

Re: 34 C.F.R. pt. 104
Section 504 of the Rehabilitation Act of 1973

June 6, 2022

To: Office for Civil Rights
U.S. Department of Education

Thank you for the opportunity to comment on prospective amendments to Section 504 of the Rehabilitation Act of 1973. My name is Lindsey Burke, and I am the Director of the Center for Education Policy at the Heritage Foundation.

The U.S. Department of Education’s Office for Civil Rights recently announced it would be soliciting public comment on its intention to amend regulations at 34 C.F.R. pt. 104, implementing Section 504 of the Rehabilitation Act of 1973, which was established to “strengthen and protect rights for students with disabilities.”¹

The Department of Education has not specified exactly what it intends to amend through updates to Section 504, which have remained unchanged since 1977, but has alluded to potential alterations pertaining to mental health. The announcement also comes on the heels of the Department reaching an agreement with the Los Angeles Unified School District, whereby the district must provide additional services to an estimated 66,000 students with disabilities who did not receive adequate school services during the COVID-19 pandemic.²

Section 504 of the Rehabilitation Act of 1973, and its companion law the Individuals with Disabilities Education Act (IDEA), have been important safeguards for children with special needs in classrooms across America. As my former Heritage Foundation colleague Romina Boccia and I detail, “In 1970, five years prior to the passage of the Education for All Handicapped Children Act, the precursor to IDEA, schools were educating just one in five children with special needs. Some states even had laws in place at the time excluding children who were blind, deaf, or who had developmental delays from accessing education.”¹ Today, 7.2 million children receive services under IDEA and approximately 1.38 million students have Section 504 plans.³ However, as we explain of IDEA:

“Implementation has not been without its challenges, and despite the spirit of the law, families too often find themselves in costly litigation in an effort to secure the special education services to which their children are entitled in public schools. Parents and school officials can have differing views on how to best serve a child, and the resulting IEP protocol can end up being determined in the courtroom rather than the classroom.”²

As professor Marcus Winters and my colleague Jay Greene explain, “Litigating against a school district costs time and money that many parents don’t have.... [D]etermined public schools can

¹ U.S. Department of Education Announces Intent to Strengthen and Protect Rights for Students with Disabilities by Amending Regulations Implementing Section 504, U.S. Department of Education, May 6, 2022, 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 Office for Civil Rights Reaches Resolution Agreement with Nation’s Second Largest School District, Los Angeles Unified, to Meet Needs of Students with Disabilities during COVID-19 Pandemic, U.S. Department of Education, April 28, 2022, at <https://www.ed.gov/news/press-releases/office-civil-rights-reaches-resolution-agreement-nations-second-largest-school-district-los-angeles-unified-meet-needs-students-disabilities-during-covid-19-pandemic>

³ Kara Arundel, Ed Department begins review of often misunderstood Section 504 rules, K-12 Dive, May 6, 2022, at <https://www.k12dive.com/news/ed-department-begins-review-of-often-misunderstood-section-504/623327/>

outspend and outlast almost any family.”³ Although these problems may be more pronounced with IDEA, there is room for improved transparency and accountability with its civil rights brethren, Section 504. To improve Section 504, the Department should consider three regulatory updates: increased transparency to parents, reductions in bureaucratic paperwork, and support for expanded learning options for families.

Updated regulations should require school districts to be transparent to parents about the services to which their children are entitled under Section 504. Parents too often feel “in the dark” about accommodations and services available to their children if they qualify for Section 504. Any rewrite should strengthen accountability to parents and encourage school districts to craft accommodations in consultation with parents. Informed parental consent is currently not required on the part of schools when making the determination that a student qualifies for a Section 504 plan; rather, parents are simply informed after the fact. As they do when developing Individualized Education Plans (IEPs) under the Individuals with Disabilities Education Act (IDEA), schools should instead obtain informed and written consent from parents before developing a Section 504 plan for a student. Additionally, under current law, parents who are dissatisfied with how a school is developing a Section 504 plan have one of two options for recourse: to try to obtain a due process hearing with the school district, or to file a complaint with the Office for Civil Rights at the Department of Education. Requesting that school districts develop Section 504 plans in concert with parents could increase parental satisfaction with the process and limit tension between families and schools.

