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Ms. Catherine E. Lhamon
Assistant Secretary for Civil Rights
Office for Civil Rights (OCR)
U.S. Department of Education
Via Electronic Submission: Section504@ed.gov

July 5, 2022

Re: Request for Written Suggestions Regarding Intended Proposed Amendments to Regulations [34 C.F.R. § 104] implementing Section 504 of the Rehabilitation Act of 1973

Dear Ms. Lhamon,

The Education Law Center-PA (“ELC”) submits these recommendations in response to the Request for Written Suggestions (“RWS”) from the Department of Education’s (“Department”) Office for Civil Rights (“OCR”) concerning how best to improve the regulations (34 C.F.R. § 104) currently implementing Section 504 of the Rehabilitation Act of 1973 (“Section 504”). We appreciate this opportunity to contribute to the Department’s revision of these regulations and share its commitment to improving educational opportunities and outcomes for our nation’s most vulnerable students.

In outreach to interest groups, OCR posed questions related to the clarity, coverage, and effectiveness of the regulations. In a listening session attended by ELC, OCR representatives stressed the importance of prioritizing the most urgent amendments. We have considered each question and, to capture the changes most crucial for student development and well-being, our recommendations emphasize three priority areas. The first is to address the consistent and widespread failure by schools and districts to identify students eligible under Section 504 and provide them effective accommodations. The second is to protect students against discrimination based on disability by ending the repeated, unfair, and harmful application of aversive discipline measures and to delineate clear procedural safeguards for students with disabilities. The third is to ensure accountability for eligible students at the local and state level. As explained below, we believe that the Department can and should address all three priorities and that such action is necessary to protect students with disabilities from disproportionate disciplinary exclusion and ensure equal access to learning as Section 504 commands.

Who We Are

The Education Law Center-PA is a statewide non-profit legal advocacy organization dedicated to ensuring that all of Pennsylvania’s students have access to a quality public education. We advocate on behalf of the most underserved students, including children living in poverty, children of color, children with disabilities, English Language Learners, those who are in the child welfare and juvenile justice systems, LGBTQI+ youth, and students experiencing homelessness.

We work in three strategic areas: enforcing equal access to a quality education, ensuring adequate and fair funding, and dismantling the school-to-prison pipeline. ELC’s work includes individual and impact litigation, statewide, local, and individual advocacy, and providing technical assistance to families and students. We participate in partnerships with grassroots community organizations, as well as with local



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and statewide organizations and agencies. Our advocacy aims to ensure that decisions made by policymakers serve the needs of students who are most marginalized. Over its history, ELC has drafted statewide and federal legislation, regulations, and regulatory guidance.

Our recommendations emanate from ELC’s nearly fifty years of on-the-ground experience, specifically work ensuring fair and equitable access to a free and appropriate public education for all students with disabilities. ELC urges that any amendments promulgated by the Department reflect the varied experiences and intersectionality of students with disabilities and clarify both the rights of students and the responsibilities of schools and districts to narrow widening educational inequalities.

Section 504

Passed as part of the Rehabilitation Act of 1973 (“Act”), Section 504 is a “landmark disability civil rights law.”¹ It informed both the Individuals with Disabilities Education Act (“IDEA”) and the Americans with Disabilities Act (“ADA”), and its regulations, published on May 9, 1977, “were the first issued by the federal government that addressed the treatment of people with disabilities through a civil rights framework, rather than through solely a medical or vocational framework.”²

ELC’s recommendations were prepared in accordance with that purpose and framework, and in furtherance of Section 504’s robust mandate that “[n]o otherwise qualified individual with a disability” shall “solely by reason of [their] disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”³ These recommendations are intended to update Section 504’s implementing regulations, bolster OCR’s enforcement efforts, meet the current needs of students, and fulfill the educational promise of Section 504: to provide full and equal access to learning and growth for students with disabilities.

Priority Recommendations

I. Ensure Prompt Identification and Accommodation of Eligible Students

a. Notice of Section 504 and Identification

The regulations implementing Section 504 require schools as recipients of federal funding (“recipients”) to “undertake to identify and locate every qualified [student with a disability] residing in” the school’s

¹ 29 U.S.C. § 794; U.S. Dep’t of Educ., *U.S. Department of Education Announces Intent to Strengthen and Protect Rights for Students with Disabilities by Amending Regulations Implementing Section 504* (2022), available at <https://www.ed.gov/news/press-releases/us-department-education-announces-intent-strengthen-and-protect-rights-students-disabilities-amending-regulations-implementing-section-504>.

