

Change on the Horizon:

The Impact of the New Section 504 Regulations

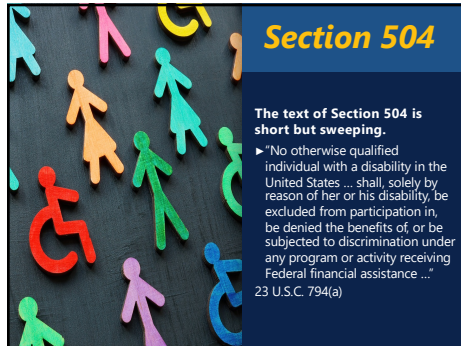
**Andrew Tatgenhorst, Amber King,
Thompson & Horton, LLP**





Change on the Horizon: The Impact of the New Section 504 Regulations

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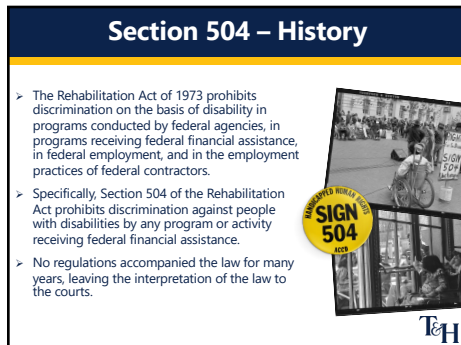
Section 504

The text of Section 504 is short but sweeping.

▶ "No otherwise qualified individual with a disability in the United States ... shall, solely by reason of her or his disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance ..."

23 U.S.C. 794(a)

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Section 504 - History



- ▶ The Rehabilitation Act of 1973 prohibits discrimination on the basis of disability in programs conducted by federal agencies, in programs receiving federal financial assistance, in federal employment, and in the employment practices of federal contractors.
- ▶ Specifically, Section 504 of the Rehabilitation Act prohibits discrimination against people with disabilities by any program or activity receiving federal financial assistance.
- ▶ No regulations accompanied the law for many years, leaving the interpretation of the law to the courts.



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Section 504 – History

- After significant delay by the administration and advocacy by the American Coalition of Citizens with Disabilities, regulations were issued in 1977.
- The regulations provide the details related to FAPE, evaluations, and procedures.
- Since 1977, ED has issued significant guidance related to Section 504 but the regulations have remained largely untouched.
- In May 2022, ED announced it was soliciting comments to develop proposed amendments to the regulations.
- Proposed regulations for Section 504 were originally expected to be released in May 2023. DOE updated release to August 2023.



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What is driving the change?


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Possible Factors Causing Change

- Spike in Section 504 advocacy?
- OCR guidance waning in influence?
- 50-year anniversary?
- Need to address complex emerging issues?
 - Title IX regulation overlap
 - Gender dysphoria
- Need to clarify relationship between IDEA and ADA?




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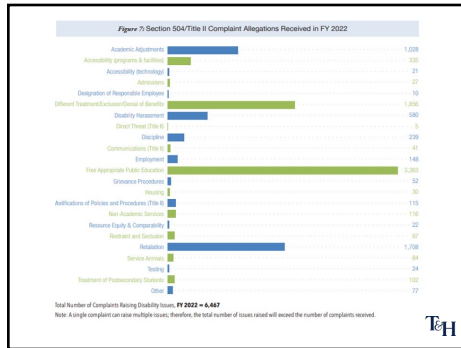
Spike in Section 504 Advocacy

"Fiscal Year 2022 saw a massive increase in complaints filed with OCR, at 18,804 complaints received, up from 8,935 the year before and 9,719 the year before that. Typically over the years, the majority of the complaints received have raised disability concerns."

Annual Report, Office for Civil Rights, accessed June 19, 2023 <https://www2.ed.gov/about/offices/list/ocr/annual-report/annual-report-2022.pdf>



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Spike in Section 504 Advocacy

Advocacy organizations have also called for increased OCR action to enforce Section 504, reporting that 3,434 districts (roughly 20% of all districts) serving over 1.8 million students identified zero 504-only eligible students.

