

# Four Decades (and Change) in the Making: An Update to the 504 Regulations

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## A little housekeeping...

- Neither the presentation nor the PowerPoint are legal advice. Consult a licensed attorney in your state for questions about a specific set of facts.
- Text in bold represents emphasis by the author.
- Internal citations in quotes are removed to ease reading.
- The U.S. Department of Education is referenced as “ED.” ED’s predecessor, the Department of Health, Education & Welfare is “HEW.”

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## Important Sources of Information

- Protecting Students with Disabilities: Frequently Asked Questions about Section 504 and the Education of Children with Disabilities (March 27, 2009, last modified January 10, 2020) Hereinafter **“Revised Q&A.”**
- ADAAG guidance from OCR, Dear Colleague Letter, 112 LRP 3621 (OCR 2012).
- Students with ADHD and Section 504: A Resource Guide, 68 IDELR 52 (July 2016).

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## Important Sources of Information: Parent & Advocacy Input

- Consortium for Constituents with Disabilities, Education Task Force, *Letter to OCR on Proposed Section 504 Regulations*, (July 1, 2021) Hereinafter **“CCD,”** found at <https://www.c-c-d.org/fichiers/CCD-Response-to-504-Regulations.pdf>
- Note that 37 disability advocacy organizations and associations (listed on next two slides) joined in the letter’s recommendations.

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## Organizations participating on CCD Education Task Force

- Access Ready
- American Council of the Blind
- American Foundation for the Blind
- American Music Therapy Association
- American Occupational Therapy Association
- American Physical Therapy Association
- American Psychological Association
- American Speech-Language-Hearing Association
- Association of University Centers on Disabilities
- Autism Society of America
- Autism Speaks
- Autistic Self Advocacy Network
- Center for Law and Social Policy (CLASP)
- Autistic Women & Nonbinary Network
- Bazelon Center for Mental Health Law
- Brain Injury Association of America
- Center for Learner Equity
- Children and Adults with Attention-Deficit/Hyperactivity Disorder
- Council for Learning Disabilities
- Council of Parent Attorneys and Advocates
- Disability Rights Education and Defense Fund
- Division for Learning Disabilities (DLD) of the Council for Exceptional Children (CEC)

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## Organizations participating on CCD Education Task Force

- Easterseals
- Epilepsy Foundation
- Family Voices
- Learning Disabilities Association of America
- Muscular Dystrophy Association
- National Association of State Directors of Special Education
- National Center for Learning Disabilities
- National Center for Parent Leadership, Advocacy and Community Empowerment (National PLACE)
- National Disability Rights Network (NDRN)
- National Down Syndrome Congress
- National Down Syndrome Society
- Perkins School for the Blind
- RespectAbility
- Association of State Directors of Special Education
- Center for Learning Disabilities
- Center for Parent Leadership, Advocacy, and Community
- Empowerment (National Disability Rights Network (NDRN))
- Down Syndrome Congress
- Down Syndrome Society
- The Advocacy Institute
- The Arc of the United States

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## Section 504 of the Rehabilitation Act of 1973

“No otherwise qualified individual with a disability in the United States... shall, solely by reason of her or his disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance ....” 29 U.S.C. § 794(a).

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## The 1977 Section 504 Regulations: Propelled by Protest and Occupation of HEW by individuals with disabilities

- In 1973, “After twice being vetoed, the Rehabilitation Act was signed by President Richard M. Nixon. But four years later, the law had yet to be implemented.”
- “The cost to meet the new standards, which required retrofitting and fixing the many federally funded buildings around the country, would have been enormous, and as administrations changed, action was delayed for years.” Julia Carmel, *Before the ADA, There was Section 504*, THE NEW YORK TIMES, July 22, 2020.

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## The 1977 Section 504 Regulations: Propelled by Protest and Occupation of HEW by individuals with disabilities

- “Once the Carter administration was in office, instead of signing the regulations, HEW set up a task force with no representation from the disability community to ‘study’ them. It became clear, through delays and leaks from inside, that the regulations were being seriously weakened in coverage, enforcement, and the whole integration mandate.”

