R. 104.33(b)(2). And the 504 regulations require K-12 public schools to take several steps similar, but not identical, to those required under IDEA:

- provide for the education of each qualified handicapped person in its jurisdiction with persons who are not handicapped to the maximum extent appropriate to the needs of the handicapped person;
- evaluate and place handicapped persons;
- follow procedural safeguards; and
- provide non-academic services.

34 C.F.R. §§104.34-104.37.

Shortly after the Section 504 regulations were issued, the Supreme Court noted in the higher education context that "Section 504 by its terms does not compel educational institutions to disregard the disabilities of handicapped individuals or to make substantial modifications in their programs to allow disabled persons to participate. Instead, it requires only that an otherwise qualified handicapped individual not be excluded from participation in a federally funded program solely by reasons of his handicap, indicating only that mere possession of a handicap is not a permissible ground for assuming an inability to function in a particular context.... An otherwise qualified person is one who is able to meet all of the program's requirements in spite of his handicap." *Southeastern Community College v. Davis*, 442 U.S. 397, 405-406 (1979). The Court found that "neither the language, purpose, nor history of Section 504 reveals an intent to impose an affirmative action obligation on all recipients of federal funds. Accordingly, we hold that even though HEW has attempted to create such an obligation itself, it lacks the authority to do so...Section 504 imposes no requirement upon an educational institution to lower or to effect substantial modifications of standards to accommodate a handicapped person." *Id.* at 411-413.

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(D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

The IDEA regulations repeat this standard: 34 C.F.R. §300.17.

Lower courts have grappled with the extent to which K-12 schools must take affirmative action to provide services to students under Section 504. *Ridley Sch. Dist. v. M.R.*, 680 F.3d 260, 280 (3d Cir. 2012)("To offer an 'appropriate' education under the Rehabilitation Act, a school district must reasonably accommodate the needs of the handicapped child so as to ensure meaningful participation in educational activities and meaningful access to educational benefits.... However, § 504 does not mandate 'substantial' changes to the school's programs ...."); *Mark H. v. Lemahieu*, 513 F.3d 922 (9th Cir. 2008)(Under Section 504, school districts are not required to make substantial adjustments in existing programs beyond those necessary to eliminate discrimination against otherwise qualified individuals. Section 504, like the Americans with Disabilities Act, does require reasonable accommodation or modifications necessary to correct for instances in which qualified disabled persons are denied meaningful access to education programs because of their disability.); *Barnett v. Fairfax County School Board*, 927 F.2d 146, 155 (4th Cir. 1991)(Requiring the school district to provide all hearing impaired students with an interpreter at their neighborhood school would constitute a substantial modification of the school district's program and was not a reasonable accommodation required under Section 504.); *Parks v. Parkovic*, 753 F.2d 1397, 1409 (7th Cir. 1985)(Section 504 does not require states to create special education programs for disabled children.); *Turillo v. Tyson*, 535 F.Supp. 577, 587-88 (D.N.J. 1998)("I fail to see how, after *Davis*, Section 504 can be construed to guarantee a free appropriate public education to all handicapped children, no matter what their individual needs are....*Davis* may not have provided lower courts with all the guidance they need, but it surely was clear on one point: Section 504 is a non-discrimination statute, not a mandate for affirmative action..."). *But see Borough of Palmyra, Board of Education v. F.C.*, 2 F.Supp.2d 637 (D. N.J. 1998)(Parents of a student suffering from Attention Deficit Hyperactivity Disorder (ADHD) were likely to succeed on the merits of their claim that payment of private school costs was required when the individual plan developed for the child under the Rehabilitation Act was inadequate.), and 34 C.F.R. §1-4.33(c)(3) (requiring necessary residential placement to be provided at no cost).

For nearly 50 years, school leaders, attorneys, staff, parents, and students have lived with this overlap in legal standards. For the vast majority of students with disabilities, the student's team – whether Section 504 or IEP – simply finds a way to get the child the supports and service she/he needs without deep analysis of what federal statutory framework applies. But when there is a disagreement about appropriate eligibility, services, evaluation, terminology, methodology, etc., the legal hair-splitting can become a time-consuming exercise. In some cases, a school district suspects or determines that a child needs special education and related services, but the parent will not

consent to an evaluation or the services themselves. By making "FAPE" the standard for K-12 schools under Section 504, the regulations have created confusion, duplication, litigation, and diminishment of Section 504's crucial role as a nondiscrimination statute.

Consider the enforcement of the Section 504 FAPE requirement. OCR frequently accepts complaints that raise claims only related to a school district's obligation to comply with the IDEA, such as IEP implementation, presumably because students eligible under IDEA are considered students with disabilities under Section 504. But there is nothing in the Rehabilitation Act that authorizes OCR to enforce matters related to FAPE under the IDEA.

