



April 22, 2019

**VIA Email Only**

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Arizona Department of Education  
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**Re: Feedback on AZ-TAS Questions and Answers: Graduation and Students with Disabilities (February 2019)**

Dear Mr. Baggs:

The Arizona Center for Disability Law (ACDL) writes to submit feedback to the Arizona Department of Education (ADE) on the working draft of the Arizona Technical Assistance System document titled *Questions and Answers: Graduation and Students with Disabilities* (February 2019) (hereinafter, *Graduation and Students with Disabilities*). See our companion letter regarding a conflict between Arizona Administrative Code R7-2-302(6) and this Guidance and the funding mechanisms for students 18-22 years of age.

ACDL is a non-profit law firm that assists Arizonans with disabilities to promote and protect their legal rights to independence, justice, and equality. ACDL is the designated protection and advocacy agency for people with disabilities in Arizona. ACDL regularly represents students with disabilities in special education matters throughout the state.

ACDL appreciates ADE's issuance of technical assistance materials regarding school districts' obligations related to graduation of students with disabilities and its willingness to revise the materials after gathering stakeholder input.

ADE is correct that guidance on this issue is warranted. ACDL staff have noted violations across many local education agencies (LEAs) of the Individuals with Disabilities Education Act (IDEA), Section 504 of the Rehabilitation Act of 1973 (Section 504), and Title II of the Americans with Disabilities Act (ADA) relating to the rights of students with disabilities and graduation. Every year, many families of students in special education call

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ACDL, and other advocacy agencies, because they are told that their son or daughter must graduate (often as early as 18 years old) because they have completed enough credits to graduate with a regular diploma. In many of these cases, examination of the student's Individualized Education Program (IEP) reveals a student with profound disabilities, an inadequate or incomplete transition plan, unmet IEP goals related to basic activities of daily living or serious behavioral issues, and/or academic coursework that has been so fundamentally altered as to not align with state standards for graduation requirements for all students. While eligibility for special education under IDEA and state law continues to age 22, this class of students is issued a regular diploma and thereby denied Free Appropriate Public Education (FAPE) to which they are entitled. See 34 C.F.R. § 300.101; A.R.S. § 15-764(A)(1); *E.R.K. ex rel. R.K. v. Hawaii Dep't of Educ.*, 728 F.3d 982, 993 (9th Cir. 2013) (finding that a Hawaii statute that barred students who received special education services under IDEA from attending public school after the last day of the school year in which they turned 20 violated IDEA). In many cases, school districts have also not complied with the procedural safeguards required under the IDEA for graduation as a change of placement. 34 C.F.R. § 300.102(a)(3)(iii).

ACDL also receives many complaints from parents whose student with a disability would be able to meet graduation requirements with reasonable modifications, but the failure to consistently provide the necessary modifications has denied the student an equal opportunity to graduate with a regular diploma. It has been suggested that 85–90% of students with disabilities can meet the same graduation standards as students without disabilities, as long as they are given the supports and specific instruction to meet their unique learning needs.<sup>1</sup>

LEAs and parents need technical assistance that will improve compliance and dispel any beliefs that these practices are lawful.

Several changes to *Graduation and Students with Disabilities* would help LEAs better comply with their obligations concerning graduation of students with disabilities. We have provided additional information below concerning the topics we believe should be added, or expanded upon, in any technical assistance document ADE produces concerning this issue.

### **Reasonable Accommodations and Modifications under IDEA, ADA Title II and Section 504**

ACDL is concerned that the current draft *Graduation and Students with Disabilities* does not mention LEAs' legal obligation to provide students with disabilities with reasonable accommodations and modifications. This obligation flows both from IDEA, and from Title II of ADA and Section 504.

IDEA requires LEAs to provide specially designed instruction to students with disabilities

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<sup>1</sup> See Diploma Options, Gradation Requirements and Exit National Center for Educational Outcome and Exit Exams for Youth with Disabilities: 2017 Study, National Center for Educational Outcome (March 2019) (citing internal study).

in order to provide them with FAPE. 20 U.S.C. § 1401(29). Specially designed instruction may include reasonable accommodations or modifications that allow a student to access the general curriculum. The regulations implementing IDEA state, for example, that an IEP must include a statement of program modifications that will be provided to enable a student to advance appropriately. 34 C.F.R. § 300.320(a)(4). The regulations further prescribe that each teacher and provider who interacts with a student with a disability be informed of the specific accommodations, modifications, and supports that must be provided for a student in accordance with that student's IEP. 34 C.F.R. § 300.323(d). When describing what must be included in an IEP regarding standardized testing, the regulations require "A statement of any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the child on State and districtwide assessments." 34 C.F.R. § 300.320(a)(6)(i). Therefore, it is clear from these regulations that accommodations and modifications are integral to the specially designed instruction required by IDEA for students with disabilities.

