



NATIONAL ASSOCIATION OF
School Psychologists

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

Re: Review of Regulations, Section 504, Rehabilitation Act of 1973

On behalf of the National Association of School Psychologists, I am pleased to offer initial comments to the Office for Civil Rights (OCR) regarding possible changes to the Section 504 regulations. The National Association of School Psychologists represents over 25,000 school psychologists who work with students, parents, teachers, administrators, and communities to create safe and supportive school environments that promote student learning, well-being, and safety. School psychologists provide direct support and interventions to students; consult with teachers, families, and personnel to improve support strategies; and work with school administrators to address the academic, social-emotional, and mental and behavioral health needs of all students. School psychologists provide direct supports to students, including those outlined in Individual Education Programs (IEP), Section 504 plans, and general education intervention plans. School psychologists also provide consultation to teachers, families, administrators, and community partners to help ensure *all* students thrive.

NASP members primarily serve students in early education and K-12 settings; therefore, we focused our in-depth review on Subpart D, "Preschool, Elementary, and Secondary Education," and the definitions in Subpart A, Sec. 104.3. The comments and recommendations below reflect input from NASP members who are working in schools.

Clarify the distinction between Section 504 and the IDEA.

In the current Section 504 regulations, the use of EHA (IDEA) procedures is noted as an acceptable way of meeting requirements of Section 504 (e.g., procedures for reevaluation and procedural safeguards). In addition, there are multiple instances in which the Section 504 regulatory language resembles or is identical to language in the IDEA. Many of our members noted that this has caused confusion, and in some cases, resulted in the application of IDEA procedures to Section 504, which is not always necessary to meet the needs of students with a disability.

Although both laws are intended to support the full inclusion of people with disabilities in all aspects of society, Section 504 and the IDEA have distinct purposes; the former designed to address discrimination based on disability (e.g., ensure equitable access), and the latter designed to ensure students with disabilities are provided a free appropriate public education (FAPE) via the provision of specially designed instruction and/or related services. In addition, Section 504 and IDEA apply differing definitions of "handicap"/disability, with the former providing discrimination protection for a much broader group of individuals. NASP conceptualizes the difference between these two laws in the following ways: Section 504 mandates services and accommodations necessary to ensure children with a disability have equitable access to public education and all activities contained therein. Regardless of the need for specific services or accommodations, Section 504 provides discrimination protections for all qualified individuals. IDEA, on the other hand, mandates specially designed instruction and related services for students who meet the criteria for one of the 13 discreet eligibility categories defined by the statute to ensure FAPE and *enable meaningful progress* in the general education curriculum. In short, there is a functional difference between the two laws: Section 504 focuses on *access to* public education while IDEA focuses on *progress and benefit* of public education. However,

based on feedback from school psychologists, this distinction is not fully understood by those tasked with the implementation of Section 504 and IDEA at the school building and/or district level.

For example, Section 504 pertains to all "qualified handicapped persons" and is implemented in the general education setting, with the goal of ensuring equitable access to public education. One could argue that a student who cannot be served in the general setting should be evaluated for IDEA services as they most likely need specially designed instruction rather than accommodations or related aids and services to access the general education curriculum. However, the 504 regulations make routine reference to the terms "special education" or "special instruction," as well as "general education" and "related services." This confusing language requires clarification to ensure appropriate implementation of both laws in the most effective, efficient, and equitable manner possible. We offer the following recommendations to improve clarity of the specific requirements of Section 504 as they relate to IDEA.

Update language and legislative references

- Change references to "handicap," "handicapped person," and "nonhandicapped person in Title 34, Subtitle B, Chapter I to" to "disability," "person with disabilities," and "person without disabilities" or "nondisabled person."
- If references are needed, update Education of the Handicapped Act to the Individuals with Disabilities Education Act.
- Remove references to the EHA/IDEA, with the exception of Sec. 104.33(b)(2), allowing the use of an Individualized Education Program as documentation of 504 services if the student is also receiving special education, i.e., specially designed instruction.

Clarify definition of key terms (Sec. 104.3)

Feedback from NASP members revealed that additional clarity regarding the following terms would be beneficial. We acknowledge that Section 504 regulations may not be the appropriate place to define all of these terms. However, confusion regarding these terms has resulted in disjointed and inconsistent application of Section 504 and service to students with disabilities. In fact, our members note significant differences in interpretation of these terms among schools within the same district. At a minimum we request guidance to improve how school teams operationalize and apply these definitions and to ensure equity in access to the protections outlined in the regulations:

- "substantially limits"

It is clear from previous OCR letters of interpretation and guidance that "substantial limitation" should be defined broadly and not require "extensive analysis." However, feedback from our members suggests individual school teams spend significant time considering how to measure and conceptualize "substantial limitation" and that these approaches vary significantly. Our members suggest defining this term in more observable and measurable terms.

