

Hon. Catherine E. Lhamon
Assistant Secretary, Office for Civil Rights

U.S. Department of Education
Office for Civil Rights
400 Maryland Avenue, SW
Washington, D.C. 20202-1100

Re: U.S. Department of Education Office of Civil Rights' request for suggestions for improvements to regulations at 34 C.F.R. pt. 104, implementing Section 504 of the Rehabilitation Act of 1973.

Dear Assistant Secretary Lhamon:

COVID Safe Campus (CSC) is a nationwide disability-led organization advocating for greater disability inclusion and public health protection in higher education. CSC was established in response to the difficulties faced by disabled students - including chronically ill and immunocompromised students - in higher education throughout the COVID-19 pandemic. These range from academic hardships and increased risk of infection to loss of access to equitable educational opportunities.

We are writing to urge the Department of Education Office of Civil Rights to make amendments that would make permanent, greater access and protections for disabled people in the education system. We appreciate the opportunity to comment on improvements to the implementation of Section 504 of the Rehabilitation Act.

COVID Safe Campus submits the following comment that includes recommendations for: changes to definitions, inclusion of hybrid and remote access, improvements to the disability accommodation process, expansion of auxiliary aids, and clarifications to accommodations to mitigate the risk of complications from infectious diseases.

Thank you for the opportunity to provide comments on this important topic. We welcome the opportunity to work with you as you update the 504 regulations to ensure all disabled students can have equitable access to education. Please do not hesitate to contact us at covidsafecampus@gmail.com if you have any questions or to discuss our comments further.

Sincerely,



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Executive Director



Courtney Bergan
Lead Legal Organizer



Kris Jayme Grawert Matas
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Introduction

The failure to guarantee disabled students' access to a variety of course delivery options has been especially detrimental to students with chronic illnesses, psychiatric disabilities, and other disabilities that affect stamina. Denial of accommodations has impeded too many disabled students' access to education through reduced access to course offerings and degree programs, segregation of disabled students from their non-disabled peers, a lack of opportunity to remain in one's cohort, and reduced opportunities to graduate. *See, e.g.,* Mary Kay Irwin & Megan Elam. *Are We Leaving Children with Chronic Illness Behind?* 30 *PHYSICAL DISABILITIES: EDUC. AND RELATED SVCS.* 67, 80 (2019). Too often, disabled students are forced out of higher education when schools refuse to provide appropriate disability accommodations- a consequence that Section 504 intends to protect against. *See id.*

§104.3 Definitions: Changes and clarifications

The language surrounding “disabled” has evolved within the disability community over time and the regulatory language must be adapted to reflect common usage, respect diverse experiences, and destigmatize disability. As the Department of Education prepares to amend and update Title 34 C.F.R. pt. 104, we strongly urge the DOE be amended to reflect generally accepted terminology used to describe disability, language supported by the disability community.

Moreover, the definition of disability should be amended to make it more inclusive and reflect the diverse needs of people with disabilities. Definitions of disability should specifically include those with chronic illnesses, conditions impacting immune system dysfunction, and cognitive and developmental disabilities; groups that have long been excluded from education due to the disability hierarchy that created inadequate regulatory protections. As our understanding of disabilities expand, so too must these definitions.

Suggested changes to the terminology used in § 104.3 Definitions.

- (j) “Handicapped person” to “disabled person”
- (i) “Physical or mental impairment” to “physical or mental disability”
“Physical or mental [disability] means”
 - a. Add language inclusive of Chronic illnesses
 - b. Specify that conditions impacting the immune system are included in the definition of disability
 - c. Add language inclusive of Cognitive and Developmental Disabilities
- (l) *Qualified [disabled person]* means:

3. With respect to postsecondary and vocational education services, a [disabled] person who meets the academic and technical standards requisite to admission or participation in the recipient's education program or activity.

a. Add: with modifications

(j) Major life activities

d. Add: Social and executive functioning

e. Rationale: Regulations last amended 20 years ago when there was significantly less awareness about disabilities affecting social and executive functioning that significantly impact success in higher education.