² 20 U.S.C. § 1400 et seq.; 42 U.S.C. § 12101; U.S. Dep’t of Educ., *U.S. Department of Education Announces Intent to Strengthen and Protect Rights for Students with Disabilities by Amending Regulations Implementing Section 504* (2022), available at <https://www.ed.gov/news/press-releases/us-department-education-announces-intent-strengthen-and-protect-rights-students-disabilities-amending-regulations-implementing-section-504>.

³ 29 U.S.C. § 794.

jurisdiction and to “[t]ake appropriate steps to notify [students with disabilities] and their parents of the recipient’s duty under this subpart.”⁴

However, this “child find” obligation lacks the level of specificity required to ensure the rights of qualifying students with disabilities. Unlike federal regulations promulgated under the IDEA,⁵ current regulations under Section 504 do not delineate what it means to “undertake to identify and locate” students and what constitutes “appropriate steps” to notify and inform parents.⁶ This lack of clarity has created confusion about school and district responsibilities, making an already low bar easier to surpass. As a result, in ELC’s experience, children are routinely under-identified as eligible for protection and accommodations under Section 504. Of those identified as eligible under Section 504, many are recognized as such only *after* discipline proceedings have been pursued or chronic truancy draws attention to them. This under-identification results in children with disabilities being disproportionately disciplined and excluded from school or subject to punitive measures due to truancy. Notably, some districts have even reported zero 504-eligible students, though practice and common-sense counsel otherwise.⁷ Anecdotally, data from a two-year ELC fellowship project focused on truancy disclosed that nearly all clients with open truancy cases needed Section 504 Plans.

Once identified, accommodations often depend upon the intervention of an attorney or other advocate. That pattern of events leaves students with disabilities far more susceptible to the school-to-prison pipeline and constitutes discrimination on the basis of disability.⁸

To address these problems, OCR should amend Section 504’s implementing regulations in the following ways:

- i. Add a clear requirement to provide notice to parents and school staff of (1) the duty to identify individuals eligible under Section 504 and (2) the reach of Section 504 protections*

Through ELC’s decades of work, we have observed the dramatic problem of under-identification of eligible students under Section 504. The regulations’ current notification requirement--to “[t]ake appropriate steps” lacks the specificity needed to ensure students are properly identified as eligible under Section 504.⁹ While some flexibility is fitting to address unique district, school, or individual circumstances, the regulations must include a firm requirement to provide notice about both a school’s duty to identify those eligible under Section 504 and the protections applicable to students. Such clear

⁴ 34 C.F.R. § 104.32.

⁵ 34 C.F.R. § 300.111.

⁶ 34 C.F.R. § 104.32.

⁷ DANIEL J. LOSEN, PAUL MARTINEZ, & GRACE HAE RIM SHIN, *DISABLING INEQUITY: THE URGENT NEED FOR RACE-CONSCIOUS RESOURCE REMEDIES*, THE CENTER FOR CIVIL RIGHTS REMEDIES AT THE CIVIL RIGHTS PROJECT, UCLA, 13-14 (2021), <https://www.civilrightsproject.ucla.edu/research/k-12-education/special-education/disabling-inequity-the-urgent-need-for-race-conscious-resource-remedies/final-Report-03-22-21-v5-corrected.pdf> (finding that 306 districts of 1,000 or more students reported zero students eligible for 504-only in 2017-18).

⁸ NAT’L COUNCIL ON DISABILITY, *BREAKING THE SCHOOL-TO-PRISON PIPELINE FOR STUDENTS WITH DISABILITIES* (2015).

⁹ 34 C.F.R. § 104.32.

notice requirements would greatly increase school community and “parent”¹⁰ understanding of Section 504, while expanding parent and school staff capacity to assist in the identification of 504-eligible individuals. This would mitigate the problem of under-identification and simultaneously reduce state recipient administrative loads by increasing local oversight. Any parental notice must be in a form that the parent can understand and ought not be just another piece of paper in the start-of-school-year stack. In making this change, OCR can draw from the regulations’ pre-existing notice of non-discrimination requirement¹¹ and build upon state regulations seeking to implement Section 504.¹²

ii. Add an affirmative obligation to identify individuals eligible under Section 504

OCR must ensure that a recipient’s duty to identify all eligible students under Section 504 is clearly defined. The identification burden presently placed on recipients by Section 504’s implementing regulations—to “[u]ndertake to identify and locate” 504-eligible individuals residing in their jurisdiction—fails to sufficiently delineate a local education agency’s (“LEA”) responsibilities.¹³ In practice, the vague demands of the burden are easily satisfied, allowing many students to remain un-identified. The language employed in the regulations is also problematically limited and outdated, as OCR’s own guidance documents and complaint resolutions indicate.¹⁴

