

# **The Right of Students with Disabilities Who Need Accessible Instructional Materials to Receive These Materials in a Timely Manner: A Brief for Families and Educators**

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# **The Right of Students with Disabilities Who Need Accessible Instructional Materials to Receive These Materials in a Timely Manner: A Brief for Families and Educators**

All students with disabilities who need accessible instructional materials have a right to receive these materials in a timely manner, regardless of whether they qualify to receive materials developed from National Instructional Materials Accessibility Standard (NIMAS) files through the National Instructional Materials Access Center (NIMAC).<sup>1</sup> The purpose of this brief is to help families and educators understand the right of all students with disabilities who need accessible instructional materials to receive these materials in a timely manner. This right is based on provisions in the Individuals with Disabilities Education Act (IDEA) as well as in the disability civil rights statutes Section 504 and Title II of the Americans with Disabilities Act (ADA).

## **What are accessible instructional materials and why are they important?**

For some students with disabilities, the printed text of instructional materials is a barrier to their participation in the general education curriculum that is provided to students without disabilities. Some students may have visual disabilities that make it difficult for them to see printed text. Other students may be unable to hold printed materials because of a physical disability. Still other students may be unable to read or derive meaning from the printed text because of their disability-related needs. Accessible instructional materials are instructional materials that have been converted into

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<sup>1</sup> See 34 C.F.R. §§ 300.172(b)(3), 300.210(b)(3).

accessible or specialized formats (braille, audio, digital text, or large print) in order to help students with disabilities learn the same curriculum that is being taught to other students in the class.

## **What are the provisions in IDEA 2004 pertaining to accessible instructional materials?**

New provisions were added in IDEA 2004 to help improve the quality and delivery of accessible instructional materials to blind students and other students with print disabilities. Among these provisions, States were required to adopt NIMAS, which stands for the “National Instructional Materials Accessibility Standard.”<sup>2</sup> NIMAS is a technical standard used to prepare “electronic files” that can be used to convert instructional materials into specialized formats (braille, audio, digital text, or large print).<sup>3</sup>

State educational agencies (SEAs) and local educational agencies (LEAs) were also given the option to coordinate with the “National Instructional Materials Access Center” (NIMAC),<sup>4</sup> a national center that stores the electronic files of print instructional materials that have been developed based on NIMAS.<sup>5</sup> In carrying out the NIMAS/NIMAC provisions, SEAs are required to work with the State agency responsible for assistive technology, to the maximum extent possible.<sup>6</sup>

A student is eligible to receive specialized formats that have been developed from NIMAS files through the NIMAC if the student falls under the following definition of “blind or other persons with print disabilities”:

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<sup>2</sup> 20 U.S.C. § 1412(a)(23)(A); 34 C.F.R. § 300.172(a)(1).

<sup>3</sup> 20 U.S.C. §§ 1474(e)(3)(B), 1474(e)(3)(D) (incorporating by reference 17 U.S.C. § 121(d)(3) (current version at 17 U.S.C. § 121(d)(4)).

<sup>4</sup> 20 U.S.C. §§ 1412(a)(23)(B), 1413(a)(6); 34 C.F.R. §§ 300.172(b)(1), 300.210.

<sup>5</sup> 20 U.S.C. § 1474(e)(2).

<sup>6</sup> 20 U.S.C. § 1412(a)(23)(D); 34 C.F.R. § 300.172(d).

- the student is served under IDEA; and
- the student may qualify under “An Act to provide books for the adult blind.”<sup>7</sup>

Students must meet both of these requirements to receive specialized formats that have been developed from NIMAS files through the NIMAC. The first requirement is that the student be served under IDEA. Students receiving services under Section 504 are not eligible unless they are otherwise eligible to receive these materials under IDEA.<sup>8</sup> The second requirement is that the student qualifies under “An Act to provide books for the adult blind.”

