

October 25, 2022

The Honorable Catherine E. Lhamon
Assistant Secretary for Civil Rights
U.S. Department of Education, Office for Civil Rights
Lyndon Baines Johnson Department of Education Building
400 Maryland Avenue, SW
Washington, DC 20202-1100

Via Electronic Submission: Section504@ed.gov

Re: Comments on Potential Amendments to the Department of Education’s Regulations at 34 C.F.R. pt. 104, Implementing Section 504 of the Rehabilitation Act of 1973

Dear Assistant Secretary Lhamon:

Thank you for the opportunity to comment on potential amendments to the United States Department of Education’s (“the Department”) regulations at 34 C.F.R. pt. 104, implementing Section 504 of the Rehabilitation Act of 1973 (“Section 504 Regulations”). We strongly support the Department’s intention to amend and update the Section 504 Regulations. Section 504 is a critical federal law designed to protect the rights of individuals with disabilities in programs and activities that receive federal funding. Only Section 504 covers students who need disability-related services in schools but are not or may not be eligible for services under the Individuals with Disabilities Education Act (IDEA).

We write today to highlight the needs of unaccompanied immigrant children¹ with disabilities, both those in federal custody and those who have been released to sponsors in the community. As background, the Department of Homeland Security (DHS) must transfer any unaccompanied children apprehended at the border to the Department of Health and Human Services’ (HHS) Office of Refugee Resettlement (ORR) within 72 hours of the child’s apprehension. Unaccompanied children held in ORR custody are placed in facilities across the United States—primarily in South Texas along the U.S.-Mexico border, but also in cities and communities around the country. The facilities are typically operated by NGOs under a contract with ORR. The facilities run along a continuum from less to most restrictive and include:

- foster homes in the community;

¹ The term “unaccompanied alien child” is defined at 6 U.S.C. §279(g)(2). Although some unaccompanied children (hereinafter “UCs”) have a parent or legal guardian who resides in the United States, DHS employs the classification if at the time of encountering the child, a parent or legal guardian is not available to provide care. A child accompanied by an adult who is not a parent or legal guardian (e.g., older siblings, aunts, uncles) is also determined to be unaccompanied.

- shelters (these are the most common placement and range from 15 to thousands of beds;² most sites exceed 100 children in a congregate care, institutionalized setting);
- staff-secure facilities, which are more restrictive, have higher staff-child ratios and serve children labeled as having “behavioral problems”;
- residential treatment centers,³ of which there are currently three in the ORR system; and
- secure facilities, which are located within state-operated juvenile detention facilities (currently, ORR has one secure facility at the Shenandoah Valley Juvenile Center in rural Virginia). Children do not have to be adjudicated delinquent by a court to be placed in secure detention.

While most children will be released to their sponsor in the community relatively quickly, some children end up in custody for months or years; children identified as having behavioral problems, which are often related to a disability, whether diagnosed or undiagnosed, are more likely to be detained in a restrictive placement and are also in custody for longer periods of time. ORR disproportionately segregates children who have behavioral or mental health disabilities in restrictive facilities, instead of the most integrated setting appropriate to their needs.

Pursuant to a federal settlement agreement (the “*Flores*” agreement⁴) and the Trafficking Victims Protection Reauthorization Act⁵, ORR must provide a basic level of education to children in its custody. As it stands, however, children with disabilities do not receive sufficient or appropriate assessments, services, specialized instruction, or accommodations to their educational programs while in federal custody.⁶ Then, once they are released to their family or another sponsor, they face intersecting challenges to accessing needed assessments and services in their preferred language or with language support, while also navigating the immigration

² See, e.g., U.S. DEP’T OF HEALTH & HUM. SERV., OFF. OF INSPECTOR GEN., OEI-07-21-00251, OPERATIONAL CHALLENGES WITHIN ORR AND THE ORR EMERGENCY INTAKE SITE AT FORT BLISS HINDERED CASE MANAGEMENT FOR CHILDREN 4 (2022) (“ORR opened its EIS on the Fort Bliss military base in El Paso, Texas, on March 30, 2021. The facility reached a capacity to care for up to 10,000 children 13–17 years of age in May 2021, and—as of June 2022—has beds for 2,000 children.”).

³ Care providers can request a transfer to a residential treatment center (RTC) for a UC who “has a psychiatric or psychological issue that cannot be addressed in an outpatient setting. A UC may only be placed into an RTC if the youth is determined to be a danger to self or others by a licensed psychologist or psychiatrist.” Off. of Refugee Resettlement, ORR Unaccompanied Children Program Policy Guide §§ 1.4.6., <https://www.acf.hhs.gov/orr/policy-guidance/unaccompanied-children-program-policy-guide>.