Any amendments should limit red tape. Any changes should keep bureaucratic red tape to a minimum and give schools flexibility to meet the needs of students. Under the Elementary and Secondary Education Act (ESEA) alone, schools are burdened with bureaucratic red tape and a paperwork load requiring 7 million man hours per year to comply with Washington mandates. IDEA and Section 504 reporting requirements likely increase that figure by millions of additional man hours. Any reductions in paperwork for school leaders through amended regulations to Section 504 would provide welcome relief and help schools focus on their primary mission: serving students.

Updated regulatory language should provide rhetorical support for education choice and flexibility for students. Unlike IDEA, Section 504 is a civil rights statute that prohibits discrimination against students with disabilities and is not supported by attendant federal funding. Although Section 504 is not programmatic in nature nor supported with federal or state funding, as an overarching principle, the Department should support the concept of students with special needs having the maximum amount of education choice possible. To that end, the Department should rhetorically support states in shifting from systems of funding schools to funding students with special needs directly, which could diminish legal battles by enabling families to personally select the services that best meet the needs of their child. Congress should allow IDEA dollars to follow students to service providers and schools of choice, in order to better achieve the goals of that law and the civil rights protections guaranteed under Section 504. States should provide state funding to students with special needs directly through education savings accounts (ESAs) giving parents the option of directing funds to schools, special education specialists, private tutors, and behavioral therapies of their choice.

A growing body of empirical evidence suggests that school choice policies increase parental satisfaction with their children’s schooling, lead to higher levels of academic achievement and attainment, reduce inequalities in the education options available to students, and, in general,

enable students to be better matched with learning options that meet their unique needs.⁴ To date, researchers have conducted 16 randomized-controlled-trial (RCT) evaluations of the impact of private school choice programs on student academic achievement. Ten of the 16 find positive benefits on math or reading scores for some or all students,⁵ four find null effects,⁶ and two—unique to a program in Louisiana—find negative effects.

Researchers have conducted eight rigorous studies (including five RCTs and three matching studies) on the impact of private school choice on student academic attainment. Six find positive impacts on academic attainment for some or all students,⁷ two find null effects,⁸ and no studies to date have identified negative effects on academic attainment.

After 45 years, the Department now has an opportunity to update Section 504 to make it more responsive to parents and better meet the needs of students by making the education decision-making process one that includes parents, teachers, and school stakeholders working in conjunction to achieve a truly student-centered approach. Maximizing transparency and accountability to parents through enhanced consultation, while infusing the principle of education choice in the regulation, can help achieve that goal.

¹ Lindsey Burke and Romina Boccia, A Bright IDEA: Modernizing the Individuals with Disabilities Education Act to Meet Student Needs and Support Integrated Employment, *The Heritage Foundation*, Backgrounder No. 3520, August 12, 2020, at <https://www.heritage.org/education/report/bright-idea-modernizing-the-individuals-disabilities-education-act-meet-student>

² *Ibid.*

³ Marcus A. Winters and Jay. P. Greene, “Debunking a Special Education Myth,” *EducationNext*, Vol. 7, No. 2 (Spring 2007), <https://www.educationnext.org/debunking-a-special-education-myth/>

⁴ Greg Forster, “A Win-Win Solution: The Empirical Evidence on School Choice,” 4th ed., EdChoice, May 2016, <https://www.edchoice.org/wp-content/uploads/2016/05/2016-5-Win-Win-Solution-WEB.pdf>