OCR should address this by codifying an expanded and clarified version of 34 C.F.R. §104.32. First, following its own guidance, OCR should expand the language of that section to cover not just those “residing in the recipient’s jurisdiction” but all those in the recipient’s jurisdiction, “regardless of residency status,” in order to include students who are highly mobile or temporarily in residential settings.¹⁵ This more inclusive approach would provide legally accurate coverage for highly mobile students, including students experiencing homelessness. Second, the child find mandate should reference identifying all children who are suspected of being a person with a qualifying disability defined as having (i) a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment. Third, OCR should

¹⁰ Currently, regulations promulgated under Section 504 do not define “parent,” *see e.g.*, 34 C.F.R. § 104.3 (definitions) and 34 C.F.R. §104 Subpart D. We would recommend using a definition of parent similar to 34 C.F.R. § 300.30: (a) Parent means— (1) A biological or adoptive parent of a child; (2) A foster parent, unless State law, regulations, or contractual obligations with a State or local entity prohibit a foster parent from acting as a parent; (3) A guardian generally authorized to act as the child’s parent, or authorized to make educational decisions for the child (but not the State if the child is a ward of the State); (4) An individual acting in the place of a biological or adoptive parent (including a grandparent, stepparent, or other relative) with whom the child lives, or an individual who is legally responsible for the child’s welfare; or (5) A surrogate parent who has been appointed by a school district in cases where no parent can be identified.

¹¹ 34 C.F.R. § 104.8.

¹² *See, e.g.*, 22 Pa. Code 15.4 (annual notice provision).

¹³ 34 C.F.R. § 104.32.

¹⁴ *Questions and Answers on Special Educ. and Homelessness*, 100 LRP 212 (OSERS 02/01/08) (expanding coverage from residents of a recipient’s jurisdiction to all those in a recipient’s jurisdiction); *Celina (TX) Independent School District*, 34 IDELR 41 (OCR 2000) (finding in the school’s favor because they utilized comprehensive approach that included regular and varied strategies for identifying and tracking students with disabilities beyond the simple language of 504’s current regulations); *Garland (TX) Indep. Sch. Dist.*, 4 ECLPR 138 (OCR 1999) (again affirming that a variety of communication methods, including television and newspapers ads, districtwide mailings, and the distribution of information to a wide array of community organizations was sufficient, indicating a higher bar than current regulations).

¹⁵ 34 C.F.R. § 104.32; *Questions and Answers on Special Educ. and Homelessness*, 100 LRP 212 (OSERS 02/01/08).

amend this section to acknowledge the need for discretion in conducting child find activities but also require a comprehensive, multi-tiered approach.¹⁶ Since OCR guidance already outlines such an approach, formalizing it in amendments to the regulations will ensure greater attention to the anti-discrimination steps already required of recipients, increasing rates of compliance and further protecting those with disabilities. But clarity in the regulations is needed to prompt proactive, diligent efforts by LEAs.

iii. Amend the obligation to evaluate to ensure prompt initial identification of students and re-evaluations in response to changes in placement

While improving notice and child find requirements will increase access to accommodations and education for students with disabilities, the barriers they face do not end there. Evaluations themselves, if not conducted appropriately, at the right time, under the right conditions, or with the right approval, can contribute to systemic discrimination. Presently, the regulations dictate that a recipient “shall conduct an evaluation in accordance with” prescribed procedures “of any person who, because of handicap [qualifying disability], needs or is believed to need special education or related services before taking any action with respect to the initial placement of the person in regular or special education and any subsequent significant change in placement.”¹⁷

That language establishes a responsibility to evaluate but fails to clearly articulate when a recipient should suspect a person “needs or is believed to need” special education or related services. This omission undermines the obligation to evaluate and even encourages intentional ignorance on the part of recipients. This also contributes to the under-identification of students. OCR must amend the regulations to include a stronger, more direct, and well-defined mandate that incorporates parent participation, carefully outlines the obligation, and requires evaluations in situations where eligibility is likely.

A revised 34 C.F.R. § 104.35 should require recipients to evaluate Section 504 eligibility under the following conditions: when IDEA eligibility is or has been considered; when a recipient knows or has reason to suspect that a student has a qualifying disability; when a student’s behavior indicates that they may be eligible; or when a parent requests an evaluation. In some instances, these changes merely affirm past OCR decisions.¹⁸ Additionally, OCR should amend Section 504’s regulations to define a “significant change in placement” as (1) a material change in physical placement that impacts the child’s education program, including transfer to an alternative school; (2) the elimination of a service or substantial increase or decrease in a service previously provided to a student with a disability or (3) exclusion for an indefinite period or more than 10 consecutive days or a series of suspensions that are

¹⁶ Cite *Letter to Veir*, 20 IDELR 864 (OCR 1993) (acknowledging need for district discretion); *Celina (TX) Independent School District*, 34 IDELR 41 (OCR 2000); *Garland (TX) Indep. Sch. Dist.*, 4 ECLPR 138 (OCR 1999).

