

December 6, 2010

SUBMITTED VIA INTERNET ONLY.

Office of Regulations
Social Security Administration
107 Altmeyer Building
6401 Security Boulevard
Baltimore, Maryland 21235-6401

**Re: Section 504 Self-Evaluation
Docket No. SSA-2010-0069**

To the Office of Regulations:

Disability Rights Education and Defense Fund (DREDF)¹, the Law Foundation of Silicon Valley², the National Senior Citizens Law Center³, Legal Services NYC (LS-NYC)⁴ and Judge David L. Bazelon Center for Mental Health Law⁵ submit these

¹ DREDF is a national law and policy center dedicated to protecting and advancing the civil rights of people with disabilities through legislation, litigation, advocacy, technical assistance, and education and training of attorneys, advocates, persons with disabilities, and parents of children with disabilities.

² The Law Foundation of Silicon Valley is a free legal services agency based on San José, California. These comments are submitted by three of its programs: Mental Health Advocacy Project (MHAP), Public Interest Law Firm (PILF), and Health Legal Services (HLS). MHAP's mission is to empower people identified as having mental or developmental disabilities to live more independent, secure and satisfying lives through the enforcement of their legal rights and the advancement of their social and economic well-being. PILF's mission is to protect the human rights of individuals and groups in the Silicon Valley area who face barriers to adequate representation in the civil justice system, using impact litigation and advocacy. PILF focuses its efforts on behalf of elders, youth, individuals with disabilities, those who are frequent victims of illegal discrimination, and those who are poor. HLS's mission is to remove barriers to health stability and secure justice by providing comprehensive legal services to individuals living with chronic or life-threatening conditions.

³ The National Senior Citizens Law Center mission is to protect the rights of low-income older adults. Since 1972, the National Senior Citizens Law Center has worked to promote the independence and well-being of low-income elderly and persons with disabilities, especially women, people of color, and other disadvantaged minorities. Through advocacy, litigation, and the education and counseling of local advocates, we seek to ensure the health and economic security of those with limited income and resources, and access to the courts for all. Because we believe in publicly-funded safety net programs, we work to preserve and strengthen Medicaid, Medicare Part D, Social Security and SSI. To guarantee fair treatment, we work for greater access to federal courts for citizens and for better enforcement of consumer's legal rights in safety net programs.

⁴ Legal Services NYC (LS-NYC) is the largest organization exclusively devoted to the provision of free civil legal services to the poor in the nation. For over forty-three years, LS-NYC has provided quality legal representation to low-income New Yorkers through our nineteen neighborhood offices located in diverse communities throughout New York City. Each year, our staff assists approximately 750 clients to obtain or maintain Social Security Disability Insurance (SSDI) or Supplemental Security Income (SSI). LS-NYC also helps coordinate New York State's Disability Advocacy Program (DAP). Statewide, DAP has served

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comments⁶ in response to the Social Security Administration's (SSA) November 5, 2010, request for ideas and suggestions regarding its planned Section 504 Self-Evaluation, published at 75 FR 68395.

over 90,000 people seeking assistance with federal disability benefits. As a coordinator for the New York City region, LS-NYC also provides support services to dozens of disability benefit advocates. These support services can include training sessions, advice, co-counseling, and information relating to disability law.

⁵ Judge David L. Bazelon Center for Mental Health Law is a national public interest organization founded in 1972 to advocate for the rights of individuals with mental disabilities. The Center has engaged in litigation, policy advocacy, and public education to preserve the civil rights of and promote equal opportunities for individuals with mental disabilities. The Center works closely with other disability groups to advocate with the Social Security Administration about their programs benefitting people with mental disabilities.

⁶ These comments are also submitted on behalf of the following legal services organizations:

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SSA asks:

What aspects of our facilities, activities, and programs should we evaluate? Should we perform a self-evaluation of individual facilities or perform a more general evaluation of our facilities, activities, and programs?

How can we best provide an opportunity for persons with disabilities, their family members, and those who work with or advocate for persons with disabilities to participate in the self-evaluation? Should we conduct public meetings, obtain ideas and suggestions through the solicitation of written comments, or obtain input through some other method?

(<http://www.federalregister.gov/articles/2010/11/05/2010-27922/agency-selfevaluation-under-section-504-of-the-rehabilitation-act-of-1973#p-20>.) Our organizations have extensive experience representing the rights of individuals with disabilities, both in matters pertaining to SSA-administered benefits and rights under Section 504, and in other contexts. We submit the below comments to aid SSA in conducting its Section 504 Self-Evaluation.

