

AEM Center Brief: The Right of Students with Disabilities Who Need Accessible Educational Materials to Receive These Materials in a Timely Manner

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The purpose of this brief is to help families and educators understand the right of students with disabilities who need accessible educational 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 educational materials and why are they important?

For some students with disabilities, text-based educational materials present 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 text. Other students may be unable to hold educational materials because of a physical disability. Still others may be unable to read or derive meaning from text because of their disability-related needs. Accessible educational materials (AEM) are print- and technology-based educational materials, including printed and electronic textbooks and related core materials that are designed or enhanced in a way that makes them usable across the widest range of learner variability, regardless of format (e.g., print, digital, graphic, audio, video).

What are the provisions in IDEA pertaining to AEM?

In 2004, provisions were added to IDEA (IDEA 2004) to help improve the quality and delivery of AEM to students with disabilities who need such materials. Among these provisions, States were required to adopt NIMAS, which stands for the “National Instructional Materials Accessibility Standard.”¹ NIMAS is a technical standard used to prepare “electronic files” that are used to convert instructional materials into accessible formats.² The term “accessible format” is defined in Section 121 of the U.S. Copyright Act as “an alternative manner or form that gives an eligible person access to the work when the copy or phonorecord in the accessible format is used exclusively by the

¹ 20 U.S.C. § 1412(a)(23)(A); 34 C.F.R. § 300.172(a)(1).

² 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)(1)).

eligible person to permit him or her to have access as feasibly and comfortably as a person without such disability.”³

IDEA 2004 also gave State educational agencies (SEAs) and local educational agencies (LEAs) the option to coordinate with the “National Instructional Materials Access Center” (NIMAC),⁴ a national center that stores the electronic files of instructional materials that have been developed based on NIMAS.⁵ To date, all States have chosen to coordinate with the NIMAC. In carrying out the IDEA provisions pertaining to the NIMAS, SEAs were further required to work with the State agency responsible for assistive technology, to the maximum extent possible.⁶

On May 26, 2020, the Office of Special Education and Rehabilitative Services (OSERS) of the U.S. Department of Education issued a final Notice of Interpretation (NOI), clarifying that the definition of “print instructional materials” in IDEA includes digital instructional materials that comply with NIMAS.⁷ Therefore, moving forward, the NIMAC may accept digital instructional materials that conform to the NIMAS specification.

³ 20 U.S.C. § 121(d)(1). In 2018, Congress passed the “Marrakesh Treaty Implementation Act” (MTIA), amending Section 121 of the U.S. Copyright Act. 17 U.S.C. § 121. Among the changes made by the MTIA, the term “specialized formats,” which had previously appeared in Section 121, was replaced with that of “accessible format.” 20 U.S.C. § 121(d)(1). Because IDEA cross-references Section 121, OSERS has stated that the term “specialized formats” in IDEA has also been replaced with that of “accessible format.” <https://osep.grads360.org/services/PDCService.svc/GetPDCDocumentFile?fileId=35283>

⁴ 20 U.S.C. §§ 1412(a)(23)(B), (C), 1413(a)(6); 34 C.F.R. §§ 300.172(b), (c), 300.210.

⁵ 20 U.S.C. § 1474(e)(2).

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

⁷ OSERS, U.S. Department of Education. 85 Fed. Reg. 31374, 31374-31378 (May 26, 2020). <https://www.govinfo.gov/content/pkg/FR-2020-05-26/pdf/2020-09273.pdf>.

A student is eligible to receive accessible formats that have been developed from NIMAS files through the NIMAC if the student:

- is served under IDEA; and
- qualifies under the Act of March 3, 1931 (also known as “An Act to Provide Books for the Adult Blind”).⁸

In order to qualify under the Act of March 3, 1931, a student must meet the definition of “eligible person” found in Section 121 of the U.S. Copyright Act – i.e., the student must be an individual who, regardless of any other disability-

(A) is blind;

(B) has a visual impairment or perceptual or reading disability that cannot be improved to give visual function substantially equivalent to that of a person who has no such impairment or disability and so is unable to read printed works to substantially the same degree as a person without an impairment or disability; or

(C) is otherwise unable, through physical disability, to hold or manipulate a book or to focus or move the eyes to the extent that would be normally acceptable for reading.⁹

According to amended regulations published by the Library of Congress on February 12, 2021, in order to be considered eligible under the Act of March 3, 1931, an individual must be certified by one of the following: “doctor of medicine, doctor of osteopathy, ophthalmologist, optometrist, psychologist, registered nurse, therapist, and professional staff of hospitals, institutions, and public or welfare agencies (such as an

⁸ 20 U.S.C. § 1474(e)(3)(A). As part of the changes made to Section 121 of the U.S. Copyright Act by the MTIA, the term “blind or other persons with disabilities” was replaced with the term “eligible person.” 17 U.S.C. § 121(d)(3). OSERS subsequently clarified that the term “blind or other persons with print disabilities,” which previously appeared in IDEA, has also been replaced with that of “eligible person.”