¹⁷ 34 C.F.R. § 104.35.

¹⁸ See e.g., *Aurora (CO) Pub. Schs.*, 61 IDELR 84 (OCR 2013) (sudden visible change in student’s health triggered the school’s responsibility to evaluate); *North Kansas City (MO) #74 Sch. Dist.*, 72 IDELR 166 (OCR 2017) (hospitalization and parent request triggered the school’s responsibility to evaluate); *Yadkin County (NC) Schs.*, 76 IDELR 132 (OCR 2019) (suspicion that a student needed classroom accommodations triggered requirement to evaluate).

each 10 days or fewer in duration thereby creating a pattern of exclusion.¹⁹ This simple adjustment will eliminate disputes over the meaning of “significant” and increase routine evaluation, decreasing the likelihood students with disabilities will enter new placements without proper supports. In addition, OCR should protect individuals with disabilities by requiring parental consent prior to any evaluation, something currently unaddressed in the regulations. Here, again, OCR would simply need to incorporate its own policy.²⁰ But the impact of doing so, by adding both weight and permanence to that policy, would help hold recipients accountable and protect many students with disabilities from unnecessary or potentially harmful placement changes and evaluations in the years to come.

Finally, the regulations should specify a time period for re-evaluations under Section 504 as every three years which must be subject to parental consent and may be waived.

iv. Ensure consistent eligibility by incorporating the 2008 ADA Amendments

In addition to expanding the coverage of evaluations to reach all individuals eligible for Section 504 supports, OCR should amend the regulations to expand the scope of eligibility. The ADA Amendments Act of 2008 did this, and OCR has treated that as sufficient, but in our experience much confusion remains.²¹ That confusion could be resolved by amending Section 504’s implementing regulations and eliminating any perceived discrepancies. OCR should incorporate the ADA Amendments Act of 2008’s definition of eligibility into 34 C.F.R. 104.3(l). For further coherence, OCR should also amend that section to indicate that behavioral health conditions can make an individual eligible and that the substantial-limitation criterion found in 34 C.F.R. 104.3(j)(1)(i) is without any mitigating measures. Neither would require OCR to do more than ratify its own policies, but both will bring clarity.²²

b. Ensure effective accommodations

Even when potentially 504-eligible students are properly notified, identified, and evaluated, they are not guaranteed to receive and benefit from appropriate accommodations. Currently, the regulations show great deference to schools and provide limited opportunities for parental input. Regarding placement procedures, reevaluations, and procedural safeguards, the regulations stop short of implementing consistent safeguards, and instead ask only that a recipient “establish procedures” within general guidelines.²³ In our experience, this leads to wide discrepancies in implementation fidelity. Unpredictable procedural protections and vague Section 504 plans lacking requisite details result in an absence of meaningful and consistent accommodations, undermining the ability of a student with

¹⁹ See *Parent and Educator Resource Guide to Section 504 in Public Elementary and Secondary Schools* (OCR 2016); Sultan (WA) Sch. Dist., 111 LRP 28318 (OCR 10/08/10); *Broward County (Fla) School District*, 36 IDELR 159 (OCR Nov. 19, 2001).

²⁰ *Letter to Durham*, 27 IDELR 380 (OCR 1997).

²¹ Office for Civil Rights, *Questions and Answers on the ADA Amendments Act of 2008 for Students with Disabilities Attending Public Elementary and Secondary Schools*, U.S. DEPARTMENT OF EDUCATION (Jan. 19, 2012), <https://www2.ed.gov/about/offices/list/ocr/docs/dcl-504faq-201109.html>.

²² *Protecting Students with Disabilities: Frequently Asked Questions About Section 504 and the Educ. of Children With Disabilities*, 67 IDELR 189 (OCR 2015).

²³ 34 C.F.R. §§ 104.35, 104.36.

disabilities to equally access education. Moreover, in sharp contrast to the IEP process, parental input and approval is lacking.

To achieve a baseline of uniformity and transparency, OCR should amend the regulations to establish the following, at a minimum: a time period for conducting evaluations and providing accommodations, a requirement that plans be written in the student and parent’s native language, a statement on the purpose and contents of Section 504 plans (with flexibility based on case-by-case student needs), a flexible definition of the 504 team’s membership (which must include a parent, a requirement that 504 Plans be signed by parents and reviewed annually -- subject to parent waiver), along with an explanation of parent due process rights.