⁴ *Flores v. Reno*, No. CV 85-4544-RFK (Px) (C.D. Cal. Jan. 17, 1997).

⁵ William Wilberforce Trafficking Victims Protection Reauthorization Act, 8 U.S.C. § 1232(c)(2)(A).

⁶ See, e.g., DISABILITY RIGHTS CALIFORNIA, THE DETENTION OF IMMIGRANT CHILDREN WITH DISABILITIES IN CALIFORNIA: A SNAPSHOT (2019), <https://www.disabilityrightsca.org/system/files/file-attachments/DRC-ORR-Report.pdf>; RUTH M. LÓPEZ, NATIONAL EDUCATION POLICY CENTER, THE (MIS)TREATMENT AND (NON)EDUCATION OF UNACCOMPANIED IMMIGRANT CHILDREN IN THE UNITED STATES (2021), <http://nepc.colorado.edu/publication/immigrant-children>; Adrian Alvarez, *Special Education No Man's Land*, ST. JOHN'S L. R. (forthcoming), <https://ssrn.com/abstract=3874201>.

system and reunification with their families.⁷ To better support this uniquely vulnerable group of children, we make the following recommendations as to the Department’s amendments to its regulations:

- **Consider how the Department can protect the educational rights of unaccompanied children in ORR custody; confirm that should ORR-grantee providers receive Department funding, they must comply with the Department’s Section 504 regulations; and clarify that the Department’s Section 504 regulations apply to public school districts that provide education services to youth with disabilities in ORR custody.**

ORR and its grantee providers are covered by Section 504, and therefore may not discriminate against children with disabilities in their custody or deny them the opportunity to receive benefits and services from their programs. Under Section 504, they must provide services, programs, and activities in the most integrated setting appropriate and make reasonable modifications in their policies, practices and procedures to avoid discrimination on the basis of disability.⁸ Yet ORR and its grantee providers fail to identify students eligible for services under Section 504; fail to provide education and accommodations in accordance with Section 504; and to fail to provide education in the least restrictive setting.

For example, beginning in 2018, Disability Rights California (the state protection and advocacy agency) monitored nine facilities in California that housed unaccompanied children. In its report, Disability Rights California found that:

By failing to ensure adequate oversight, appropriate education programming, or access to special education services, ORR is failing immigrant children, particularly those with disabilities. . . . [Except in rare cases, an] immigrant child held in an ORR-contracted facility does not receive educational services through a public school district, and does not have access to special education screening or any specialized programming for children with special education needs. . . . The ORR manual does not require any type of screening for special education or any development of IEPs. The manual discusses educational assessments very briefly in three vague and imprecise paragraphs, and there is no direction regarding the identification of and specialized services for children with special education needs.⁹

⁷ See, e.g., *id.*; Valerie Strauss & Sophia Rodriguez, *Challenges that Young Immigrants Face with U.S. Public Schools*, WASH. POST (Oct. 12, 2022), <https://www.washingtonpost.com/education/2022/10/12/challenges-immigrants-face-public-schools/>.

⁸ U.S. DEP’T OF HEALTH & HUM. SERV., OFF. OF CIVIL RIGHTS, KNOW THE RIGHTS THAT PROTECT INDIVIDUALS WITH DISABILITIES FROM DISCRIMINATION (undated), <https://www.hhs.gov/sites/default/files/knownyourrights504adafactsheet.pdf>.

⁹ DISABILITY RIGHTS CALIFORNIA, THE DETENTION OF IMMIGRANT CHILDREN WITH DISABILITIES IN CALIFORNIA: A SNAPSHOT 20-21 (2021), <https://www.disabilityrightscalifornia.org/system/files/file-attachments/DRC-ORR-Report.pdf>.

When Congress created the Department in 1979, it declared a list of its purposes, the first of which is “to strengthen the Federal commitment to ensuring *access to equal educational opportunity for every individual*.”¹⁰ We ask the Department to consider how it can ensure that unaccompanied children in custody are also able to access educational opportunities.¹¹ We also ask the Department to confirm that, should ORR grantee providers receive Department funding, they must comply with protections extended by the Section 504 regulations, including its Child Find requirements and the requirement for the provision of education in the least restrictive environment.

Finally, we ask that the Department clarify that its Section 504 regulations apply to public school districts that provide education services to youth in ORR custody. While rare, some ORR grantees do contract with public school districts for education services. The Department should remind public school districts that this contractual arrangement does not relieve them of their existing obligations under the Section 504 regulatory obligations, including their Child Find duty to locate and identify qualified youth with disabilities.