- Kitty Cone, *Short History of the 504 Sit-in*. Disability Rights Education & Defense Fund, <https://dredf.org/504-sit-in-20th-anniversary/short-history-of-the-504-sit-in/>

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## The 1977 Section 504 Regulations: Propelled by Protest and Occupation of HEW by individuals with disabilities

- “There was a list of issues that included consortia: this would have meant that all the universities in a locale could form a consortium and thereby offer a full curriculum. **Attending classes at a variety of universities** would be absurd for a nondisabled person, but **for a person with a disability it was absurd and patently unequal.**” *Id.*

- “The list of issues also included whether **alcoholics and drug addicts** were to be covered by the regulations. A case that occurred later concerned whether a coach who was a recovering alcoholic could be fired, although he had been sober for years. The list started out a short and grew to be about 20 issues.” *Id.*

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## The 1977 Section 504 Regulations: Propelled by Protest and Occupation of HEW by individuals with disabilities

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- “By 1977 — after years of letter writing, lobbying and pleading with lawmakers — disability activists were tired of waiting. The American Coalition of Citizens With Disabilities said that if... the secretary of Health, Education and Welfare [HEW] ...did not take action by April 4, there would be national protests.” *NYT, supra.*
- “On April 5, demonstrators across the country began occupying federal offices; protesters in New York City showed up to protest outside of the H.E.W. offices in Manhattan, while disabled people in Washington occupied areas outside of [the office of HEW’s Secretary]. Sit-ins began across the country; federal buildings in Atlanta, Boston, Chicago, Denver, Los Angeles, Philadelphia and Seattle, among others, were occupied for hours or days.” *Id.*

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## The 1977 Section 504 Regulations: Propelled by Protest and Occupation of HEW by individuals with disabilities

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- “In San Francisco, Judy Heumann, then 29, and Kitty Cone, who turned 33 during the protests, showed up at the regional H.E.W. office. With them were more than 100 other disabled protesters, interpreters and personal care aides.
- But when the demonstrators arrived to meet with Joseph Maldonado, the regional director who reported to Mr. Califano, they expected him to be aware of the issues.
- **‘No one had briefed him; he didn’t know what 504 was,’** Ms. Heumann said in an interview with The New York Times. “We were incredulous about the fact that nobody was taking what we were doing seriously.” *Id.*

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## The Big Picture: 504 & IDEA

- Section 504 in the shadow of IDEA
  - Congress passed the Rehabilitation Act of 1973. The EHA (PL 94-142), now the IDEA, passed in 1975
    - No 504 regulations were issued until *after* IDEA was created.
    - IDEA seem to be reflected to some degree in 504.
      - The Section 504 FAPE was *not* created by Congress but by ED in the 504 regulations.
      - Implementation of an IEP under IDEA is one way to provide a FAPE under 504. 34 C.F.R. § 104.33(b)(2).
      - An LRE-like requirement is included in 504 at § 104.34(a).

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## The Big Picture: 504 & IDEA

- Section 504 in the shadow of IDEA: Significant differences between IDEA & 504:
  - The word “parent” sparingly used in the 504 regulations.
  - A single sentence describes the 504 procedural safeguards—pages are required to do the same in IDEA.
  - No 504-dedicated funding is provided by Congress.
  - To be IDEA-eligible, students must require a high level of services and supports (specially designed instruction), some of which are not available to other students.
  - IDEA FAPE is more valuable (see below).

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## The Big Picture: 504 & IDEA

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- Section 504 in the Gravitational Pull of IDEA
- In 1985, Supreme Court Justice Thurgood Marshall provided the following warning: “[a]ny interpretation of §504 must therefore be responsive to two powerful but countervailing considerations—the need to give effect to the statutory objectives and the desire to keep §504 within manageable bounds.” *Alexander v. Choate*, 469 U.S. 287, 299 (1985).
- *A little commentary*: The author sees no logic in requiring § 504 to match existing legal protections available now only to the most disabled and educationally involved students eligible under IDEA.