These alterations would bring Section 504 and IDEA closer together but would not be a significant departure from current policy. For instance, OCR has long stated that initial evaluations must occur within a “reasonable period of time” and acknowledged that IDEA’s 60-day deadline informs Section 504 reasonableness.²⁴ Relatedly, though the regulations contain no writing requirement, they do recognize the need to provide evaluation materials in a student’s native language, acknowledging the importance of effective, non-discriminatory communication.²⁵ Despite issuing guidance in this area, OCR has often deferred to state regulations.²⁶ Our experience has taught us that in the absence of clear, rigorous and detailed federal requirements, students with disabilities continue to languish and fail to receive the support and services they need and to which they are legally entitled.

II. Discriminatory and Dangerous Use of Discipline

a. The Problem

Although it is well-documented that students with disabilities are regularly subject to harsh discipline for disability-related behavior,²⁷ Section 504’s implementing regulations are practically silent on discipline protections. The absence of such language results in disability discrimination -- a core tenant of Section 504. The Civil Rights Data Collection (“CRDC”) and state-level studies confirm that discipline disparities between students with disabilities and those without disabilities are vast and persistent.²⁸ A regulatory directive is badly needed to stop schools from subjecting students with

²⁴ *Lumberton (MS) Pub. Sch. Dist.*, 18 IDELR 33 (OCR 1991); *Concept Charter Sch. (IL)*, 115 LRP 17593 (OCR 02/13/15).

²⁵ 34 C.F.R. § 104, Appendix A.

²⁶ *Cherry Creek (CO) School District*, 48 IDELR 169 (OCR 2006) (explaining that “in determining what is [a reasonable timeline], OCR looks to state timelines as a guideline.”); *Miami-Dade County Pub. Schs. (FL)*, 118 LRP 45421 (OCR 06/12/18) (establishing that state reevaluation timelines inform OCR decisions when the timing of a reevaluation is challenged).

²⁷ See, e.g., LOSEN ET AL., *supra* note 7, at 23-49 (analyzing CRDC data to demonstrate disparate disciplinary treatment of students with disabilities and related differences in rates of lost instruction due to exclusion).

²⁸ Pennsylvania Advisory Committee to the U.S. Commission on Civil Rights, *Briefing Report: Disparate and Punitive Impact of Exclusionary Practices on Students of Color, Students with Disabilities and LGBTQ Students in Pennsylvania Public Schools* (April 2021), <https://www.usccr.gov/files/2021/04-09-Pennsylvania-Public-Schools.pdf>; Office for Civil Rights, U.S. Department of Education, *2017-2018 Civil Rights Data Collection: The Use of Restraint and Seclusion on*

disabilities to unfair, unnecessarily harsh, and, most importantly, discriminatory disciplinary practices. OCR can address this issue by amending Section 504’s implementing regulations as follows:

i. Clarify that manifestation determination reviews are required by Section 504

Adding a specific clear requirement for manifestation determination reviews to be conducted prior to the imposition of any school discipline, including restraints, exclusion, or changes in placement, would ensure that recipient schools carefully consider a child’s disability and its impact prior to the administration of disciplinary measures. Although the current implementing regulations are silent on the requirement for manifestation determinations under Section 504, numerous educational agencies and OCR have inferred this requirement for significant changes in placement.²⁹ Our experience indicates that the same concerns and discriminatory outcomes animating OCR’s approach to significant changes in placement are found in *all* discipline proceedings and changes in placement, demanding an extension in coverage.

As under IDEA, this requirement will protect students with disabilities from being punished for behavior that is a result of their disability or the failure of a school to follow a student’s Section 504 Plan. This will prevent the discriminatory exclusion of students based on their disabilities. Any student with a qualifying disability must have the right to this review, otherwise they will continue to suffer from the very discrimination Section 504 explicitly forbids. This change would be simple, as OCR can import language from IDEA’s regulations and model state regulations that further implement IDEA and Section 504.³⁰ OCR should also import and build on IDEA’s accompanying procedural requirements to create uniformity and consistency across processes.³¹ This would include provisions identifying required participants in a Section 504 manifestation determination review and simply limiting the number of school representatives, to avoid situations where a recipient “packs the room” to achieve their desired outcome.

ii. Add a “stay put” provision for 504-eligible students with pending dispute resolutions

There is currently no “stay put” provision under Section 504 which prevents a school from unilaterally changing a student’s placement prior to the outcome of a manifestation determination review. This is

Children with Disabilities in K-12 Schools (Oct. 2020), <https://www2.ed.gov/about/offices/list/ocr/docs/restraint-and-seclusion.pdf>.

²⁹ OCR has consistently concluded that manifestation determination reviews must be held for a student eligible under Section 504 prior to significant changes in placement because a school district cannot discipline a student with a disability for behavior that is a manifestation of his disability. *See e.g., Springfield (IL) School District #186*, 55 IDELR 206 (OCR June 29, 2010) (holding that a school district violated Section 504 when it expelled a 7th Grader with ADHD without conducting a manifestation determination); *Dunkin (MO) R-V Sch. Dist.*, 52 IDELR 138 (OCR) (holding that Section 504 required a manifestation determination before a student could be suspended for more than ten days); *South Harrison County (MO) R-II Sch. Dist.*, 51 IDELR 110 (OCR 2008) (holding that a student’s eligibility under Section 504, and not IDEA, did not free a district of its responsibility to conduct a manifestation review).