- **Require recipients to develop evidence-based Behavior Intervention Plans; conduct manifestation determinations; and ensure that students are not subjected to unnecessary restrictive or segregated placements.**

As discussed above, children with disabilities in federal custody are disproportionately placed in restrictive settings, due to behavior that is a manifestation of their disabilities, without appropriate disability-related assessments, services, and protections. This occurs even though according to ORR’s own guidance, it is required to place children in its custody in the least restrictive setting that is in the child’s best interests, and care providers must provide support services and effective interventions, when appropriate, to help keep a child in the setting.¹² Likewise, once released from ORR custody and attending community schools, unaccompanied children can continue to face disproportionate discipline and removal from classroom settings. Research has shown that racial and ethnic minority children, and children with disabilities, face disproportionately high rates of exclusionary discipline in schools.¹³

¹⁰ U.S. Dept’ of Educ, *An Overview of the U.S. Department of Education* (Sept. 2010), <https://www2.ed.gov/about/overview/focus/what.html>.

¹¹ See, e.g., Jeanette M. Acosta, *The Right to Education for Unaccompanied Minors*, 43 HASTINGS CONST. L.Q. 649 (2016). (“The U.S. Department of Education is not explicitly involved in the interagency process [in place to address the apprehension and care of unaccompanied children]. As a result of the various federal departments and agencies involved and the several phases that unaccompanied children must endure during their journey, the education of unaccompanied minors is frequently interrupted and potentially non-existent during the disjointed interagency process.”).

¹² Off. of Refugee Resettlement, ORR Unaccompanied Children Program Policy Guide §§ 1.1, 1.2, 1.4.1., <https://www.acf.hhs.gov/orr/policy-guidance/unaccompanied-children-program-policy-guide>.

¹³ Nicolas Gage et al., *Exploring Disproportionate Discipline for Latinx Students With and Without Disabilities: A National Analysis*, 47 BEHAVIORAL DISORDERS 3–13 (2021); NCLD, SIGNIFICANT DISPROPORTIONALITY IN SPECIAL

Therefore, we urge the Department to develop and adopt regulations that protect students with disabilities who may face disciplinary actions and proceedings, including, but not limited to: explicitly requiring the development of Behavior Intervention Plans through evidence-based evaluations; explicitly requiring manifestation determinations; and defining and curtailing the use of restraint and seclusion. We ask the Department to codify the recent guidance it provided on schools' responsibilities under Section 504 to ensure nondiscrimination against students based on disability when imposing student discipline.¹⁴ Without these explicit protections, students with disabilities who may not qualify for services under the IDEA or attend schools in facilities where the IDEA may not apply remain vulnerable to punishment based on their disability.

- **Improve requirements for trauma-informed care and services**

Many unaccompanied children have experienced intense traumatic events in their lives, whether in home country, during their immigration journey, or in immigration custody, and are therefore particularly likely to be affected by complex trauma, a condition in which someone is exposed to multiple traumatic events that can be interpersonal, invasive, and continue for a long period of time. Unaddressed complex trauma can profoundly affect a young person's ability to learn, think, read, concentrate, and communicate, and social science has linked complex trauma with academic, behavior, and attendance challenges. Many children who have emotional or behavioral disorders due to experiencing trauma could be eligible for supports under Section 504 and could receive earlier intervention if so identified.¹⁵ Failure to provide these assessments and support can contribute to discipline disparities, unnecessarily prolonged detention, and poorer health and educational outcomes. The Department should consider how the Section 504 Regulations could confirm that trauma may be a covered disability and could improve access to trauma-informed care and services, including for unaccompanied children. For example, by codifying

EDUCATION: TRENDS AMONG LATINX STUDENTS (2020) ("Like many other children of color, Latinx students with disabilities are disproportionately recipients of harsh discipline, and socioeconomic status does not account for these disparities. They are more likely to be taught in separate classrooms, given office referrals, removed from school by a hearing officer, suspended, and expelled compared to White students with disabilities. Approximately one-quarter of Hispanic children with disabilities in public school experience one out-of-school suspension.").

¹⁴ U.S. DEP'T OF EDUC., OFF. CIVIL RIGHTS, SUPPORTING STUDENTS WITH DISABILITIES AND AVOIDING THE DISCRIMINATORY USE OF STUDENT DISCIPLINE UNDER SECTION 504 OF THE REHABILITATION ACT OF 1973 (July 2022), <https://www2.ed.gov/about/offices/list/ocr/docs/504-discipline-guidance.pdf>.

