AHEAD Comments on Potential Updates to the Section 504 Regulations

The Association on Higher Education and Disability (AHEAD) is pleased to submit these comments to the US Department of Education, Office for Civil Rights, in response to its request for input regarding potential amendments to 34 C.F.R. pt. 104, implementing Section 504 of the Rehabilitation Act of 1973.

Introduction

AHEAD is a national nonprofit association representing over 4,000 members who are actively engaged in service provision, consultation and training, and policy development to create just and equitable higher education experiences for disabled individuals on college campuses throughout the country. AHEAD promotes disability accessibility across the field of higher education and beyond by developing and sharing relevant knowledge; strategically engaging in actions that enhance higher educational professionals’ effectiveness; and advocating on behalf of its membership, their institutions, their work, and those they serve, ensuring full, effective participation by individuals with disabilities in every aspect of the postsecondary experience. The enforcement of federal and state disability rights laws is fundamental to that full participation in education and advancement for disabled people.

In preparing its comments, AHEAD drew from the suggestions of its varied membership, who possess expertise in myriad aspects of higher education accessibility issues. The membership of AHEAD sits at the front lines of the battle to remove barriers to equal educational opportunity for students with disabilities. Comprehensive, unambiguous federal regulations are the most effective tool campus disability professionals have to provide reasoning and clarity to guide and persuade higher level administrators regarding their obligations to disabled students.

1. Definitions, Section 104.3

There are a number of terms that are currently undefined or underdefined that AHEAD believes should be added or clarified.

A. Definition of Disability:

AHEAD suggests that the Department take the steps necessary to harmonize the definition of “disability” in Sec. 504 with the definition in the Title II and III regulations implementing the ADAAA. Clarifying the definition of disability was a core component of the ADAAA with a recognition that it was not being interpreted correctly by the courts and other entities. The Title II and III ADAAA regulations and guidance clearly identified
that an industries of concern included post-secondary education and the standardized testing industry such as those involved in admissions.

The Title II and III regulations at Sections 35.103 and 36.103 - Relationship to other laws, require that the ADAAA regulations not apply a lesser standard than those applied under Section 504. To ensure that the definition in Section 504 is construed correctly, adoption of the regulatory language from the ADAAA is suggested. Specifically, AHEAD suggests adding language specifying that the determination of whether an individual's impairment rises to the level of a disability should not “demand extensive analysis” and that the determination “usually will not require scientific, medical, or statistical evidence.” The revised regulations should also include those provisions of the ADAAA that make clear that a history or record of academic success is not preclusive of having a disability, such as a specific learning disability.

AHEAD also recommends that the regulations clarify that the determination of disability is a distinct determination, separate from the determination of the need for a requested modification or accommodation. It would also be helpful for the regulations to clarify that while accommodations received in high school should be pertinent to an interactive process that identifies necessary and effective accommodations, receipt of an accommodation at the secondary level is not determinative of the accommodations to be received at the postsecondary level.

B. Definition of Qualified Student with a Disability

Though most OCR letters of finding focus on the interactive process, most postsecondary court decisions focus on whether the plaintiff is or is not a “qualified student with a disability.” Unlike the definition of a qualified employee, the definition of a qualified student with a disability, found in section 104.3, doesn’t clearly convey that a student who can meet the essential academic and technical standards of a program, with the benefit of reasonable accommodation, meets the definition. It also fails to note that the student need only meet those requirements that are essential. AHEAD recommends expressly defining qualified students with a disability using that language.

The definition of “qualified” should be clarified further to address the circumstances of students with intellectual disabilities. Students with an intellectual disability who have been admitted to a college program specifically designed for such students must be entitled to receive the same academic adjustments and auxiliary aids as all other students. Nor may such students be arbitrarily excluded on the basis of their disability from the full range of academic and nonacademic programs and activities that the recipient institution offers to other students.