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## The Big Picture: 504 & IDEA

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- Section 504 in the Gravitational Pull of IDEA
  - *A little commentary*: Consider these Congressional findings in 1975’s EHA (now IDEIA). 20 USC § 1401(3)(b).
  - “(6) because of the lack of adequate services within the public school system, families are often forced to find services outside of the public school system, often at great distance from their residence and at their own expense;
  - “(7) developments in the training of teachers and in diagnostic and instructional procedures and methods have advanced to the point that, given appropriate funding, State and local educational agencies can and will provide effective special education and related services to meet the needs of handicapped children;”

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## The Big Picture: 504 & IDEA

- Section 504 in the Gravitational Pull of IDEA, Congressional findings in 1975's EHA (now IDEIA). 20 USC § 1401(3)(b).

"(8) State and local educational agencies have a responsibility to provide education for all handicapped children, but present financial resources are inadequate to meet the special educational needs of handicapped children;"

*More commentary:* IDEA's protections are designed for students with severe disabilities and greater need for complex and intensive services (specially designed instruction) than their § 504-only counterparts. The funding provided by Congress and complexity of student need, together with promise of FAPE despite complexity of need require more significant procedures and parent rights to protect.

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## The Big Picture: 504 & IDEA

- *A little more commentary:* ED should resist efforts to add requirements to the §504 process simply because they exist in IDEA.
  - **Eligibility rates of § 504 students are low** despite the expansion efforts of the ADA. Imposing additional procedures and requirements from IDEA will create disincentive to identify of § 504 students (see statistics below).
  - **"Due process" is an elastic concept.** Where more significant rights or entitlement exist, greater procedural protections exist as well. IDEA FAPE's meaningful benefit in light of circumstances is more valuable than 504 FAPE.

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## The Big Picture: 504 & IDEA

- *Still more commentary: When would borrowing from IDEA make logical sense?* The author would encourage ED to examine some flexibility provisions in the 2004 reauthorization of IDEA that might be practically applied to §504. For example:
  - Allow schools and parents to amend § 504 plans by means of **written amendments instead of convening § 504 team meetings.**
  - Exception to counting In-school suspension as short-term removal when student participates in curriculum in “smart” or “super ISS.” See, *Fox (MO) C-6 School District*, 109 LRP 54751 (OCR 2009)(**in-school suspension of a Section 504 student may not count toward the 10 cumulative days** if three conditions are met).

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## The Big Picture: 504 & IDEA

- *Still more commentary: What about situations where 504 students appear to have more rights than IDEA students?* For example:
  - It is a legal anomaly that § 504 students have greater legal protections than IDEA students with respect to offenses involving serious bodily injury and weapons. In this circumstance, the two laws should be brought into unison.

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## The Big Picture

### Why are new 504 regulatory changes coming NOW?

*Commentary:* There does not appear to be any discernible pressure compelling changes to the regulations *at this time*.

- Why not in 1990 with passage of the ADA?
- Why not in 2008 with ADAAA?
- Why not in 2012 instead of a guidance letter on ADAAA?
- Maybe this letter from CCD in December 2021 caught OCR's attention? [https://www.c-c-d.org/fichiers/CCD-Education-TaskForce-Letter-on-504-Recs-12\\_18.pdf](https://www.c-c-d.org/fichiers/CCD-Education-TaskForce-Letter-on-504-Recs-12_18.pdf)

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### Is serious noncompliance to blame for new 504 regs?

- CCD expressed concerns over a variety of 504 issues, including:
  - The Center for Civil Rights Remedies (CCRR) report that “3,434 districts (roughly 20% of all districts) serving over 1.8 million students identified zero 504-only eligible students.”
  - “Many more districts fall well below the national average of 2.7 percent of all students.”

*A little commentary:* Note both the low percentages AND the problem of determining how many students *should be* eligible under 504 with very subjective 504 eligibility criteria (see discussion below).

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## Differing Opinions on what should change

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- What should the updated regulations include? The following are thoughts from the author, as well as suggestions proposed by a CCD, a consortium of parent and advocacy groups.
  - Note that what actually appears in proposed regulations and in the final regulations cannot be divined at this point. What follows are opinions, not actual changes in the Section 504 regulations.
  - We begin with parent and advocacy proposals. In July of 2022, CCD provided OCR with suggestions for the proposed 504 regulations, including the following:

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## Parent & advocacy proposals: Definitions and existing OCR guidance

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- **“Align Section 504 definitions with those found in the ADA.”**
- **“Review the guidance issued in ensuring FAPE to students with ADHD”**
  - “Students with ADHD are sometimes incorrectly identified as 504-only when IDEA services may be more appropriate.”
  - The provisions outlined in the 2016 ADHD Resource Guide should be codified as they apply to the disability community at large, not just those with ADHD.
- *A little commentary:* Shouldn't any OCR guidance for which schools will be held responsible appear in the 504 regulations to provide proper notice?