¹⁵ CTR. FOR CIV. RTS. REMEDIES, DISABLING INEQUITY: THE URGENT NEED FOR RACECONSCIOUS RESOURCE REMEDIES (2018), <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>. See also *P.P. v. Compton Unified Sch. Dist.*, 135 F. Supp. 3d 1098, 1110-11 (C.D. Cal. 2015); Benjamin C. Hattem, *Carceral Trauma and Disability Law*, 72 STAN. L. REV. 995, 1019 (2020).

requirements for schools to implement a continuum of evidence-based practices, including specific strategies for underserved communities.¹⁶

- **Strengthen requirements for language access and cultural competency in the provision of screening, assessment, and services for students with disabilities.**

After unaccompanied children with disabilities are released to families or sponsors, they will often benefit from assessments and services provided by schools under the IDEA and Section 504 processes. However, assessments, programs, and resources are sometimes not provided in a family or child’s primary or preferred language, leading to barriers to access and confusion and isolation not only for children but also for their caregivers.¹⁷

We therefore recommend that Section 504 regulations codify the guidance in the Department’s 2015 Dear Colleague Letter on English Language Learner Students and Limited English Proficient Parents¹⁸ that schools must ensure that all English-language learners who may have a disability are located, identified, and evaluated for disability-related education, supports, and services in a timely manner in their preferred language. When conducting such evaluations, schools must consider the English language proficiency of students in determining the appropriate assessments and other evaluation materials to be used and must administer those evaluations in the child’s preferred language to avoid error or misclassification.¹⁹ Schools must identify or determine whether English language learners have disabilities independently of their English language proficiency. We have seen schools or school districts decide that a child cannot have both English language learning services and disability-related services at the same time. Regulations should be explicit that schools must provide students with disabilities with both the language assistance and disability-related services to which they are entitled.

- **Make explicit that Section 504 protections apply regardless of the students’ or their parents’ or guardians’ actual or perceived citizenship or immigration status or health insurance status**

The Supreme Court decision in *Plyer v. Doe* established that all children have a right to education regardless of their or their parents’ immigration status. Although *Plyer v. Doe* has been well-established law for forty years and has been incorporated into federal statutory law

¹⁶ See, e.g., U.S. DEP’T OF EDUC., SUPPORTING CHILD AND STUDENT SOCIAL, EMOTIONAL, BEHAVIORAL, AND MENTAL HEALTH NEEDS 22-28 (2021), <https://www2.ed.gov/documents/students/supporting-child-student-social-emotional-behavioral-mental-health.pdf>.

¹⁷ See, e.g., *id.* at 11 (“Latino ELs have been identified as a unique group of students who are at an elevated social, emotional, and/or behavioral risk. However, many screening assessments for social, emotional, and behavioral risk have limited data to support their reliability, validity, and usability with ELs, as screenings are not usually conducted in students’ native languages and may not capture student need.”).

¹⁸ U.S. Dep’t of Educ., Dear Colleague Letter on English Language Learner Students and Limited English Proficient Parents (2015), available at <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-el-201501.pdf>.

¹⁹ In conducting the evaluation and making placement decisions, school districts must draw upon information from a variety of sources (e.g., aptitude and achievement tests and social and cultural background). 34 C.F.R. § 104.35(c).

through a provision expressly indicating that Congress would not interfere with *Plyler* rights,²⁰ its enforcement remains at risk today due to anti-immigrant political sentiment.²¹ We therefore ask that the Department’s Section 504 regulations explicitly state that all children have a right to protections and services under Section 504, regardless of the child’s immigration status or the status of their parents, family, or guardians.

Likewise, because many unaccompanied children will not have lawful status upon their release from custody, they also are more likely than other children to be ineligible for Medicaid or other health insurance coverage. We have seen school districts refuse to provide or delay providing disability-related services to children who do not have insurance. We ask that the regulations explicitly state that schools may not deny or delay services due to health insurance status or insurance reimbursement status.

We appreciate the opportunity to provide the Department with measures we feel could strengthen Section 504, which is a crucial tool to ensuring unaccompanied children with disabilities receive an appropriate education. If you have any questions or would like further clarification, please contact Anne Kelsey, Policy Analyst for Disability Rights at the Young Center for Immigrant Children’s Rights, via email at akelsey@theyoungcenter.org.

Respectfully,

Young Center for Immigrant Children’s Rights
National Disability Rights Network
Mental Health Advocacy Services, Inc
Disability Rights California
Disability Rights New York
Bazelon Center for Mental Health Law
Legal Services NYC

²⁰ 8 U.S.C. § 1643(a)(2): “Nothing in this chapter may be construed as addressing alien eligibility for a basic public education as determined by the Supreme Court of the United States under *Plyler v. Doe* (457 U.S. 202)(1982).”

²¹ Bill Chapell, *Texas governor says the state may contest a Supreme Court ruling on migrant education*, NPR, May 6, 2022; News Release, MALDEF, *Statement on Texas Governor’s Comments on Landmark Education Ruling*, (May 5, 2022), <https://www.maldef.org/2022/05/maldef-statement-on-texas-governors-comments-on-landmark-education-ruling/>.