C. Definition of Reasonable Accommodation

Although the term “reasonable accommodation” is found only in the employment section of the 504 regulations, this term is commonly used in the context of higher education by the courts as well as faculty and administrators. If the regulations add the term “Reasonable Accommodations, and in that definition state that the term “reasonable
accommodation includes academic adjustments and auxiliary aids for postsecondary students,” it would make it easier for our members to communicate with a reluctant faculty member who asks, “where does it say that we must provide our disabled students with reasonable accommodations?”

D. Defined Process for Determining Fundamental Alteration

AHEAD suggests that the regulations add a clear description or definition of “fundamental alteration” and what constitutes an appropriate process for determining if an academic adjustment would result in an essential course or program requirement being fundamentally altered. Guided by court precedent in this area, OCR has regularly indicated that:

“In reviewing an institution’s determination that a specific standard or requirement is an essential program requirement that cannot be modified, OCR considers whether that requirement is educationally justifiable. The requirement should be essential to the educational purpose or objective of a program or class. OCR policy requires, among other factors, that decisions regarding essential requirements be made by a group of people who are trained, knowledgeable and experienced in the area; through a careful, thoughtful and rational review of the academic program and its requirements; and that the decision-makers consider a series of alternatives for the essential requirements, as well as whether the essential requirement in question can be modified for a specific student with a disability.”

OCR Letter to Northern Arizona University, Case No. 08-22-2063.

AHEAD recommends incorporating specific guidance like this regarding the process and who should participate, so that higher education professionals doing this work could refer directly to the regulations for support of an appropriate decision-making process.

Equally important, the definition should make clear that fundamental alteration is an affirmative defense and may only be asserted when certain processes have been followed before reaching such a determination.

E. Definition of “Personal Service”

The current regulation at 104.44(d)(2) notes that recipients need not provide “services of a personal nature.” AHEAD recommends that the regulation define what is a personal service by restricting that definition to daily living functions that pertain to self-care such as feeding, bathing, mobility, and toileting. The definition should make clear that scribing, notetaking, voicing, and manual skills used in a testing center, classroom, or laboratory setting (such as pouring chemical in a lab course) are not personal services and, where necessary and effective, should be treated as reasonable accommodations unless to do so would result in a fundamental alteration to the nature of the program.
2. General Prohibitions, 34 C.F.R. sections 104.4 and 104.43

AHEAD believes that increasing the clarity of these sections would help both university officials and trial courts better understand compliance obligations by making clear what is prohibited.

A. Adding “Failure to Accommodate” to the Regulations

Although the regulations currently address both disparate treatment (Section 104.4(b)ii-iv) and disparate impact (Section 104.4(b)(4)), AHEAD recommends that the general prohibitions add the third primary form of disability discrimination: unlawful denial of or failure to implement a reasonable accommodation. A violation would occur if an accommodation was requested, necessary, and effective (logically connected to the nature of the disability), and neither a fundamental alteration nor an undue burden. Such a provision should not limit the opportunity of institutions to provide equally effective alternative accommodations (except for persons for whom the Title II “primary consideration” standard of deference, found at 28 CFR 35.160(2), should be applied, as described below).

B. Defining and Expressly Requiring an “Interactive Process”

In findings letters and complaint resolutions, OCR regularly references that Sec. 504 “envisions” an interactive process between the student and the institution. However, this requirement is not expressly stated in the 504 regulations themselves. AHEAD suggests that the regulations identify that engagement in an interactive process is a required duty of recipients and failure to engage could result in an independent violation. We further recommend that the regulations include a clear description or definition of what constitutes an interactive process. For example, recent findings letters issued by OCR often include the following:

"Section 504 envisions a meaningful and informed process with respect to the provision of modifications, through an interactive and collaborative process between a post-secondary institution and the student. Students are responsible for knowing these procedures and following them. Generally, upon receiving documentation of a disability and a request for academic adjustments, a postsecondary institution’s evaluation of a student’s request requires a fact-specific, case-by-case inquiry. This evaluation process should be interactive, with information exchanged between the student and the postsecondary institution to arrive at a conclusion about the academic adjustment requested."

