



State of California
Office of the Attorney General

ROB BONTA
ATTORNEY GENERAL

June 30, 2022

VIA EMAIL AT Section504@ed.gov

The Honorable Catherine Lhamon
Assistant Secretary
U.S. Department of Education, Office for Civil Rights
Lyndon Baines Johnson Department of Education Building
400 Maryland Avenue, SW
Washington, D.C. 20202

RE: Section 504 Education Regulations

Dear Assistant Secretary Lhamon:

I write today in response to the Department of Education, Office for Civil Rights (“ED OCR”)’s May 6, 2022, solicitation for public input regarding its “Intent to Strengthen and Protect Rights for Students with Disabilities by Amending Regulations Implementing Section 504.” I applaud ED OCR’s efforts to update these important regulations¹ to ensure that Section 504 is robustly implemented so that students with disabilities are afforded full and equal access to educational opportunities in America.

Section 504 and its regulations are vital for students with disabilities. ED OCR data show that three percent of K-12 students—about 1.5 million children with disabilities—are protected by Section 504 but not by the Individuals with Disabilities Education Act (“IDEA”).² And of

¹ The California Department of Justice refers to the regulations at issue throughout as the “Section 504 education regulations” or “the regulations.”

² U.S. Dep’t of Educ., 2017-18 Civil Rights Data Collection: The Use of Restraint and Seclusion on Children With Disabilities In K-12 Schools, 2 (Oct. 2020), <https://www2.ed.gov/about/offices/list/ocr/docs/restraint-and-seclusion.pdf>.

course that does not capture students in higher education, nearly one in five of whom have disabilities nationwide.³

Unfortunately, students with disabilities in California and the United States continue to experience discrimination in education, from harassment on the basis of disability to systemic barriers to educational access that deny them equal educational opportunity. Equal access to schools and educational opportunities is especially important to ensure that people with disabilities can fully participate in all aspects of society. Section 504 and its implementing regulations are tools to ensure that equal access. They prohibit discrimination on the basis of disability in all programs and activities of recipients of federal financial assistance, with the goal of ensuring that the federal government does not directly or indirectly fund educational programs or services that discriminate against students with disabilities.

California has long been a leader in protecting disability rights through legislation. California enacted the Disabled Persons Act in 1968, five years before Section 504.⁴ And California education anti-discrimination law is to be interpreted consistent with Section 504, except where it provides additional protections.⁵

As California's Attorney General, I have a strong interest in promoting educational equity and a mandate to advance the civil rights of all Californians. My office helps ensure compliance with anti-discrimination laws and regulations so that people with disabilities have equal access to the services and programs of schools and other entities. In January of 2021, my office created a Bureau of Disability Rights to ensure that consistent and concerted attention is paid to the rights of all Californians with disabilities. The Bureau of Disability Rights works alongside the California Department of Justice's Bureau of Children's Justice (created in 2015) to protect the rights of young people with disabilities in educational contexts. These two Bureaus have, since their creation, consistently defended the rights of students with disabilities under Section 504 and other relevant laws.⁶

³ Nat'l Ctr. for Educ. Statistics, Fast Facts – Students with Disabilities, <https://nces.ed.gov/fastfacts/display.asp?id=60> (citing 2015-2016 school year data).

⁴ See Cal. Civ. Code § 54.

⁵ E.g., Cal. Educ. Code § 201(g); Gov't Code § 11135.

⁶ See, e.g., Press Release, California Attorney General Rob Bonta, Attorney General Bonta *Issues Guidance to Remind Local Officials of Key Legal Protections for Californians with Disabilities* (June 14, 2022) (providing guidance to California businesses and local governments on myriad disability rights topics); Press Release, California Attorney General Xavier Becerra, Attorney General Becerra, *Los Angeles County Enter into Groundbreaking Settlements to Protect the Rights of Youth in the Juvenile Justice System* (Jan. 13, 2021) (sweeping educational reform including for youth with disabilities); Press Release, California Attorney General Xavier Becerra, *Attorney General Becerra Secures Settlements with Barstow and Oroville School Districts to Address Discriminatory Treatment of Students Based on Race and Disability Status* (Aug. 25, 2020) (addressing disproportionate use of exclusionary discipline); Press Release, California Attorney General Xavier Becerra, *Attorney General Becerra Secures Settlement*

Disability rights are of particular importance to my office given the substantial numbers of students with disabilities in California and the challenges they face. Nearly 800,000 K-12 California students have identified disabilities.⁷ These students are over-represented among groups who are subject to other forms of discrimination and disadvantage, including low-income students and students of color.⁸ Students with disabilities score lower on standardized tests, are disproportionately disciplined, and have lower attendance rates.⁹ It is essential that we do everything we can to ensure that schools provide students with disabilities with full and equal access to educational programs and services.

We welcome this opportunity to provide input on ways to strengthen Section 504's implementing regulations, relying on the California Department of Justice's substantial experience in enforcing anti-discrimination laws and ensuring that schools provide full and equal educational opportunity to students. First, we provide recommendations designed to prevent discrimination and discriminatory acts aimed at students with disabilities. Second, we propose changes to maximize the integration of students with disabilities into educational programs and services alongside their peers without disabilities. Third, we recommend changes relating to how recipients should employ affirmative tools used by students with disabilities to ensure they have access to educational services and programs. Fourth, we provide recommendations designed to ensure implementation of effective and consistent procedures to comply with Section 504's mandates. Finally, we propose a shift to people-first language consistent with other federal and state anti-discrimination statutes.

1. DISCRIMINATORY ACTS PROHIBITED

The Section 504 education regulations should be updated to clarify the scope of prohibited discriminatory acts, specifically the overuse of restraint and seclusion, school removals on the basis of disability, and disability-based harassment. When a recipient is in noncompliance, the Section 504 education regulations should reflect that remedial actions include steps to end discrimination, remedy its effects, and prevent recurrence.

Against Online Special Education Services Provider, Requiring Independent Expert Review (Aug. 19, 2020) (false advertisement regarding virtual special education services); Press Release, California Attorney General Xavier Becerra, *Attorney General Becerra Issues Alert Reminding California Schools of their Obligations to Protect the Civil Rights of All Students* (Feb. 4, 2019) (reminding school districts to continue following California law after rescission of important guidance on discipline of children with disabilities).

⁷ Cal. Legis. Analyst's Off., *Overview of Special Education in California*, 3 (Nov. 6, 2019), <https://lao.ca.gov/reports/2019/4110/overview-spec-ed-110619.pdf>.

⁸ *Id.* at 8.

⁹ *Id.* at 12.

A. Preschool-12 Restraint and Seclusion

The Preschool, Elementary, and Secondary Education Section 504 education regulations are silent on the use of restraint and seclusion for students with disabilities.¹⁰ Indeed, at least as of 2009, no federal regulations proscribed their use.¹¹ ED has documented that improper and excessive use of restraint and seclusion “can have very serious consequences, including, most tragically, death.”¹² ED’s existing guidance “stress[es] that every effort should be made to prevent the need for the use of restraint and seclusion and that any behavioral intervention must be consistent with the child’s rights to be treated with dignity and to be free from abuse.”¹³ California law also recognizes that “restraint and seclusion are dangerous interventions, with certain known practices posing a great risk to child health and safety.”¹⁴

ED OCR has found that the use of restraints and seclusion—such as not limiting their use to emergency situations and having policies regarding restraining and secluding only children with disabilities—can violate Section 504 and its existing regulations as recently as late-May 2022.¹⁵ ED OCR’s most recent data collection reflects that over 100,000 children with disabilities were subjected to restraint or seclusion in a single school year.¹⁶ And Black students with disabilities were significantly more likely to be subjected to restraint or seclusion than their peers.¹⁷ ED has recognized that that there “continues to be no evidence that using restraint or seclusion is effective in reducing the occurrence of the problem behaviors that frequently precipitate the use of such techniques.”¹⁸ Existing ED resource documents set forth fifteen principles regarding the use of restraint or seclusion.¹⁹

Similarly, California law proscribes methods of restraint and seclusion and sets the expectation that even allowed forms are interventions of last resort.²⁰ Schools “shall avoid,

¹⁰ See 34 C.F.R. §§ 104.31-.39.

¹¹ U.S. Gov’t and Accountability Off., *Seclusions and Restraints: Selected Cases of Death and Abuse at Public and Private Schools and Treatment Centers*, 2 (May 2009), <https://www.gao.gov/assets/gao-09-719t.pdf>.

¹² U.S. Dep’t of Educ., *Restraint and Seclusion: Resource Document*, iii (May 2012), <https://www2.ed.gov/policy/seclusion/restraints-and-seclusion-resources.pdf>.

¹³ *Id.* at 2.

¹⁴ Cal. Educ. Code § 49005(a).

¹⁵ U.S. Dep’t of Educ., Off. for Civ. Rts., *Horry County Schs.*, OCR Case No. 11-19-5002 (May 24, 2022), <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/11195022-a.pdf> (resolution letter).

