

December 23, 2013

SUBMITTED VIA INTERNET ONLY.

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

**Re: Section 504 Business Process
Docket No. SSA-2013-0042**

To the Social Security Administration:

We are nonprofit legal services organizations and other groups that advocate for the rights of people with disabilities in public benefits programs.¹ We submit these comments on the Social Security Administration's Proposed Business Process Vision Under the Rehabilitation Act of 1973, published at 78 Fed. Reg. 70088 (Nov. 22, 2013).

Through firsthand experience, individual client representation, legislative and regulatory policy advocacy, and impact litigation, we have seen the ways in which the Social Security Administration's ("SSA's") administration of its programs—in particular its too-frequent failure to provide reasonable accommodations—negatively impacts people with disabilities. We believe that a thorough Section 504 evaluation and a comprehensive Section 504 policy are essential to SSA's ability to afford people with disabilities equal access to its programs and services.

We are pleased that SSA is making progress toward developing policies and procedures to meet its legal obligations and to better serve people with disabilities. However, we have several concerns regarding the *Proposed Section 504 Business Process Vision to Provide Individuals with Disabilities Meaningful Access to Social Security Programs and Activities* ("Business Process Vision"). As discussed in greater detail below, the *Business Process Vision* provides too few practical details and is nowhere near being a comprehensive Section 504 enforcement policy; of those policies and procedures that are described, many appear unduly burdensome for people with disabilities; and the document lacks clarity as to whether public comment will be solicited and considered when SSA does promulgate actual policies and procedures for Section 504 compliance.

¹ Contact information for all of the signatories to this letter is listed in Appendix 1.

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Doing disability justice

I. Background

The regulations implementing Section 504 of the Rehabilitation Act of 1973 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’s regulations require that agencies must, among other things: a) ensure that affected persons 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).

Section 504 requires federal agencies, including SSA, to conduct thorough self-evaluations of their current policies and practices to analyze them for compliance with Section 504. (45 C.F.R. § 85.11.) Where such policies and practices do not meet the requirements of Section 504, the agency must make necessary modifications. As noted in our² December 3, 2010, comments to SSA and our February 24, 2011, letter to Commissioner Astrue, attached to this letter as Appendices 2 and 3, respectively, the Section 504 self-evaluation should examine the impact of *all* agency policies and practices on people with disabilities. In Attachment A to our February 24, 2011, letter, we listed hundreds of SSA policies that we recommend for this review and evaluation process. In Attachment B to the same letter, we provided examples of problems with SSA policies, along with recommended policy modifications. Although SSA has had the Section 504 self-evaluation obligation for nearly two decades, it has yet to complete a comprehensive self-evaluation; Appendix A to the *Business Process Vision*, the description of “Current Business Process,” does not constitute the type of comprehensive analysis contemplated by Section 504’s regulations.

II. Areas of Concern in SSA’s Proposed *Business Process Vision*

A. The *Business Process Vision* Does Not Contain Concrete Policies or Procedures for Ensuring That SSA Is Meeting Its Obligations Under Section 504.

While the *Business Process Vision* is detailed in some areas, such as including relevant hyperlinks and phone numbers, it lacks significant concrete information about actual policies or their implementation. The *Business Process Vision* appears to acknowledge this deficiency; the flow chart on page 6 indicates that SSA will “[d]evelop agency and component Section 504

² Many, but not all, of the signatories to this letter were also signatories to the December 3, 2010, and February 24, 2011, letters referenced above and attached to this letter as Appendices 2 and 3.

policy” *after* the close of this public comment period. The flow chart does not indicate that SSA will solicit additional public comment on the Section 504 policy itself.

1. **Need for More Practical Information Regarding Implementation**

As written, the *Business Process Vision* does not provide people with disabilities, advocates, the public, or SSA staff with a clear picture of how SSA conceives of its Section 504 obligations nor of how it intends to carry out those obligations. Where in SSA’s own rules are its Section 504 obligations embodied? What procedures will field office staff follow when presented with a request for a reasonable accommodation? What can people with disabilities expect of SSA in terms of meeting their disability-related needs? Moreover, what are the mechanisms by which SSA will collect and analyze data concerning when, if, and how standard and nonstandard accommodation requests are met? How will this information be disseminated for public accountability and used to further improve policies and procedures over time? The answers to these central questions are not readily apparent in the *Business Process Vision*.