Citing Lopez, D.J., Martinez, P., & Kim Shin, G. H. (2021). Disabling Inequality: The Urgent Need for Face-Consistent Resource Remedies. The Center for Civil Rights Remedies. Retrieved Feb. 7, 2023, from www.civilrightsproject.ucts.edu/



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OCR Guidance Waning in Influence?

Out Society - Federal - Justice
Judge Vacates Biden Administration Rules Allowing Transgender Bathroom Use, Child Gender Modification

The judge vacated two separate instances of federal rulemaking in the same decision.

HEADLINE CHALLENGER | OCTOBER 11, 2022

OCR previously received great deference in the unofficial guidance it released. However, courts have recently not given this deference to OCR guidance that does not go through federal rulemaking (regulations).



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It's the 50th anniversary of...

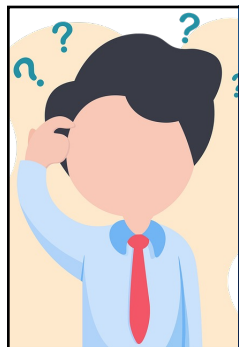
Section 504
of the Rehabilitation Act of 1973



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Other Complex Issues

- Title IX regulation overlap
- Gender dysphoria
- IDEA (2004)
- ADA (2008)



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No Proposed Regulations . . . Yet


- Expected in August 2023
- According to the Agency Rule List Spring 2023
 - "ED will propose to amend regulations implementing Section 504, including advancing equity for persons with disabilities addressing persistent barriers to access for students with disabilities in education, updating outdated language, and aligning the current regulations with the ADA and the ADA Amendments Act."
- Can speculate on what issues will be addressed



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Section 504 – Predictions

Parent participation	MDRs	Due process requirements	Stay put	Grievance procedures	Technically eligible
"Special Education"	"Evaluation"	Consent for evaluation	Informal removals	504 plans	Revocation of IDEA consent
Mitigating Measures	Episodic impairments	Timelines	Substantially limits	Major life activity	Proactive behavior supports



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Proposals from Advocates

- Several groups have offered suggestions, including:
 - The Leadership Conference on Civil and Human Rights
 - Consortium for Constituents with Disabilities
- Wrote a July 2022 letter to OCR with recommendations signed by 36 organizations




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CCD
CONSORTIUM FOR CONSTITUENTS
WITH DISABILITIES

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

Letter to OCR on Proposed Section 504 Regulations. Consortium for Constituents with Disabilities [PDF file]. Retrieved June 19, 2023, from <https://www.c-c-d.org/fichiers/CCD-Response-to-504-Regulations.pdf>




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Proposals from Advocates

➤ **Align Section 504 definitions with those found in the ADA.**

- "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."
- Current language and definitions need to be aligned to current terminology, including language from the Americans with Disabilities Act Amendments Act of 2008.




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Proposals from Advocates

➤ **Align Section 504 definitions with those found in the ADA.**


- Incorporate ADA and ADAAA (2008), to address:
 - Use of language, including "handicapped"
 - Maximum eligibility allowed under the law
 - Conditions that are episodic or in remission
 - Expansion of the non-exhaustive listing of major life activities
 - Definition of "substantial limitation" component of eligibility
 - Consideration of mitigating measures in determining eligibility.



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Proposals from Advocates


- **Review the guidance issued in ensuring FAPE to students with ADHD.**
 - "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."
 - The provisions outlined in the 2016 ADHD Resource Guide should be codified as they apply to the disability community at large, not just those with ADHD.
 - Broader implication(?): Make clear distinction between Section 504 and IDEA



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Proposals from Advocates


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



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Proposals from Advocates


- **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.**
 - "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 Learning (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."



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Proposals from Advocates


- **Clarify that 504-eligible students must be provided accessible educational services when their disability prevents them from attending schools in person.**
 - "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."
 - Accounting for virtual learning in some way.