³⁰ 34 C.F.R. § 300.530(e); *N.Y. Comp. Codes R. & Regs. Tit. 8* § 201.4.

³¹ 34 C.F.R. § 300.500-537.

another way in which Section 504’s protections fail to match those of IDEA and leave students with disabilities vulnerable to discriminatory changes in placement, even in situations where the behavior prompting the change in placement is later determined to have been a manifestation of the student’s disabilities. OCR itself has said that “a fair due process system [under Section 504] would encompass a district waiting for the results of due process before making the change.”³² It is time to close this loophole and prevent discriminatory changes in placement, which disrupt learning and have long-term consequences for those students who need stability and support services the most.

iii. Ensure protections for students with disabilities from the use of restraint and seclusion

Given the unique vulnerabilities of students with disabilities, and the known disproportionate use of restraints and seclusion against them, OCR must amend Section 504’s implementing regulations to address the discrimination these students face through the application of restraints and seclusions. We believe that OCR should ban recipients’ use of restraint and seclusion for all students. In the absence of this action, OCR should incorporate guidance from the Department’s 2016 *Dear Colleague Letter: Restraint and Seclusion of Students with Disabilities*, which made clear that the use of restraints and seclusion on students with disabilities can violate Section 504, the circumstances under which it does, and the responses required from schools when it does.³³ The regulations should also include clear definitions of what constitutes a restraint, what forms of restraint or seclusion are strictly prohibited, and articulate a high standard for the use of restraints. For example, some states have prohibited school personnel from using restraints such as zip ties, handcuffs and straightjackets and banned the use of seclusion techniques,³⁴ or prohibited the use of prone restraints.³⁵ Pennsylvania state regulations provide in part that the standard for employing “[r]estraints to control acute or episodic aggressive or self-injurious behavior may be used only when the student is acting in a manner as to be a clear and present danger to himself, to other students or to employees, *and* only when less restrictive measures and techniques have proven to be or are less effective.”³⁶ OCR should also consider imposing a requirement that restraints cannot be used unless a child with a disability has a positive behavior support plan that is being followed *and* the school entity maintains a schoolwide positive behavior support program. Such a program must include the training of personnel on the use of specific procedures, methods and techniques, a written policy and procedure on the use of positive behavior support techniques, as well as

³² *Letter to Zirkel*, 22 IDELR 667 (OCR 1995).

³³ Office for Civil Rights, *Dear Colleague Letter: Restraint and Seclusion of Students with Disabilities*, U.S. DEPARTMENT OF EDUCATION (Dec. 28, 2016), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201612-504-restraint-seclusion-ps.pdf> [hereinafter *Dear Colleague Letter*]

³⁴ Fla. Stat. Ann. § 1003.573.

³⁵ 22 Pa. Code § 14.133 (Pennsylvania law expressly prohibits aversive techniques of handling behavior such as (1) corporal punishment; (2) punishment for a manifestation of a student’s disability; (3) locked rooms, locked boxes or other structures or spaces from which the student cannot readily exit; (4) noxious substances; (5) deprivation of basic human rights, such as withholding meals, water or fresh air; (6) suspensions constituting a pattern under § 14.143(a) (relating to disciplinary placement); (7) treatment of a demeaning nature; and (8) electric shock).

³⁶ 22 Pa Code § 14.133(c) (emphasis added).

a requirement that parental consent must be obtained prior to the use of any restraints or intrusive procedures.³⁷

Additionally, as OCR has recognized, the use of restraint and seclusion may indicate an unidentified disability or the need to reevaluate a student with an already identified disability.³⁸ In both scenarios, evaluation or reevaluation should be automatically available, with parents making the final decision.

iv. Clarify the rights of students in the face of evolving disciplinary methods

In ELC’s experience, schools are increasingly implementing “non-traditional” forms of discipline which are leading to frequent school exclusions for students with disabilities. Examples include forced virtual school attendance, exclusions while psychiatric evaluations are pending, shortened school days, and “voluntary” parent removals of children which are urged and imposed to avoid formal suspensions. These exclusions are often “off the books” and therefore are not documented in the same way as other, more common, discipline exclusions, such as in-school suspension, out-of-school suspension, and expulsion. As a result, schools do not provide any of the procedural safeguards required by federal and state law. However, these exclusions are no less harmful and are the source of growing discrimination against students with disabilities. Large swaths of disciplinary action are going unrecognized and unregulated, as fundamental student rights go unobserved and unprotected. These new forms of punishment should trigger the same protections under Section 504 and demand the same attention from OCR. As the pandemic continues, and virtual learning becomes more ingrained in daily school life, this problem has only grown in magnitude. OCR should amend Section 504’s implementing regulations to ensure that all school exclusions are recognized for what they are—denials of access to education for which students with disabilities must have protection to prevent further discrimination.

