



June 30, 2022

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

Autistic Self Advocacy Network Comments Re: Department of Education's Proposed Amendments to Regulations Implementing Section 504 of the Rehabilitation Act of 1973

The Autistic Self Advocacy Network (ASAN)¹ appreciates the opportunity to provide recommendations supporting the Department of Education (DOE)'s effort to update and strengthen the regulations implementing Section 504² of the Rehabilitation Act. Section 504 of the Rehabilitation Act was the first federal civil rights law protecting the rights of people with disabilities.³ Section 504 protects people with disabilities from discrimination by federally funded programs, including schools receiving federal funding.⁴ This law is particularly important for students, as only Section 504 covers students who need disability-related services in schools but are not eligible for services under the Individuals with Disabilities Education Act (IDEA).⁵

ASAN's comments expand on those of the Consortium for Constituents with Disabilities (CCD), who submitted their own comments on June 30, 2022, which we endorse. Our

¹ For more information on ASAN, visit <https://autisticadvocacy.org/>.

² U.S. Dep't Educ., *U.S. Department of Education Announces Intent to Strengthen and Protect Rights for Students with Disabilities by Amending Regulations Implementing Section 504* (May 6, 2022), <https://www.ed.gov/news/press-releases/us-department-education-announces-intent-strengthen-and-protect-rights-students-disabilities-amending-regulations-implementing-section-504>; U.S. Dep't Educ., *Rulemaking and Regulations by the Office for Civil Rights*, <https://www2.ed.gov/policy/rights/reg/ocr/index.html> (last updated Jun. 23, 2022).

³ Disability Rts. Educ. & Defense Fund, *Section 504 of the Rehabilitation Act of 1973*, <https://dredf.org/legal-advocacy/laws/section-504-of-the-rehabilitation-act-of-1973/> (last visited Jun. 27, 2022).

⁴ *Id.*

⁵ Univ. Wash., *What is the difference between an IEP and a 504 Plan?*, Disabilities, Opportunities, Internetworking, and Technology, <https://www.washington.edu/doit/what-difference-between-iep-and-504-plan> (last updated May 24, 2022).

comments provide context not provided by CCD, express opinions that are specific to our positions, and cover subjects not referenced by CCD.

We recommend that the term “auxiliary aids” be replaced with the term “auxiliary aids and services.” We recommend that DOE align the regulations’ definition with the ADA’s regulations. We also recommend that DOE expand the list of auxiliary aids and services listed beyond those covered by the ADA to include computer-based aids and services primarily used by nonspeaking students.

The “auxiliary aids” listed in the current regulations is outdated. It refers to “auxiliary aids” rather than the more commonly used term “auxiliary aids and services” and does not list the items described by the ADA’s regulations. 34 C.F.R. § 104.44(d)(2) (2022). To ensure that Section 504 and Title II of the ADA cover similar items, we support CCD’s request, particularly the addition of “assistive technology devices,” which would cover dedicated Augmentative and Alternative Communication (AAC) devices.

We request that the term “auxiliary aids” be changed to “auxiliary aids and services” to better align Section 504 and the ADA. ASAN’s further comments are specific to addressing the needs of nonspeaking students. To ensure that their communication needs are met, we recommend that the term “assistive programs and apps on general use devices” be added to the list of auxiliary aids and services. Additionally, we recommend adding the sentence “Recipients must allow a student to use their general-use device for the purposes of AAC when an assistive program or app allowing the use of AAC is installed.” This would codify AAC app users’ communication access in school.

The current regulations do not include common assistive devices, such as iPads and other general use devices. These devices are critical for many nonspeaking students, who use them to communicate in schools’ diverse social and academic contexts. Effective, robust communication in school is part of what it means to have a free appropriate public education (FAPE). Still, nonspeaking students are routinely denied access to the devices they need, even when the student already has a device and the school does not need to pay for one. This can be for many reasons, such as a school refusing to acknowledge the student’s communication method or enforcing a general policy prohibiting student use of cell phones or computers. By clarifying that these students’ form of AAC is covered, DOE prevents these students from being denied communication and a FAPE.

DOE should revise its regulations based on its 2014 joint guidance with the Department of Justice on effective communication. This guidance requires public schools to give “primary consideration” to the student’s preferred communication method. This would better align Section 504’s regulations with Title II of the ADA. The regulations should require schools to provide support for the communication method in students’ classrooms as needed.

DOE’s 2014 guidance on Title II already requires schools to provide the student’s preferred form of communication unless it can show that another form of communication is as effective as that provided to students without disabilities.⁶ However, school officials continue to deprive nonspeaking autistic students of effective communication and reject their authentic communication, whether they receive IDEA or 504 services. Nonspeaking students have reported to ASAN that they are being prevented from using their preferred communication methods and, instead, provided with extremely limited forms of communication.

These students are often left without the ability to do more than ask “Yes/No” questions and the location of the bathroom. Such poor communication access forecloses these students’ meaningful participation in school activities. It causes academic and social deprivation, preventing nonspeaking students from developing the robust, language-based communication they will need for self-expression throughout their lives. The change we propose would limit schools’ ability to exchange effective communication for ineffective alternatives and thereby discriminate against these students in violation of Section 504.