⁵ P. J. Wolf et al., “School Vouchers and Student Outcomes: Experimental Evidence from Washington, DC,” *Journal of Policy Analysis and Management*, Vol. 32, No. 2 (2013), pp. 246–270; J. Cowen, “School Choice as a Latent Variable: Estimating the ‘Complier Average Causal Effect’ of Vouchers in Charlotte,” *Policy Studies Journal*, Vol. 36, No. 2 (2008), pp. 301–315; J. P. Greene, “Vouchers and the Test-Score Gap,” *Education Matters*, Vol. 1, No. 2 (2000); J. P. Greene, P. E. Peterson, and J. Du, “Effectiveness of School Choice: The Milwaukee Experiment,” *Education and Urban Society* (1999); C. E. Rouse, “Private School Vouchers and Student Achievement: An Evaluation of the Milwaukee Parental Choice Program,” *The Quarterly Journal of Economics*, Vol. 113, No. 2 (1998), pp. 553–602; W. G. Howell et al., “School Vouchers and Academic Performance: Results from Three Randomized Field Trials,” *Journal of Policy Analysis and Management*, Vol. 21, No. 2 (2002); J. Barnard et al., “Principal Stratification Approach to Broken Randomized Experiments: A Case Study of School Choice Vouchers in New York City,” *Journal of the American Statistical Association*, Vol. 98 (2003), pp. 299–323; and H. Jin, J. Barnard, and D. B. Rubin, “A Modified General Location Model for Noncompliance with Missing Data: Revisiting the New York City School Choice Scholarship Program Using Principal Stratification,” *Journal of Educational and Behavioral Statistics*, Vol. 35, No. 2 (2010), pp. 154–173.

⁶ A. B. Krueger and P. Zhu, “Another Look at the New York City School Voucher Experiment,” *American Behavioral Scientist* (2004); M. Bitler et al., “Distributional Analysis in Educational Evaluation: A Case Study from the New York City Voucher Program,” *Journal of Research on Educational Effectiveness*, Vol. 8 (2013), pp. 419–450; E. Bettinger and R. Slonim, “Using Experimental Economics to Measure the Effects of a Natural Educational Experiment on Altruism,” *Journal of Public Economics*, Vol. 90 (2006), pp. 1625–1648; and Ann Webber et al., “Evaluation of the DC Opportunity Scholarship Program: Impacts Three Years After Students Applied,” *National Center for Education Evaluation and Regional Assistance*, 2019, <https://files.eric.ed.gov/fulltext/ED594875.pdf>

⁷ P. J. Wolf et al., “School Vouchers and Student Outcomes: Experimental Evidence from Washington, DC,” *Journal of Policy Analysis and Management*, Vol. 32, No. 2 (2013), pp. 246–270; Matthew M. Chingos and Paul E. Peterson, “Experimentally Estimated Impacts of School Vouchers on College Enrollment and Degree Attainment,”

Journal of Public Economics, Vol. 122 (2015), pp. 1–12, <https://ideas.repec.org/a/eee/pubeco/v122y2015icp1-12.html>; Albert Cheng, Matthew M. Chingos, and Paul E. Peterson, “Experimentally Estimated Impacts of School Voucher on Education Attainments of Moderately and Severely Disadvantaged Students,” Annenberg/Brown University EdWorkingPaper, May 2019, <https://www.edworkingpapers.com/ai19-76>; Matthew M. Chingos, Tomas Monarrez, and Daniel Kuehn, “The Effects of the Florida Tax Credit Scholarship Program on College Enrollment and Graduation: An Update,” Urban Institute, February 2019, https://www.urban.org/sites/default/files/publication/99728/the_effects_of_the_florida_tax_credit_scholarship_program_on_college_enrollment_and_graduation_2.pdf; P. J. Wolf, J. F. Witte, and B. Kisida, “Do Voucher Students Attain Higher Levels of Education? Extended Evidence from the Milwaukee Parental Choice Program,” Urban Institute, 2019, https://www.urban.org/sites/default/files/publication/96721/do_voucher_students_attain_higher_levels_of_education.pdf; and Joshua M. Cowen et al., “School Vouchers and Student Attainment: Evidence from a State-Mandated Study of Milwaukee’s Parental Choice Program,” Policy Studies Journal, Vol. 41, No. 1 (2013), https://www.researchgate.net/profile/Patrick_Wolf3/publication/256053549_School_Vouchers_and_Student_Attainment_New_Evidence_from_a_State-Mandated_Study_of_Milwaukee%27s_Parental_Choice_Program/links/5423454f0cf26120b7a6c03c.pdf

⁸ Heidi Holmes-Erickson, Jonathan Mills, and Patrick J. Wolf, “The Effect of the Louisiana Scholarship Program on College Entrance,” EDRE Working Paper No. 2019-12, 2019, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3376236, and Matthew M. Chingos, “The Effect of the DC Voucher Program on College Enrollment,” Urban Institute, 2018, https://www.urban.org/sites/default/files/publication/96686/the_effect_of_the_dc_school_voucher_program_on_college_enrollment_1.pdf