



21st Century Community Learning Centers

Lessons From the Field: Serving All Students, Including Students With Disabilities



Topic Guide 2

Legal Foundations of Inclusion: What You Need to Know

After reading this guide, you'll be able to...

- ✓ Identify the legal foundations for including students with disabilities.
- ✓ Explain the meaning and importance of case-by-case assessments, reasonable modifications and communication access.
- ✓ Stay informed on state laws and requirements related to inclusion.

Tools in this guide include...

- ✓ An action planning checklist, with links to selected resources.

Disability and Inclusion

Children with activity limitations are often referred to as having a disability or “special needs.” This simply means that their participation in age-appropriate activities is limited by chronic physical, developmental, behavioral or emotional conditions.¹ This guide uses the definition of *disability* in the *Americans with Disabilities Act (ADA)*, which describes a “person with a disability as any person who has a mental or physical impairment that substantially limits one or more major life activities, has a history of such impairment, or is regarded as having such impairment.” The *ADA* provides examples of major life activities, including these: caring for oneself, performing manual tasks, seeing, hearing, walking, sitting, reaching, lifting, breathing, learning, concentrating, communicating, interacting with others and working.

In September 2015, the U.S. Department of Health and Human Services and the U.S. Department of Education issued a joint policy statement calling for expanded efforts to build a culture of inclusion through the following actions²:



YOU FOR YOUTH

All *Lessons From the Field* guides on inclusion, as well as other professional learning and technical assistance tools for 21st CCLCs, are available on the U.S. Department of Education’s You for Youth (Y4Y) website at <https://y4y.ed.gov>.

- Celebrate diversity of all forms and in all facets of society.
- Talk to neighbors, community members, and state and local leaders about the importance of inclusion; highlight the universal benefits of inclusion for children with and without disabilities; and counter myths, misconceptions and stereotypes about children with disabilities. (Easterseals counters myths and provides facts about people with disabilities at <http://www.easterseals.com/explore-resources/facts-about-disability/myths-facts.html>.)
- Co-create strategic plans for inclusion at the state, local education agency, school and program levels.
- Strongly communicate inclusion as a shared responsibility and a top priority, and demonstrate commitment to inclusion through policy changes and appropriate resource allocation at all levels.

Although the joint statement focuses on including young children with disabilities in early childhood programs, it promotes a “shared vision that all people be meaningfully included in all facets of society throughout the life course.”

DEFINITION

Disability and Inclusion

These terms, as used in this guide, are defined as follows:

Disability: A mental or physical impairment that substantially limits one or more major life activities.

Inclusion: Attitudes and practices that support students with disabilities, even significant disabilities, and give all an opportunity to participate; inclusion rests on the belief that people have the right to be included with their peers in age-appropriate activities throughout life.

The *Every Student Succeeds Act (ESSA)* authorizes 21st CCLC programs to support services for students with disabilities:

Sec. 4205(a)(5): AUTHORIZED ACTIVITIES.— Each eligible entity that receives an award under section 4204 may use the award funds to carry out a broad array of activities that advance student academic achievement and support student success, including ... services for individuals with disabilities.



Understanding the Legal Foundations for Inclusion

Three laws provide the legal foundation for inclusion in 21st CCLC programs: Section 504 of the *Rehabilitation Act of 1973*, the *Americans with Disabilities Act of 1990* and the *Individuals with Disabilities Education Act of 2004*.

Section 504 of the Rehabilitation Act of 1973

Section 504 of the *Rehabilitation Act* prohibits discrimination on the basis of disability in federally funded programs, including nonprofit and for-profit agencies, public schools, and extracurricular or religious programs. Section 504 requires that the needs of students with disabilities be met as adequately as the needs of students without disabilities. It covers all students with disabilities, regardless of whether they qualify for special education services, because it broadly defines disability as “a physical or mental impairment that substantially limits a major life activity.” Students who have a “504 plan” often have learning or attention disabilities and also have documentation that the disability limits their ability to learn and participate in a general education classroom. A student’s 504 plan details

Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 794

“No otherwise qualified individual with a disability in the United States ... shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”

The U.S. Department of Education enforces Section 504 in programs and activities that receive funds from the Department, and has published a regulation implementing Section 504 (34 C.F.R. Part 104), available at <http://www2.ed.gov/about/offices/list/ocr/docs/edlite-FAPE504.html>.

specific modifications, supports or services provided in general education settings. Each district develops its own 504 plan format, as no standard format is provided in the legislation.