Consider also the question of parent consent. Unlike the IDEA's requirement to provide special education services to an eligible child with a disability, the requirements of Section 504 are not consent-driven; i.e., its anti-discrimination requirement is not based upon parental consent. Parents could withdraw consent for special education services under IDEA, but because of the affirmative obligation to provide "regular or special education and related aids and services" that "are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons," a school arguably would be required to provide such services under Section 504 absent parental consent.

One way to strengthen the Section 504 mandate would be for the Department to return Section 504 to its vital nondiscrimination purpose: to provide equal access and opportunity to students with disabilities. The IDEA provides an extensive framework for identifying, evaluating, and serving eligible students with an "appropriate" program. Without the "FAPE" language, the Section 504 regulations could provide guidance on addressing the needs of a large population of students with disabilities in this era, many of whom are struggling with mental health issues, allergies, and attention difficulties that were not broadly understood when the original regulations were issued. Consistent with the structure and purpose of the statutes, IDEA would apply to students with disabilities whose "FAPE" requirements exceed the Section 504 "reasonable accommodation" standards.

**Areas of Difficulty for School Leaders**

A number of specific areas of concern could benefit from clarity from the Department, as explained below.

*Service Animals Used by Students in Schools*

The Department of Justice regulations on service animals, 28 C.F.R. § 35.136, have been applied to public schools since their release in 1991/2010. Although the Supreme Court has provided some guidance on exhaustion of administrative remedies *vis a vis* the IDEA in service animal cases, *Fry v. Napoleon Community Schools*, 580 U.S. 154 (2017), the DOJ regulations reflect an outdated approach to service animals in schools, and the Department of Education's OCR has issued very little guidance.

In general, the law/regulations around service animals contemplate short visits (like a visually impaired person walking into the post office with her service dog) and do not take into account the myriad of issues that arise when a student is bringing a dog into the classroom for an extended period of time, including:

- Interaction with other students with allergies to dogs. OCR has asserted that "whichever came first" gets priority (so if the school knew about Student A's dog allergy prior to Student B bringing their service dog to school, Student A is accommodated at the expense of Student B).[9] This is difficult if not impossible in many cases, because parents do not always tell a district about a dog allergy in advance. If both students are in specialized classrooms – perhaps the only life skills classroom in the building – how should the school decide whose concerns prevail?[10]
- Health concerns. Must service animals used at school be free of ticks, fleas, and appropriately clean and groomed if they are going to be in a classroom?
- Pets represented as service animals. Genuine service animals are familiar to school districts. They tend to be dogs trained from puppyhood by a non-profit organization and partnered with the child for months in advance. Usually, the parents clearly communicate with the school about the dog coming into school weeks in advance. But schools are seeing many family pets trained by the families represented as "service dogs." Schools have seen such dogs that aren't properly house-trained or trained to support the student during the school day.

[9] West Gilbert Charter Elementary School, OCR 08-14-1282 (2015); Grand Rapids (MI) Public Schools, 115 LRP 10965, OCR 15-14-1281 (2014).

[10] See generally, U.S. Department of Justice, Civil Rights Division, "Frequently Asked Questions about Service Animals and the ADA," U.S. Department of Justice Civil Rights Division (July 2015), https://www.ada.gov/resources/service-animals-faqs/.

- Handling requirements. At present, it is not clear when and whether the student or school staff must "handle" the service animal. DOJ states: "The ADA requires that service animals be under the control of the handler at all times. In most instances, the handler will be the individual with a disability or a third party who accompanies the individual with a disability. In the school (K-12) context and in similar settings, the school or similar entity may need to provide some assistance to enable a particular student to handle his or her service animal."[11] A few courts have addressed this issue,[12] but schools often receive requests that that the school provide a full-time employee to serve as a handler or help with the service animal when the student themselves cannot be the handler. Schools must now determine whether school staff may or should help the student with tethering or untethering, getting water or pouring water into a bowl, and getting outdoors for toileting.
- Schools need a defined time period in which to request or require information about a service animal before it is brought into the building so that staff can prepare adequately. Schools need to ask, for example:
    - How would the student and family like the service animal to be introduced to the other children in the classroom?
    - Are there other children or adults in the classroom (or bus) who have pet dander allergies or a fear of dogs that need to be addressed before bringing in a dog?
    - How will the student and his/her service animal be transported to and from school? Are there any special concerns regarding the service animal's response to or needs regarding vehicle transport?
    - Are there any special concerns regarding the service animal's interaction with children or adults?
    - Are there any special concerns regarding the service animal's response to or needs in common areas of noise or crowds (such as the cafeteria, gymnasium, hallways, auditorium, etc.)? In areas where food is served?
    - Are there any special concerns regarding the service animal's response to or needs responding to loud noises, alarms, or sudden panic or worry by its handler or a crowd?

