

Submitted via email

June 30, 2022

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

RE: Comments on Proposed Improvements to Department of Education Regulations Implementing Section 504 of the Rehabilitation Act of 1973

Dear Deputy Assistant Secretary Galanter,

Access to high quality education is a basic right of all children, and all 50 states and the District of Columbia, children are required by law to attend school at least until the age of 16.ⁱ As Section 504 of the Rehabilitation Act of 1973 (Sec. 504) is a vital component in the United States' effort to provide equity of educational opportunity for all students, the American Occupational Therapy Association (AOTA) commends the Department of Education's efforts to amend and update the regulations implementing Sec. 504. In the 30 years since the last update to regulatory language, our nation has made great strides in providing a more effective and inclusive educational environment for all students. AOTA is pleased join the Department in working to build on the progress made since the last update.

Sec. 504 is a bedrock federal civil rights law protecting the rights of individuals with disabilities in programs and activities receiving federal funding, such as from the Department of Education. The statute of Sec. 504 is as simple as it is effective. The statute states: "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 ..."

The Department of Education's regulatory language enshrined the right to a free appropriate public education (FAPE) for all students with a disability, regardless of the nature or severity of the disabilityⁱⁱ. The goal is to create an educational system where every student receives the support need to achieve educational success, and this update must compliment that effort.

Background

The AOTA is the national professional association representing the interests of more than 244,500 occupational therapists, occupational therapy assistants, and students of occupational therapy across the nation.

The practice of occupational therapy is science-driven, evidence-based, and enables people of all ages to live life to its fullest by promoting health and minimizing the functional effects of illness, injury, and disability. Occupational therapy is uniquely suited to the educational setting. Our members take a holistic perspective and focus on the education of the whole child. Academic success is critical, but the social, emotional, and behavioral aspects of educational progress cannot be minimized or separated. Occupational therapy uses activity or occupation-based interventions to enable students to achieve their potential by increasing their functional skills for better participation in school and later in adult life, as well as to minimize the effects of disabilities.

AOTA conducted an extensive national survey of school-based occupational therapy and occupational therapy assistants, who represent over a quarter of the 213,000 occupational therapy practitioners (OTPs) across the country, on implementation of the current Sec. 504 regulations. During the thorough, in-depth review of the survey results and current best practices for school-based occupational therapy practitioners, four broad areas of the regulations emerged that need to be addressed

- Increasing Equity and Inclusion in Schools
- Greater Clarification of Sec. 504 Requirements
- Increased Uniformity of Across Schools and Districts
- Better Coordination Between Laws

AOTA is pleased to provide the following comments on the current Sec. 504 regulations, focused on Subpart A, “General Provisions,” and Subpart D, “Preschool, Elementary, and Secondary Education.”

Equity and Inclusion

a. Universal Design for Learning

All children deserve the supports they need to access their education. The Higher Education Opportunity Act was the first education law to include universal design for learning (UDL) to provide students with the greatest access to education. When the UDL principles of equitable use, flexibility, simplicity, perceptibility, and efficiency to both the educational environment and process of teaching and learningⁱⁱⁱ are implemented across all environmental factors, as defined in the International Classification of Functioning, Disability, and Health (ICF), it creates more inclusive classroom environment where the differences of all individuals are welcomed and celebrated, and the overall need for adaptations is reduced.

The holistic perspective and approach of occupational therapy, and its unique focus on the person, occupation, and environment, makes the OTP a critical member of the team,

along with other specialized instructional support personnel (SISP), charged with implementing UDL on a school or district wide level.

1. **Recommendation:** The Department should encourage schools to have policies and procedures in place to enact the UDL framework to the maximum extent possible which aligns §103(a)(24) of the Higher Education Opportunity Act (P.L. 110-315)

b. Updating Regulatory Definitions and Legislative References

There is a need to update existing language to align with current, more inclusive language

2. **Recommendation:** Replace all instances and references to the “Education of the Handicapped Act” with the “Individuals with Disabilities Education Act” or the “IDEA.”
3. **Recommendation:** Replace all use of the term “handicapped person” with “person with a disability.”
4. **Recommendation:** Amend §104.3(2)(i) to state: Physical, mental, or sensory system impairment
 - a. Add as (c): Any disorder or condition that affects visual, auditory, olfactory, gustatory, tactile, proprioceptive, vestibular, interoceptive functions
5. **Recommendation:** Amend §104.3(j)(2)(ii) to state: Major life activities means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, working, and social participation.