The Americans with Disabilities Act of 1990 (ADA)

The *ADA* describes “a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.” It requires “reasonable accommodations” for people with disabilities to access public activities and sites, providing them with equal opportunities to participate in daily life. All federal, state and local government facilities and activities must be accessible to everyone, regardless of ability. Likewise, any program that receives federal funds must meet *ADA* requirements, and programs that receive state funds must meet any additional state requirements for including persons with disabilities.

Americans with Disabilities Act, § 36.104

Disability means, with respect to an individual, a physical or mental impairment that substantially limits one or more of the major life activities of such individual; a record of such an impairment; or being regarded as having such an impairment.

Facility means all or any portion of buildings, structures, sites, complexes, equipment, rolling stock or other conveyances, roads, walks, passageways, parking lots, or other real or personal property, including the site where the building, property, structure, or equipment is located.

These definitions are included in the revised *Title III* regulation, which integrates the Department’s 2010 regulatory provisions with the text of *Title III*. The revised regulation is available at http://www.ada.gov/regs2010/titleIII_2010/titleIII_2010_regulations.htm#anchor3508.

What Are “Reasonable Modifications?”

Under a regulatory provision implementing *Title II* of the *ADA*, public entities are required to make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.

Office for Civil Rights, <http://www2.ed.gov/about/offices/list/ocr/504faq.html>

In the context of education, *reasonable modifications* to policies, practices or procedures must be provided to avoid discrimination on the basis of disability, unless the modifications would cause a fundamental alteration or undue burden as defined by law. A *fundamental alteration* is something that changes the nature of the program. An *undue burden* is a significant difficulty or expense to the program. To determine whether a modification would pose an undue burden, the program must consider the nature and cost of the modification and the overall financial resources of the subgrantee organization or agency.

Programs are not required to provide specialized services outside of their focus or area of expertise. For example, they are not required to provide skilled nursing or therapeutic intervention services if they are not otherwise provided in the program. However, in many cases, it is considered a reasonable modification for a program to allow another agency to provide such services in the program facility. For example, if a child’s family seeks private behavioral therapy services, the afterschool program could allow the child’s behavioral therapist to work with the child on-site to help meet personal and program goals (e.g., to coach the child in initiating positive interactions with peers or resolving conflicts with peers).

Individuals with Disabilities Education Act of 2004 (IDEA)

Passed in 1975 and amended in 2004, *IDEA* requires public schools to make available to all eligible children with disabilities a “free appropriate public education” in the least restrictive environment for their individual needs. *IDEA* requires public school systems to develop an individualized education program (IEP) for each child with a disability. As with 504 plans, no standardized form is defined in the legislation, so IEPs look different from one place to another. See topic guide 8, “Working With IEPs, Section 504 Plans and Transition Plans,” for more about IEPs, *IDEA* privacy protections for students with disabilities and *Family Educational Rights and Privacy Act (FERPA)* requirements pertaining to educational records.

If participation in a 21st CCLC program is considered important to the student’s development, it can be written into the IEP. Then the accommodations and supports the child relies on during the school day may follow the child into the afterschool program, as appropriate. Each state provides regulations and guidance for implementing *IDEA*, and a number of states have additional regulations beyond the federal requirements.

IDEA establishes guiding principles that are key to understanding the intent of the law.³ Parent and student participation in decision making is one of these principles. Parents or guardians must be part of the

IDEA, Part D

The first purpose of *IDEA* is stated as follows:

“(1)(A) to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living.” (Page 118, Stat. 2651)

Full text of legislation is available at <http://idea.ed.gov/download/statute.html>.

team that makes decisions about placement, services and information to be included in the IEP. Parents have the right to include other individuals on the IEP team who have knowledge about the student, and students who are 14 years or older must also be included on the team.

Providing Services for Students With Disabilities: Case-by-Case Assessments, Reasonable Modifications, and Communication Access

The *ADA* and Section 504 require grantees and subgrantees to offer services to all students who meet the basic age and eligibility requirements for the 21st CCLC program. In other words, a student may not be turned away based solely on the fact that he or she has a disability or other condition. In addition, provisions of these laws align with the *IDEA* principle of providing services in the “least restrictive environment,” which encourages equal participation by all students.

Under Section 504, grantees and subgrantees *cannot*

- Deny a qualified youth the opportunity to participate;
- Provide a student with a disability an opportunity to participate that is not equal to the opportunity of others (e.g., tell a parent that the student can attend the program only on Mondays and Wednesdays because those are the only days that additional staff are available to support the student’s needs);
- Provide different or separate programs to students with disabilities (instead, programs should group students with disabilities with same-age peers who do not have disabilities); and/or
- Otherwise limit a student in the enjoyment of any right, privilege, advantage or opportunity enjoyed by other students (e.g., tell a student he cannot attend the field trip because an accessible bus is not available).