¹⁶ U.S. Dep’t of Educ., *2017-18 Civil Rights Data Collection: The Use of Restraint and Seclusion on Children With Disabilities In K-12 Schools*, 5 (Oct. 2020), <https://www2.ed.gov/about/offices/list/ocr/docs/restraint-and-seclusion.pdf>.

¹⁷ See *id.* at 10 (disaggregating by race/ethnicity students with services under IDEA subjected to restraint or seclusion).

¹⁸ U.S. Dep’t of Educ., *Restraint and Seclusion: Resource Document*, at iii.

¹⁹ *Id.* at 12-23.

²⁰ Cal. Educ. Code § 49005.8.

whenever possible, the use of seclusion or behavioral restraint techniques.”²¹ Among other things, schools cannot 1) use restraint or seclusion for “coercion, discipline, convenience, or retaliation,” 2) use methods that impair a student’s breathing, 3) place students facedown with their hands behind their back, or 4) continue a restraint for longer than is necessary to prevent a “clear and present danger of serious physical harm.”²² And California law requires “constant, direct supervision” of students who are placed in seclusion.²³ And California is not alone in proscribing at least some restraint and seclusion. Washington D.C. and forty-six states have laws limiting restraint or seclusion of children in some way.²⁴

The Section 504 education regulations should explicitly limit the scope and circumstances under which recipients can use restraint and seclusion. Specifically, Section 504’s implementing regulations should restrict or ban the use of mechanical and pharmaceutical restraints. Current ED resource documents reflect as a principle that: “[s]chools should never use mechanical restraints to restrict a child’s freedom of movement, and schools should never use a drug or medication to control behavior or restrict freedom of movement (except as authorized by a licensed physician or other qualified health professional).”²⁵ At least thirty states already generally ban the use of mechanical restraint in schools.²⁶

The Section 504 education regulations should also restrict or ban the use of restraint techniques that are likely to result in asphyxiation and death. Restraints that obstruct a student’s airway, otherwise limit a student’s ability to breathe, or place the student face-down on the ground (prone) are particularly dangerous and have no place in schools. ED has already recognized that restraint or seclusion “should never be used in a manner that restricts a child’s

²¹ Cal. Educ. Code § 49005.6.

²² Cal. Educ. Code § 49005.8(a).

²³ Cal. Educ. Code § 49005.8(b).

²⁴ See U.S. Dep’t Of Educ., Compendium Of School Discipline Laws And Regulations For The 50 States, District Of Columbia And The U.S. Territories (2021), <https://safesupportivelearning.ed.gov/sites/default/files/discipline-compendium/School%20Discipline%20Laws%20and%20Regulations%20Compendium.pdf> (only Arkansas, Idaho, North Dakota, and South Carolina appear to lack any laws on restraint and seclusion).

²⁵ U.S. Dep’t of Educ., Restraint and Seclusion: Resource Document, at 12 and 14.

²⁶ See U.S. Dep’t Of Educ., Compendium Of School Discipline Laws And Regulations For The 50 States, District Of Columbia And The U.S. Territories (at least Alabama, Alaska, Colorado, Delaware (subject to an individualized waiver process), Georgia, Hawaii, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Michigan, Mississippi, Montana, Nebraska (subject to an individualized waiver process), New Hampshire, New Jersey, Ohio, Oklahoma, Oregon, Rhode Island, Tennessee, Utah, Vermont, Virginia, West Virginia, Wisconsin, and Wyoming ban mechanical restraints).

breathing or harms the child.”²⁷ California law also bans or restricts many such practices.²⁸ At least thirty other states ban the use of restraints that restrict breathing.²⁹

A 2018 report highlighted the tragic example of a thirteen-year old Davis Unified School District student with autism who died following prolonged prone restraint at Guiding Hands Non-Public School.³⁰ Staff at the private school held the student in prone restraint for over an hour and a half.³¹ An investigation revealed that the student told his teacher he was going to vomit and pleaded to use the restroom, but was forced to urinate on himself.³² He became unresponsive during the restraint and later died.³³

The California Department of Justice proposes that the Section 504 education regulations expressly proscribe the use of restraints and seclusion of students with disabilities consistent with existing ED OCR guidance, California law, and a majority of states’ laws. We have provided proposed draft language for consideration in a new subdivision (d) of section 104.36:

(d) Restraint and Seclusion

(1) A recipient may not use seclusion or a behavioral restraint unless it is to control behavior that poses a clear and present danger of serious physical harm to the student or others that cannot be immediately prevented by a response that is less restrictive.

(2) A recipient shall not do any of the following:

(A) Use seclusion or a behavioral restraint for the purpose of coercion, discipline, convenience, or retaliation.

(B) Use locked seclusion, unless it is in a facility otherwise licensed or permitted by state law to use a locked room.

(C) Use a physical restraint technique that obstructs a student’s respiratory airway or impairs the student’s breathing

²⁷ U.S. Dep’t of Educ., Restraint and Seclusion: Resource Document, at 12 and 16-17.

²⁸ Cal. Educ. Code § 49005.8(a).

²⁹ See U.S. Dep’t Of Educ., Compendium Of School Discipline Laws And Regulations For The 50 States, District Of Columbia And The U.S. Territories (at least Alaska, California, Colorado, Connecticut, Florida, Georgia, Hawaii, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Mississippi, New Hampshire, New Jersey, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming ban restraints that restrict breathing).

³⁰ *Protect Children’s Safety and Dignity: Recommendations on Restraint and Seclusion in Schools*, Disability Rts. Cal., 3, https://www.disabilityrightsca.org/system/files/file-attachments/Restraint_and_Seclusion_Report.pdf.

³¹ *Id.*

³² *Id.*

³³ *Id.*

or respiratory capacity, including techniques in which a staff member places pressure on a student's back or places his or her body weight against the student's torso or back.

(D) Use a behavioral restraint technique that restricts breathing, including, but not limited to, using a pillow, blanket, carpet, mat, or other item to cover a student's face.

(E) Use a prone restraint on a student, including placing a pupil in a facedown position with the pupil's hands held or restrained behind the pupil's back.

(F) Use a mechanical restraint on a student, except if it is necessary to prevent a clear danger to self or others and other less-restrictive means have been tried and failed.

(G) Use a drug or medication to control behavior or restrict freedom of movement (except as authorized by a licensed physician or other qualified health professional).

(H) Use a behavioral restraint for longer than is necessary to contain the behavior that poses a clear and present danger of serious physical harm to the student or others.

(3) A recipient shall keep constant, direct observation of a student who is in seclusion, which may be through observation of the student through a window, or another barrier, through which the educational provider is able to make direct eye contact with the student. The observation required pursuant to this subdivision shall not be through indirect means, including through a security camera or a closed-circuit television.

(4) A recipient shall afford to students who are restrained the least restrictive alternative and the maximum freedom of movement, and shall use the least number of restraint points, while ensuring the physical safety of the student and others.

B. Preschool-12 Manifestation Determinations Before Disciplinary Changes of Placement

The Preschool, Elementary, and Secondary Education Section 504 education regulations lack clarity on the protections afforded to students with disabilities who are removed from class or school because of behaviors that are either related to their disability or have arisen because the school has not accommodated their disability. It is well-documented that school removals lead to

a range of negative educational outcomes.³⁴ ED OCR's most recent data show that students with disabilities represent thirteen percent of K-12 enrollment in the United States, yet these students receive twenty-five percent of out-of-school suspensions.³⁵ The manifestation determination is an important procedural protection for students with disabilities.

Based on existing Section 504 education regulations requiring an evaluation prior to a change in placement, ED OCR has long-interpreted the existing regulations to require a manifestation determination review meeting to determine whether the child's disability caused the behavior at issue for disciplinary changes of educational placement in excess of ten days.³⁶

The Supreme Court has held that ten days of removal is a "serious life event" regarding the basic procedural rights of all students facing school discipline:

A short suspension is, of course, a far milder deprivation than expulsion. But, 'education is perhaps the most important function of state and local governments,' (citation) and the total exclusion from the educational process for more than a trivial period, and certainly if the suspension is for 10 days, is a serious event in the life of the suspended child. Neither the property interest in educational benefits temporarily denied nor the liberty interest in reputation, which is also implicated, is so insubstantial that suspensions may constitutionally be imposed by any procedure the school chooses, no matter how arbitrary.³⁷

In the same vein, the Supreme Court later created the right to a manifestation determination under IDEA in *Honig v. Doe*, holding that schools cannot "unilaterally exclude disabled children from the classroom for dangerous or disruptive conduct growing out of their disabilities."³⁸ A bipartisan Congress then substantively³⁹ adopted *Honig's* approach by

³⁴ E.g., Christina LiCalsi, David Osher, Paul Bailey, *An Empirical Examination of the Effects of Suspension and Suspension Severity on Behavioral and Academic Outcomes*, Am. Insts. for Rsch., 32-42 (Aug. 2021), <https://www.air.org/sites/default/files/2021-08/NYC-Suspension-Effects-Behavioral-Academic-Outcomes-August-2021.pdf>.