Hybrid and remote learning are crucial to educational equity

Amending the regulations at 34 C.F.R. pt. 104 presents a timely opportunity to address educational equity for disabled students by making explicit and permanent protections to expand access to remote and hybrid learning. The widespread shift to virtual learning at the beginning of the COVID-19 pandemic illustrated the feasibility of delivering flexible, online modalities as both a public health measure and a reasonable modification for disabled students with a multitude of needs. Some students with disabilities, such as those with chronic illnesses, psychiatric disabilities, and mobility disabilities experienced greater inclusion and access to their education and extracurricular activities when their schools offered online programming. Remote options may be less taxing to disabled students' health, more compatible with their medical needs, and provide more equitable opportunities to participate in the academic community.

Accommodations providing remote and hybrid access promote inclusion and reduce isolation for students who otherwise would not have meaningful access to their education and accompanying social experiences that are necessary for academic equity. Protecting and maintaining remote and hybrid options can aid in maintaining continuity of learning, ensuring students have sufficient access to complete requirements. Remote access is necessary to afford many disabled students any opportunity for meaningful access and inclusion in higher education. Therefore, the DOE should explicitly require that schools provide remote access accommodations for disabled students to gain equal access to higher education and ensure more equitable socioeconomic opportunities for disabled people.

If a disabled student requests remote or hybrid access to classes, a school should not suggest a leave of absence in lieu of the requested accommodations that would otherwise allow students to remain enrolled with their cohort. Both Section 504 and the ADA require schools to provide services in the "integrated setting appropriate to the needs of the individual." 28 C.F.R. §

36.203; *see also United States v. Georgia*, 461 F. Supp. 3d 1315 (N.D. Ga. 2020). Thus, when a school suggests an unrequested leave of absence instead of providing the requested accommodations, students are unnecessarily excluded from educational programs and activities which can have devastating social, emotional, and economic consequences.

For those who can remain in the education system, a lack of remote and hybrid learning modalities presents an increased risk to students' health and wellbeing. Schools failing to provide equitable alternatives to in-person attendance may also exacerbate students' existing disabilities. Therefore, providing remote or hybrid access is the "most integrated setting" when that is the modification requested by a disabled student and schools must provide this access. *See, e.g., 28 C.F.R. § 36.203; 34 C.F.R § 104.43.*

§ 104.4: Suggested changes to § 104.4 Discrimination prohibited.

Section 104.4 identifies that covered entities may not deny qualified disabled students' equal opportunities to participate in and benefit from federally funded educational services. Rather, schools "must afford [disabled] persons equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement, in the most integrated setting appropriate to the person's needs." Accordingly, the Department of Education should more explicitly define certain proscribed conduct that is per se disability discrimination to prevent confusion and ensure equitable access to disability accommodations in higher education:

Universities shall not deny remote and hybrid access. The DOE should explicitly require schools to generally provide remote and hybrid access to classes as a reasonable accommodation under Section 504 of the Rehabilitation Act, absent a compelling need for the students to be in person, such as in a clinical or lab-based course.

§ 104.44: Suggested changes to § 104.44 Academic adjustments.

(a) Academic requirements.

Hybrid and remote learning are per se reasonable modifications.

Schools should not be permitted to use accrediting and professional licensing bodies' requirements to limit or deny hybrid and remote course delivery to eligible individuals. Accrediting bodies are also subject to the provisions of the ADA and Section 504 and must allow for modifications to their requirements to provide disabled individuals equal opportunities to participate in accredited programs. An accrediting body that does not allow an accredited program to make modifications to its programs should also be investigated by the appropriate regulatory entity.

(b) *Course examinations.*

1. Delivering exams remotely should be deemed a per se reasonable academic adjustment given the widespread implementation of remote testing during the COVID-19 pandemic. Any remote testing options should also be required to meet students' other disability related testing needs.
2. Remote examination options shall not be limited to automated remote proctoring software that frequently preclude equal access to students of color and students with disabilities. See Lydia X. Z. Brown et al., Center for Democracy and Technology, *Ableism and Disability Discrimination in New Surveillance Technologies: How new surveillance technologies in education, policing, health care, and the workplace disproportionately harm disabled people* (May 2022).
 - i. **Technical Assistance Information:** Alternative remote proctoring options schools could consider are live video conference proctoring exams, signed testing agreements, etc.