[11] *Id.* at Q27.
[12] *Alboniga v. School Board of Broward County Florida*, 87 F.Supp.3d 1319 (S.D. Fl. 2015); *Riley v. School Administrative Unit #23*, 2015 WL 9806795 (D. N.H. 2015).

- Are there any special concerns regarding the service animal's response to or needs for toileting, feeding, watering, or grooming?
- Has the service animal ever shown aggression or timid behavior during or after being trained?

*Relationship Between Section 504 Plans and Health Plans*

School personnel regularly work with individualized healthcare plans, or "health plans," which are written documents describing the medical needs of a student during the school day and outlining how the school will provide healthcare services to the student, along with specific student outcome goals.[13] Health plans are created for students whose healthcare needs affect or have the potential to affect their safe and optimal school attendance and academic performance. A school nurse is often the primary developer and implementer of a health plan, along with the child's health professional.

As many students with school health plans also have disabilities as defined under Section 504, there is much overlap between what a Section 504 plan for a child would cover, as compared to a health plan. Because the plans are developed differently, the former by a team, the latter by a health professional, they tend to differ in approach. A Section 504 plan describes how a child with a disability is to be supported in school activities, while a health plan describes a child's medical treatment *in the context of* the school day.

Because of the nature of some children's disabilities, however, it is not clear under the current regulations whether they require a health plan, a Section 504 plan for health needs, or both. Some would argue that all health plans function as Section 504 plans because the child is likely to be a student with a disability within the meaning of the statute. At present there are no federal criteria for determining whether a Section 504 plan for health needs is required. Does a health plan become a 504 plan when other school personnel—besides the nurse and the student him/herself—are involved? Or does it depend on *which* the particular school personnel need to be involved?

[13] National School Boards Association, *Drugs, Substance Abuse, and Public Schools* (2019), p. 7, https://nsba.org/-/media/NSBA/File/legal-drugs-substance-abuse-and-public-schools-guide.pdf. *See also* National Association of School Nurses, *Individualized Healthcare Plans: Role of the School Nurse*, https://www.nasn.org/advocacy/professional-practice-documents/position-statements/ps-ihps.

*Parent Consent*

Like other nondiscrimination statutes, Section 504 does not require affirmative parent consent ahead of a school evaluating or providing supports and service to students under it. Indeed, it would be illogical to require parental consent in order for the school to "not discriminate." Because the supports and services provided are developed by a team that usually includes the parent,[14] the meaning of the evaluation data, and the placement options, because the supports and services can be quite extensive (a child with a hearing impairment who uses and electronic device in the classroom, and interpreter for assemblies, an online platform to complete assignments, for example), and because OCR has interpreted parent consent to be required for the initial evaluation,[15] schools almost always require some form of parent consent before implementing the program for the child.

No regulation currently spells out at what point in the Section 504 process schools should obtain parental consent: evaluation, meetings, services, etc. Also unclear is the extent of a school's legal obligations if consent is denied or not required. Does the school have a legal obligation to seek court action to obtain consent? May the school implement the supports and services absent consent?

*Current National Mental Health Crisis*

In its press release, the OCR cites its concern about the mental health needs of students and their advocates, resulting from the current national mental health crisis. It would be helpful for the Department to explain whether it is seeking to expand the population covered by Section 504 from the roughly 1-2% of students to a much larger number of students. The definition of "handicap," in the statute (now "disability") could be read to include a much larger of number of students, but the Department's current regulations requiring FAPE clearly require services "designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met." K-12 school leaders are inquiring to what extent Section 504 will be interpreted to apply. If a large percentage, say 20-50 percent, of students now struggle with mental health challenges according to various measures, is the definition of "nonhandicapped" now different? Are

[14] See 34 C.F.R. §104.35(c)(3)(requiring schools to ensure "that the placement decision is made by a group of persons, including persons knowledgeable about the child").
[15] United States Department of Education Office for Civil Rights, *Parent and Educator Resource Guide to Section 504 in Public Elementary and Secondary Schools* (2016), p. 19, https://www2.ed.gov/about/offices/list/ocr/docs/504-resource-guide-201612.pdf.

all these students covered under Section 504's FAPE requirement? Such a move would drastically change the law which was designed for a small percentage of students.

**Conclusion**

NSBA urges the Department to consider the experiences of public schools, families, and students over nearly five decades, and to use this historic opportunity to clarify Section 504's crucial role as a nondiscrimination statute. We ask the Department to consider streamlining existing regulations and replace them with clear criteria on schools' obligations to make school programs and activities accessible to students with disabilities, based on a "reasonable accommodation" standard. This would reduce significantly the confusion, controversy, and conflation of the Section 504 and IDEA standards.

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