I. Background

The regulations implementing Section 504 of the Rehabilitation Act of 1973 (Section 504) set forth general prohibitions against discrimination based on disability in federal agencies and federally funded programs. (45 C.F.R. §§ 85 *et seq.*) Section 504 protects all persons who have physical or mental impairments [that substantially [limit] one or more major life activities, [who have] a record of such an impairment, or [who are] regarded as having such an impairment.] (45 C.F.R. § 85.3.) Section 504 [

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regulations require that agencies must, among other things: a) ensure that affected person receive notice of their protections against disability discrimination (§ 85.12); b) ensure that [n]o qualified individual with handicaps shall on the basis of handicap be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity conducted by the agency (§ 85.21(a)); c) make programs readily accessible and useable including making buildings physically accessible (§ 85.41); d) [take appropriate steps to ensure effective communications] (§ 85.51(a)), including provision of "appropriate auxiliary aids where necessary to afford an individual with handicaps an equal opportunity to participate in, and enjoy the benefits of, program or activity conducted by the agency" (§ 85.51(a)(1)); and e) afford effective complaint procedures to ensure that the agency complies with its obligations under Section 504 (§ 85.61).

II. Recommendations

In light of all of the above, we believe that SSA should include the following in its Section 504 self-evaluation:

A. Evaluation of SSA's Current Policies, Including Section 504 Enforcement Policy

SSA should identify all current policies relevant to employee operating instructions and carrying out the law, regulations and rulings and evaluate whether they are consistent with SSA's obligations under Section 504, as described more fully in Sections B and C, below. This evaluation should include examining whether relevant policies comply with or undermine Section 504 rights in any way. Further, SSA should identify all policies that contradict each other, and that may thereby compromise existing Section 504-compliant policies. We are especially concerned with policies that lack necessary rights-conferring language, which may confuse and/or mislead staff and the public as to rights under Section 504. Such an evaluation calls for both general and individualized evaluations of facilities, activities, policies and programs. We are available to help review and identify pertinent policies.

Moreover, SSA should evaluate whether it has a clear Section 504 enforcement policy (or policies) that covers all of the applicable Section 504 regulations. This assessment should include an examination of whether the policy is adequately publicized in its manuals and other informational materials for staff, applicants, recipients, beneficiaries, and the general public.

If SSA determines that it does have a Section 504 enforcement policy, SSA should evaluate whether that policy adequately provides for reasonable accommodations and program modifications necessary to afford applicants, recipients and beneficiaries [meaningful access] to benefits administered by SSA. SSA's obligation to provide reasonable accommodations and program modifications to such individuals is discussed in greater detail in Section B, below.

SSA should also evaluate whether its Section 504 enforcement policy (if it exists), is adequate to ensure that SSA employs non-discriminatory methods of administration in all aspects of its benefits programs through enforcement of Section 504 requirements. An enforcement policy should provide for: a) adequate training and supervision of staff to implement the policy (*e.g.*, training of staff to offer and provide reasonable accommodations and program modifications to individuals with disabilities); and b) adequate notice to applicants, recipients and beneficiaries regarding the requirements of Section 504. Regarding such notice, the preamble to 45 C.F.R., part 85.12, underscores the agency's affirmative obligation to inform affected persons of such information:

Section 85.12 requires the agency to disseminate sufficient information to employees, applicants, participants, beneficiaries, and other interested persons to apprise them of the rights and protections afforded by section 504 and this part. Methods of providing this information include, for example, the publication of information in handbooks, manuals, and pamphlets that are distributed to the public to describe the agency's programs and activities or in connection with recruitment; the display of informative posters in service centers and other public places; or the broadcasting of information by television or radio.

(53 Fed. Reg. 25595 (July 8, 1988).) SSA should evaluate whether it has agency-wide policies regarding the provision of such notice, as well as whether such notice is actually provided to affected persons on both an agency-wide level and at SSA field offices.

However, if SSA does not have a Section 504 enforcement policy, or if that policy is inadequate, SSA should set forth a program for developing and implementing a Section 504 enforcement policy that ensures that individuals with disabilities are protected from discrimination in SSA's programs.