³⁵ U.S. Dep't of Educ., U.S. Department of Education's Office for Civil Rights Seeks Information on the Nondiscriminatory Administration of School Discipline (June 4, 2021), <https://www.ed.gov/news/press-releases/us-department-educations-office-civil-rights-seeks-information-nondiscriminatory-administration-school-discipline>.

³⁶ E.g., U.S. Dep't of Educ., Off. for Civ. Rts., Pitt County Schs., Case No. 11-13-1266 (Mar. 11, 2014), <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/11131266-a.pdf> (resolution letter).

³⁷ *Goss v. Lopez*, 419 U.S. 565, 576 (1975) (quoting *Brown v. Board of Education*, 347 U.S. 483, 493 (1954)).

³⁸ 484 U.S. 305, 308 (1988) (superseded by statute as to the availability to schools of a dangerousness exception to stay put).

³⁹ Procedurally, *Honig* had posited the disciplinary protection in the so called stay-put right much like ED OCR has interpreted the evaluation requirements of the Section 504 education regulations to include a manifestation determination evaluation. *Id.* at 323.

codifying the manifestation determination requirement in IDEA's 1997 reauthorization.⁴⁰ Under IDEA's regulations, children with disabilities are entitled to a manifestation determination review meeting prior to a change in placement.⁴¹ A change in placement is defined to include removal of a student from instruction in excess of ten days under circumstances that reflect a pattern of removals.⁴² California special education law incorporates IDEA's regulations by reference.⁴³

To ensure that the regulatory text is consistent with ED OCR guidance and decades of developments in education law, the California Department of Justice proposes that the Section 504 education regulations expressly require recipients to conduct a manifestation determination review prior to making a disciplinary change of placement as defined. We have provided proposed draft language for consideration in a new subdivision (e) of section 104.36:

(e) Manifestation Determinations

(1) A recipient may not remove a student with a disability from their educational placement for more than ten school days—including patterns of removal that amount to a total of ten school days in a school year—unless a team, which includes the student's teacher, the parent(s)/guardian(s) of a student with a disability, and a school administrator, has conducted a manifestation determination evaluation and agreed that the behavior at issue was neither the result of the student's disability nor the result of a failure to implement the student's 504 plan.

(2) A manifestation determination evaluation is an evaluation of the student with a disability to determine whether behavior resulting in a disciplinary infraction is the result either of the student's disability or of a failure to implement the student's 504 plan.

C. Disability-Based Harassment

Section 504 education regulations do not explicitly state that recipients are required to prohibit and prevent disability-based harassment of students, whether that harassment is by the agent/employee of the recipient or by fellow students. ED OCR, however, has correctly explained that Section 504 requires recipients to respond to harassment or bullying of students on

⁴⁰ See IDEA Amendments of 1997, 105 P.L. 17, 111 Stat. 37, § 615(k)(4) (1997) (codified at 20 U.S.C. § 1415(k)(4) (1999)).

⁴¹ 34 C.F.R. § 300.530(e) (2022).

⁴² 34 C.F.R. § 300.536(a) (2022).

⁴³ Cal. Educ. Code § 48915.5(a) (requiring school districts to follow IDEA and its regulations prior to expelling a child with a disability).

account of their disabilities that limits or denies students' ability to participate in or receive educational services and sets forth specific steps for meeting that obligation.⁴⁴ This guidance makes clear that recipients violate Section 504 and its implementing regulations when student harassment based on disability is sufficiently serious that it creates a "hostile environment," whenever such harassment is "encouraged, tolerated, not adequately addressed, or ignored by school employees."⁴⁵ Indeed, the Ninth Circuit has noted that disability-based hostile learning environment claims are likely cognizable under Section 504 and its regulations.⁴⁶

ED OCR should amend the regulations to explicitly incorporate these requirements. That approach is informed by the California Department of Justice's efforts to ensure that schools respond to student harassment of all types.⁴⁷ It is also consistent with previous enforcement efforts of ED OCR, which has applied standards similar to those proposed here.⁴⁸

The California Department of Justice proposes that the Section 504 education regulations expressly define and prohibit harassment on the basis of disability. We have provided proposed draft language that covers some key elements to address disability-based harassment for consideration in a new subdivision (b)(1)(vii) of section 104.4:

⁴⁴ E.g., U.S. Dep't of Educ., Off. for Civ. Rts., Dear Colleague Letter on Schools' Obligations to Protect Students from Student-on-Student Harassment on the Basis of Sex; Race, Color and National Origin; and Disability (Oct. 26, 2010), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf> (inconsistency noted "in some respects" with 2020 amendments to Title IX regulations and Executive Orders 13988 (gender and sexual orientation discrimination) and 14021 (sex, including sexual orientation or gender identity) from 2021); U.S. Dep't of Educ., Off. for Civ. Rts., Dear Colleague Letter on Bullying of Students with Disabilities (Oct. 21, 2014), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-bullying-201410.pdf>.

⁴⁵ U.S. Dep't of Educ., Off. for Civ. Rts., Dear Colleague Letter on Bullying of Students with Disabilities, 4.

⁴⁶ *McIntyre v. Eugene Sch. Dist. 4J*, 976 F.3d 902, 916 (9th Cir. 2020) ("We need not resolve that question here, but the weight of authority supports the conclusion that a hypothetical plaintiff could bring [a disability-based hostile learning environment] claim in different circumstances").

⁴⁷ See, e.g., Press Release, California Attorney General Xavier Becerra, *Attorney General Becerra Secures Settlements with Barstow and Oroville School Districts to Address Discriminatory Treatment of Students Based on Race and Disability Status* (Aug. 25, 2020); Press Release, California Attorney General Xavier Becerra, *Attorney General Becerra Leads Multistate Coalition Opposing U.S. Department of Education Rule that Would Weaken Protections Under Title IX for Survivors of Sexual Harassment and Violence* (Jan. 31, 2019).

⁴⁸ See, e.g., U.S. Dep't of Educ. Off. for Civ. Rts., Palo Alto Unified Sch. Dist., Case No. 09-11-1337 (Dec. 26, 2012), <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/09111337-a.pdf> (resolution letter).

(b) Discriminatory actions prohibited.

(1) A recipient, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of ~~handicap~~ disability:

...

(vii) Permit disability-based harassment of a person with a disability by either students or employees/agents of the recipient, including encouraging, tolerating, failing adequately to address, or ignoring such harassment, that is severe, pervasive, or persistent so as to result in the denial or limitation of the student's ability to participate in or receive education benefits, services, or opportunities.

(A) Once a recipient knows, or should know, of possible disability-based harassment between students, it is responsible for determining what occurred and responding appropriately. The recipient is not responsible for the actions of a harassing student, but rather for its own discrimination in failing to respond appropriately. A recipient may violate Section 504 if: (1) the harassing conduct is sufficiently serious to deny or limit the student's ability to participate in or benefit from the educational program; (2) the recipient knew or reasonably should have known about the harassment; and (3) the recipient fails to respond appropriately.

(B) If an employee or agent of the recipient who is acting, or reasonably appears to be acting, in the context of carrying out these responsibilities engages in disability-based harassment that is sufficiently serious to deny or limit a student's ability to participate in or benefit from the program, the recipient is responsible for the discriminatory conduct.

(C) An appropriate response to harassment includes: (1) conducting a thorough, impartial, and prompt investigation to determine what occurred; and (2) if harassment occurred, taking adequate steps to stop the harassment, prevent recurrence, eliminate the hostile environment if one has been created, and remedy the effects of harassment.

D. Remedial Action

The Section 504 education regulations require a recipient to take the necessary steps to “overcome the effects of the discrimination” when ED OCR finds that it has violated Section 504 or its regulations.⁴⁹ ED OCR has long interpreted this provision to mean that recipients must take all reasonable steps to end the discrimination, overcome the effects of the discrimination, and prevent its recurrence.⁵⁰ It is critical that recipients end identified discrimination and prevent recurrence of such discrimination; providing a remedy to address the effect is important but not enough on its own to stop the discrimination or prevent it from recurring.

The California Department of Justice proposes that the Section 504 education regulations expressly require that recipients take reasonable steps to end the discrimination and prevent its recurrence, and remedy the effects of harassment when ED OCR finds violations of Section 504 and its regulations. We have provided proposed draft language for consideration in subdivision (a)(1) of section 104.6:

(a) Remedial action.

(1) If the Assistant Secretary finds that a recipient has discriminated against persons on the basis of ~~handicap~~ *disability* in violation of section 504 or this part, the recipient shall take such remedial action as the Assistant Secretary deems necessary to *end the discrimination*, overcome the effects of the discrimination, *and prevent recurrence*.