In order to qualify under “An Act to provide books for the adult blind,” a student must be certified by a “competent authority” as having one of four qualifying disabilities: (1) blindness, (2) visual disability, (3) physical limitations, or (4) reading disability resulting from organic dysfunction.<sup>9</sup> For the first three disabilities, various individuals may serve as a competent authority, including medical doctors, doctors of osteopathy, ophthalmologists, optometrists, therapists, social workers, and counselors.<sup>10</sup> For a reading disability resulting from organic dysfunction, the competent authority must be a medical doctor, who may consult with colleagues in associated disciplines.<sup>11</sup>

Only those students who are served under IDEA and qualify under “An Act to provide books for the adult blind” are eligible to receive specialized formats that have been developed from NIMAS files through the NIMAC. As discussed below, however, all students with disabilities who need accessible instructional materials have a right to receive these materials in a timely manner, regardless of whether they are eligible for NIMAS/NIMAC. For students served under IDEA, this right is based on the right to a free appropriate public education (FAPE) under IDEA and protections under Section

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<sup>7</sup> 20 U.S.C. § 1474(e)(3)(A).

<sup>8</sup> OFFICE OF SPECIAL EDUC. PROGRAMS, U.S. DEP’T OF EDUC., QUESTIONS AND ANSWERS ON THE NATIONAL INSTRUCTIONAL MATERIALS ACCESSIBILITY STANDARD (NIMAS), at 6 (rev. Aug. 2010).

<sup>9</sup> 36 C.F.R. § 701.6(b)(1).

<sup>10</sup> *Id.* § 701.6(b)(2)(i).

<sup>11</sup> *Id.* § 701.6(b)(2)(ii).

504 and Title II of the ADA. For students served only under Section 504, this right is based on protections under Section 504 and Title II of the ADA.

## **What is the relationship between accessible instructional materials and FAPE under IDEA?**

Instructional materials play a key role in helping students learn the knowledge and skills that are part of the general education curriculum. Therefore, accessible instructional materials are essential to enabling students with disabilities to participate in the general education curriculum. The U.S. Department of Education has stated that timely access to appropriate and accessible instructional materials is an inherent component of the obligation of public agencies to ensure that FAPE is available for children with disabilities and that children with disabilities participate in the general education curriculum as specified in their Individualized Education Programs (IEPs).<sup>12</sup>

SEAs and LEAs are required to provide accessible instructional materials to all students who need them, regardless of whether or not the students qualify for accessible materials produced from NIMAS-derived files. The IDEA regulations state that nothing relieves an SEA or LEA of its responsibility to ensure that children with disabilities who need instructional materials in accessible formats, but are not included under the definition of blind or other persons with print disabilities, or children who need materials that cannot be produced from NIMAS files, receive those instructional materials in a timely manner.<sup>13</sup>

For students who are unable to receive accessible instructional materials through the NIMAS/NIMAC process, SEAs and LEAs must obtain these materials in other ways.

## **What additional IDEA requirements reinforce the right to appropriate, accessible instructional materials?**

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<sup>12</sup> 71 Fed. Reg. 46540, 46618 (Aug. 14, 2006).

<sup>13</sup> 34 C.F.R. §§ 300.172(b)(3), 300.210(b)(3).

There are a number of requirements in IDEA, falling under the umbrella of FAPE, that reinforce the right of students with disabilities who need accessible instructional materials to receive these materials in a timely manner. These provisions apply to all students with disabilities served under IDEA who need accessible instructional materials, regardless of whether they are eligible for materials developed from NIMAS files obtained through the NIMAC.

## **(1) Evaluation Process**

The evaluation process is a critical, first step in identifying a student's needs in relation to instructional materials. As part of an initial evaluation or reevaluation, the school district must assess the student in all areas of suspected disability.<sup>14</sup> The goal is to obtain information that will be used to develop an IEP that will enable the student to be involved and progress in the general education curriculum.<sup>15</sup> This evaluation should consider whether the printed text of instructional materials is a barrier to the student's participation in the general education curriculum because of the student's disability-related needs. The evaluation should also consider whether the student needs assistive technology in order to use a particular specialized format (braille, audio, digital text, or large print).

An evaluation under IDEA cannot be used to determine whether the child is blind or has a print disability, unless the person conducting the evaluation is a "competent authority" to make such a determination. For students with a reading disability resulting from organic dysfunction, the competent authority must be a medical doctor, who may consult with colleagues in associated disciplines.<sup>16</sup> Although the IEP Team (which includes the parent of the child) cannot make a determination for NIMAS/NIMAC eligibility, the IEP Team can recommend that a referral be made to a medical doctor.

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<sup>14</sup> 20 U.S.C. § 1414(b)(3)(B); 34 C.F.R. § 300.304(c)(4).

<sup>15</sup> 20 U.S.C. § 1414(b)(2)(A)(ii); 34 C.F.R. § 300.304(b)(1)(ii).