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## Parent & advocacy proposals:

### Accessible materials, alignment of standards and plain language

- Provide access to National Instructional Materials Accessibility Standard (NIMAS) -derived materials to Section 504 students with visual impairments rather than limiting access to IDEA-eligible students.
- Align the standards of website, and information and communication technology with the Department of Justice and Health & Human Services.
- Require “use of plain language in written communication and allowing for advocacy supports to be made available” to students with Intellectual and Developmental Disabilities.

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## Parent & advocacy proposals:

### Track ADA Effective Communication guidance

- §504 regulations should track the Effective Communication standards in the Justice Department’s regulations implementing ADA Title II, and consistent with the 2014 joint guidance.
  - *A little commentary:* The author does not believe that this guidance letter addresses significant school concerns regarding 504/ADA effective communication responsibilities while and IDEA evaluation is pending.
- "Clarify that 504-eligible students must be provided accessible educational services when their disability prevents them from attending school in person."

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## Parent & advocacy proposals:

### Clarify situations where disability discrimination can occur

- **Clarify that disability discrimination can occur in bullying and harassment, restraint and seclusion, and corporal punishment.**
  - *A little commentary:* Agreed that any of these types of action can impact a student's ability to participate and benefit at school whether arising from disability or not. Unfortunately, recent OCR guidance on discipline does not seem to reflect this same concern. *Dear Colleague Letter, Supporting Students with Disabilities and Avoiding the Discriminatory Use of Student Discipline under Section 504 of the Rehabilitation Act of 1973* (OCR July 19, 2022).

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## Parent & advocacy proposals:

### Clarify situations where disability discrimination can occur

- *A little more commentary: The problematic piece of language is this:* "Where a student's evaluation shows that challenging behavior is caused by or directly and substantially related to the student's disability or disabilities, the placement decision by the Section 504 team must identify individualized services, such as behavioral supports, to meet the student's educational needs." *2022 Discipline DCL, p.10.*
- Factors other than disability-related behavior can jeopardize student access and benefit (e.g., bullying and harassment, restraint and seclusion, and corporal punishment) as can student behavior unrelated to disability (e.g., truancy, work refusal). Why does non-disability-based bullying targeting the student require 504 Team attention while the student's non-disability-based behavior does not?

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## Parent & advocacy proposals:

### Suggestions on the FAPE process

- Require that 504 Plans be written documents created by a group of school professionals and a parent or legal guardian.
  - *A little commentary:* Parents are not required members of the 504 Team or Committee under the current regulations, but most schools invite parents as a matter of policy. Written 504 plans are also the rule rather than the exception in district practice.

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## Parent & advocacy proposals:

### Suggestions on the FAPE process

Require a parent or legal guardian on the 504 Team or Committee.

- *A little more commentary:* Mandating parental participation in §504 meetings as a required procedural safeguard will complicate the §504 process for schools, requiring rescheduling of meetings, dealing with situations where parents cannot be convinced to attend, documenting parental participation, and establishing disagreement procedures, among others.
- Under IDEA, the requirement makes logical and legal sense due to the IDEA student's FAPE entitlement. The lesser 504 FAPE should not create an equality of parent rights between 504 & IDEA.

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## **Parent & advocacy proposals:**

### **Standardize evaluation procedures**

- Ensure any evaluation conducted under Section 504 must be conducted timely. “All SEA and LEAS should be held to the same standard of evaluation procedures under the update regulations, and that standard must be reasonable.”
  - *A little commentary:* The position correctly notes that current guidance requires completion within a reasonable time. Note that the comment does not propose a time limitation which would be required to standardize timelines.

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## **Parent & advocacy proposals:**

### **Declare that no medical diagnosis is required**

- “Reiterate that ‘substantial limitation’ as it currently appears in the definition of ‘handicapped person,’ does not require a medical diagnosis.”
  - *A little commentary:* No argument here, as this reflects longstanding OCR guidance.