OCR Letter to Northern Arizona University, Case No. 08-22-2063.
C. Adding “Failure to Engage in the Interactive Process” to the Regulations

Additionally, AHEAD recommends that the failure to engage in the interactive process should be explicitly cited as a violation in Section 104.4 or 104.43. We further recommend that this regulation clarify that if the interactive process would not reveal any viable accommodation for the student, a violation would not exist. AHEAD recognizes that this responsibility is mutual, and recommends the regulations also state that students who fail to engage in the process may not be entitled to the accommodation under consideration.

D. Clarifying the Duty to Provide Accommodations in Required Off-Campus Learning Environments

The regulation provision that pertains to the duty to not discriminate in internships, field placements, etc., Section 104.43(b), is written in a manner that makes it difficult for the lay reader to understand. AHEAD recommends that this provision be re-worded so that non-lawyer administrators and campus leaders can more easily recognize their obligations. We also suggest that the provision be made more specific regarding what steps a school should take to “assure itself” that the other entity is fully accessible to students with disabilities.

Further, the regulation does not specify which entity—the school or the third-party institution at which the student is interning/working—is responsible for providing/financing the student’s accommodations, which often results in students receiving no accommodations as both entities assert the other should be paying. The confusion arises especially when a student is both receiving credit from the school and monetary compensation from the third-party placement entity. AHEAD strongly recommends clarifying this provision to specify how schools should make a determination regarding whether a student completing an internship, rotation, or other off-campus learning is considered an employee (if ever) or a student, and who is subsequently responsible for determining appropriate accommodations and providing and financing them.

E. Adding “Hostile Environment” to the Regulations

AHEAD notes that Title IX expressly includes as a violation the failure to promptly and equitable address a hostile environment. We recommend that a similar provision be added to the 504 Regulations, making it a violation to create or allow a hostile environment on the basis of disability. It is our hope that this will create an incentive for more disability compliance training, in line with the Title IX compliance training that so many institutions currently provide.
3. Costs of Accommodations to the Institution

A. Clarifying Funding Obligation of the Institution

The Appendix A to Part 104 – Analysis of Final Regulation states:

“Under Section 104.44(d), a recipient must ensure that no handicapped disabled student is subject to discrimination in the recipient’s program because of the absence of necessary auxiliary educational aids. Colleges and universities expressed concern about the costs of compliance with this provision. The Department emphasizes that recipients can usually meet this obligation by assisting students in using existing resources for auxiliary aids such as state vocational rehabilitation agencies and private charitable organizations. Indeed, the Department anticipates that the bulk of auxiliary aids will be paid for by state and private agencies, not by colleges or universities.”

Despite this, in the late 1990s to early 2000s, virtually all state vocational rehabilitation agencies ended long standing MOUs with colleges and universities, forcing postsecondary education institutions to absorb the entire costs of paying for auxiliary aids and services. The demand and costs for providing these services have significantly increased in the last decade.

Current 504 regulations do not give disability professionals the much-needed, explicit language to convince campus administrators there are institutional compliance responsibilities to fund approved accommodations. As a result, currently there are institutions that require that disabled students exhaust all funding options available through the state and private agencies before they can seek services through the school, causing students significant delays in obtaining accommodations. AHEAD recommends the 504 regulations expressly state that the educational institution is the entity primarily obligated to finance the provision of reasonable accommodations.

B. Clarifying Undue Hardship Defense

Due to the high costs of certain auxiliary aids and services, particularly for persons with sensory impairments, instead of providing accommodations based on what is equally effective, some institutions instead choose the auxiliary aid based on what is most inexpensive without regard to effectiveness or the preference of the student. See 28 CFR section 35.160(2). Institutions mistakenly assume that the underfunded budget of the campus disability office is all that is considered in an undue burden analysis. AHEAD recommends that Section 104.5(c) be revised to expressly state that it is the budget of the entire institution/system that is to be considered, not just the budget of the Disability Office or Student Services Division.
As with fundamental alteration, the definition of undue burden should make clear that it is an affirmative defense and may only be asserted when certain processes have been followed before reaching such a determination.