Under the *ADA*, grantees and subgrantees *cannot*

- Deny program acceptance or enrollment to a qualified youth;



- Make assumptions about whether a student can participate based on his or her disability or condition;
- Use admissions policies that exclude students with disabilities (e.g., require that students use the bathroom independently); and/or
- Require students with disabilities to accept modifications they do not want (e.g., require that the student have a 1:1 aide during program hours).

Subgrantees have a legal obligation to provide the following services for students with disabilities: individualized assessments, reasonable modifications and communication access.

Individualized Assessments

The *ADA* requires programs to make an “individualized assessment” of what each student with a disability needs in order to participate in the 21st CCLC setting — and whether the program can meet the particular needs of a student with a disability without fundamentally altering the nature of the service, program or activity being provided, or incurring significant difficulty or expense. An assessment must be based on the individual student, the program environment and available resources. Programs cannot base decisions on stereotypes or presuppositions about what the student with a disability can or cannot do or how much assistance the student might require. Modifications provided in the 21st CCLC setting may differ from those provided in school. For example, some students might need an aide during the school day but participate in the 21st CCLC program without one.

Reasonable Modifications

Programs are required to make reasonable modifications to policies, practices and procedures to support the participation of qualified students with disabilities. Modifications can promote access to learning, recreation, leisure or work. Access means enrollment in the 21st CCLC program, physical access *and* having support to participate in all activities in meaningful ways.

Interpreting what “reasonable modifications” means and looks like is often challenging for providers, parents and even the courts. Generally speaking, modifications are reasonable if they do not result in a fundamental alteration

to the nature of the program or cause an undue burden (significant difficulty or expense). Programs are not required to make fundamental alterations, which in general means they are not required to offer services that are outside the program scope.

For example, the majority of 21st CCLC programs do not offer direct mental health services to students. Under the law, programs that do not offer such services are not required to offer them to include a student with a disability because it would fundamentally alter the nature of the program from an educational, recreational program to a therapeutic one.

Programs need to consider the following factors in determining whether a modification is reasonable:

- The actual needs of the student, free from judgment about whether the student can participate in the program;
- How services are provided to all students and how that relates to the modification required (e.g., all students play outdoors for a portion of the afternoon, but a narrow doorway prevents a student who uses a wheelchair from accessing the playground); and
- The resources available to provide the modification at little or no cost to the program (e.g., partnering with the Department of Vocational Rehabilitation to provide a skilled nursing aide).

For examples of reasonable modifications, see “Commonly Asked Questions About Child Care and the *ADA*” on the U.S. Department of Justice *ADA* Information and Technical Assistance website (www.ada.gov/childqanda.htm). The responses in the document specify factors to consider when determining whether a modification is reasonable. For example:

Question: “We do not normally diaper children of any age who are not toilet trained. Do we still have to help older children who need diapering or toileting assistance due to a disability?”

Answer: “It depends. To determine when it is a reasonable modification to provide diapering for an older child who needs diapering because of a

disability and a center does not normally provide diapering, the center should consider factors including, but not limited to, (1) whether other non-disabled children are young enough to need intermittent toileting assistance when, for instance, they have accidents; (2) whether providing toileting assistance or diapering on a regular basis would require a child care provider to leave other children unattended; and (3) whether the center would have to purchase diapering tables or other equipment. If the program never provides toileting assistance to any child, however, then such a personal service would not be required for a child with a disability. Please keep in mind that even in these circumstances, the child could not be excluded from the program because he or she was not toilet trained if the center can make other arrangements, such as having a parent or personal assistant come and do the diapering.”

Modifications that are appropriate in a school setting might not be appropriate in the 21st CCLC setting. (See topic guide 9, “Addressing Individual Needs and Engaging All Learners,” for more about differentiating activities and supports for the program environment.)

Communication Access

Under *Title II of ADA*, programs receiving federal funding must, without charge, ensure that communication with students with disabilities, and with any student’s adult family members who have disabilities, is as effective as communication with other students and families. This requirement gives primary consideration to students and parents in determining which auxiliary aids and services are necessary to provide effective communication. Here are a few examples — but remember, the use of particular aids and services must be based on individualized assessments:

- For a student who is deaf, deaf-blind or hard of hearing: exchange of written materials, sign language interpreters, note takers, assistive listening systems, accessible electronic and information technology, and open and closed captioning.
- For a student who is blind, deaf-blind, or has low vision: qualified readers, taped texts, audio



recordings, Braille materials and refreshable Braille displays, accessible e-book readers, screen reader software, magnification software, optical readers and large-print materials.