<sup>16</sup> 36 C.F.R. § 701.6(b)(2)(ii).

School districts have the responsibility to obtain the appropriate certification, including the assumption of any costs associated with certification by a medical doctor.<sup>17</sup>

## **(2) IEP Development**

Several provisions pertaining to the development of IEPs also reinforce the right to accessible instructional materials for a student who needs these materials:

*(a) Present levels of academic achievement and functional performance, including how the disability affects the student's involvement and progress in the general curriculum.*<sup>18</sup>

This statement should indicate how the student's disability-related needs affect his/her ability to access and derive meaning from the printed text of the instructional materials that make up the general education curriculum.

*(b) Measurable annual goals, including academic and functional goals, designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum.*<sup>19</sup>

IEP goals lay the foundation for a student's educational program and provide a roadmap for the teacher. It is therefore important for the IEP to describe how the particular specialized format or formats will help the student reach these goals in order to enable the student to be involved and progress in the general education curriculum.

*(c) Special education and related services, supplementary aids and services, program modifications, or supports for school personnel that will be provided for*

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<sup>17</sup> Office of Special Educ. Programs, U.S. Dep't of Educ., Questions and Answers on the National Instructional Materials Accessibility Standard (NIMAS), at 7 (rev. Aug. 2010).

<sup>18</sup> 20 U.S.C. § 1414(d)(1)(A)(i)(I); 34 C.F.R. § 300.320(a)(1).

<sup>19</sup> 20 U.S.C. § 1414(d)(1)(A)(i)(II); 34 C.F.R. § 300.320(a)(2).

*the student to be involved in and make progress in the general education curriculum.*<sup>20</sup>

This part of the IEP provides another opportunity to specify the particular specialized format or formats that the student will use to be involved and progress in the general education curriculum. This part of the IEP also specifies the accommodations, supports, and assistive technology that are necessary to help the student use the specialized formats. It would also benefit the student for the IEP to indicate the individual at the school who will help the student use the specialized formats.

For students who are NIMAS/NIMAC eligible, the IEP should state that the student has been certified by a competent authority on a particular date to fall under one of the qualifying disability categories (blindness, visual disability, physical limitations, reading disability resulting from organic dysfunction) and is eligible to receive specialized formats that have been developed from NIMAS files through the NIMAC.

### **(3) Special Factors for the IEP Team to Consider**

Two of the “special factors” that IEP Teams must consider in developing IEPs are important to the issue of accessible instructional materials: (a) for blind students and students with other visual impairments, the Team must provide for instruction in braille and the use of braille, unless the Team determines that such instruction or use is not appropriate for the student; and (b) for all students, the Team must consider whether the student needs assistive technology.<sup>21, 22</sup> Assistive technology may be necessary to help the student use particular specialized formats. Both of these factors emphasize the importance of accessible instructional materials as part of the right to FAPE.

### **(4) IEP Review**

The annual review of the student’s IEP provides an opportunity for the IEP Team to examine the student’s use of instructional materials—e.g., how effective particular

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<sup>20</sup> 20 U.S.C. § 1414(d)(1)(A)(i)(IV); 34 C.F.R. § 300.320(a)(4).

<sup>21</sup> 20 U.S.C. § 1414(d)(3)(B)(iii); 34 C.F.R. § 300.324(a)(2)(iii).

<sup>22</sup> 20 U.S.C. § 1414(d)(3)(B)(v); 34 C.F.R. § 300.324(a)(2)(v).



specialized formats and supports/accommodations have been as well as the extent to which the student received the materials in a timely manner.<sup>23</sup> The Team should also review whether the specialized formats are helping the student to be involved and progress in the general education curriculum.

## **(5) Transition Planning**

The transition planning process, beginning when the student turns 16 (or earlier, if determined appropriate by the IEP Team or required by State law), allows the IEP Team to develop measurable postsecondary goals and transition services to be included in the student's IEP.<sup>24</sup> As part of the transition planning process, the Team should help the student understand his/her own disability in relation to the need for accessible instructional materials.

It is important to consider accessible instructional materials during the transition planning process because when students with disabilities exit special education and are no longer entitled to special education and related services under IDEA, they have to be able to advocate on their own behalf in other settings, including postsecondary education. At the postsecondary level, individuals with disabilities must be able to communicate information about the nature of their disability in order to request particular aids or services that will enable them to have an equal opportunity to achieve at the same level as students without disabilities.