2. ENSURING INTEGRATION

The Section 504 education regulations should be updated to better ensure integration of students with disabilities in the areas of transportation, extracurricular programming, vocational placement, and student housing.

A. Transportation

The Section 504 education regulations contain three provisions addressing transportation issues. First, the Preschool, Elementary, and Secondary Education regulations note that “transportation” is considered a “non-academic and extracurricular service” or “activit[y],” such that recipients must provide it “in such manner as is necessary to afford handicapped students an equal opportunity for participation in such services and activities.”⁵¹ Second, if a Preschool,

⁴⁹ 34 C.F.R. § 104.6(a)(1) (2022).

⁵⁰ *E.g.*, U.S. Dep’t of Educ., Off. for Civ. Rts., Santa Paula Unified Sch. Dist., Case No. 09-15-1355 (Nov. 1, 2016), <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/09181246-a.pdf> (resolution letter; “[t]he response must be tailored to stop the harassment, eliminate the hostile environment, prevent the recurrence of harassment and remedy the effects of the harassment”).

⁵¹ 34 C.F.R. § 104.37(a)(1)-(2) (2022).

Elementary, or Secondary Education recipient places a student with a disability in an educational program not operated by the recipient, it must “ensure that adequate transportation to and from the [the outside program] is provided at no greater cost than would be incurred ... if the person were placed in ... services operated by the recipient.”⁵² Third, the Postsecondary regulations note that, in general terms, no student “shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subject to discrimination” with respect to transportation.⁵³

Despite these provisions, some recipients currently maintain a “separate but equal” system of providing transportation to students with disabilities via separate busses, sometimes derogatorily referred to as the “short bus.”⁵⁴ Indeed, in elementary and secondary schools, the “short bus” has become “an immediately recognizable symbol of children with disabilities in public school,” and as such has developed a stigmatizing “negative connotation for children with disabilities.”⁵⁵ While circumstances undoubtedly exist in which some students with disabilities must be transported via different means from students without disabilities, disability rights advocates have argued that such separate transportation options are overused, and instead should be considered as a system of last resort.⁵⁶ This approach is consistent with broader issues in education of students with disabilities, in which a focus on providing the “least restrictive environment” and a mainstream educational experience is paramount.⁵⁷

The California Department of Justice proposes that the Section 504 education regulations expressly address integration of transportation to the extent possible. We have provided proposed draft language for consideration in a new subdivision (c)(2)(i) of section 104.33 (Preschool, Elementary, and Secondary FAPE), new subdivision (d) of section 104.37 (Preschool, Elementary, and Secondary nonacademic services), and note that this language could also be included, as needed, in a new subdivision (a)(1) of section 104.43 (Postsecondary non-exclusion):

Transportation ...

A recipient to which the subpart applies that provides transportation services to its students shall do so in the least

⁵² 34 C.F.R. § 104.33(c)(2) (2022).

⁵³ 34 C.F.R. § 104.43(a) (2022).

⁵⁴ See, e.g., Stephen A. Rosenbaum, *Full Speed Ahead: Expanding IDEA Idea to Let All Students Ride the Same Bus*, 4 Stan. J. Civ. Rts. & Civ. Liberties 373, 373-74 (2008).

⁵⁵ Wendy F. Hensel, *Sharing the Short Bus: Eligibility and Identity Under the Idea*, 58 Hastings L.J. 1147, 1151 n.22 (2007).

⁵⁶ Rosenbaum, *supra*, 4 Stan. J. Civ. Rts. & Civ. Liberties at 391-92.

⁵⁷ *Id.* at 376 (discussing transportation reform in the contexts of both the least restrictive environment under IDEA and the inclusion mandate of the No Child Left Behind Act); Hensel, *supra*, 58 Hastings L.J. at 1178-79 (discussing transportation reform in the context of the least restrictive environment under IDEA).

restrictive means possible. To the greatest extent feasible, the recipient shall ensure that persons with disabilities are provided transportation via the same means as persons without disabilities.

B. Preschool-12 Extracurricular Programs

The Preschool, Elementary, and Secondary Education Section 504 education regulations apply to “nonacademic and extracurricular services and activities,” including “counseling services, physical recreational athletics, transportation, health services, recreational activities, special interest groups or clubs sponsored by the recipients, referrals to agencies which provide assistance to handicapped people, and employment of students, including both employment by the recipient and assistance in making available outside employment.”⁵⁸ The regulations also state that meal and recess periods constitute nonacademic and/or extracurricular services and/or activities, distinguishing such programs from “academic settings.”⁵⁹

Because the Section 504 education regulations define and separately address extracurricular activities, they are sometimes misinterpreted to indicate that recipients do not have to provide the same degree of equal access to extracurricular programs as compared to academic or curricular programs. Moreover, some recipients may believe they have no obligation to ensure that outside entities comply with Section 504’s requirements in an extracurricular setting, since the recipient’s requirement to provide a Free and Appropriate Public Education is tied to an “education” by its terms.⁶⁰ It is essential, however, that recipients are aware their obligations under Section 504 and its regulations are not satisfied when students with disabilities are denied full and equal access to extracurricular programs and services provided to other students.⁶¹

The California Department of Justice proposes that the Section 504 education regulations clarify that students with disabilities have a right to equal access to, accommodation for, and non-discrimination with respect to extracurricular activities to the same extent as curricular activities. We have provided proposed draft language for consideration in a new subdivision (b)(1) of section 104.34:

⁵⁸ 34 C.F.R. § 104.37(a)(2) (2022).

⁵⁹ 34 C.F.R. § 104.34(b) (2022).

⁶⁰ See 34 C.F.R. § 104.33 (2022).

⁶¹ See, e.g., U.S. Dep’t of Educ. Off. for Civ. Rts., Berkeley Unified Sch. Dist., Case No. 09-14-1158 (Aug. 19, 2014), <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/09141158-a.pdf> (resolution letter where school district thought it was justified in denying a student transportation to extracurricular programs after the recipient found “that participation in the after-school programs was not required in order to provide the Student with a FAPE”).

(b) Nonacademic settings. ...

(1) Recipients shall ensure access to nonacademic extracurricular services and activities for students with disabilities to the same extent as curricular/educational services and activities, whether these programs are operated by the recipient or an outside entity. A recipient shall not deny an accommodation to ensure equal access of students with disabilities to nonacademic or extracurricular services when a similar accommodation would be provided for a curricular/educational service or activity.

C. Vocational Placement

The Section 504 education regulations prohibit discrimination on the basis of disability when a recipient employs a student, both in the K-12⁶² and postsecondary context.⁶³ However, in both contexts the regulations should be strengthened to make clear that all recipients have an obligation to ensure that outside providers of vocational opportunities that are an element of the recipient's programs or services comply with Section 504 and its regulations as well.

In the K-12 context, the regulations state that whenever a recipient places or refers a student with a disability for "aid, benefits, or services other than those it operates or provides," it "remains responsible for ensuring that the requirements of this subpart are met with respect to any handicapped person so placed or referred."⁶⁴ Although vocational opportunities facilitated by a K-12 school, such as privately-run occupation programs, should be considered a "service" or "program" covered by Section 504 mandates, the regulations do not specifically state that recipients must ensure that outside entities at which a student is placed for a vocational opportunity comply with Section 504 and its regulations.⁶⁵

The regulations also impose a similar requirement in the postsecondary context, but state that the recipient must "assure itself that [] employment opportunities ... are made available in a manner that would not violate subpart B if they were provided by the recipient" only when the recipient "*assists* any agency, organization, or person in providing employment opportunities."⁶⁶ This language requires recipients to ensure that outside employers comply with the regulations mandates in many circumstances. But it suggests that an outside school-related placement, including a field placement or internship, may not be covered. It also suggests that a recipient must "assist" an employer in providing employment opportunities for it to be required to ensure that the employer complies with the regulation's mandates, even where such employment is

⁶² 34 C.F.R. § 104.37(a)(2) (2022).

⁶³ 34 C.F.R. § 104.46(c) (2022).

⁶⁴ 34 C.F.R. § 104.33(b)(3) (2022); *see also* § 104.37(a)(2) (2022) (stating that "assistance in making available outside employment" is a service or activity covered by Section 504's mandates).

⁶⁵ *See* 34 C.F.R. § 104.33 (2022).

⁶⁶ 34 C.F.R. § 104.46(b) (2022) (emphasis added).

required as part of a recipient’s educational program. These results are contrary to Section 504’s intent, and can place significant hardships on students with disabilities in vocational programs with a practical component, such as nursing programs, which require students to secure outside placement at private entities that may not be in compliance with Section 504.

The California Department of Justice proposes that the Section 504 education regulations expressly require recipients to ensure protection of students in vocational field placements and internships, both in the K-12 and postsecondary contexts. We have provided proposed draft language for consideration in new subdivisions (a)(3) of section 104.37 and (d) of section 104.46:

34 C.F.R. § 104.37

(a) ...