2. **Need for Additional Opportunities for Public Comment**

Because the documents that have been made available for public comment do not contain concrete policies, SSA has not given the public an adequate opportunity to review, comment on, and participate in the development of its rules regarding Section 504 compliance. For public participation in this process to be meaningful, SSA must make actual policies available for the public’s review and feedback. The *Business Process Vision* contemplates the development of actual policies at a later date, and SSA must make *those* policies available for public review and comment before they are adopted.

B. *The Business Process Vision’s Policy on Reasonable Accommodations Is Inadequate.*

As the *Business Process Vision* notes, providing reasonable accommodations to people with disabilities is essential to ensuring their “right to equal opportunity to participate in, and have meaningful access to, [SSA’s] programs or services.” (p. 6.) While we applaud SSA for taking this step toward developing a comprehensive reasonable accommodation policy, we are concerned with several flaws in SSA’s vision for that policy.

1. **Conceptual Issues**

First, while the *Business Process Vision* does reference Section 504’s definition of disability on page 3, it does not clarify that the definition of disability for purposes of Section 504 is broader and more inclusive than the definition of disability for the purposes of benefits eligibility. It also does not address how SSA plans to screen people to identify disability-related barriers to complying with SSA’s program requirements.³ In our experience, field office staff are often confused about the two different definitions of disability—they do not understand that a disability might meet Section 504’s standard (“substantially limits one or more major life activities”) even if it is not sufficiently severe to qualify someone to receive SSI or Title II benefits on the basis of disability. And they do not understand that someone who receives Title

³ We have not identified any existing SSA policy that addresses these concerns at all.

If retirement benefits may also be entitled to protections under Section 504 on the basis of disability. SSA's policies must make it clear that even people who cannot meet SSA's stringent standards for disability benefits eligibility may still be entitled to reasonable accommodations in the administration of SSA's programs.

Second, the *Business Process Vision* does not adequately acknowledge that an individual with a disability is the person best able to identify the accommodation or accommodations that will best meet their needs. As the HUD/DOJ statement on reasonable accommodations notes: "persons with disabilities typically have the most accurate knowledge about the functional limitations posed by their disability." (*Joint Statement of the Department of Housing and Urban Development and the Department of Justice: Reasonable Accommodations Under the Fair Housing Act* (May 17, 2004) < <http://www.hud.gov/offices/fheo/library/huddojstatement.pdf>>.)⁴ Instead, the *Business Process Vision* suggests that employees should steer individuals who self-identify as having disabilities into standard accommodations. ("When an individual indicates a need for assistance or requests an accommodation, employees will offer the appropriate standard accommodations and enter information about the request in the automated system." [p. 8.] "If individuals requesting the accommodation decline standard accommodations, they must explain why the accommodations offered are insufficient to provide meaningful access to our programs, services, or facilities." [p. 10].) Further, the discussion of nonstandard accommodations implies that the individual with a disability's preferred accommodation will not be given priority over other possible accommodations. ("When an individual with a disability requests an accommodation to communicate effectively with the agency, we must give primary consideration to the individual's request *unless another effective means of communication exists*." [p. 9.] [emphasis added])

Along the same lines, the *Business Process Vision* does not discuss how SSA staff should help people with disabilities obtain reasonable accommodations when the person with a disability does not affirmatively identify her disability and request an accommodation. How will staff initiate a discussion about reasonable accommodations if the person doesn't take the initiative to request one? How will SSA ensure that staff are sensitive and respectful in their communications with people who appear to have disability-related impairments but who do not self-identify as having a disability?

As it develops its policies for providing reasonable accommodations, SSA should address methods to identify people who may need accommodations and should clarify that the individual's preferred accommodation should be given priority over all other alternate accommodations that SSA might consider, even where those alternate accommodations are, in SSA's view, also effective.