- "related aids and services"

School districts, and individual schools themselves, vary in their interpretation about the role of school psychologists and other specialized instructional support personnel (currently defined as related services personnel in IDEA) regarding the services they can provide, and to whom. Our members noted significant variation in the types of related services that are considered allowable in Section 504 plans. For example, our members noted that some districts allow these professionals to provide only consultative services under Sec. 504, whereas others allow ongoing provision of direct services. While the Section 504 regulations do not list specific types of related services as in the IDEA, there should be some definition to guide the determination of accommodations and related aids and services, including that the universe of those services is non-exhaustive. This will support more consistent decision making and help school professionals better navigate parent requests for accommodations.

- “free appropriate public education”

As noted above, there is confusion as to the meaning of free appropriate public education (FAPE) under Section 504 (Sec. 104.33) and FAPE under the IDEA and the differing responsibilities for the LEA under each law. As previously noted, the use of language from the IDEA statute in the current Section 504 regulations cloud the distinction between who is served under Section 504 versus the IDEA, as well as what services are provided. As such we recommend that OCR remove language in Sec. 104.33(b)(1) that defines 504 services as "provision of regular or special education" and rewrite as "provision of accommodations and related aids and services."

Prohibited Discrimination (Sec 104.4)

NASP appreciates and supports the intent of Section 504, which is to ensure students with disabilities have equal access to public education as compared to their nondisabled peers. However, this regulation has caused considerable confusion in practice. Section 104.4(b)(2) states “for purposes of this part, aids, benefits, and services, to be equally effective, are not required to produce the identical result or level of achievement for handicapped and nonhandicapped persons, but must afford handicapped persons equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement, in the most integrated setting appropriate to the person's needs.” Without further guidance or clarification, it is difficult to distinguish the difference between aids and services that produce equal results and those that provide equal opportunities. Clarity on the difference would be appreciated. Further, the final clause, “appropriate to the person’s needs” can be used to negate the intent of this provision. Accordingly, we ask OCR to consider re-drafting this section.

Evaluation and Placement Requirements (Sect. 104.35)

NASP members noted several areas addressed in this section in which clarity would improve schools’ ability to properly identify and serve students with disabilities.

Child find responsibilities

Under the IDEA, ‘child find’ refers to the responsibility to identify children who are suspected of meeting eligibility requirements for one of the specific categories of disability and for whom special education (i.e. specialized instruction and related services) would be appropriate. Under Section 504, a child is automatically eligible for services by virtue of an "impairment" that "substantially limits" one or more major life activities and for whom accommodations and related aids and services are needed to access instruction. As such, we ask that OCR provide more clarity regarding the difference in ‘child find’ requirements under Section 504 and the IDEA including: including:

- Clear guidance to appropriately identify students “regarded as having a disability” including relevant data and documentation.
- Clarification on what constitutes a “temporary impairment” and how that relates to the need for specific services or accommodations.
- Clarity regarding appropriate consideration of substance abuse in eligibility determination.

504 Team Composition

Current Section 504 regulations provide little guidance about the members of the “group” that determines eligibility for Section 504 and determines appropriate accommodations and placement decisions. It is our recommendation that updated regulations define this term. At a minimum, in PreK-12 settings, the "group" should include:

- the child's parents/legal guardian;
- a general education teacher who has knowledge of the child;
- a general education administrator or the school district's 504 coordinator who has oversight for delivery of 504 services;

- a special education teacher if the child also is or will be receiving services under the IDEA;
- one or more specialized instructional support personnel who are often the professionals who design, support and/or directly provide 504 accommodations and related aids and services, or directly provide related aids and services;
- The child, as appropriate

Evaluation and Reevaluation Procedures

Our members noted confusion about what constitutes an appropriate evaluation, including what types of data are necessary to make an eligibility determination, and how often a reevaluation is necessary. We recommend the following changes in future regulatory language:

- Clarification as to what constitutes ‘educational need’ when determining eligibility for Section 504 and needed accommodations and services
- Rewrite Sec. 104.25(a) "A recipient...shall conduct an evaluation...of any person who, because of ~~handicap~~ disability, needs or is believed to need ~~special education or related services~~ accommodations or related aids and services...."
- Rewrite Sec. 104.34(d): "A recipient...shall establish procedures...for ~~periodic~~ periodic reevaluation, periodically as circumstances warrant, of students who have been provided ~~special education and related services~~ accommodations and related aids and services under this Part to determine if those services are appropriate and continue to be necessary. ~~A reevaluation procedure consistent with the Education for the Handicapped Act is one means of meeting this requirement.~~"

Additional Concerns and Recommendations

Additional topics that NASP members wish to see addressed, either in changes to regulatory language or in improved guidance and technical assistance, are outlined below. The topics included represent those that were most frequently identified as we gathered feedback to respond to OCR’s initial request for information.

Written 504 Plan

Beyond just who is served and for what purpose, procedures should be distinct. As just one example, an evaluation for accommodations under Section 504 should look different than an IDEA evaluation for specially designed instruction for a student with a specific disability. Yet, the 504 regulations state that an evaluation is appropriate for a student who is believed to need "special education." As such, we recommend an added requirement to develop a written 504 plan.