<https://osep.grads360.org/services/PDCService.svc/GetPDCDocumentFile?fileId=35283>.

⁹ In the “Further Consolidated Appropriations Act, 2020,” Congress amended the Act of March 3, 1931 to incorporate definitions that had been added to Section 121 as part of the MTIA, including the term “eligible person.” 2 U.S.C. §§ 135a(1), (g)(1) (incorporating by reference 17 U.S.C. § 121). The Library of Congress also incorporated the definition of “eligible person” into its amended regulations published on February 12, 2021. 86 Fed. Reg. 9289, 9289 (Feb. 12, 2021) (codified at 36 C.F.R. § 701.6(b)(1)).

<https://www.govinfo.gov/content/pkg/FR-2021-02-12/pdf/2021-02837.pdf>.

educator, a social worker, case worker, counselor, rehabilitation teacher, certified reading specialist, school psychologist, superintendent, or librarian).”¹⁰

What is the relationship between AEM and FAPE under IDEA?

Educational materials play a key role in helping students acquire the knowledge and skills that are part of the general education curriculum. Therefore, AEM are essential to enabling certain students with disabilities to participate in the general education curriculum. OSERS has stated that timely access to appropriate and accessible instructional materials is an inherent component of the obligation of public agencies to ensure that a free appropriate public education (FAPE) is available for all students with disabilities and that students with disabilities participate in the general education curriculum as specified in their Individualized Education Programs (IEPs).¹¹

IDEA regulations state that nothing relieves an SEA or LEA of its responsibility to ensure that students with disabilities who need instructional materials in accessible formats but are not included under the definition for eligibility for such formats, or students who need materials that cannot be produced from NIMAS files, receive those materials in a timely manner.¹² For students who are unable to receive accessible materials developed from NIMAS-based files through the NIMAC, SEAs and LEAs must obtain these materials from other sources.¹³

¹⁰ Library of Congress, 86 Fed. Reg. 9289, 9290 (Feb. 12, 2021) (codified at 36 C.F.R. § 701.6(b)(2)).
<https://www.govinfo.gov/content/pkg/FR-2021-02-12/pdf/2021-02837.pdf>.

¹¹ OSERS, U.S. Department of Education. 71 Fed. Reg. 46540, 46618 (Aug. 14, 2006).
https://sites.ed.gov/idea/files/20060814-Part_B_regulations.pdf.

¹² 34 C.F.R. §§ 300.172(b)(3), 300.210(b)(3).

¹³ OSERS, U.S. Department of Education. (rev. Aug. 2010, p. 6). *Questions and answers on the national instructional materials accessibility standard (NIMAS)*. Washington, DC: Author.
<https://sites.ed.gov/idea/files/nimas-qa-08-2010.pdf>.

What additional IDEA requirements support the right to appropriate AEM?

There are a number of additional requirements in IDEA that further support the right of students with disabilities who need AEM to receive these materials in a timely manner. These provisions apply to all students with disabilities served under IDEA who need AEM.

(1) Evaluation Process

The evaluation process is a critical, first step in identifying a student's needs in relation to educational materials. As part of an initial evaluation or reevaluation, the school district must assess the student in all areas of suspected disability.¹⁴ The evaluation obtains information to help in developing an IEP that will enable the student to be involved and progress in the general education curriculum.¹⁵ During the evaluation process, it is important for the district to consider whether, because of the student's disability-related needs, the text of educational materials poses a barrier to the student's participation in the general education curriculum. The evaluation should also consider whether the student needs assistive technology in order to use a particular accessible format.

(2) IEP Development

Several statements that are part of the IEP are also relevant to the provision of AEM to students with disabilities who need 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 education curriculum.¹⁶

It is important for the school district, in drafting this statement for the IEP, to consider how the student's disability-related needs affect the student's ability to access and

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

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

¹⁶ 20 U.S.C. § 1414(d)(1)(A)(i)(I); 34 C.F.R. § 300.320(a)(1)(i).

derive meaning from the text of the educational 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.¹⁷

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 a particular accessible 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 the student to be involved in and make progress in the general education curriculum.¹⁸

This part of the IEP provides another opportunity to specify the particular accessible format or formats that the student will use in order 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 accessible format(s). It also benefits the student for the IEP to indicate if there is an individual at the school who will help the student use the accessible format(s) and/or technology.