Greater Clarification

a. Allowable related aids and services

School districts vary in their interpretation about the role of SISP, such as OTPs, and the services they provide. Some districts allow these professionals to provide only consultative services under Sec. 504, whereas others allow provision of direct services. While the Sec. 504 regulations do not list specific types of services as in the IDEA, there should be some definition to guide the determination of accommodations, related aids, and services, including that the universe of those services is non-exhaustive.

Additionally, while the use of multi-tiered systems of support (MTSS) model is an effective support for all students, it should not serve as a substitute for needed services and aids for children with disabilities.

6. **Recommendation:** Specify explicit allowance for direct and consultative services of occupational therapy and other specialized instructional support services as allowable under Sec. 504

b. Make child find in public schools explicit

According to the Civil Rights Data Collection (CRDC) most recent data available (School Year 2017-18), there were 1.4 million public school students with disabilities

served solely under Sec. 504 – or 2.7 percent of public-school enrollment. While the number of 504-only students has increased steadily over the past decade, based on a recent analysis of the 2017-2018 CRDC presented in the Center for Civil Rights Remedies (CCRR) report, *Disabling Inequity: The Urgent Need for Race-Conscious Resource Remedies*, thousands of school districts fail to identify even one student as eligible under Sec. 504. The CCRR report found 3,434 districts (roughly 20% of all districts) serving over 1.8 million students identified zero 504-only eligible students.

7. **Recommendation:** Amend 104.32(a) to state: “Undertake an effort to identify and locate every child with a disability residing in the recipient’s jurisdiction, including those who are not receiving public education.”
8. **Recommendation:** Develop specific language to prevent disproportionate identification of racial or ethnic groups

c. Interpretation of “substantial limitation”

It is clear from previous OCR letters of interpretation and guidance that "substantial limitation" should be defined broadly and not require "extensive analysis." Given those statements, perhaps if a clear definition cannot be developed, school districts should be directed to spend less time on deciding about substantial limitation and more on whether a disabling condition exists. As this is a civil rights law that does require an "eligibility" determination for services but rather simply whether a disability exists, the school district's focus should be on what services may be needed. This clarification for school districts would relieve a lot of pressure and staff time in making the "substantial limitation" determination.

9. **Recommendation:** State that schools should focus more on disability eligibility and what, if any, accommodations, services, or aids are needed. Provide clear guidance on process and criteria for determining such eligibility.

Increased Uniformity

a. The Need for a Written 504 Plan

OTPs can work in multiple schools sometimes across multiple districts. Sec. 504 implementation can be drastically different in each setting. The time spent learning and adhering to the specific, yet often very different processes is onerous. Making the process more uniform will help remove ambiguity for both school staff and families, allowing the limited resources in schools to be put to better use.

10. **Recommendation:** Regulations should require a written 504 plan for each student with a disability. Such a plan should, at a minimum, include the following:
 - Documentation of the child’s qualifying disability
 - If the qualifying disability requires accommodations, services, or aids to meet the individual education needs of the child, a list of such accommodations, services, or aids to be provided. Such accommodations, services, or aids can include:

- Direct or consultative services from a SISP, or any service as agreed to by the 504 team
- Is developed by a 504 team, as described in the following section
- The projected date for the beginning of the accommodations, services, or aids, and the anticipated frequency, location, duration of those accommodations, services, or aids, and if there is an anticipated change to accommodations, services, or aids based on a stated goal.
- Documentation of existing supports based on UDL framework to which the child has access
- Specific timeline for review of the 504 plan to occur not less than annually
- Wherever appropriate, any provisions which are similar under both Sec. 504, and the IDEA, satisfying the requirements under the IDEA will be considered to having satisfied the requirement of a 504 plan.
 - Example: The development of an Individualized Education Program (IEP) would satisfy the requirement of developing a 504 plan.

b. 504 Team Composition

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.

