

Section 504 Notice of Proposed Rulemaking Expected August 2023

By Adrienne Kirshner

In May 2022, the U.S. Department of Education announced that it intended to strengthen and protect rights for students with disabilities by amending the regulations implementing Section 504 of the Rehabilitation Act of 1973 (“Section 504”). Section 504 is the federal law that prohibits discrimination on the basis of a disability in public programs, and in private programs and activities that receive federal financial assistance, including schools. As part of the proposed rule-making process, the Office of Civil Rights (“OCR”) sought comments from the public about how to improve the current regulations. The notice of proposed rulemaking process is expected to be announced in August 2023.

During the public comment period, OCR reported receiving over 400 public comments in just the first two months of the lengthy comment period. Public comments were submitted by organizations representing advocates for disability rights and organizations representing school administrators. The public comments submitted by both organizations addressed the same concern: the need for clarification between Section 504 and the Individuals with Disabilities Education Act (“IDEA”). However, the type of clarification sought differed.

The public comments submitted by many disability rights organizations discussed the need to clarify and strengthen obligations entities have under Section 504 and suggested that those clarifications be similar in nature to those found in IDEA. Many of the public comments referenced the need for explicit requirements concerning Manifestation Determination Reviews (“MDR”) prior to changes in placement, with at least one comment going even further and suggesting an MDR should be required every time a disabled student is suspended, a requirement that would go beyond what is required under IDEA, but if implemented would apply to students that qualify under IDEA. Another public comment suggested a requirement similar to that found in IDEA, which would require a student protected under Section 504 to continue to receive educational services even if an MDR finds the student’s conduct was not a manifestation of a disability. Another public comment (borrowing from IDEA) suggested explicitly requiring parental consent for evaluations and requiring re-evaluations every three years. In sum, it appears as if disability rights organizations that submitted public comments were suggesting to make Section 504 more like IDEA, with the only real difference being the absence of the requirement to provide specially designed instruction to students who are found to be disabled only under the Section 504 definition.

While both sets of organizations sought clarity regarding the definition of a free appropriate public education (“FAPE”) under Section 504, organizations representing school administrators made clear in their public comments the desire for a definition that made clear that Section 504 is related solely to providing *access* to the educational environment compared with nondisabled peers. These organizations stressed in their public comments that Section 504 is meant to focus on access to public education, while IDEA focuses on *progress and benefit of* public education. The push from these organizations was to

make that distinction clearer so that Section 504 could return to its vital nondiscrimination purpose of providing reasonable accommodations.

Once the Notice of the Proposed Rulemaking is announced, the process will not yet be complete. It will be published in the *Federal Register* to notify the public of the proposal and give the public an opportunity to provide comments specific to the proposal. The proposed rule and the new set of comments received will form the basis of the final rule.

Given the effect the final rules may have on what schools may be required to do in regards to identifying, evaluating, and providing accommodations to students with disabilities under Section 504, careful attention will need to be paid to the final rules to ensure all local policies and procedures are updated accordingly.

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