(3) If outside placement, including field placement or an internship, whether paid or unpaid, is offered as part of any program or service of the recipient, the recipient shall ensure that the outside placement complies with subparts B and D prior to and during the placement.

34 C.F.R. § 104.46

...

(d) If outside placement, including field placement or an internship, whether paid or unpaid, is offered as part of any program or service of the recipient, the recipient shall ensure that the outside placement complies with subparts B and E prior to and during the placement.

D. Postsecondary Student Housing

The Postsecondary Section 504 education regulations require that student housing in postsecondary education be accessible “as a whole.”⁶⁷ Nevertheless, students with disabilities continue to face barriers to equal access to student housing and continue to be insufficiently integrated with their peers.⁶⁸ Too often, students with disabilities have been charged for

⁶⁷ 34 C.F.R. § 104.45 (2022).

⁶⁸ See, e.g., U.S. Dep’t of Educ. Off. for Civ. Rts., Eastern Univ., Case Nos. 03-17-2078 and 03-17-2378 (Jan. 24, 2018), <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/03172078-a.pdf> (resolution letter regarding, among other things, whether failing to provide single-occupancy rooms due to inadequate supply was a violation).

reasonable accommodations—like wheelchair-accessible rooms and air conditioners—that should be provided at no additional cost.⁶⁹

The California Department of Justice proposes that the Section 504 education regulations clarify the requirement for student housing and expressly state that reasonable accommodations must be provided at no additional cost. We have provided proposed draft language for consideration in subdivisions (a) and (b) of section 104.45:

(a) Housing provided by the recipient. A recipient that provides housing to its ~~nonhandicapped~~ students *without disabilities* shall provide comparable, convenient, and accessible housing to ~~handicapped~~ students *with disabilities* at the same cost as to others *and in the most integrated setting possible. A recipient may not charge the student for a reasonable accommodation.* At the end of the transition period provided for in subpart C, such housing shall be available in sufficient quantity and variety so that the scope of ~~handicapped students~~² *students with disabilities*' choice of living accommodations is, as a whole, comparable to that of students without disabilities.

(b) Other housing. A recipient that assists any agency, organization, or person in making housing available to any of its students shall take such action as may be necessary to assure itself that such housing is, as a whole, made available in a manner that does not result in discrimination on the basis of ~~handicap~~ *disability, including by ensuring that housing for students with disabilities is in the most integrated setting and comparable, convenient, and accessible to that of students without disabilities.*

3. ACCESSIBILITY

The Section 504 education regulations should be updated to address accessibility of modern classrooms through technology and an inclusive definition of service animals.

A. Technology

The Section 504 education regulations are silent on technology aside from a statement that students with disabilities should be provided “educational auxiliary aids” and other “effective methods” of communication as needed to prevent exclusion from participation or

⁶⁹ *E.g.*, U.S. Dep’t of Educ. Off. for Civ. Rts., Adrian Coll., Case No. 15-17-2049 (Apr. 2, 2019), <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/15172049-a.pdf> (resolution letter regarding surcharges for air conditioning and providing single-occupancy rooms as reasonable accommodations); U.S. Dep’t of Educ. Off. for Civ. Rts., SUNY Cortland, Case Nos. 02-17-2071 and 02-17-2164 (Aug. 31, 2017), <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/02172071-a.pdf> (resolution letter regarding surcharges for wheel-chair accessible rooms).

discrimination.⁷⁰ However, technology has an increasingly important role in at least two educational contexts relevant to Section 504. First, the websites, intranet services, and social media communications of recipients are increasingly interwoven with both their educational and non-curricular services and programs, and thus must be accessible to students and parents/guardians with disabilities.⁷¹ Second, it is essential for the Section 504 education regulations to account for the many aids now available to students with disabilities due to technological advances, and that such technology aids may be necessary to ensure equal educational access. Because *both* of these issues are addressed in detail in other federal statutes and regulations, we recommend that the Section 504 education regulations incorporate clearer guidance from these sources to ensure consistency and that all recipients are aware of compliance requirements.

First, given the equal access mandates of Section 504, all public and student-facing methods of electronic communication must be accessible to and usable by students with disabilities.⁷² A different portion of the Rehabilitation Act—Section 508—already requires that federal agencies’ electronic and information technology be accessible to usable by people with disabilities.⁷³ Pursuant to Section 504, in 2017, the United States Access Board published detailed regulations for federal agencies on how to ensure their websites are compliant.⁷⁴ Because the Section 504 regulations contain no similar guidance, and providing clear guidance is important to ensure consistency and website accessibility, the California Department of Justice recommends the education regulations either incorporate Section 508 guidance or the Web

⁷⁰ 34 C.F.R. § 104.44(d) (2022). The U.S. Department of Justice Section 504 regulations contain an explicit requirement to provide “effective communication.” 29 C.F.R. § 39.160; *see also K.M. ex rel. Bright v. Tustin Unified Sch. Dist.*, 725 F.3d 1088, 1099–100 (9th Cir. 2013). ED OCR may consider amending or expanding the education regulation at 34 C.F.R. § 104.36 to clarify the existing requirement to provide “effective methods” of various forms of communication to also clearly state that “effective communication” is a requirement of Section 504, similar to the Department of Justice regulations; placing it in that section of the Section 504 education regulations would further help ensure communication access for parents/guardians as well as for students.

⁷¹ *See, e.g.,* Lainey Feingold, *Digital Accessibility and the Quest for Online Equality*, 21 J. Internet L. 3 (2017); Cynthia A. Dieterich et al., *Online Accessibility for Students with Disabilities in Higher Education*, 377 Ed. Law Rep. 839 (2020); Shawn Grant, *Lessons from the Pandemic: Congress Must Act to Mandate Digital Accessibility for the Disabled Community*, 55 U. Mich. J.L. Reform 45, 46 (2021).

⁷² *See* 34 C.F.R. § 104.44(d) (2022) (specifying auxiliary aids in Postsecondary education).

⁷³ 29 U.S.C. § 794d.

⁷⁴ 36 C.F.R. § 1194.1 (2022); 36 C.F.R. Part 1194 Appendix A (2022).

Content Accessibility Guidelines.⁷⁵ This would be consistent with, and supported by, existing ED OCR compliance efforts addressing website accessibility.⁷⁶

Second, even where a recipient’s public-facing or intranet sites comply with Section 508 or similar guidance, that does not necessarily mean the recipient has met Section 504’s requirement to provide equal access for a specific individual with a disability.⁷⁷ Schools increasingly rely on emerging technological tools that enable more effective teaching of their students, including assistive technology designed to increase access for students with disabilities and provide a Free Appropriate Public Education. ED OCR has provided guidance on this subject, but that guidance has been limited to discussing the importance of providing Electronic Book Reader technology when necessary for students.⁷⁸ ED OCR’s guidance does acknowledge that the Section 504’s mandates can apply “beyond electronic book readers to other forms of emerging technology,” as well as to “online courses and other online content,” but the regulations remain silent on what sort of “emerging technology” might be required as an “educational auxiliary aid.”⁷⁹ Both “assistive technology” and “auxiliary aids and services” have already been defined in other federal laws and regulations protecting people with disabilities.⁸⁰ These definitions combine to provide important information to recipients regarding the types of technological tools that should be considered necessary to ensure students with disabilities have full and equal access to educational programs and services.

The California Department of Justice proposes further defining the terms “assistive technology” and “auxiliary aids” to ensure that recipients have a comprehensive understanding of the types of tools that may be needed to provide FAPE and equal and effective communication

⁷⁵ Web Accessibility Initiative, Web Content Accessibility Guidelines (March 18, 2022), <https://www.w3.org/WAI/standards-guidelines/wcag/>.

⁷⁶ U.S. Dep’t of Educ. Off. for Civ. Rts., Settlements Reached in Seven States, One Territory to Ensure Website Accessibility for People with Disabilities (June 29, 2016), <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/20160629.html>.

⁷⁷ Guidance provided by the U.S. Department of Health and Human Services notes that “an agency may need to provide an appropriate auxiliary aid to an individual with a disability, regardless of whether information on its website meets accessibility requirements under Section 508.” U.S. Dep’t of Health and Human Servs., What Is Section 504 and How Does It Relate to Section 508? (Aug. 19, 2015), <https://www.hhs.gov/web/section-508/what-is-section-504/index.html>.

⁷⁸ U.S. Dep’t of Justice, Civ. Rts. Div. & U.S. Dep’t of Educ., Off. for Civ. Rts., Guidance on Use of Electronic Book Readers and Other Emerging Technologies (June 29, 2010), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-20100629.pdf>; U.S. Dep’t of Educ., Off. for Civ. Rts., Guidance on Use of Electronic Book Readers and Other Emerging Technologies (Follow-Up to 2010 Guidance) (May 26, 2011), <https://www2.ed.gov/about/offices/list/ocr/docs/dcl-ebook-faq-201105.html>.