B. Elements of an Adequate Section 504 Enforcement Policy

We believe that effective Section 504 enforcement policy requires, at a minimum, the following elements:

1. SSA should make **written assurances** addressing methods of implementation and enforcement of every substantive Section 504 regulation as found at 45 C.F.R., part 85 *et seq.*
2. All relevant SSA policies should contain information to offer and provide every SSA applicant, recipient and beneficiary **reasonable accommodations and program modifications** as necessary to ensure meaningful access to benefits administered by SSA, including those benefits for which disability is not a condition of eligibility, such as age. Section 504 policies should include specific assurances regarding physical and program access,

processes for offering and providing reasonable accommodations and program modifications, including effective communications, and auxiliary aids and services. *E.g.*:

- a. Systematic and periodic reviews of SSA programs and facilities to ensure readily accessible and useable programs, including physical access to buildings;
- b. Assistance to complete necessary forms, including applications and appeals of adverse determinations;
- c. Assistance to gather necessary documentation (*e.g.*, identification, citizenship/immigration status, treating physician reports, impairment-related work expenses, and employer subsidies);
- d. Assistance to challenge the accuracy of information adverse to an individual's eligibility for SSA benefits (*e.g.*, citizenship/immigration status, felon status);
- e. Waiver of SSA program requirements, that, if applied, would have a discriminatory effect, such as substituting an office visit with a home visit if a face-to-face visit is required or waiver of certain reporting requirements that normally cannot be waived;
- f. In the event of any adverse determination regarding SSA benefits due to non-compliance with SSA program requirements, offering to determine whether a disability basis for a "good cause" exemption to the imposition of such requirements may exist, so that benefits are preserved back to the date that would apply in the absence of such non-compliance;
- g. Effective procedures for enforcement of Section 504 compliance by state agencies responsible for disability determinations; and
- h. Appropriate steps to ensure **effective communications** with individuals with disabilities, including providing for the use of auxiliary aids. "Auxiliary aids" means services or devices that enable persons with impaired sensory, manual, or speaking skills to have an equal opportunity to participate in, and enjoy the benefits of, programs or activities conducted by the agency. (45 C.F.R. § 85.3.).

SSA policy should include provisions for giving primary consideration to individual requests for auxiliary aids and services. (45 C.F.R. § 85.51(a)(1)(i).)

3. **Notice of rights** under Section 504 should be given in a variety of forms (*i.e.*, in accessible language and format) and at every stage of the application and review process, particularly at any stage involving a decision affecting a person's benefits. Notice should be provided prominently, including, but not limited to, postings at field offices and written statements in SSA informational materials, on applications, on notices of adverse determinations, and prominently on SSA's website. Effective notice of Section 504 rights should be provided by SSA representatives upon each contact with a SSA applicant, recipient, or beneficiary, including contacts by telephone and with all personnel at SSA field offices, including security guard personnel who are often the first point of contact for people entering SSA field offices. SSA's Section 504 notice policy should, at a minimum, include:
 - a. Mailing a brochure to all SSA program participants regarding the rights of participants with disabilities, including information about how to obtain help and file a disability discrimination complaint. The same brochure should also be available in SSA office waiting rooms;
 - b. Creating, distributing, and posting a poster informing all applicants, recipients and beneficiaries with disabilities of their right to reasonable accommodations and program modifications, with examples, including information about how to obtain help and file a disability discrimination complaint; the poster should be placed in all SSA office waiting rooms;
 - c. Including in relevant SSA notices information necessary to inform every SSA applicant, recipient and beneficiary of his/her rights under Section 504, in simple language and with examples of reasonable accommodations and program modifications, as described above;
 - d. Including in all relevant SSA forms an inquiry whether the applicant, recipient or beneficiary requires extra help to comply and/or respond due to a disability; and
 - e. Including in SSA's medical documentation forms language informing applicants, recipients and beneficiaries that SSA

will assist in making medical appointments, obtaining needed medical verification, getting forms and other medical documentation returned to SSA for those who need such assistance because of their disability.

4. SSA's policy should incorporate at least the following methods to ensure that SSA personnel are appropriately **screening and identifying** individuals who need reasonable accommodations and/or program modifications:
 - a. Procedures for screening and identifying applicants, recipients and beneficiaries who may need reasonable accommodations and/or program modifications, including persons applying for or receiving benefits on a basis other than disability. Such procedures should be developed with input from the disability community to understand and recognize disabling conditions that may affect ability to comply with SSA program rules;
 - b. Procedures for determining needed accommodations and/or program modifications, including procedures for responding to requests by applicants, recipients and beneficiaries for accommodations and/or program modifications;
 - c. The database field (in an application or case file) indicating the presence of a disability requiring reasonable accommodation and/or program modification should be made prominent by a flashing color, to alert a representative entering data into or accessing the file that an accommodation and/or program modification may be needed;
 - d. A field should be added to application and case files to delineate the nature of the accommodation and/or program modification to be provided;
 - e. When the needed accommodation is oral (in addition to written) notice, an alert should be sent to the SSA representative whenever a written notice is issued, prompting the worker to call the client in a timely manner; and
 - f. An alert should be sent to the SSA field office representative when an applicant, recipient or beneficiary

who requires an accommodation and/or program modification is scheduled to receive notice of adverse action for not complying with SSA program rules. The alert should issue before the adverse action is mailed, and the SSA representative should attempt to contact the applicant, recipient or beneficiary to offer and provide an accommodation and/or program modification as needed to complete the required process.