2. **Standard Accommodations**

The purpose of distinguishing between standard and nonstandard accommodations appears to be the simplification of providing standard accommodations. If such is the case, then we believe the distinction can be useful. For example, if SSA has a list of standard accommodations that

⁴ Although this statement focuses primarily on the Fair Housing Act, its analysis is also applicable to reasonable accommodations under Section 504. See p. 2, fn. 4.

will be automatically granted if requested, such a policy could make it easier for people with disabilities to get their requested accommodations with minimal staff time and effort. If staff know that they must provide certain accommodations upon request without making further inquiries into the need for the accommodation, the nexus between the disability and the accommodation, or the accommodation's reasonableness, then people with disabilities will be more likely to get the help they need without unnecessary hassle or delay.

However, it is unnecessary, confusing, and discriminatory to list accommodations by disability. As structured, the *Business Process Vision*'s list of standard accommodation suggests that certain accommodations are only available for people with certain impairments. Such groupings could lead staff to deny a standard accommodation simply because the requestor has a different disability than the one for which the standard accommodation is listed, in turn denying or delaying a presumptively reasonable accommodation that would help the requestor access Social Security's programs and services.

For example, "[h]elp with filling out forms" is listed as a standard accommodation only for people with mobility or physical impairments (although it is also mentioned as an accommodation in Appendix D for a few other types of impairments). (*Business Process Vision*, pp. 8-9, App. D.) Conducting business with SSA routinely requires individuals to complete and submit forms, and it is our experience that many different types of impairments—including a wide range of physical and mental impairments—make it difficult for people with disabilities to complete SSA forms without assistance. "Help filling out forms" should be a standard accommodation regardless of the type of impairment someone has. To make this assistance available as a standard accommodation for some disabilities but not others is likely to have a discriminatory effect on people whose disabilities are excluded from the list of standard accommodations.

Furthermore, there does not appear to be a definitive list of "Standard Accommodations." Until SSA clarifies the scope of its standard accommodations, it is impossible to judge the reasonableness of the standard versus nonstandard accommodations. The distinction is very important because SSA's proposal for processing nonstandard accommodations is very burdensome.

And the *Business Process Vision*'s current list of standard accommodations is far too short; it omits some common accommodations. Examples of other accommodations that should be included are:

- Assistance collecting necessary information or documents;⁵
- Providing extensions for missing deadlines;⁶
- Providing accessible alternate formats to individuals who are not able to complete forms in standard print formats;⁷ and

⁵ Procedures for doing so are already found in POMS GN 00301.180.

⁶ The *Business Process Vision* categorizes such an accommodation as a program modification and, thus, a nonstandard accommodation. (p. 7.) However, good cause for late filing is already contemplated in POMS 03101.020, and field offices should be able to authorize late filing for disability-related reasons. Other issues with the proposed process for nonstandard accommodations are discussed below.

⁷ Although the standard accommodations allow SSA to *provide* written information in alternate formats, they do not contemplate allowing people with disabilities to *complete* necessary forms in alternate formats. Furthermore, the

- Home visits and telephonic appointments for individuals who are unable to attend face-to-face meetings at a field office.

This list is not exhaustive, and SSA should solicit additional feedback from advocates and people with disabilities regarding appropriate standard accommodations.

3. **Nonstandard Accommodations**

The process for providing nonstandard accommodations as described in the *Business Process Vision* is extremely lengthy and burdensome, and it runs contrary to the purpose of the Rehabilitation Act.

First, SSA's contemplation of nonstandard accommodations is vastly overbroad: "[w]hen a disabled individual is unable to access or use an agency program or activity, the individual may request an accommodation he or she believes will provide meaningful access. For the most part, requests for program modifications are 'nonstandard accommodations.'" (78 Fed. Reg. 70088 (Nov. 22, 2013) at 70089.) SSA's recent policy change involving SSN and benefits verifications is a good example of how onerous this notion is. SSA recently announced that, as of February 2014, it will no longer offer Social Security number (SSN) printouts and benefits verification information in its field offices. SSA will only contemplate exceptions based on "dire need". However, people with disabilities may need print verifications from field offices for disability-related reasons. If those reasons or not, in SSA's view, indicative of "dire need," then it appears that a person with a disability would have to go through the nonstandard accommodation process simply to obtain a print verification.