⁷⁹ U.S. Dep’t of Educ., Off. for Civ. Rts., Guidance on Use of Electronic Book Readers and Other Emerging Technologies (Follow-Up to 2010 Guidance) at 5.

⁸⁰ *E.g.*, 29 U.S.C. § 3002(4) (Assistive Technology Act); 28 C.F.R. § 35.104 (Americans with Disabilities Act, Title II regulations).

access in K-12 and postsecondary education, respectively. We have provided proposed draft language for consideration in new subdivisions (n) and (o) of section 104.3:

(n) Assistive technology means any item, piece of equipment, or product system, whether acquired commercially, modified, or customized, that is used to increase, maintain, or improve functional capabilities of individuals with disabilities.

(o) Auxiliary aids and services includes—

(1) Qualified interpreters on-site or through video remote interpreting (VRI) services; notetakers; real-time computer-aided transcription services; written materials; exchange of written notes; telephone handset amplifiers; assistive listening devices; assistive listening systems; telephones compatible with hearing aids; closed caption decoders; open and closed captioning, including real-time captioning; voice, text, and video-based telecommunications products and systems, including text telephones (TTYs), videophones, and captioned telephones, or equally effective telecommunications devices; videotext displays; accessible electronic and information technology; or other effective methods of making aurally delivered information available to individuals who are deaf or hard of hearing;

(2) Qualified readers; taped texts; audio recordings; Brailled materials and displays; screen reader software; magnification software; optical readers; secondary auditory programs (SAP); large print materials; accessible electronic and information technology; or other effective methods of making visually delivered materials available to individuals who are blind or have low vision;

(3) Acquisition or modification of equipment or devices; and

(4) Other similar services and actions.

B. Service Animals

The Postsecondary Section 504 education regulations state that a recipient may not prohibit “dog guides” used by students with disabilities, but otherwise make no reference to, nor provide rules regarding, service animals.⁸¹ The Preschool, Elementary, and Secondary Education

⁸¹ 34 C.F.R. § 104.44(b) (2022).

Section 504 education regulations make no mention of service animals.⁸² Regulations implementing Title II of the Americans with Disabilities Act contain requirements applicable to all public entities (including public schools) regarding accessibility and “service animals.”⁸³ Nevertheless, the lack of specific guidance in Section 504 regarding this issue, especially as service animals have become more widely utilized by students with disabilities other than visual impairments, has led to confusion and litigation.⁸⁴ And as ED OCR’s own enforcement efforts have shown, recipients sometimes respond with skepticism and hostility to students with non-visual disabilities who legitimately assert their right to utilize a service animal.⁸⁵

The California Department of Justice therefore proposes removing the outdated term “dog guides” and replacing it with the phrase “service animals,” as defined by existing federal law, clarifying the scope of service animals, and clarifying that students in Preschool-12 can also be entitled to bring a service animal(s) to school. We have provided proposed draft language for consideration in new subdivision (o) of Section 104.3, new subdivision (c)(6) of section 104.33 for Preschool-12 and new subdivision (b)(1) of section 104.44 for postsecondary:

§ 104.3 Definitions.

...

(o) Service animal is defined in accordance with its definition in 28 C.F.R. 35.104.

§ 104.33 Free appropriate public education.

...

(c) Free education –

...

⁸² See 34 C.F.R. § 104.31-.39 (2022).

⁸³ 28 C.F.R. § 35.136 (2022).

⁸⁴ See generally Susan G. Clark, *The Use of Service Animals in Public Schools: Legal and Policy Implications*, 254 Educ. Law Rep. 1 (2010); *Fry v. Napoleon Cmty. Sch.*, 580 U.S. 154, ___, 137 S. Ct. 743, 758-59 (2017) (holding, 9-0, that kindergarten student with cerebral palsy had a cognizable Section 504 claim for denial of service animal).

⁸⁵ See, e.g., U.S. Dep’t. of Educ., Off. for Civ. Rts., Calaveras Unified Sch. Dist., Case No. 09-20-1152 (Nov. 18, 2019), <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/09201152-a.pdf> (resolution letter); U.S. Dep’t. of Educ., Off. for Civ. Rts., Menifee Union Sch. Dist., Case No. 09-19-1563 (Nov. 22, 2019), <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/09191563-a.pdf> (resolution letter).

(6) A recipient shall not limit the use or availability of service animals to students with vision-based disabilities or any other disability, but rather shall permit the usage of any service animal reasonably necessary to ensure the equal participation of students with any disability in the recipient's education program or activity.

§ 104.44 Academic adjustments.

...

(b) Other rules. A recipient to which this subpart applies may not impose upon ~~handicapped~~ students *with disabilities* other rules, such as the prohibition of tape recorders in classrooms or of ~~dog guides~~ *service animals* in campus buildings, that have the effect of limiting the participation of ~~handicapped~~ students *with disabilities* in the recipient's education program or activity.

(1) A recipient shall not limit the use or availability of service animals to students with vision-based disabilities or any other disability, but rather shall permit the usage of any service animal reasonably necessary to ensure the equal participation of students with any disability in the recipient's education program or activity.

4. CLARIFYING PROCEDURES

The Section 504 education regulations should be updated to address a variety of procedural issues. These include clarifying that child find requirements include evaluation, requirements to ensure that evaluations are appropriate, setting specific timelines for evaluations, clarifying impartial hearing requirements, protecting students' right to stay put in their educational placement pending a dispute, further clarifying that contractors like private and virtual schools are covered entities, codifying existing guidance regarding school placements outside a recipient's usual jurisdictional limits, and making conforming changes to the way that IDEA is cited.

A. Preschool-12 Child Find—Identifying, Locating, and Evaluating Public School Students

The Preschool, Elementary, and Secondary Education Section 504 education regulations require procedures for identifying and locating people with disabilities who are *not* receiving a public education, but its child find provision does not clearly require public recipients to locate

and identify people with disabilities who *are* receiving a public education.⁸⁶ The regulations require recipients to take appropriate steps to notify the parents/guardians of such individuals of the recipients' duties under the regulations.⁸⁷ The regulations also require a recipient to evaluate children suspected of having a disability.⁸⁸ ED OCR has read these provisions together to require recipients to locate, identify, and evaluate public school children who may have a disability under Section 504.⁸⁹

The child find provision of IDEA's regulations expressly requires location, identification, and evaluation of students once found.⁹⁰ This is a critical component to ensure that all students with suspected disabilities are served. The affirmative obligation to locate, identify, and evaluate public school students suspected of a disability at least annually should be clarified in the Section 504 education regulations.

The California Department of Justice proposes that the Section 504 education regulations clarify that on an annual basis public school students should be affirmatively identified, located, and evaluated under the regulations' child find provision. We have provided proposed draft language for consideration in a new subdivisions (b) and (c) of section 104.32:

§ 104.32 ~~Location~~ *Identification, location, evaluation, and notification.* A recipient that operates a public elementary or secondary education program or activity shall annually:

...

(b) Undertake to identify, locate, and evaluate every qualified person with a disability residing in the recipient's jurisdiction who is receiving a public education; and

~~(b)~~ *(c) Take appropriate steps to notify ~~handicapped~~ persons with disabilities and their parents and guardians of the recipient's duty under this subpart.*

⁸⁶ 34 C.F.R. § 104.32(a) (2022).

⁸⁷ 34 C.F.R. § 104.32(b) (2022).

⁸⁸ 34 C.F.R. § 104.35(a) (2022).

⁸⁹ *E.g.*, U.S. Dep't of Educ., Off. for Civ. Rts., Sierra Sands Sch. Dist., Case No. 09-18-1246 (Sep. 10, 2018), <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/09151355-a.pdf> (resolution letter; "school districts must ensure that all students who may have a disability and need services under IDEA or Section 504, are located, identified, and evaluated for special education and disability-related services in a timely manner").

⁹⁰ 34 C.F.R. § 300.111(a)(1)(i) (2022).

B. Preschool-12 Appropriate Evaluations

The Preschool, Elementary, and Secondary Education Section 504 education regulations require that evaluations for eligibility not rely solely on “a single general intelligence quotient” and that tests are administered in a way that accounts for a person’s disability.⁹¹ Federal and California law clarify that special education evaluations must not be culturally biased and must be conducted in the person’s native language.⁹² In another context, the Supreme Court has held that failure to appropriately accommodate and serve English language learners violates Title VI.⁹³

Evaluation is the cornerstone of providing a free appropriate education. The Ninth Circuit has explained that special education’s extensive evaluation procedures “are designed to ensure that this initial evaluation (as well as any subsequent reevaluations) achieves a complete result that can be reliably used to create an appropriate and individualized educational plan tailored to the needs of the child.”⁹⁴ An appropriate evaluation determines the nature and degree of a student’s abilities and disabilities; it is critical that it does not serve as a proxy for lack of exposure to English, for example.⁹⁵ And for a range of reasons, including inadequate evaluation practices, “Black and Hispanic children continue[] to be less likely to be identified with [Autism] than white children.”⁹⁶

The California Department of Justice proposes that the Section 504 education regulations require that evaluations must not be culturally biased, and must be conducted in the person’s native language. We have provided proposed draft language for consideration in new subdivisions (b)(4) and (5) of section 104.35:

(b) Evaluation procedures. A recipient to which this subpart applies shall establish standards and procedures for the evaluation and placement of persons who, because of ~~handicap~~ *disability*, need or are believed to need special education or related services which ensure that:

...