Disability Accommodations Process

Often disability accommodations processes don't prioritize students' knowledge of their own access needs, dissuading many disabled students from seeking formal disability accommodations in higher education. In fact, research suggests roughly half of all disabled students do not seek formal disability accommodations in higher education due to a lack of knowledge of their rights, a lack of documentation, fear of stigma, or inadequate accommodations offerings. See Dana C. Gierdowski et al., Educause, *2020 Student Technology Report: Supporting the Whole Student* (October 21, 2020).

To address documentation barriers impeding disability access, universities should not be permitted to require excessive proof of disability. Excessive documentation requirements speak to unfounded suspicion about the validity of disabilities, which inevitably contributes to inequity and exclusion. See Doron Dorfman, *Fear of the Disability Con: Perceptions of Fraud and Special Rights Discourse*. 53 LAW & SOC'Y REV. (October 3, 2019). The word "qualified" as it is used in both Section 504 and the ADA, refers to a person's non-disability related qualifications for a program, not proof of disability. Extensive documentation requirements disproportionately impact students who are from negatively racialized communities, non-native English users, undocumented students, students from low-income families, and students from other historically underrepresented groups. In addition, students with certain types of disabilities may experience increased barriers to documentation, such as people with communication disabilities and highly stigmatized disabilities. In lieu of the extensive documentation presently required by many higher education institutions, informal records of functional limitations, ongoing symptoms, diagnosis, or current treatments should be sufficient

to obtain disability accommodations. Examples of sufficient documentation could include a printout of a personal health record obtained from a patient portal, pharmacy records, and other accessible, non-burdensome forms of documentation. See Katherine Macfarlane, *Disability Without Documentation*, 90 FORDHAM L. REV., 60 (February 7, 2021). Moreover, students' own requests for modifications to course format, aids, and services should be given primary consideration, as individual students are the best judges of their access needs, not disability services professionals or healthcare providers. Neither excessive documentation requirements nor professional gatekeeping should impede disability access.

Finally, disabled students are often discouraged from disclosing their disability or accommodations. However, it's a student's right to disclose or withhold information about their own disabilities. Furthermore, many disabled students don't have the privilege of choosing whether or not to disclose their disabilities or access needs due to the visible nature of certain disabilities and/or accessibility devices. Disabled students who do have the choice to avoid disclosure, often choose to avoid self-disclosure of disability status due to educators' biases, resulting in discrimination. See Christopher Toutain. *Barriers to Accommodations for Students with Disabilities in Higher Education: A Literature Review*. 32 J. OF POSTSECONDARY EDUC. AND DISABILITY. 297, 310 (2019).

§ 104.4 Discrimination Prohibited. Suggested changed to 104.4(b) *Discriminatory actions prohibited*.

Excessive documentation requirements are per se discrimination that should be deemed a prohibited action.

§ 104.44 Academic Adjustments: Suggested changes to 104.44(b) *Other Rules*.

Schools shall not prohibit disabled individuals from disclosing a disability or any modifications granted to disabled individuals under this section. This shall not be construed to require disclosure, but rather to leave the choice about disclosure to disabled individuals' discretion.

Auxiliary aids

In amending 34 C.F.R. pt. 104, the Department of Education should expand the list of auxiliary aids and services available to students, so it is consistent with the list articulated by the DOJ's implementing regulations for Title II of the ADA. See 28 C.F.R. § 35.160. In addition, schools too often limit access to auxiliary aids and services to students with specific sensory disabilities, when these same auxiliary aids and services benefit people with all types of disabilities. Moreover, people with dynamic disabilities, such as neuromuscular disabilities, processing disabilities, and disabilities worsened by fatigue, mental, and/or physical exertion, may also

benefit from auxiliary aids and services on an intermittent, self-determined basis to mitigate the fluctuating functional limitations inherent to these disabilities.