For students who are eligible to receive accessible formats that have been developed from NIMAS files obtained through the NIMAC, it is important to indicate that the student has been certified as eligible to receive such materials.

(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 AEM: (a) for blind students or students with visual impairments, the Team must provide for instruction in Braille and the use of Braille, unless the Team

¹⁷ 20 U.S.C. § 1414(d)(1)(A)(i)(II); 34 C.F.R. § 300.320(a)(2)(i).

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

determines that such instruction or use is not appropriate for the student;¹⁹ and (b) for all students, the Team must consider whether the student needs assistive technology devices and services.²⁰ Assistive technology may be necessary to help the student use particular accessible formats. Both of these factors emphasize the importance of AEM to ensure that students receive FAPE.

(4) IEP Review

The annual review of the student's IEP²¹ provides an opportunity for the IEP Team to examine the student's use of educational materials—e.g., how effective particular accessible formats and supports/accommodations have been as well as the extent to which the student received the materials in a timely manner. The Team should also review whether the accessible formats are helping the student to be involved and progress in the general education curriculum.

(5) Transition Planning

Beginning when the student turns 16 (or earlier, if determined appropriate by the IEP Team or required by State law), the IEP must specify appropriate measurable postsecondary goals and transition services to be included in the student's IEP.²² As part of the transition planning process, it is beneficial for the Team to help the student understand his/her own disability in relation to the need for AEM. When students with disabilities exit special education and are no longer entitled to special education and related services under IDEA, they need to be able to advocate on their own behalf in other settings, including postsecondary education settings. At the postsecondary level, students 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) is provided when the student's eligibility for special education services ends as a result of the student graduating from high school

¹⁹ 20 U.S.C. § 1414(d)(3)(B)(iii); 34 C.F.R. § 300.324(a)(2)(iii).

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

²¹ 20 U.S.C. § 1414(d)(4)(A); 34 C.F.R. § 300.324(b)(1).

²² 20 U.S.C. § 1414(d)(1)(A)(i)(VIII); 34 C.F.R. § 300.320(b).

or exceeding the age of eligibility.²³ The SOP must include a summary of the student's academic achievement and functional performance, including recommendations on how to assist the student in meeting his or her postsecondary goals.²⁴ 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 content to be included.

What options do parents have under IDEA if their child does not receive needed AEM in a timely manner?

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.²⁵ Therefore, if a student who needs AEM 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 potential violation of FAPE. Parents can also pursue a resolution of the matter through mediation.²⁶

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.²⁷ State complaints may be filed by an individual or an organization²⁸ and may allege violations regarding a specific child or a group of

²³ 20 U.S.C. § 1414(c)(5)(B)(i); 34 C.F.R. § 300.305(e)(2).

²⁴ 20 U.S.C. § 1414(c)(5)(B)(ii); 34 C.F.R. § 300.305(e)(3).

²⁵ 20 U.S.C. § 1415(b)(6)(A); 34 C.F.R. § 300.507(a)(1).

²⁶ 20 U.S.C. § 1415(e); 34 C.F.R. § 300.506.

²⁷ 34 C.F.R. §§ 300.151-300.153.

²⁸ 34 C.F.R. § 300.153(a).

children.²⁹ 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 AEM.

What protections are available under Section 504 and Title II of the ADA for students with disabilities who need AEM?

(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.³⁰ 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.³¹

All students who are served under IDEA are automatically protected under Section 504 and Title II.³² 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.

(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.³³ For

²⁹ OSERS, U.S. Department of Education. (rev. June 2009, p. 6). *Questions and answers on procedural safeguards and due process procedures for parents and children with disabilities*. Washington, DC: Author. <https://www2.ed.gov/policy/speced/guid/idea/procedural-safeguards-q-a.pdf>.

³⁰ 29 U.S.C § 794(a); 34 C.F.R. § 104.4(a) (Section 504); 42 U.S.C. § 12132; 28 C.F.R. § 35.130(a) (Title II).

³¹ 29 U.S.C. §§ 705(9), (20); 34 C.F.R. § 104.3(j) (Section 504); 42 U.S.C. § 12102; 28 C.F.R. § 35.108 (Title II).

³² 34 C.F.R. § 104.3(l)(2).