⁹¹ 34 C.F.R. § 104.35(a) and (b) (2022).

⁹² 34 C.F.R. § 300.304(b) and (c) (2022); Cal. Educ. Code § 56320(b) and (c).

⁹³ *Lau v. Nichols*, 414 U.S. 563, 566-69 (1974).

⁹⁴ *Timothy O. v. Paso Robles Unified Sch. Dist.*, 822 F. 3d 1105, 1110 (9th Cir. 2016).

⁹⁵ English Language Learners can be both under- and over-identified as children with disabilities as multi-axial testing is relatively new. *See, e.g.*, Amy Suserman, *English Learners with or at Risk for Disabilities*, Inst. of Educ. Sci. (Aug. 3, 2021), <https://ies.ed.gov/blogs/research/post/english-learners-with-or-at-risk-for-disabilities> (summarizing recent research funded by the National Center for Special Education Research).

⁹⁶ *See, e.g.*, U.S. Dep’t of Health & Human Servs., Centers for Disease Control and Prevention, Spotlight On: Racial and Ethnic Differences in Children Identified with Autism Spectrum Disorder (ASD) (Aug. 27, 2019), <https://www.cdc.gov/ncbddd/autism/addm-community-report/differences-in-children.html>.

(4) The student is assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities;

(5) Assessments and other evaluation materials used to assess a student under this Subpart—

(i) Are selected and administered so as not to be discriminatory on a racial or cultural basis;

(ii) Are provided and administered in the student's native language or other mode of communication and in the form most likely to yield accurate information on what the student knows and can do academically, developmentally, and functionally, unless it is clearly not feasible to so provide or administer;

(iii) Are used for the purposes for which the assessments or measures are valid and reliable;

(iv) Are administered by trained and knowledgeable personnel; and

(v) Are administered in accordance with any instructions provided by the producer of the assessments; and

...

C. Preschool-12 Timely Evaluations

The Preschool, Elementary, and Secondary Section 504 education regulations require procedures for evaluating and reevaluating people with disabilities but do not provide specific minimal requirements to ensure a reasonably prompt evaluation.⁹⁷ ED OCR has interpreted the Section 504 education regulations to include a timeliness component for completing an evaluation and developing a plan to serve a student with a disability, who qualifies under Section 504.⁹⁸ Both federal and California special education law set a specific timeline: 60 days for evaluations.⁹⁹ It is important for students who are only eligible for a Section 504 plan to receive timely evaluation and services; without timelines, semesters and entire academic years quickly waste away without necessary supports and accommodations.

The California Department of Justice proposes that the Section 504 education regulations include the same timeframe for identification and evaluation of students with potential

⁹⁷ 34 C.F.R. § 104.35 (2022).

⁹⁸ *E.g.*, U.S. Dep't of Educ., Off. for Civ. Rts., Gilroy Unified Sch. Dist., Case No. 09-16-1953 (Jan. 25, 2017), <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/09161953-a.pdf> (resolution letter).

⁹⁹ *E.g.*, 34 C.F.R. § 300.301(c) (2022) (establishing a 60 day timeline for initial evaluations); Cal. Educ. Code § 56043(c) (same).

disabilities that is provided for students identified under IDEA, namely 60 days to complete the evaluation and hold a meeting to develop a plan. We have provided proposed draft language for consideration in a new subdivision (b)(6) of section 104.35:

(b) Evaluation procedures. A recipient to which this subpart applies shall establish standards and procedures for the evaluation and placement of persons who, because of ~~handicap~~ *disability*, need or are believed to need special education or related services which ensure that:

...

(6) Testing is completed and a team meeting is convened within 60 days of receiving the parent/guardian's request for the evaluation, or, if the child was identified and located under Section 104.32 of this Subpart, then within 60 days of identification and location.

D. Preschool-12 Impartial Hearings

The Preschool, Elementary, and Secondary Education Section 504 education regulations require recipients to have in place a system of procedural safeguards that includes “an impartial hearing with opportunity for participation by the person’s parents or guardian and representation by counsel.”¹⁰⁰ Recipients that employ fifteen or more staff must have a grievance policy that provides for the “prompt and equitable resolution of complaints.”¹⁰¹ The regulations also provide for notice of procedural safeguards, the opportunity to review educational records and a review procedure for the administrative hearing.¹⁰² The Supreme Court has outlined the basic requirements for due process in administrative hearings: “[t]he fundamental requirement of due process is the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’”¹⁰³ ED OCR has consistently interpreted the impartiality requirement to bar school district employees and district officials, including school district board members, from serving as hearing or review officers.¹⁰⁴

The Section 504 education regulations already provide that one way that a recipient can comply with these requirements is by complying with IDEA’s requirements for such impartial

¹⁰⁰ 34 C.F.R. § 104.36 (2022).

¹⁰¹ 34 C.F.R. § 104.7(b) (2022); *and see E.g.*, U.S. Dep’t of Educ. Off. for Civ. Rts., Barnesville Exempted Sch. Dist., Case No. 15-20-1240 (Feb. 5, 2021), <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/15201240-a.pdf> (resolution letter).

¹⁰² 34 C.F.R. § 104.36 (2022).

¹⁰³ *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

¹⁰⁴ *E.g.*, U.S. Dep’t of Educ. Off. for Civ. Rts., Mathews County Pub. Schs., Case No. 11-14-1017 (Apr. 9, 2014), <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/11141017-a.pdf> (resolution letter).

hearings.¹⁰⁵ IDEA's regulations set forth extensive requirements regarding impartial hearings.¹⁰⁶ Among other things, IDEA's regulations: set forth basic requirements for hearing officers;¹⁰⁷ give parties the right to present evidence and confront and cross-examine witnesses;¹⁰⁸ give parents/guardians the right to a written or electronic transcript of the hearing and findings of fact and decision at no cost;¹⁰⁹ give parents/guardians the right to decide whether the child will be present and whether the hearing will be open to the public;¹¹⁰ and set a 45 day timeline to complete the administrative hearing and issue a decision.¹¹¹ Most parents feel strongly—one way or the other—about whether their child should participate in an administrative hearing. And the right of parents/guardians to decide whether a hearing is public is important to those parents/guardians who seek a public forum to provide transparency. Those basic requirements—a fraction of IDEA's procedural mandate—are just as important under Section 504 as they are under IDEA.

The California Department of Justice proposes that the Section 504 education regulations specify additional basic rights that attach to an impartial hearing. We have provided proposed draft language for consideration as a new subdivision (b) of section 104.36:

(b) Impartial hearings –

(1) A recipient must ensure that the hearing officer is impartial and qualified. The hearing officer may not be an employee of the recipient or have a personal or professional interest that conflicts with the hearing officer's objectivity in the hearing. The hearing officer must possess knowledge of, and the ability to understand, the provisions of Section 504 including its regulations, and legal interpretations by Federal and State Courts. The hearing officer must possess knowledge and ability to conduct hearings.

(2) At hearing, each party shall have right to present evidence and present and question witnesses.

(3) The parent/guardian of a student with a disability shall have the right to a written or electronic transcript of the hearing, findings of fact, and a decision at no cost.

¹⁰⁵ 34 C.F.R. § 104.36 (2022).

¹⁰⁶ 34 C.F.R. §§ 300.507-.515 (2022).

¹⁰⁷ 34 C.F.R. § 300.511(c)(1) (2022).

¹⁰⁸ 34 C.F.R. § 300.512(a)(2) (2022).

¹⁰⁹ 34 C.F.R. § 300.512(a)(4) and (c)(3) (2022).

¹¹⁰ 34 C.F.R. § 300.512(c) (2022).

¹¹¹ 34 C.F.R. § 300.510(c) (2022).

(4) The parent/guardian of a student with a disability shall have the right to decide whether the child will be present and whether the hearing will be open to the public, except to the extent the respondent is also a student and then both parties must agree for the hearing to be public.

(5) A recipient must ensure that the hearing is completed and a written decision issued within 60 calendar days of when the complaint is filed unless the parties agree in writing to a continuance.