4. Other Recommendations

A. Discriminatory intent

AHEAD recommends the regulations specifically state that discrimination on the basis of disability need not be intentional to be considered discriminatory, and that students need not have to file a complaint to ensure compliance. Conversely, to address a common misconception, the regulation should also explicitly state that Section 504 prohibits intentional discrimination, bias, and stereotype-based discrimination and that all students with disabilities are protected from this form of discrimination, even if not registered with the college’s program for students with disabilities.

B. Dual enrollment in Secondary and Post-secondary Institutions

Many school districts have paired with local community colleges or universities to offer courses that will provide credits for both high school and college. Sometimes those classes are taught at the high school, sometimes on the college campus. Sometimes they are taught by high school faculty, sometimes college faculty. In all cases, it is very unclear whether students enrolled in both a high school and a college should receive accommodations based on their secondary school IEP or 504 plan or through the college’s disability office. Further, it is unclear which entity bears responsibility for the costs and procedural implementation of accommodations. As a consequence of this confusion, students “slip through the cracks” with neither entity taking responsibility for their accommodations.

AHEAD recommends revising the Section 504 regulations to:

- State a clear process for determining how and by which entity accommodations for dual enrollment students should be determined and implemented, whether that is dependent on where the class is held, which entity pays the instructor, or some other clear measure.
- State that the school district and college are strongly encouraged (or even required) to enter into a memorandum of understanding setting forth an agreement as to how accommodations will be determined and provided and how the cost for such services will be divided.

C. Accommodations for Financial Aid

For disability-related reasons, some students must take a lesser course load than what is considered “full-time” by the institution, which can cause them to have reduced or no eligibility for financial aid. AHEAD recommends that Section 104.46 be amended to specify that disabled students with a reduced-course load accommodation be permitted:
• Eligibility for financial aid at full-time levels, even if taking less than a “full time”
courseload.
• Additional semesters of financial aid eligibility beyond those currently allowed by
the federal student financial aid program.
• Expressly state that financial aid professionals may include the following costs as
“educational expenses” covered by federal financial aid:
  o The cost of obtaining psycho-educational evaluations or other medical or
psychological assessments for determining eligibility for disability
accommodations,
  o The costs of disability-related personal services, software, or items related
to participating in higher education that are not covered by the disability
office or vocational rehabilitation programs.

AHEAD is aware that these issues are also being addressed in separate federal
legislation currently pending, but believes Section 504, as the civil rights legislation for
people with disabilities, is an essential place to ensure that issues of financial aid that
further disenfranchise students with disabilities in the higher education environment be
reviewed and strengthened. However this problem is ultimately addressed, this issue
was one of the top issues of concern identified by AHEAD members.

D. Reduced Course Load
In addition to the financial aid implications above, the 504 regulations also should
specify that disabled students with a reduced-courseload accommodation must be
allowed access to other institutional services and benefits that require “full time student”
status, such as pledging for a fraternity or sorority, eligibility for athletics or housing, etc.

E. Clarifying Obligations relating to Communication and Auxiliary Aids
and Services
Within definitions under 34 C.F.R.104.3, “equally effective communication,” “auxiliary
aids and services,” “qualified interpreter,” and “Video Remote Interpreting (VRI)” are not
listed or defined. With the exception of “auxiliary aids,” none of these terms are currently
included in the 504 regulations. Although not defined, the examples provided for
“auxiliary aids” (34 CFR Section 104.44(d)(1) and (2)) such as “taped text,” do not
reflect technological advances. AHEAD recommends that the 504 regulations
incorporate the definitions of “equally effective communication,” “auxiliary aids and
services,” “qualified interpreter,” and “video remote interpreting (VRI)” from Title II of the
ADA.