³³ See 34 C.F.R. § 104.4(b)(1) (Section 504); 28 C.F.R. § 35.130(b)(1) (Title II).

aids, benefits, and services to be “equally effective,” they must provide qualified 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.³⁴ If a qualified student with a disability who needs AEM does not receive the materials in a timely manner and the student is not provided the information through alternative means that are equally effective, the student may be denied comparable aids, benefits, and services – i.e., 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.”³⁵ The term “criteria” refers to “written or formal policies,” while the term “methods of administration” refers to “actual practices or procedures.”³⁶ When a qualified student with a disability who needs AEM does not receive these materials in a timely manner, and the student consequently does not have an equal opportunity to reach the same level of achievement that is expected for all students, the school district’s practices or procedures may be in violation of the methods of administration provision of Section 504 and Title II.³⁷

(4) FAPE under Section 504

Section 504 also requires school districts to provide qualified students with FAPE.³⁸ 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

³⁴ 34 C.F.R. § 104.4(b)(2) (Section 504); 28 C.F.R. § 35.130(b)(1)(iii) (Title II).

³⁵ 34 C.F.R. § 104.4(b)(4) (Section 504); 28 C.F.R. § 35.130(b)(3) (Title II).

³⁶ See *Illinois State Bd. of Educ.*, 20 IDELR 687, at **4-5 (OCR IL 1993).

³⁷ 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).

³⁸ 34 C.F.R. § 104.33(a).

students without disabilities.³⁹ Failure to provide AEM to a qualified student with a disability who needs these materials may result in the student being denied 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 in order to afford 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.⁴⁰ 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.⁴¹ The term “communications” refers to the transfer of information, including the text of a book and the resources of the Internet.⁴²

What are the requirements concerning accessible technology?

In 2010, the Civil Rights Division (CRD) of the U.S. Department of Justice and the Office for Civil Rights (OCR) of the U.S. Department of Education issued a joint policy letter, which stated that requiring the use of technology that is inaccessible to students with disabilities constitutes discrimination under Section 504 and the ADA, unless these students are provided accommodations or modifications that enable them to receive all

³⁹ *Id.* § 104.33(b)(1).

⁴⁰ 28 C.F.R. § 35.160(b)(1).

⁴¹ *Id.* § 35.160(a)(1).

⁴² *Letter to: California State Univ.*, 108 LRP 20251, at *2 (OCR CA 2003).

the educational benefits afforded by the technology in an equally effective and equally integrated manner.⁴³

The following year, OCR issued a Frequently Asked Questions (FAQ) document that included a “functional definition of accessibility,” according to which, students with disabilities must be provided the opportunity to acquire the same information, engage in the same interactions, and enjoy the same services as students without disabilities with “substantially equivalent ease of use.”⁴⁴ OCR has further explained that a student with a disability “must be able to obtain the information as fully, equally and independently” as someone without a disability.⁴⁵

Criteria for accessible technology can be found in the technical standards for Section 508 of the Rehabilitation Act (Section 508).⁴⁶ Section 508 requires federal departments and agencies to ensure accessibility of their “electronic and information technology” unless to do so would result in an “undue burden.”⁴⁷ In 2017, the U.S. Architectural and Transportation Barriers Compliance Board (Access Board) issued a final rule, updating the Section 508 standards.⁴⁸ The revised standards, which became effective in 2018, contained a number of changes, including incorporation of the Web Content Accessibility Guidelines (WCAG) 2.0.⁴⁹ Although Section 508 applies to federal

⁴³ CRD, U.S. Department of Justice and OCR, U.S. Department of Education. (2010, p. 1). Joint “dear colleague” letter: Electronic book readers. Washington, DC: Author. <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-20100629.pdf>.

⁴⁴ OCR. (2011, p. 2). Frequently asked questions about the June 29, 2010 dear colleague letter. Washington, DC: Author. <https://www2.ed.gov/about/offices/list/ocr/docs/dcl-ebook-faq-201105.pdf>.

⁴⁵ *Resolution Agreement South Carolina Technical College System OCR Compliance Review No. 11-11-6002*, at *1 (OCR 2013). <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/11116002-b.pdf>.

⁴⁶ 29 U.S.C. § 794d(a)(2).

⁴⁷ *Id.* § 794d(a)(1).

⁴⁸ 82 Fed. Reg. 5790, 5790-5841 (Jan. 18, 2017). <https://www.govinfo.gov/content/pkg/FR-2017-01-18/pdf/2017-00395.pdf>.

⁴⁹ *Id.* at 5791-5792.

departments and agencies, some States have adopted the Section 508 standards at the State level.

What options do parents have under Section 504 and Title II if their child does not receive needed AEM in a timely manner?

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.⁵⁰ Thus, a parent who believes that their child has not been provided needed AEM in a timely manner may file a complaint with OCR for alleged discrimination on the basis of disability. Information on filing an OCR complaint can be found at the [U.S. Department of Education](https://www.ed.gov/office-of-compliance).

⁵⁰ 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).