11. Recommendation: The 504 team should at the minimum, include

- The parents or guardians of a child with a disability
- Not less than one teacher of the child
- A representative of the school who
 - Is knowledgeable about the general education curriculum
 - Is knowledgeable of the availability of resources of the recipient
 - Has access to the data required to understand the current or expected workload of SISP who would be required to provide any services
- At least one SISP representative of each service to be provided directly or in consultation qualified to provide that service in accordance with state law
- When appropriate, the child with a disability

Better Coordination Between Laws

a. Sec. 504 vs other education laws

Sec. 504 has a specific role in supporting the education for students. However, there are many instances where the line between laws lacks clarity. For instance, the IDEA has instances of provisions with similar language, procedures, and staff to provisions of Sec. 504. OTPs noted repeatedly about a great deal of confusion in how to differentiate the two laws and, therefore, in how to best implement them. Similar concerns were received related to the Every Student Succeeds Act (ESSA), and Individual Health Plans.

12. **Recommendation:** Insert language, perhaps as "Purposes and Findings" in Subpart D to make a clear distinction between Sec. 504 and other laws.
13. **Recommendation:** Clarify how services and accommodations provided as a part of a 504 plan, differ from those provided as a part of ESSA and IDEA such as early intervening services, differentiated instruction, or multi-tiered systems of supports.

a. Workload issues considerations

With regards to federal law, schools and districts are required to follow a series of laws with different requirements, resources, and goals. However, schools don't have separate staff dedicated to implement each one. It is critical school and district leadership adopt a workload model for all SISP services, as opposed to the caseload model. The workload model considers all activities in which an OTP or other SISP engages in to supports students. This includes direct engagements, such as assessments and direct services, and indirect engagements, such as ongoing teacher or parent collaboration, or school and district-level efforts to support UDL implementation, and any other activities necessary to ensure compliance with the different mandates.

14. **Recommendation:** The Department should include provisions in the regulations to adopt the workload model, as well as subsequent guidance documents

b. Additional funding for schools

The largest barrier schools face is the severe limitation of funding. While the federal government funds public education through the IDEA and ESSA, Sec. 504 has no funding stream associated with it. Medicaid remains the largest underutilized funding source for school-based occupational therapy, and other SISP services.

Traditionally, the administrative burdens associated with Medicaid billing has proved too much to overcome for some districts. The Bipartisan Safer Communities Act (P.L. 117-159), which was recently signed into law, included a requirement for the Secretary of Health and Human Services to consult with the Secretary of Education provide guidance to state Medicaid agencies, local education agencies (LEA), and school-based entities to support the delivery medical assistance to Medicaid and CHIP beneficiaries in school-based settings. AOTA urges the Department of Education to also look for ways to support schools in any effort to bill private payors for services under Sec. 504 during the process to draft guidance.

15. **Recommendation:** Develop guidance on all funding options available to schools, and their flexibility to fund accommodations, services, or aids available under Sec. 504

c. Additional critical guidance development

When ESSA was signed into law in 2015, a new term was created, specialized instructional support personnel (SISP). The intention was to provide general education

students, including those eligible under Sec. 504, with similar services to which students with IEPs had access. It is vital for the entire school community to know what resources are available in the school, and an idea of the services they provide.

16. **Recommendation:** Develop guidance document on the term specialized instructional support personnel, as defined in ESSA, as well as best practices for how SISP work together as a team to support student achievement under ESSA, IDEA, Sec. 504, and any other laws

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Thank you for the opportunity to provide these comments. AOTA stands ready to provide any additional information you need and collaborate on any efforts in this area. Please contact Abe Saffer at asaffer@aota.org if you have questions or need additional information.

Sincerely,



Abe Saffer, MPM

CC:

The Honorable Miguel Cardona, Secretary of Education

The Honorable Catherine E. Lhamon, Assistant Secretary of Education for Civil Rights

ⁱ https://nces.ed.gov/programs/statereform/tab5_1.asp

ⁱⁱ <https://www2.ed.gov/print/about/offices/list/ocr/504faq.html>

ⁱⁱⁱ Best Practices for OT in Schools – page 162