We recommend that DOE update the definition of “major life activities” under Section 504 to include all major life activities present in the ADA.

The ADA’s definition of “major life activities” includes many aspects of disability relevant to education, such as “standing, lifting, bending . . . reading, concentrating, thinking, communicating.” 28 C.F.R. § 36.105(c)(1)(2022). Section 504’s current regulations do not cover some of the activities in the ADA, nor do they include the phrase “include, but are not limited to.” *Id.* Making these changes would better align DOE’s regulations with its other guidance on Section 504 and the ADA Amendments Act of 2008. This change would also extend Section 504’s protections to a greater number of students. Some public school students, for example, have a reading-related disability such as dyslexia. In some cases,

⁶ U.S. Dep’t Justice & U.S. Dep’t Educ., Frequently Asked Questions on Effective Communication for Students with Hearing, Vision, or Speech Disabilities in Public Elementary and Secondary Schools 8 (2014), *available at* <https://www2.ed.gov/about/offices/list/ocr/docs/dcl-faqs-effective-communication-201411.pdf>.

reasonable accommodations, not special education services, are necessary to meet the student's needs. These students would be included in our proposed definition of "major life activities." This would also increase the number of college students with cognitive disabilities covered by Section 504. They would benefit from a definition of "major life activities" that encompasses their disabilities and need for services.

We recommend that DOE clarify that students with intellectual disabilities in higher education are considered "qualified" under Section 504. We recommend that DOE provide guidance requiring public universities to remove administrative barriers to full access to the school's facilities for these students when these barriers violate Section 504.

Greater numbers of students with intellectual disabilities are pursuing a university education than ever before. These students typically qualify for university educational programs known as Comprehensive Transition and Postsecondary Programs (CTPs).⁷ Through these programs, students with intellectual disabilities can take college courses and strive for program-specific educational credentials, often a certificate of program completion.⁸ These programs provide valuable learning experiences to students who otherwise have few opportunities to learn new skills past high school. Students with intellectual disabilities in college are too often treated as second class students. They are often denied access to student facilities, extracurricular activities, campus housing, and disability-competent mental health and counseling services.⁹ This has consequences ranging from forcing students out of college to isolating them and depriving them of the full value of campus life.

Our request would reduce these inequities by using Section 504's existing language. Current 504 regulations do not say whether these students are "qualified" students. Under

⁷ Nat'l Parent Ctr. on Transition & Employment, *Inclusive Postsecondary Education for Students with Intellectual Disabilities*, <https://www.pacer.org/transition/learning-center/postsecondary/college-options.asp> (last visited Jun. 27, 2022); Federal Student Aid Office, U.S. Dep't Educ, *Students with intellectual disabilities may be able to get certain types of federal student aid*, <https://studentaid.gov/understand-aid/eligibility/requirements/intellectual-disabilities> (last updated May 31, 2022).

⁸ Nat'l Parent Ctr. on Transition & Employment, *supra* note 11.

⁹ See, e.g., Kevyn Burger, *Minnesotans with intellectual disabilities are new kids on campus*, Star Tribune (Oct. 3, 2015, 11: 15PM), <https://www.startribune.com/minnesotans-with-intellectual-disabilities-are-new-kids-on-campus/330411671/> (program is "first of its kind" to allow students with ID to live on campus, demonstrating the rarity of full inclusion even in programs specialized for students with ID); Michelle McKnight-Lizotte, Elizabeth S.G. Dimond, Trenton J. Landon, Michael Gerald & Susan M. Reeves, *Mental Health Needs for Students Enrolled in Inclusive Postsecondary Education Programs*, J. Inclusive Postsecondary Educ., May 2021, at 9-10 (describing the issues faced by students with intellectual disabilities when attempting to get services on campus).

Section 504's current regulations, a "qualified" student with a disability cannot be denied access to academics, counseling, or any campus facility on the basis of disability. 34 C.F.R. §104.43(a)(2022). They must be provided with the auxiliary aids and services they need to participate. *Id.* By clarifying that these students are as "qualified" for access to campus life under Section 504's regulations, DOE can prevent their discriminatory exclusion from much of what makes higher education worthwhile. DOE should take this opportunity to promote these students' access to all extracurricular programs and provide necessary auxiliary aids and services.

Additionally, we recommend that DOE produce guidance explaining that eligibility criteria which include students with intellectual disabilities only in educational programs that lack access to campus facilities may be discriminatory. The guidance should detail the specific circumstances in which the criteria are discriminatory. For example, some university programs for students with intellectual disabilities deny them access to campus housing on the grounds that the program is not full time. Other part-time students do not have access to campus housing either. However, by allowing students with intellectual disabilities to enter the university only through such a program, the university effectively denies all students with intellectual disabilities access to campus housing. DOE can clarify that these policies may be discrimination and outline the circumstances under which a specific policy would violate Section 504.

ASAN is likely to submit additional comments after a proposed rule has been published in the Federal Register. We thank DOE for the opportunity to provide early recommendations which will further its development of robust, effective regulations on Section 504 of the Rehabilitation Act. For more information on ASAN's positions on Section 504 in the context of education, please contact Kelly Israel at kisrael@autisticadvocacy.org.