The Summary of Performance (SOP) should be used to provide the child with a summary of the child's academic achievement and functional performance in order to assist the child to transition beyond high school.<sup>25</sup> The SOP must include recommendations on how to assist the child in meeting his or her postsecondary goals.<sup>26</sup> IDEA does not otherwise specify the information that must be included in the SOP; rather, State and local officials have the flexibility to determine the appropriate

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<sup>23</sup> 20 U.S.C. § 1414(d)(4)(A)(i); 34 C.F.R. § 300.324(b)(1)(i).

<sup>24</sup> 20 U.S.C. § 1414(d)(1)(A)(i)(VIII); 34 C.F.R. § 300.320(b).

<sup>25</sup> 20 U.S.C. § 1414(c)(5)(B)(ii); 34 C.F.R. § 300.305(e)(3).

<sup>26</sup> 20 U.S.C. § 1414(c)(5)(B)(ii); 34 C.F.R. § 300.305(e)(3).

content to be included in a child's SOP, based on the child's individual needs and postsecondary goals.

## **How can parents challenge the school district's failure to provide accessible instructional materials in a timely manner under IDEA?**

Under IDEA, parents have the right to file a complaint against the school district and proceed to a due process hearing for any matter pertaining to identification, evaluation, educational placement, or provision of FAPE.<sup>27</sup> Therefore, if a student who needs accessible instructional materials does not receive these materials in a timely manner and, as a result, the student is unable to participate in the general education curriculum, the student's parent has a right to file a due process complaint for a violation of FAPE. Parents can also pursue a resolution of the matter through mediation.<sup>28</sup>

As an alternative to a due process complaint or mediation, parents have the option to file a complaint through IDEA's State complaint system, which is separate from IDEA's due process system.<sup>29</sup> State complaints may be filed by an individual or an organization and may allege violations regarding a specific child or a group of children.<sup>30</sup> IDEA's State complaint system can be used to challenge systemic violations on the part of an LEA with respect to the timely delivery of accessible instructional materials.

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<sup>27</sup> 20 U.S.C. § 1415(b)(6)(A); 34 C.F.R. § 300.507(a)(1).

<sup>28</sup> 20 U.S.C. § 1415(e); 34 C.F.R. § 300.506.

<sup>29</sup> 34 C.F.R. §§ 300.151-300.153.

<sup>30</sup> Office of Special Educ. Programs, U.S. Dep't of Educ., Questions and Answers on Procedural Safeguards and Due Process Procedures for Parents and Children with Disabilities, at 6 (June 2009).

# **What protections are available under Section 504 and Title II of the ADA for students who need accessible instructional materials?**

## **(1) Prohibition of Discrimination on the Basis of Disability**

Section 504 and Title II of the ADA are both civil rights statutes that prohibit discrimination on the basis of disability.<sup>31</sup> While Section 504 applies to entities that receive federal funding, Title II applies to all public entities (regardless of whether they receive federal funding). Public schools, LEAs, and SEAs are all subject to the requirements of Section 504 and Title II. Students with disabilities who qualify under Section 504 and Title II are those who: (1) have a physical or mental impairment that substantially limits one or more major life activities; (2) have a record of such an impairment; or (3) are regarded as having such an impairment.<sup>32</sup>

All students who are served under IDEA are automatically protected under Section 504 and Title II.<sup>33</sup> At the same time, because the definition of disability under Section 504 and Title II is broader than that under IDEA, some students with disabilities may be protected under these disability civil rights statutes but not qualify under IDEA. Students on a 504 plan who need accessible instructional materials are not eligible to receive these materials through NIMAS/NIMAC unless they are otherwise eligible to receive these materials under IDEA.<sup>34</sup> However, these students are entitled to receive accessible instructional materials under Section 504 and Title II.

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<sup>31</sup> 29 U.S.C § 794(a) (Section 504); 42 U.S.C. § 12132 (Title II).

<sup>32</sup> 29 U.S.C. § 705(20)(B); 34 C.F.R. § 104.3(j)(1) (Section 504); 42 U.S.C. § 12102(1); 28 C.F.R. § 35.104 (Title II).

<sup>33</sup> 34 C.F.R. § 104.3(l)(2)(iii).