By adopting the primary consideration language from the ADA Title II regulations, the DOE can help ensure schools grant students the access they require. *See* 28 C.F.R. § 35.160 (2). The primary consideration language acknowledges that disabled people are best positioned to know what modifications, aids, and services satisfy their own access needs. *See id.* Accordingly, the DOE should expand access to auxiliary aids and services in terms of eligibility and the types of aids and services that schools must furnish to all disabled students who could benefit.

§ 104.44 Academic Adjustments: Suggested changes to 104.44 (d) *Auxiliary aids*.

1. Auxiliary aids and services shall not be limited to individuals with sensory disabilities given the various disabilities that may be mitigated by auxiliary aids and services.
2. Auxiliary aids of any type must be equally available for people with disabilities who require such to have equal opportunities.
3. Adopt DOJ language on Primary consideration language: “In determining what type of auxiliary aid and service is necessary, a public entity shall give primary consideration to the requests of the individual with disabilities.” 28 C.F.R. § 35.160 (2).

Public health measures are disability access and equity

The topic of ventilation is overlooked in Subpart C and E of 34 C.F.R. pt. 104 and it should be treated like any other facility modification regarding both academic activities and housing in higher education. Poor air filtration and airflow put those with respiratory and immune conditions as well as other chronic illnesses at significant risk for complications of communicable diseases. Thus, appropriate filtration and ventilation are essential to the inclusion of disabled students. Students with ventilation and filtration related needs must not be excluded from courses, housing, or events in higher education. Because disabled students may require housing that satisfies certain air quality requirements, a request for a single room should also be deemed a per se reasonable accommodation to mitigate infectious disease risk. Disabled students should not be forced to find off-campus housing due to failures to consider disability access in institutional infrastructure planning processes.

Integration and inclusion of disabled students requires options to use any personal protective equipment (PPE) that may be necessary for health and safety. Personal protective equipment, such as masks and gloves, is an effective and essential public health measure that reduces infectious diseases and allergens. Disabled students shouldn't need to disclose their disability status to use any PPE necessary to safely partake in education. Instead, students must be free

to use personal protective equipment without explicit or implicit threats of harassment or retaliation.

§ 104.4 Discrimination Prohibited: Suggested changes to § 104.4(b) *Discriminatory actions prohibited*.

To ensure qualified disabled persons have equal opportunities “to participate in or benefit from [an] aid, benefit, or service that is [] equal to that afforded others,” infection control and public health measures must be deemed necessary to full inclusion. Infection control and public health measures such as universal masking, vaccination requirements, adequate ventilation, and remote access are reasonable modifications essential to providing equal opportunities for people at heightened risk from infectious diseases.

§ 104.22 Existing Facilities: Considerations in Amendments to § 104.22(a) *Accessibility*.

Section 104.22(a) requires that covered entities shall operate their programs so that when “each program is viewed in its entirety, it is readily accessible” to disabled persons.

- a. Ventilation needs are not a reason to exclude students or deny access and should be addressed using the same processes as other architectural barriers.
- b. Addressing disability related ventilation needs should include but not be limited to any facilities used for learning opportunities, course offerings, events, commencement, and housing.

§ 104.43 Treatment of students; general: Considerations in Amendments to § 104.43 to address school policies prohibiting or limiting the use of PPE.

- a. Covered entities shall not prohibit the use of personal protective equipment that may be needed by disabled persons to gain full access to an educational program.
- b. Additionally, schools shall not intimidate, threaten, or harass disabled individuals who are using PPE.

§ 104.45 Housing: Suggested changes to § 104.45 (a) *Housing provided by the recipient to Address Ventilation in Campus Housing*.

Accessibility with respect to housing shall include the quality of ventilation and airflow in the housing facility. Insufficient ventilation and airflow in a housing placement is a valid reason for request of single room housing assignment, or priority placement in housing with sufficient ventilation.