- For a student with a speech disability: a picture, word or letter board; writing materials; spelling to communicate; a qualified sign language interpreter; a portable device that writes and/or produces speech; and telecommunications services.

Staying Informed on State Laws and Requirements Relevant to Inclusion

State laws and requirements set the direction for how 21st CCLC programs implement federal legislation such as *IDEA* to provide services for students with disabilities. State education agencies align their policies and decisions with these laws. It is important to understand state-specific laws and policies around special education services, as they may expand on federal laws in a variety of ways. The state department of education website can often provide information and updates about state laws and requirements. State coordinators can help programs understand how these laws affect services provided to students with disabilities in 21st CCLC programs.

Legal Foundations of Inclusion

Action Planning Checklist for 21st CCLC Programs (With Selected Resources)

Understanding the Legal Foundations of Federal Disability Laws and Policies

- **See the other topic guides in this series.** Especially, see topic guide 8, “Working with IEPs, Section 504 Plans and Transition Plans.”
- **Consult with your 21st CCLC state coordinator** to see if state-specific resources and information are available specific to inclusion in 21st CCLC programs.
- **Explore online resources** relevant to including students with disabilities. For example:
 - **Office for Civil Rights**, “Protecting Students With Disabilities: Frequently Asked Questions About Section 504 and the Education of Children With Disabilities,” <http://www2.ed.gov/about/offices/list/ocr/504faq.html>.
 - **U.S. Department of Education, Office of Special Education and Rehabilitative Services.** For guidance and resources on *IDEA*, including best practices from the field and tips for teachers and parents, go to <http://www2.ed.gov/about/offices/list/osers/osep/index.html>.
 - **Kids Included Together (KIT)** is a nonprofit organization that helps individuals and organizations that serve children understand inclusive practices. KIT’s booklet “Understanding the Laws Supporting Inclusion” is available at http://www.kitonline.org/html/about/publications/2013_understanding_the_laws_supporting_inclusion.html.
 - **Understood** is a collaboration of 15 nonprofit organizations that offers information for parents of students with learning and attention disabilities. See, for example, its article “Understanding 504 Plans,” available at <https://www.understood.org/en/school-learning/special-services/504-plan/understanding-504-plans>.

21st CCLC Programs and the Law

- **Consult any guidance from the state for program directors and site coordinators** to ensure that policies and practices align with the federal and state laws related to inclusion. Visit <http://www.ada.gov/childqanda.htm> and <http://childcarelaw.org/wp-content/uploads/2014/06/Know-the-Law-About-The-Americans-with-Disabilities-Act-and-Child-Care.pdf> for answers to frequently asked questions.
- **If the state does not have a case-by-case assessment checklist, offer to help develop one.** Such a checklist could be completed when a student with a disability enrolls. It should describe processes for gathering information about the student and developing reasonable modifications.
- **Reach out to your state coordinator and program director to propose appropriate ways to modify policies, procedures or practices to support students with specific types of needs.** You might propose accommodations by category (i.e., physical access, program access and communication access) or by type of need (communication, developmental, social-emotional) and share them during statewide meetings or professional development events. Working as a learning community with other 21st CCLC programs can help everyone create more inclusive environments.

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Action Planning Checklist for 21st CCLC Programs (continued)

Staying Informed on State Disability Laws and Requirements

- Visit your state's special education department website to find the state laws and related documents, as well as resources and information for parents.
- Check other state websites that might have information on serving students with disabilities. Health and human services agencies, for example, might help you identify state and local resources.



YOU FOR YOUTH

Interested in checklists on other inclusion topics? All *Lessons From the Field* topical guides on inclusion contain checklists like this one. The guides are available at <https://y4y.ed.gov>.

Notes

¹ National Center for Health Statistics, *Chartbook on Trends in the Health of Americans. Limitations of Activity: Children* (Hyattsville, MD, 2008), <http://www.childstats.gov/americaschildren/health4.asp>.

² U.S. Department of Health and Human Services and U.S. Department of Education, *Policy Statement on Inclusion of Children With Disabilities in Early Childhood Programs* (Washington, DC: U.S. Departments of Health and Human Services and Education, September 14, 2015), <http://www2.ed.gov/policy/speced/guid/earlylearning/joint-statement-full-text.pdf>.

³ N. Todd, *Special Education: Understanding Federal and State Statutory Requirements* (Quincy: Massachusetts Teachers Association, Center for Education Policy and Practice, 2008), http://massteacher.org/-/media/Files/CEPP/sped_primer.pdf.

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