Furthermore, Title II of the ADA and Section 504 prohibit discrimination on the basis of disability in public entities and programs and services receiving federal financial assistance, including LEAs. 42 U.S.C. § 12132, *et seq.*; 29 U.S.C. § 701, *et seq.* These federal laws require that entities such as LEAs make reasonable modifications, including academic modifications, to ensure that students with disabilities are provided equal opportunities to participate in the academic programs of the LEA. While ADE does not enforce the ADA and Section 504, pointing out the intersection of these laws improves compliance with IDEA and related state law.

ACDL is concerned that several statements in the current draft of *Graduation and Students with Disabilities* fail to capture LEAs' legal obligations to make reasonable academic modifications to graduation requirements as necessary to provide students with disabilities equal access to their academic programs. For example, *unqualified* statements such as "[s]tudents with disabilities, like their nondisabled peers, can earn a regular high school diploma if they meet the competency requirements set by the Arizona State Board of Education or the more rigorous requirements set by the PEA's governing board" (see p. 5) may lead an LEA to believe it is not required to consider reasonable academic adjustments for a qualified student with a disability who seeks to graduate with a regular diploma.

While guidance and case law regarding the provision of reasonable modifications and auxiliary aids and services to students with disabilities has primarily been developed in the area of post-secondary education, these cases provide many examples of academic modifications that can be made to enable students with disabilities to be able to meet the state and district graduation requirements.

Academic adjustments that are commonly provided in the post-secondary context include, but are not limited to, testing accommodations (e.g., extended time, separate testing location, provision of alternative testing formats, and provision of readers and scribes) and adjustments to degree requirements such as course substitutions. See, e.g., *Disability Rights Enforcement Highlights, Office for Civil Rights, U.S. Department of*

*Education* (2012) at 11 (“Students with disabilities who meet the academic and technical standards of admission to, or participation in, the program are entitled to academic modifications (such as course substitutions or additional time for completing degree requirements) and auxiliary aids and services (such as screen readers or sign language interpreters) to ensure their equal opportunity to participate in the program.”); Terri Forsbach-Rothman, Fernando F. Padró, and Jennifer Rice-Mason, *Course Substitution Practices, Policies, and Implications for Students with Disabilities*, 25 NACADA Journal 17, 21 (2005) (finding 90.8% of institutions of higher learning surveyed offer course substitutions as necessary for students with disabilities).<sup>2</sup>

LEAs have an obligation to make reasonable modifications under Title II and Section 504. For example, while it may not be reasonable to request an LEA waive requirements set by the state for obtaining a regular diploma, it is required to consider whether a course substitution would be a reasonable modification to provide to a student with a disability who seeks to graduate with a regular diploma. Furthermore, LEAs must provide reasonable accommodations and modifications to students with disabilities on classroom tests as well as on district and state-wide assessments in accordance with their IEPs.<sup>3</sup> This information is absent from the current draft of *Graduation and Students with Disabilities* and should be incorporated to ensure LEAs understand their legal obligations to students with disabilities under Title II and Section 504.

## **Transition Services**

Amending the current draft of *Graduation and Students with Disabilities* to provide additional guidance in the area of transition services will assist LEAs in understanding their obligations to graduation-aged students with disabilities. ACDL appreciates that there is some discussion of transition requirements included in the current draft. However, we believe more information and practical guidance should be included to avoid misinterpretation and inconsistency of implementation.

Specifically, ACDL recommends that the following additional information concerning transition services be added to *Graduation and Students with Disabilities*:

- For a student receiving special education services, graduation with a regular diploma constitutes a change in placement. Therefore, the LEA must provide parents/non-minor students with Prior Written Notice of graduation. 34 C.F.R. §

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<sup>2</sup> A entity covered by Title II of the ADA is not required to make adjustments that would fundamentally or substantially alter the nature of its academic programs or standards. See, e.g., *Powell v. National Board of Medical Examiners*, 364 F.3d 79, 88 (2nd Cir. 2004). These civil rights protections require equal access, equal opportunities, and equal participation, not equal outcomes.

<sup>3</sup> The current version of *Graduation and Students with Disabilities* does not discuss the Multi-State Alternate Assessment (MSAA), an examination that is designed to assess students with significant cognitive disabilities and is aligned to state content standards. It is unclear from the current guidance whether or not courses that culminate with an MSAA end-of-course (EOC) assessment count for credit toward a regular high school diploma. This should be clarified in the revised technical assistance document.

300.102(a)(3)(iii). LEAs should provide the notice within "a reasonable time" before proposing to graduate a student, in order to ensure that there is sufficient time for the parents and student to plan for, or challenge, the pending graduation. 34 C.F.R. §300.503(a).