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Proposals from Advocates


- **Clarify that individuals are subjected to discrimination if such decision is tied to severity of disability (34 CFR Part 100)**
 - "Section 504 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."
 - Clarity on Access/participation in programs



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Proposals from Advocates


- **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.**
 - "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."
 - The impact of bullying not addressed in Section 504 but impacts are addressed in guidance.



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Proposals from Advocates


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



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Proposals from Advocates


- **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.**
 - "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."
 - No specific requirements regarding Section 504 plans.
 - Parents are also not required members of Section teams.



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Proposals from Advocates


- **Ensure any evaluation conducted under Section 504 must be conducted timely.**
 - "Section 504 does not currently require a specific timeline for evaluation; case law and previous OCR guidance, however, indicate that evaluation must take place within a reasonable timeframe."
 - Unlike IDEA, there is no real timeline.



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Proposals from Advocates


- **Reiterate that "substantial limitation," as it currently appears in the definition of "handicapped person," does not require a medical diagnosis.**
 - "OCR clarified through its 2012 Dear Colleague Letter, '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.'"
 - Make clear what "substantial limitation" means in the regulations.



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Proposals from Advocates


- **Clarify the requirements of schools to conduct due diligence on the eligibility of students for services under both the IDEA and Section 504.**
 - "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."
 - One process for identification?



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Proposals from Advocates


- **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.**
 - "In many instances, students served under Section 504 require direct services (as opposed to consult services only), such as direct instruction from a 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."



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Proposals from Advocates


- > 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.
 - > What exactly can be provided under Section 504?



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Proposals from Advocates


- > Clarify "special education" and the overlap with the IDEA.
 - > The use of the term "special education" in the 504 regulations has been a source of endless confusion among schools and parents. IDEA fiscal, procedural, and placement requirements preclude the access of non-IDEA students to IDEA-funded "specially designed instruction."
 - > IDEA comment: "One commenter requested modifying the definition of special education to distinguish special education from other forms of education, such as remedial programming, flexible grouping, and alternative education programming." 71 Fed. Reg. 46,577 (2006)



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Proposals from Advocates


- > Clarify "special education" and the overlap with the IDEA.
 - > IDEA comment: "We do not believe it is necessary to change the definition to distinguish special education from the other forms of education mentioned by the commenter." 71 Fed. Reg. 46,577 (2006).
 - > Can specially designed instruction be provided to Section 504 students?
 - > What is the limit of regular education instruction that will be permitted under the IDEA?



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Proposals from Advocates

- **Clarify that 504 requires manifestation reviews.**
 - "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."



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**The Leadership Conference
on Civil and Human Rights**

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December 5, 2022


Submitted via Section504@ocr.ed.gov

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

Proposed amendments to the Department of Education's regulations implementing Section 504 of the Rehabilitation Act of 1973

Dear Deputy Assistant Secretary Galanter,


Letter to OCR on Proposed Amendments to Section 504 Regulations. The Leadership Conference [PDF file]. Retrieved June 19, 2023, from <https://civilrightsdocs.info/pdf/policy/letters/2022/Section504-Joint-Comment-Letter-120522.pdf>



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Proposals from Advocates


- **Include stronger language regarding the Child Find obligation of districts and schools to identify all potentially eligible children.**
 - "Unlike federal regulations promulgated under the IDEA, current regulations under Section 504 do not delineate what it means to 'undertake to identify and locate' students and what constitutes 'appropriate steps' to notify and inform parents. This lack of clarity has created confusion about school and district responsibilities, making an already low bar easier to surpass."
 - Put IDEA-like parameters on child-find.



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Proposals from Advocates


- **Amend Section 504's regulations to define a "significant change in placement."**
 - "OCR must amend Section 504's regulations to define a "significant change in placement" as (1) a material change in physical placement that impacts the child's education program, including transfer to an alternative school; (2) the elimination of a service or substantial increase or decrease in a service previously provided to a student with a disability; or (3) exclusion for an indefinite period or more than five consecutive days or a series of suspensions that are each five days or fewer in duration thereby."