<sup>34</sup> Office of Special Educ. Programs, U.S. Dep't of Educ., Questions and Answers on the National Instructional Materials Accessibility Standard (NIMAS), at 6 (rev. Aug. 2010).

## **(2) Comparable Aids, Benefits, and Services**

Section 504 and Title II prohibit schools from engaging in discriminatory actions that deny qualified students with disabilities comparable aids, benefits, and services.<sup>35</sup> For aids, benefits, and services to be “equally effective,” they must provide individuals with disabilities with an equal opportunity to obtain the same result, gain the same benefit, or reach the same level of achievement as students without disabilities.<sup>36</sup> When a school district fails to provide a qualified student with a disability with needed accessible instructional materials, the district may be denying the student comparable aids, benefits, and services. In this case, the student would be denied an equal opportunity to learn the same knowledge and skills that all students are expected to learn and an equal opportunity to reach the same level of achievement as students without disabilities.

## **(3) Criteria or Methods of Administration**

Section 504 and Title II also prohibit school districts from using discriminatory “criteria or methods of administration.”<sup>37</sup> The term “criteria” refers to “written or formal policies,” while the term “methods of administration” refers to “actual practices or procedures.”<sup>38</sup> When a qualified student with a disability who needs accessible instructional materials does not receive these materials in the same time frame that regular print instructional materials are made available to other students, and this delay has a negative impact on the opportunity of the student to reach the same level of achievement that is expected for all students, the school district’s procedures for delivering accessible instructional materials may violate the methods of administration provision of Section 504 and Title II.<sup>39</sup>

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<sup>35</sup> See 34 C.F.R. § 104.4(b)(1).

<sup>36</sup> *Id.* § 104.4(b)(2).

<sup>37</sup> *Id.* § 104.4(b)(4).

<sup>38</sup> See *Illinois State Bd. of Educ.*, 20 IDELR 687, at \*\*4-5 (OCR IL 1993).

<sup>39</sup> See *Letter to: California State Univ.*, 108 LRP 20251, at \*3 (OCR CA 2003)(focusing on the methods of administration provision in the higher education context).

## **(4) FAPE under Section 504**

Section 504 also requires school districts to provide qualified students with FAPE.<sup>40</sup> FAPE under Section 504 is defined differently than under IDEA as the provision of regular or special education and related aids and services designed to meet the individual educational needs of students with disabilities as adequately as the needs of students without disabilities.<sup>41</sup> Failure to provide accessible instructional materials to a qualified student with a disability who needs these materials may be a violation of FAPE under Section 504.

## **(5) Auxiliary Aids and Services and Effective Communications under Title II**

Unlike Section 504, Title II does not require school districts to provide FAPE. Title II requires all public entities, regardless of the education level, to provide “auxiliary aids and services” when necessary to provide a qualified individual with a disability an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity of the public entity.<sup>42</sup> Title II also requires public entities to take appropriate steps to ensure that communications with qualified individuals with disabilities are as effective as communications with individuals without disabilities.<sup>43</sup> The term “communications” refers to the transfer of information, including the printed text of a book and the resources of the Internet.<sup>44</sup>

## **How can parents challenge a school district’s failure under Section 504 and Title II to**

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<sup>40</sup> 34 C.F.R. § 104.33(a).

<sup>41</sup> *Id.* § 104.33(b)(1).

<sup>42</sup> 28 C.F.R. § 35.160(b)(1).

<sup>43</sup> *Id.* § 35.160(a)(1).

<sup>44</sup> *Letter to: California State Univ.*, 108 LRP 20251, at \*2 (OCR CA 2003).

## **provide accessible instructional materials in a timely manner?**

The U.S. Department of Education Office for Civil Rights (OCR) is the federal agency responsible for enforcing Section 504. OCR also enforces Title II in the context of public educational entities. Any individual or organization who believes that a school district has discriminated against a student or a group of students on the basis of disability may file a complaint with OCR.<sup>45</sup> Thus, a parent who believes that his/her child has not been provided needed accessible instructional materials in a timely manner may file a complaint for alleged discrimination on the basis of disability with OCR. Information on filing an OCR complaint can be found at the [U.S. Department of Education](#).

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<sup>45</sup> 34 C.F.R. § 104.61 (incorporating by reference 34 C.F.R. § 100.7(b)) (Section 504); 28 C.F.R. § 35.170 (Title II).