E. Preschool-12 Stay Put During Disputes

The Preschool, Elementary, and Secondary Education Section 504 education regulations are silent as to whether a student with a disability will continue to receive an existing service, such as speech therapy or counseling, during the pendency of a dispute. But neither is there any exception to the requirement to provide a free appropriate public education during the pendency of a dispute—recipients remain responsible for educating children during disputes.¹¹² Under federal special education law, children with disabilities in special education are expressly allowed to “stay put” with their then-current education services and placement pending resolution of a dispute.¹¹³ California special education law also identifies this right.¹¹⁴ Courts have recognized the importance of stay put because of the “heightened risk of irreparable harm inherent in the premature removal of a [child with a disability] to a potentially inappropriate educational setting.”¹¹⁵ This right is vital because it ensures that the student has education and supportive services through the duration of any dispute, which may last for semesters, if not years.

The California Department of Justice proposes that the Section 504 education regulations similarly recognize the right to “stay put” during a dispute. We have provided proposed draft language for consideration as a new subdivision (c) of section 104.36:

(c) Stay put. Except as provided in subsection (e)(3), during the pendency of any proceedings conducted pursuant to this section, unless the recipient and the parents otherwise agree, the recipient shall not remove the student from the then-current educational placement until all such proceedings have been completed. If applying for initial admission to a public school,

¹¹² See 34 C.F.R. § 104.33(a) (2022) (responsibility for a FAPE).

¹¹³ 34 C.F.R. § 300.518 (2022).

¹¹⁴ Cal. Educ. Code § 56505(d).

¹¹⁵ *Joshua A. v. Rocklin Unified Sch. Dist.*, 559 F.3d 1036, 1040 (9th Cir. 2009) (discussing Congress’s perceived intent behind creating the stay put right in IDEA).

with the consent of the parents, the student shall be placed in the public school program until all such proceedings have been completed.

F. Covered Entities

The Section 504 education regulations expressly cover a variety of entities as recipients.¹¹⁶ The regulations are clear that they apply to any “entity ... to which Federal financial assistance is extended directly or through another recipient, including any successor, assignee, or transferee of a recipient.”¹¹⁷ But some agencies, such as virtual schools and non-public special education schools that receive federal funding indirectly when a student with a disability is placed by a local education agency, may incorrectly believe that they are not covered by the Section 504 education regulations. In these settings, it is just as important that children with disabilities receive Section 504’s protections.¹¹⁸

The Section 504 education regulations should be revised to clarify that they cover all entities receiving federal funding, even those entities that receive the funding through an intermediary, including when a child is placed by the public education agency or another directly funded recipient. We have provided proposed draft language for consideration in subdivision (f) of section 104.3:

(f) Recipient means any state or its political subdivision, any instrumentality of a state or its political subdivision, any public or private agency, institution, organization, or other entity, or any person to which Federal financial assistance is extended directly or through another recipient, *such as a non-public school or a private virtual school*, including any successor, assignee, or transferee of a recipient, but excluding the ultimate beneficiary of the assistance.

G. Preschool-12 School Responsibility

The Appendix to the current Section 504 education regulations notes that when a recipient places a student with a disability outside of its jurisdiction, it remains responsible for the placement.¹¹⁹ Nevertheless, responsibility disputes occur regularly with respect to serving

¹¹⁶ 34 C.F.R. 104.3(f) (2022).

¹¹⁷ *Id.*

¹¹⁸ See, e.g., Press Release, California Attorney General Xavier Becerra, *Attorney General Becerra Secures Settlement Against Online Special Education Services Provider, Requiring Independent Expert Review* (Aug. 19, 2020) (investigating a provider of virtual special education services).

¹¹⁹ U.S. Dep’t of Educ., Off. for Civ. Rts, Appendix A to Part 104 – Analysis of Final Regulation, comment 23 (Jul. 2017), <https://www.ecfr.gov/current/title-34/part-104/appendix-Appendix%20A%20to%20Part%20104>.

children with disabilities.¹²⁰ The requirement of Section 504 that a recipient remains financially responsible for an outside placement recognized in the Appendix should be incorporated into the text of the regulation itself to help clarify responsibility and minimize such disputes.

The California Department of Justice proposes that this requirement be incorporated into the Section 504 education regulations to remove any confusion about responsibility. We have provided proposed draft language for consideration in a new subdivision (c)(5) of section 104.33:

(c) Free education –

...

(5) If a recipient places a student in a program other than its own, it remains financially responsible for the student, whether or not the other program is operated by another recipient or educational agency. Moreover, a recipient may not place a student in a program that is inappropriate or that otherwise violates the requirements of Subpart D. And in no case may a recipient refuse to provide services to a student with a disability in its jurisdiction because of another person's or entity's failure to assume financial responsibility.

H. Conforming Changes

When the Section 504 education regulations became effective in 1977, IDEA was still called the Education for all Handicapped Children Act of 1975 and generally referred to by its public law number, 94-142.¹²¹ Since that time, that act has been reauthorized and amended numerous times and been renamed IDEA.¹²² Moreover, the modern convention in referencing federal statutes is to refer to them by their location in the United States Code.¹²³

The California Department of Justice suggests amendments to the regulations to cite IDEA instead of the Education for all Handicapped Children Act of 1975 and to cite it by its relevant locations in the United States Code instead of by public law number and section thereof.

¹²⁰ See, e.g., *Orange Cty. Dep't of Educ. v. Cal. Dep't of Educ.*, 650 F.3d 1268 (9th Cir. 2011) (the Ninth Circuit certified a question regarding responsibility for serving court-involved youth under the Individuals with Disabilities Act to the California Supreme Court); *Cal. Sch. Bds. Ass'n v. Brown*, 192 Cal. App. 4th 1507, 1516-17 (2011) (disputes over responsibility for educationally related mental health students under the Individuals with Disabilities Act arose following the veto of state funding).

¹²¹ 34 C.F.R. § 104.3(c) (2022).

¹²² See 20 U.S.C. § 1400(a).

¹²³ The Bluebook: A Uniform System of Citation R.12.1 (Columbia L. Rev. Ass'n et al. eds., 21st ed. 2020) ("Citing official codes is preferable"); cf. *id.* at R.12.2.2(b) ("The historical fact of enactment, amendment, or repeal should be cited to the session laws").

5. USING PEOPLE-FIRST LANGUAGE

Finally, the Section 504 education regulations consistently refer to a “handicapped person” when describing eligible people with disabilities.¹²⁴ Using people-first language when talking with and about people with disabilities is important to ensure appropriate and respectful communication with and about an individual with a disability, and to emphasize the person first, not the disability.¹²⁵ Section 504’s regulation-authorizing provision uses people-first language.¹²⁶ Federal regulations implementing IDEA and the Americans with Disabilities Act use people-first language.¹²⁷ California law also uses people-first language.¹²⁸

The California Department of Justice recommends amendment to use people-first language throughout the Section 504 education regulations. Namely, referring to “people with disabilities,” “people without disabilities,” and “disabilities” (instead of “handicaps”).

6. CONCLUSION

I strongly support the aims of ED OCR in strengthening the protections afforded by ED OCR’s Section 504 regulations. While California’s disability rights laws are designed to address such discrimination, the California Department of Justice continues to receive complaints that, among other things, Californians with disabilities continue to experience barriers in obtaining equal access to education.

These proposed changes are intended to help strengthen Section 504’s education regulations by: addressing discrimination, including disability-based harassment, ensuring education transportation and student housing are provided in most integrated setting possible, increasing accessibility for critical communication tools, and clarifying procedures that help ensure that the Section 504 education regulations are implemented with fidelity. These proposals are generally consistent with longstanding ED OCR interpretations of Section 504 and its regulations, federal education-related disability laws, relevant court decisions, and/or California laws. And they are necessary in order to meet Section 504’s mandate that “[n]o otherwise qualified individual with a disability ... be excluded from the participation in, be denied the

¹²⁴ *E.g.*, 34 C.F.R. § 104.3(j) (2022) (defining the term).

¹²⁵ *See, e.g.*, U.S. Dep’t of Health & Human Servs., Centers for Disease Control and Prevention, Communicating With and About People with Disabilities (Feb. 1, 2022), <https://www.cdc.gov/ncbddd/disabilityandhealth/materials/factsheets/fs-communicating-with-people.html>.

¹²⁶ 29 U.S.C. § 794(a) (“individual with a disability”).

¹²⁷ 34 C.F.R. § 300.8 (2022) (“child with a disability” under IDEA); 28 C.F.R. § 35.104 (2022) (“individual with a disability” under Title II concerning governmental entities); 28 C.F.R. § 36.104 (2022) (“individual with a disability” under Title III concerning places of public accommodation).

¹²⁸ *E.g.*, Cal. Educ. Code § 56026 (“individual with exceptional needs”); Cal. Civ. Code § 54 (“Individuals with disabilities”).

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benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.”¹²⁹

I appreciate your consideration of these comments, and our office welcomes the opportunity to work with the United States Department of Education, Office for Civil Rights to help ensure adoption.

Sincerely,



ROB BONTA
California Attorney General

¹²⁹ 29 U.S.C. § 794(a).