To reflect continuity with the ADA Title II regulations, the Section 504 regulations should
expand and rename the “auxiliary aids” section to “auxiliary aids and services” and
within this expanded section:
• Adopt the ADA regulations’ standard regarding Communications (28 C.F.R.
section 35.160(a) – (c)) including primary consideration being given to the
requests of individuals with disabilities (35.160 (b)(2)).
• Clarify that institutions are responsible for ensuring accessibility of all communications and instructional materials used by the institution.

• Expand areas of “equally effective communication” for postsecondary education to include (not an exhaustive list):
  o websites and web-based services; enterprise and 3rd party courseware; textbooks; on-line, in-person, hybrid, and remote learning; alternative media production; software; electronic and paper documents, including presentation materials/slides and portable document formats (pdfs); lecture content; in-person and virtual instruction and meetings; phone and email communications; videos (instructional materials); audio; text; images; signage.

• Clarify/define “alternate media production” to make clear that it applies to everything, including class handouts, daily assignments etc. This provision should also make clear that untimely provision of alternate media is a denial of equal communication.

• Strike the short list of disabilities for which “auxiliary aids” must be provided (currently limited to “persons with impaired sensory, manual, or speaking skills”) or alternately specify that these are merely examples and not exhaustive, because the list as written limits to whom auxiliary aids must be provided. (104.52(d)(1))

• “Auxiliary aid” examples for postsecondary education should be updated and better aligned with those that appear in the ADA Title II Section 35.104 definitions.

F. Conduct Code Violations

There have been court decisions reflecting allegations of misconduct by students with disabilities including invisible disabilities, such as students on the Autism spectrum or with intellectual disabilities. Sometimes colleges find themselves caught between a “rock and a hard place,” trying to harmonize Title IX and Section 504 requirements with regard to a disabled student who has allegedly engaged in sexual harassment. AHEAD is concerned that this area is fraught with misunderstandings of the law and its application. Much of the detail pertaining to these subject areas would likely be well-suited to a “Dear Colleague” letter than the 504 regulations. But AHEAD suggests that the below principles should be laid-out in the updated regulations:

• A student with a disability who, with or without reasonable accommodation, cannot comply with the essential elements of a college’s code of conduct is not an otherwise qualified individual with a disability as the student is not able to comply with the “technical requirements” of the college. This pertains to academic rules (cheating, plagiarism, etc.) and conduct rules (prohibitions against violence, stalking, etc.).

• A student with a disability who, with or without reasonable accommodation, represents a direct threat to the health and safety of others, is not a qualified individual with a disability.

• It is a violation of Section 504 to hold a student with a disability to a higher degree of compliance with a college’s code of conduct than non-disabled
students or to use noncompliance with the code of conduct, or a direct threat
determination, as a pretext for disability discrimination.

- It is a violation of Section 504 to provide a student with a disability with less
  opportunity for due process than a non-disabled student.
- The duty to accommodate extends to due process proceedings. The
  accommodations provided during due process proceedings may be different or in
  addition to those provided in other settings and may require additional interactive
  communication with the student prior to the proceeding. Rules prohibiting the
  presence of parents or counsel for students in due process hearings may have to
  waived in order to provide some students with an equally effective due process
  opportunity.
- It is a violation of Section 504 to impose greater sanctions for similar misconduct
  on a student with a disability than is imposed on non-disabled students.
  Moreover, disability should be taken into account in determining which type and
  duration of sanction should be imposed on a disabled student who has violated
  the code of conduct or has represented a direct threat to the health and safety of
  others.

G. Clarifying the Statute’s Use of “Solely” by Reason of Disability

The 504 statute itself prohibits discrimination that is “solely by reason of disability.” Part
104 of the regulations does not define or reference the term “solely.” Nonetheless, its
presence in the statute has created a great deal of dispute. The various circuits do not
 treat “solely” in the same manner. Faculty sometimes interpret the regulation to mean
that if a student is excluded on any basis in addition to disability, Section 504 does not
apply at all. AHEAD recommends that the term “solely” be added to the definition
section in the regulations. We are particularly concerned that the absence of a definition
will be exploited by some courts to seriously weaken Section 504.