According to the *Business Process Vision*, a person with a disability who is requesting a nonstandard accommodation will have to wait over a month for the accommodation request to be processed by the Center for Section 504 Compliance—regardless of how easy or inexpensive the requested accommodation. Such unnecessary bureaucratic delay would be detrimental to our clients, many of whom rely on access to SSA's benefits programs to afford the basic necessities of life.

One way to circumvent such delays would be to allow field offices to grant nonstandard accommodations and to have them refer nonstandard accommodations to the Center only if the field office determines that there is a legitimate reason within appropriately developed policy criteria to obtain further review before approval. In other words, a nonstandard accommodation could be granted at any level but would have to be processed by the Center before it could be denied.

The *Business Process Vision* suggests that the Center could deny an accommodation based on its creating an undue financial or administrative burden or fundamental alteration to SSA's programs. (p. 11.) However, the *Business Process Vision* provides no guidance on what these

requirement that alternate formats for forms be requested on an as-needed basis discriminates against those who require such an accommodation because the 45-day waiting period interferes with the necessary flow of business conducted with SSA. The accommodations as listed also provide no mechanism to for an individual to obtain an accessible copy of the completed paperwork, making it impossible for such individuals to verify the accuracy of the form or to maintain it for their own records.

nuanced and heavily litigated terms mean.⁸ SSA's reasonable accommodation policy must explain these terms. The policy should also clarify that a denial of a reasonable accommodation based on undue burden or fundamental alteration must be based on evidence and cannot be denied simply because the SSA employee processing the request feels that the accommodation is "unreasonable."

The proposed process for SSA decision-making regarding nonstandard accommodations is also inadequate because it does not provide for an interactive process. Under Section 504 and other anti-discrimination laws, if an agency decides to deny a reasonable accommodation, it must engage in an interactive process with the person with a disability to determine whether an alternate accommodation could meet the individual's needs. (*See O'Dell v. Dep't of Pub. Welfare*, 346 F. Supp. 2d 774, 785-786 (W.D. Penn. 2004); *see also HUD/DOJ Statement, supra*, at p. 7.) In contrast, the nonstandard accommodations process described in the *Business Process Vision* provides for flat denials of accommodations. (p. 11.) It neither authorizes an interactive process nor allows a person with a disability to appeal the denial of a reasonable accommodation. As such, it does not comply with Section 504.

C. Communications and Marketing

SSA should provide more information about how it intends to notify people with disabilities of their right to request accommodations. While publication of information on the website will be helpful, many of our clients don't have access to the internet, don't use computers, or can't read. For those individuals, it is essential that information be communicated—in multiple languages—through other formats. For example, SSA could provide more information about the posters it intends to create for its field offices to describe what the posters will say and how they will reach their intended audience.

D. Center for Section 504 Compliance

While we are generally supportive of a unit at SSA developing expertise in Section 504 issues, we are concerned that having Section 504 activities centralized in one location will make those activities less accessible to our clients, who deal primarily with field offices. As discussed above, many of our clients do not use computers and would not benefit from the proposed automated online services. We encourage SSA to give additional thought to how to make the Center effective at its mission rather than simply being an additional layer of bureaucracy for individuals with disabilities

III. Conclusion

Thank you very much for considering these comments on the *Business Process Vision*. If you have any questions or would like to discuss these comments further, please contact Melissa Morris at the Law Foundation of Silicon Valley at (408) 280-2429 or melissam@lawfoundation.org.

⁸ As a practical matter, it is unlikely that many—or any—individual accommodation requests would create an undue financial or administrative burden for an agency with the size, scope, and budget of SSA.

Please notify us when SSA has developed concrete Section 504 policies and make those policies available to us—and to the general public—for review and comment. We look forward to continuing to work with SSA to ensure its compliance with Section 504.

Sincerely,

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