5. SSA must ensure that staff receive **sufficient training** on Section 504 requirements and must **monitor** compliance with Section 504 by all SSA program components, including field offices, teleservice representatives, and state agencies responsible for disability determinations. As such, SSA policy should include:
 - a. Conducting mandatory training for staff on Section 504 compliance, including training of all staff on the Section 504 rights of individuals with disabilities; all relevant policies; screening and identification procedures discussed above; and possible reasonable accommodations and/or program modifications that could and should be provided for applicants, recipients and beneficiaries;
 - b. Adopting a system of supervisory reviews whereby SSA supervisors periodically review knowledge and implementation of Section 504 requirements, including SSA's Section 504 policies and practices, by SSA representatives and state agency representatives responsible for disability determinations, as part of formal and informal performance evaluations, such as random spot checks of personnel. SSA should ensure that formal reviews, or similar reviews, are conducted at least annually for all SSA representatives and supervisors performing initial and ongoing eligibility determination functions; and
 - c. To facilitate appropriate Section 504 monitoring, oversight and accountability, SSA should formally include Section 504 compliance as part of its quality control programs; *e.g.*, issue quarterly public reports which indicate □ by SSA office, SSA program, type of disability and type of reasonable accommodation and/or program modification □ the number of cases identified to SSA and by SSA as requiring a reasonable accommodation and/or program modification in that quarter; and the number of cases afforded a reasonable accommodation and/or program

modification in that quarter; the number of alerts issued in that quarter regarding batch closings for clients identified as requiring a reasonable accommodation and/or program modification.

C. Scope of Self-Evaluation

In sum, all aspects of SSA programs (not just disability programs) should receive Section 504-oriented attention in your evaluation. Some of these programs, by definition, serve individuals with severe impairments and SSA often has actual knowledge of a claimant's particular physical and mental limitations that might require accommodations and/or program modifications. Others serve individuals on another basis, such as age, many of whom are disabled and entitled to protection under Section 504. SSA programs, and their contractors, should thus be examined and reformed as necessary to ensure that personnel are particularly well trained in identifying consumers who do not self-identify as needing accommodations and/or program modifications, informing consumers of their rights to disability accommodations and/or program modifications, and in implementing such accommodations and/or program modifications.

SSA should particularly evaluate how to make its disability accommodation and program modification process proactive instead of reactive in all of its programs. Currently, SSA has very little information posted on how a person with a disability can proactively request an accommodation and/or program modification before a dispute arises. We can find very little guidance to SSA staff on how to make claimants aware of their right to do so, or process and document such a request. Rather, SSA posts information on (and has forms for) how to file disability discrimination complaints, after a dispute arises. SSA should evaluate how it can use a more proactive approach to help it comply with Section 504 requirements, and reduce the need for disability discrimination complaints.

Your regulations, POMS, and other sub-regulatory guidance should be thoroughly evaluated to determine whether they provide clear instructions to SSA staff and others on the need to accommodate people with disabilities, and what it means to do so. Critical steps like the claims adjudication rules should receive special attention. These requirements should be reinforced with training of SSA staff to ensure that the rules and policies are implemented, as required by Section 504.

SSA should review whether those policies and procedures are effectively implemented at regional and local field offices, and by SSA teleservice personnel. SSA should also review the policies and procedures of the agencies and organizations with whom it contracts to provide services (*e.g.*, state agencies that make disability determinations for SSA-administered benefits eligibility) to ensure that those agencies are also complying with Section 504.

D. Obtaining Input from Affected Persons

We believe that SSA should conduct public meetings throughout the country, obtain ideas and suggestions through the use of third-party surveys, interviews of affected persons, solicitation of written comments, and input through other methods suggested by persons with disabilities, their family members, and those who work with or advocate for persons with disabilities. SSA should affirmatively seek input from organizations that are comprised of and/or serve individuals with disabilities, including legal services organizations (such as our own), non-profit social service agencies, protection and advocacy agencies, centers for independent living, and peer organizations of individuals with disabilities. SSA should also actively reach out to organizations that are comprised of and/or serve seniors.

III. Conclusion

Thank you for considering our recommendations for SSA's Section 504 Self-Evaluation. We look forward to providing additional input throughout the Self-Evaluation process and are available to assist SSA to resolve these concerns. If you have any questions, please contact Larisa Cummings, Staff Attorney, DREDF, at (510) 644-2555 ext. 5245 or lcummings@dredf.org.

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