

March 15, 2017

Ms. Rebecca Bond  
Chief  
Disability Rights Section  
Civil Rights Division  
United States Department of Justice  
1425 New York Avenue, NW  
Suite 4055  
Washington, DC 20005

Re: RIN 1105-AB50

Dear Ms. Bond:

The National Federation of the Blind (NFB) hereby submits the following comments to the Department's Notice of Proposed Rulemaking (NPRM) in regard to regulations implementing Section 504 of the Rehabilitation Act of 1973. As an initial matter, we assume that the Department believes, as we do, that Executive Order 13771, Section 2(a) does not apply to this NPRM. This NPRM involves amendments to long-standing regulations and thus are not new regulations envisioned by the new Executive Order. We urge the Department of Justice to move forward with the planned updates.

The NFB is the oldest and largest national organization of blind persons with affiliates in all fifty states, Washington, DC, and Puerto Rico. The NFB and its affiliates are widely recognized by the public, Congress, executive agencies of state and federal governments, and the courts as a collective and representative voice on behalf of blind Americans and their families. The organization promotes the general welfare of the blind by assisting the blind in their efforts to integrate themselves into society on terms of equality and by removing barriers that result in the denial of opportunity to blind persons in virtually every sphere of life, including education, employment, family and community life, transportation, and recreation. This NPRM is a very important component of achieving equal access and breaking down the barriers that continue to stand in the way of the goals and dreams of the blind. The NFB knows that blindness is not the characteristic that defines us or our future. Every day, we raise the expectations of blind people because low expectations create obstacles between blind people and our dreams. We can live the lives we want; blindness is not what holds us back. With this in mind, we ask that you consider the following comments.

### **The “Direct Threat” Affirmative Defense**

The NPRM expresses the Department's intent to revise its Section 504 regulations to include a provision addressing the “direct threat” affirmative defense that is consistent with the standards articulated by the Supreme Court and the language in the Department's ADA Title II and III regulations. That is, by defining a “direct threat” as “a significant risk to the health or safety of

others that cannot be eliminated by a modification of policies, practices, or procedures, or by the provision of auxiliary aids or services.” See 28 CFR 35.104, 36.104. Similarly, the NPRM expresses a similar intent in the employment discrimination context, although utilizing the standard defined in the EEOC’s regulation implementing Title I of the ADA which includes in its definition, a significant risk of substantial harm to self. See 29 CFR 1630.2(r) and 1630.15(b). Any determination of “direct threat” must be based on an individualized finding of fact that takes into account the nature, duration, and severity of any risk, and the likelihood that injury might occur, *and* whether reasonable accommodations can be made to policies, practices, and procedures.

These pronouncements on their own have not prevented uninformed persons from applying stereotypes in a way that has interfered with the lives of blind individuals on the basis of a mistaken fear of harm to self or others. Those who do not know better wrongfully assume that blindness poses a risk in almost any activity that can be conceived. Blindness is often an easy target for those raising the “direct threat” affirmative defense. By way of illustration, others often assume that a blind person cannot cross the street independently because they do not understand the method a blind person uses to accomplish this task. Likewise, others often assume that a blind person cannot be a teacher responsible for supervising a classroom of children because they are unfamiliar with the techniques a blind person uses to do so. Rather than taking steps to learn how a blind person accomplishes a given task, others presume that, without sight, it cannot be done. This rush to judgment often results in unnecessary and discriminatory barriers that have prevented blind people from obtaining employment or have excluded their participation in other opportunities. The fact is blind persons have safely and successfully worked and operated in all manner of environments including heavy industry where operation of power tools and other machinery are required.

To the extent that the affirmative defense of “direct threat” is included in the revised regulations, we urge the Department to also include language that demands that recipients of federal funds acknowledge that disability itself can never be presumed to be a “direct threat”. This much is confirmed by the Supreme Court precedent on which the Department is relying for this rulemaking. *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 85 (2002). Blindness (like hair color or skin tone) does not have any inherent risks. It is critical that recipients put in place procedural safeguards to protect blind people from discriminatory, unsubstantiated assumptions that are a result of fear and ignorance.

### **Reasonable Accommodations**

The NFB applauds the Department’s intention to include language regarding the obligation to provide reasonable accommodations within the provisions of Section 504, both in terms of employment, as directed by the EEOC, and similarly in non-employment contexts. Requiring recipients, when needed, to make changes to policies, practices, and procedures unless those changes can be shown to pose a fundamental alteration to the program or activity or an undue financial and administrative burden certainly increases the chance that equal opportunity will truly be afforded to individuals with disabilities.

As 29 U.S.C. 701(3) states, “disability is a natural part of the human experience and in no way diminishes the right of individuals to —

- (A) live independently;
- (B) enjoy self-determination;
- (C) make choices;
- (D) contribute to society;
- (E) pursue meaningful careers; and
- (F) enjoy full inclusion and integration in the economic, political, social, cultural, and educational mainstream of American society”.

We therefore urge the Department to move forward with the proposal to update Section 504 relative to the requirement to provide reasonable accommodations for millions of Americans who have the right to participate in life’s activities.

### **Communications**

The NFB supports the Department’s proposed reorganization and revision of the language at Section 42.511, so that it generally conforms with the effective communication provisions in the Department’s ADA Title II regulation at 28 CFR 35.160, 35.161, and 35.164. The Department accurately acknowledges in Section 42.511(a), that since its first issuance of the Section 504 federally assisted regulations in 1980, “electronic and information technology has changed the way that recipients communicate with interested persons.”

As the oldest and largest organization of blind people in the United States, the NFB has been, and continues to be, on the frontlines of digital accessibility and has intervened on behalf of many of its members who have been sidelined by the artificial barriers erected by recipients’ use of inaccessible electronic and information technology. We commend the Department’s acknowledgement at Section 42.511(a) that “Individuals with disabilities—like other members of the public—should be able to equally engage with a recipient’s services, programs, and activities using electronic and information technology.” We strongly encourage the Department to include this language as part of its revised regulation.

### **Conclusion**

Wherefore, the NFB respectfully requests that the Department implement the regulatory updates as anticipated in the NPRM. In doing so, we would ask that our comments be incorporated into the regulatory text upon adoption of the final rule.

Respectfully submitted,

National Federation of the Blind