- Rewrite Sec. 104.33(b)(2): "A recipient shall develop a written plan detailing the accommodations and related aids and services provided to the person with a disability under this Part. For persons receiving special education and related services under the Individuals with Disabilities Education Act and accommodations and related aids and services under this Part, an addendum to the Individualized Education Program developed in accordance with the Individuals with Disabilities Education Act is one means of meeting this requirement."

For accountability and service delivery purposes, having a standardized written document detailing accommodations and related aids and services is critical. This will ensure families are able to understand and track what services their children should be receiving and would be a means of holding school districts accountable for providing those services.

There are instances where a child may be receiving services under both 504 and IDEA. For example, a child with learning disabilities is identified as needing special education and related services under the IDEA, but also is diabetic

and has their blood checked as a 504 accommodation. It makes sense in that instance to combine services delivered under both laws in one document for ease of understanding at a glance all services the child is receiving, as well as for ease of accountability.

Documentation of ADHD Diagnosis

Further guidance and/or regulatory language related to ADHD and medical diagnoses is needed. Many school psychologists noted inconsistent practice about the need for a diagnosis and who must complete an evaluation. For example, it was noted that in many states, for purposes of IDEA eligibility, an evaluation completed by a school psychologist is deemed sufficient, but for Section 504, the implication is that a student must have a medical diagnosis and an evaluation by the school psychologist is not sufficient. NASP believes that school psychologists are fully qualified to identify students with ADHD and a medical diagnosis should not be required to access services.

Importance of maintaining commitment to high quality education for all

Our members expressed concern that the line between Section 504 and IDEA has become blurred over the years. NASP, and our members, want to ensure all students, including those with disabilities, have equal access to education and can obtain the services they need to be successful. However, we want to be sure that Section 504 is not being used as a mechanism for obtaining services that all students should be entitled to, regardless of disability status (e.g., mental and behavioral health services, evidence-based interventions, etc.). One example provided regards serving students with learning disabilities such as dyslexia. They may have a diagnosis of a learning disability, but not meet the state eligibility criteria for SLD under IDEA. If they do not meet criteria to receive specially designed instruction, how/should Section 504 be used to support them? Is 504 the appropriate avenue? Should services not be available to these students outside of Section 504?

These questions are particularly relevant and demand attention from OCR in light of additional feedback from school psychologists citing concern about inequitable application of Section 504. Many school psychologists raised the issue of under-identification of students who are "qualified" under Sec. 504, particularly in under-resourced schools, but do not receive critical services and accommodations that could support academic and social/emotional success. Conversely, many school psychologists noted they are concerned with parents and families taking advantage of the broad interpretation of the current regulations as a way of misusing Section 504 to help their student access specific accommodations. They report a common misperception that 504 is intended to "maximize potential" and consequently, some families inappropriately seek to obtain accommodations and services that go beyond ensuring equal access. This can contribute to inequities faced by students with disabilities and students who do not have access to knowledgeable advocates. Since there is no funding attached to Section 504, this diverts valuable and limited human and financial resources away from those who genuinely need accommodations.

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We would welcome the opportunity to dialogue with OCR around these equity concerns, so all students who are "qualified persons" under Sec. 504 receive appropriate and timely services, as needed, while also ensuring that Section

504 is not being inappropriately used as a mechanism to gain access to accommodations and services that should be available to all students regardless of disability status.

Student Discipline/Harassment/Bullying

We request that OCR provide more concise and clear language regarding discipline and manifestation determination requirements and responsibilities under Section 504. The history of the extensive discipline regulations under the IDEA evolved from the anti-discrimination language of Sec. 504. While there is no specific discipline language in Sec. 504, OCR has relied on the 504 language that requires an evaluation prior to schools taking action with regard to a "significant change in placement," triggering a manifestation determination. Given the increase in serious behavioral issues in schools, NASP believes a discussion is warranted to determine if Sec. 504 should include specific language at a minimum directing school districts to develop disciplinary procedures under Sec. 504.

In addition, we request explicit direction related to schools' obligations to address bullying and harassment as it relates to students with disabilities, how this could result in discrimination, and schools' obligations to prevent and address this issue. School psychologists are committed to creating school environments that are free of bullying, discrimination, and harassment for all students. As such, we would appreciate commentary as to how/if specific efforts to protect students with disabilities from discrimination resulting from bullying and harassment differ from efforts to protect all students from similar harmful outcomes.

Caution against further stigma and discrimination against certain groups

NASP fully supports the mission of upholding the civil rights of all students, but we have concerns that the broad interpretation of disability, including "regarded as having a disability" inadvertently mislabels some students and incorrectly implies that some characteristics are inherently disordered or disabling (e.g., LGBTQ+ students, gender non-conforming students). To be sure, these students can also be students with a disability, but LGBTQ+ status in and of itself is not a disability and that needs to be explicitly stated.

NASP will be happy to engage further with OCR on any of these preliminary comments as you develop proposed regulations. We look forward to those proposals and will provide more in-depth comments when they are released.

Sincerely,



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