- When a student who receives special education services graduates, the LEA is required to provide a summary of performance. This summary should include academic and functional levels of performance, as well as recommendations to assist the student in meeting post-secondary goals. 34 C.F.R. § 300.305(e)(3).
- LEAs should collaborate with other service organizations like Vocational Rehabilitation (VR) when providing transition services. There is an interagency agreement between ADE and the Arizona Department of Economic Security (ADES) that is intended to provide seamless delivery of services to students with disabilities from school to post-school activities. ADES Contract No. DE13-033866. LEAs should invite representatives from other agencies, such as VR, to participate in IEP meetings in which transition services and postsecondary goals are discussed. Office of Special Education and Rehabilitative Services, U.S. Department of Education, *A Transition Guide to Postsecondary Education and Employment for Students with Disabilities* (2017), at 9. Furthermore, recent amendments to the Rehabilitation Act authorize the VR agency, along with the LEA, to provide or arrange for the early provision of pre-employment transition services for all students with disabilities who are eligible or potentially eligible for VR services. 34 C.F.R § 361.48.
- If a transition services provider that is not a state agency fails to provide transition services as described in a student's IEP, the LEA must reconvene the IEP team to identify alternative strategies to meet the transition objectives for the student. Office of Special Education and Rehabilitative Services, U.S. Department of Education, *A Transition Guide to Postsecondary Education and Employment for Students with Disabilities* (2017), at 9.
- Transition services must be provided in the Least Restrictive Environment (LRE), just like any other service under the IDEA. This means a student should engage in transition services alongside non-disabled peers to the greatest extent appropriate. Letter to Spitzer-Resnick, Swedeen, and Pugh, 59 IDELR 230 (OSEP 2012).
- IDEA Part B funds can be used for student participation in transitional programs on college campuses or in community-based settings. Letter to Dude, 62 IDELR 91 (OSEP 2013). Therefore, IEPs can include transition services in the form of coursework at a community college or other postsecondary institution, provided that the State recognizes the coursework as secondary school education under state law.

ACDL also recommends adding two additional questions/answers to *Graduation and*

### *Students with Disabilities:*

- What if a student with an IEP meets credit hour requirements but has not received appropriate/adequate transition services?
  - An LEA that has failed to provide a student with disabilities with a FAPE under the IDEA (e.g., failed to provide a student with appropriate transitional services) may be prevented from graduating the student with a regular diploma, even if the student has met all credit hour requirements. See, e.g., *Doe v. Marlborough Pub. Sch.*, No. CIV. A. 09-11118-WGY, 2010 WL 2682433, at \*4 (D. Mass. June 30, 2010); *Bell v. Bd. of Educ. of the Albuquerque Pub. Sch.*, No. 06-1137, 2008 WL 5991062, at \*33 (D.N.M. Nov. 28, 2008); *Kevin T. v. Elmhurst Cmty. Sch. Dist. No. 205*, No. 01-0005, 2002 WL 433061, at \*14-15 (N.D. Ill. March 20, 2002).
  - Such a student should be offered appropriate transition services for a length of time adequate to make sufficient progress toward transition goals before being awarded a regular diploma.
  
- What happens if an LEA fails to provide adequate transition services?
  - Parents have access to the same dispute resolution options they would for any other failure to provide FAPE. 34 C.F.R. § 303.430.
  - Due process hearing officers have ordered diplomas to be rescinded and special education services to be reinstated. See, e.g., *Stock v. Massachusetts Hosp. Sch.*, 392 Mass. 205, 214, 467 N.E.2d 448, 455 (1984), on reh'g, 394 Mass. 437, 476 N.E.2d 210 (1985).
  - LEAs may be required to provide compensatory education or transition services. See, e.g., *JO v Tacoma Sch Dist* 64 IDELR 269 (SEA WA 2015).
  - LEAs may be ordered to reimburse parents for the cost of private transition services. 34 C.F.R. § 300.148(c).

Additionally, ACDL disagrees with the part of the current draft of *Graduation and Students with Disabilities* that states that transition activities should occur simultaneously with a student's coursework (see p. 8). Although transition services should not be delayed and are mandated to begin with a transition plan no later than age 16, there is no requirement that transition services be provided simultaneous to academic services.

Transition planning, like all other aspects of the IEP, should be an individualized process. The placement, frequency/duration, and type of transition services provided to a student with a disability must be determined by the student's IEP team and must be based on the individual student's needs, taking into account the student's preferences and interests. 34 C.F.R § 300.29. Therefore, the decision as to whether transition activities should be integrated with a student's coursework or should be provided separately must be made by the IEP team and be based on the individual student's needs and preferences.

There are transition programs at several Arizona LEAs that provide intensive pre-vocational, mobility, or independent living transition services without an academic component. While participation in such programs should never be mandatory, when a

particular student's IEP team determines participation will align with the student's needs and preferences, these programs can afford students great benefit while complying with state and federal law.

## Conclusion

Thank you for your consideration of this feedback. We hope that the information noted above is incorporated into the final draft of *Graduation of Students with Disabilities* or similar technical assistance documents to ensure that LEAs are provided with complete information concerning their legal obligations to all students with disabilities. Please contact me at 520-327-9547 or [rdalyrooney@azdisabilitylaw.org](mailto:rdalyrooney@azdisabilitylaw.org) if you require clarification or further information concerning ACDL's feedback.

Sincerely,



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