v. Clarify key terms

ESSA mandates that each state plan describe “how the [s]tate educational agency will support local educational agencies . . . to improve school conditions for student learning, including through reducing . . . *incidences of bullying and harassment, the overuse of discipline practices that remove students from the classroom, and the use of aversive behavioral interventions that compromise student health and safety.*” To effectuate such goals, federal regulations under Section 504 should define key terms regarding indicators of prohibited discrimination based on disability. For example, the following terms should be used and clearly defined:

Removal from school: Any and all forms of exclusionary discipline, including expulsion, out-of-school suspension, in-school suspension, removal from the classroom, mandated virtual instruction and any other disciplinary method that denies a student instructional time in the classroom.

³⁷ *Id.*

³⁸ *Dear Colleague Letter, supra* note 33, at 11.

Aversive behavioral interventions: Any activities, practices, forms or techniques, including the use of seclusion or restraints that restrict a student’s participation in school or access to resources or are undertaken because a child has an aversion to the action, even if most children would not be upset by it. Aversive interventions include a broad spectrum of activities that range from clear physical and emotional abuse to more subtle forms of restriction.

Overuse of discipline practices: The disproportionate use of *any* disciplinary practice or intervention that disrupts student learning in any manner *or* leads to contact with or placement in the criminal or juvenile justice system.

III. Lack of Transparency and Accountability at the Local and State Level

a. The Problem

Our experience demonstrates that effective compliance with Section 504 is often illusory, making it important for parents to have the procedural tools and information necessary to ensure compliance in the face of discrimination at the school level. In addition, there must be greater oversight of compliance with Section 504 at both the LEA and state level.

At the school building level, parents need transparent record-keeping and data to ensure that students are identified, and Section 504 Plans are implemented. To successfully challenge a school’s practices as violating Section 504, one must know what the recipient is or is not doing.

In addition, data must be collected at the local and state level. Unfortunately, at present, the only uniform source of data on Section 504 is the Civil Rights Data Collection which, at best, is collected every other year. Further complicating matters, CRDC data does not capture nuanced local practices or explore intersectional concerns in depth – such as the relationship between Section 504 eligibility and race. Essentially, CRDC data for the 2020-2021 school year consisted of tracking: (1) total number of students enrolled in school (disaggregated by race, gender, disability-Individuals with Disabilities Education Act (IDEA), disability-504 only, and English Learners (EL)); (2) discipline, offense, and bullying and harassment data disaggregated by race, gender, disability-504 only, and EL status; (3) number of non-IDEA students subjected to mechanical restraint, physical restraint, or seclusion— disaggregated by race, gender, and whether the student is served by Section 504 only or is an English Learner (EL); and (4) number of *instances* of mechanical restraint, physical restraint, and seclusion— disaggregated by students without disabilities, students with disabilities served by the IDEA, and students with disabilities served by Section 504 only.³⁹

In the rare instances where enough data can be found, reliance on OCR’s already overburdened complaint system places an additional hurdle in the path of students with disabilities. When access to the dispute resolution process is achieved, appropriate remedies are not always sought or granted amidst yet

³⁹ See 2020–21 Civil Rights Data Collection: List of CRDC Data Elements for School Year 2020–21, available at <https://www2.ed.gov/about/offices/list/ocr/docs/2020-21-crdc-data-elements.pdf>.



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more confusion regarding available remedies. In light of the forgoing, we urge OCR to expand Section 504’s implementing regulations to include the following:

i. Require a building-level Section 504 Coordinator to interface with Parents

In pursuit of a more proactive approach to identifying eligible students, conducting evaluations, and developing robust Section 504 Plans, OCR should require recipients to maintain a building-level Section 504 Coordinator. Just as with similar building-level Special Education Directors/Coordinators, this change to the regulations would promote greater internal awareness of Section 504 and student needs and more effective coordination of information sharing with parents and the provision of needed supports and effective resolution of disputes.

ii. Require district- and state-level data collection to track 504 eligibility, discipline practices, and intersectional experiences

Relying on limited CRDC data collected biennially is clearly insufficient to ensure effective compliance. By requiring LEA recipients to collect and report annual data, OCR can pursue increased compliance while disseminating oversight responsibility among parents and advocates. In ELC’s experience, without data, interested parties cannot know what is happening, make a strong case, and push for change. And it is imperative that the data cover all demographics and intersectional concerns: for example, percentage of Black students served by Section 504 only who were subject to school discipline. Without that, prevention of individual discrimination and disproportional effects reflecting racial discrimination will remain elusive.