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Proposals from Advocates


- **Explicitly require parental consent for evaluations, provide for re-evaluation every three years.**
 - "OCR must protect individuals with disabilities by requiring parental consent prior to any evaluation, something currently unaddressed in the regulations. The regulations should specify a time period for reevaluations under Section 504 as every three years, which must be subject to parental consent and may be waived."



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Proposals from Advocates


- **Add specific language assuring parents receive notification of a school's intention to evaluate, refusal to evaluate, or other actions related to evaluations.**
 - "Parents are entitled to be fully informed of any action the school intends to take regarding their child. Since OCR has 'interpreted Section 504 to require districts to obtain parental permission for initial evaluations,' updated regulations must assure timely notifications are required when a school intends to evaluate the child and/or the school refuses to evaluate the child. OCR has also inferred and enforced a right to written notice."



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Proposals from Advocates


- **Clarify that children with disabilities should be excluded from threat assessment processes.**
 - "Threat assessments pose major risks for and to students, including increased and early contact with law enforcement, over-identification of students of color and students with disabilities (and students at the intersection of those identities) for 'threatening' behavior, and undermining of students' rights under civil rights laws, including IDEA and Section 504."



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Proposals from Advocates

- **Add a 'stay put' provision for 504-eligible students with pending dispute resolutions.**
 - "There is currently no 'stay put' provision under Section 504, which prevents a school from unilaterally changing a student's placement prior to the ultimate outcome of a manifestation determination review, which may include the parents' formal challenge to the school's placement decision."



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Proposals from Advocates

- **Accommodations must be provided to students with intellectual and other disabilities, including in incidences related to code of conduct violations.**
 - "Updated 504 regulations should state explicitly the obligation of schools to ensure the equitable treatment and participation of students with disabilities, including intellectual disabilities, in disciplinary proceedings. Students must be provided sufficient time to request accommodations, which may include communication support."



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Potential School Proposals

- **Clarify the role of medical information in the evaluation process.**
 - "A physician's medical diagnosis may be considered among other sources in evaluating a student with an impairment or believed to have an impairment which substantially limits a major life activity. Other sources to be considered, along with the medical diagnosis, include aptitude and achievement tests, teacher recommendations, physical condition, social and cultural background, and adaptive behavior." *Protecting Students With Disabilities: Frequently Asked Questions About Section 504 and the Education of Children with Disabilities*, 121 LRP 5510 (OCR 01/10/20).

T&H

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Potential School Proposals


- **Clarify when students are Section 504 eligible.**
 - "The procedures also state that a student is not eligible under Section 504 as a student with a disability if the student does not need Section 504 services in order for the student's educational needs to be met, which conflates the determination of disability with placement and services decisions, which should be separate." *Memphis (MI) Cmty. Schs.*, 54 IDELR 61 (OCR 2009).

T&H

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Potential School Proposals

- Clarify what happens when parent refuses IDEA services.
 - The IDEA allows parents to revoke or refuse consent for IDEA services, and such decision cannot be challenged by the school district via procedural safeguards.
 - Is the student then entitled to a Section 504 FAPE? What does that mean?
 - Courts have not offered clarity.
 - Generally, compliance with the IDEA, and the offer of an IEP, is FAPE for Section 504, but it is not explicit. 34 CFR 104.33(b).



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What's Next?

- 1 Proposed Rulemaking**
A notice of proposed rulemaking is published in the Federal Register as required by the Administrative Procedures Act (APA)
- 2 Public Comment Period**
At least a 30-day public comment period is open.
- 3 Review Comments**
Agency reviews comments and drafts final rule. Agency must respond to each comment.
- 4 Final Rule Published and Rule Implemented**
Final rule is published in the Federal Register and implementation date is established.

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