iii. Clarify requirement of state monitoring of Section 504 implementation

In addition to the above data collection, improved state-level monitoring of Section 504 compliance is needed. Recipient schools and districts cannot be relied upon to monitor themselves, and federal oversight of every recipient to the extent needed would be impractical. Regular, meaningful state inspections regarding compliance with Section 504 are needed. Such compliance is ignored while IDEA compliance is tracked in different ways. Such on-site inspections should be automatic and occur at predetermined intervals. They should not depend upon a complaint or formal request, which would unjustly place an additional burden on those disempowered and suffering at the hands of recipients. Inspections should include statistically representative file reviews, data analysis regarding school discipline, bullying and harassment, and the use of restraints and seclusion, as well as interviews with students, parents, teachers, administrators, and community members. The results of these inspections should be made public.

iv. Require state-level administrative complaint system

The requirements for State complaint procedures under *IDEA* are found in the regulations at 34 C.F.R. §§ 300.151 through 300.153. The Department has stated that it “views the State complaint procedures as an

important tool for a State to use to fulfill its general supervision responsibilities to monitor implementation of the requirements in Part B of the *IDEA* by LEAs in the State. These responsibilities extend to both systemic and child-specific issues.”⁴⁰ However, state administrative complaint systems often do not extend to claims involving Section 504.⁴¹ Importantly, this prevents states from addressing not only individual claims that can be more easily asserted in a state administrative context but prevents states from addressing systemic violations of Section 504 that require state intervention, oversight, and monitoring. Pennsylvania’s state administrative complaint system for example considers alleged violations under the *IDEA* but not Section 504.⁴²

Based on its experience, ELC believes that every state administrative complaint system should consider Section 504 violations in order to improve access to justice and cultivate responsive leadership. Each system should allow parents to file written requests for assistance to state departments of education if a recipient is not following a 504 plan or otherwise failing to follow Section 504 and its implementing regulations. Such a request should be followed by investigations, within prescribed timelines, and informal conferences or formal due process hearings. If, at the end of the process, a parent is not satisfied with the administrative outcome and files for due process or an appeal or action in State or Federal Court, a stay of the administrative outcome should be automatic. By requiring this of all states, OCR can maximize the benefits of a multi-tiered oversight framework and provide an easier, possibly quicker, path to positive outcomes for students with disabilities.

v. Clarify that Section 504 allows both damages and compensatory educational services; require notice of each

The relief available under Section 504 is not identical to that under *IDEA*. Further, since recipients and courts are more familiar with claims brought under *IDEA*, the pursuit of relief under Section 504 is, in ELC’s experience, often treated the same. This is a problem, since Section 504 allows for money damages, whereas *IDEA* does not.⁴³ As a result, students who have been discriminated against suffer further deprivations at the relief stage either because they are not aware of the relief available, or others deny the availability of that relief. OCR should amend Section 504’s implementing regulations to make clear to all that both compensatory educational services and damages are available under the statute. Additionally, OCR should require that recipients provide notice of this to students and parents to guarantee that those harmed know what remedies are available to them.

⁴⁰ *Questions and Answers on Procedural Safeguards and Due Process Procedures for Parents and Children with Disabilities* at A-1 (OSERS, Rev. June 2009), available at <https://www2.ed.gov/policy/speced/guid/idea/procedural-safeguards-q-a.pdf>.

⁴¹ See e.g., *A.M. v. New York City Dep’t of Educ.*, 840 F. Supp. 2d 660, 672 & n.17 (E.D.N.Y. 2012) (noting that under New York State education law, the State Review Officer’s jurisdiction is limited to matters arising under the *IDEA* or its state counterpart), *aff’d*, 513 Fed. App’x 95 (2d Cir. 2013); see also *F.C. v. New York City Dep’t of Educ.*, 2016 WL 8716232, at *11 (S.D.N.Y. Aug. 5, 2016).

⁴² 22 Pa. Code § 15.8.

⁴³ *S. H. v. Lower Merion Sch. Dist.*, 729 F.3d 248 (3d Cir. 2013) (recognizing the possibility of damages award under Section 504).



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Conclusion

We appreciate this opportunity to suggest recommendations to Section 504's implementing regulations. It is our firm belief that the recommendations above would significantly improve the implementation of Section 504, facilitate equitable educational access, and increase opportunities for students with disabilities to learn and thrive in an inclusive school environment. We welcome future opportunities to partner with the Department in pursuit of these goals, including proposing draft language for specific regulatory provisions.

Sincerely,

A handwritten signature in black ink that reads "Maura McInerney".

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