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## Parent & advocacy proposals:

### Clarify 504 & IDEA child find and offer of evaluation rules

- “Clarify the requirements of schools to conduct due diligence on the eligibility of students for services under both the IDEA and Section 504.”
- “It must be clear that schools can – and in many cases should – consolidate IDEA and 504 eligibility meetings to ensure that the student’s needs are being adequately met by whichever services they are found eligible for.”
  - *A little commentary:* Consolidating 504 and IDEA eligibility meetings will likely confuse parents and schools (e.g., which rights apply to *this portion* of the meeting?). Such a practice would likely result in IDEA procedures taking over both evaluation processes.

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## Parent & advocacy proposals:

### Clarify 504 & IDEA child find and offer of evaluation rules

- “The regulations must make clear that when a child is found ineligible for services under IDEA, a district and school team is encouraged to automatically pivot and move from the IDEA eligibility determination meeting to a discussion about the individual’s eligibility under Section 504.”
  - *A little commentary:* As long as the parent is provided notice of the 504 meeting, their 504 rights, and an explanation that IDEA rules do not apply to the 504 meeting that is to occur, no argument here.

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## Parent & advocacy proposals:

### Clarify 504 & IDEA child find and offer of evaluation rules

- “It should also be made clear that there are many instances in which a student can, and should, be found eligible and served under IDEA and Section 504 concurrently.”
- *A little commentary:*. The author strongly disagrees. While IDEA students have 504 nondiscrimination rights, they are served through the IEP under longstanding guidance (next slide).

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## Parent & advocacy proposals:

### Clarify 504 & IDEA child find and offer of evaluation rules

#### Longstanding OCR guidance on simultaneous IEP & 504 Plan

“35. If a student is eligible for services under both the IDEA and Section 504, must a school district develop both an individualized education program (IEP) under the IDEA and a Section 504 plan under Section 504?”

No. If a student is eligible under IDEA, he or she must have an IEP. Under the Section 504 regulations, one way to meet Section 504 requirements for a free appropriate public education is to implement an IEP.” *Revised Q&A #35.*

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## **Parent & advocacy proposals:**

### **Clarify the MDR requirement. Clarify requirements on pre-K settings**

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- “Clarify that 504 requires manifestation review.”
  - *A little commentary:* Agreed. The requirement is longstanding. See also previous comment on 2022 OCR discipline guidance.
- “Provide clarity on the requirements of entities to provide FAPE and an education free from discrimination to students with disabilities in childcare, preschool, pre- kindergarten, and Early Head Start/Head Start settings.”
  - *A little commentary:* Agreed. The current regulations provide little insight into the process of making determinations of disability, need and level of support required. Further, some states are considering universal pre-k.

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## **Parent & advocacy proposals:**

### **Require higher ed to give some deference to K-12 504 plans and IEPs**

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- “Clarify the requirements of Institutions of Higher Education (IHE) to prohibit discrimination of students with disabilities in higher education.”
- “Require IHEs to treat any student with an existing 504 plan or IEP as qualifying for any needed Academic Adjustment in postsecondary education.”
  - *A little commentary:* Interesting idea. IHEs have no 504/ADA duty to child find, evaluate or provide FAPE. IHEs can require that students present medical or other evidence of disability and need for services that must be created/gathered at student expense. The existence of a high school IEP or 504 Plan does not carry much weight to some IHEs under the current regulations.

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**The following are suggested changes to the regulations from the author's perspective as a school attorney.**

Please note, there are interesting overlaps in parent/advocate suggestions with those that follow from the author.

## **Incorporation of ADAAA changes from 2008**

**With the exception of swapping "disability" for "handicap", the words of Section 504 eligibility didn't change in 2008.**

- In addition to being "qualified" the student has to be "disabled," meaning that the student
  - (i) has a physical or mental impairment which substantially limits one or more major life activities;
  - (ii) has a record of such an impairment; or
  - (iii) is regarded as having such an impairment." 34 CFR § 104.3(j).

## **Incorporation of ADAAA changes from 2008**

1. The philosophy of maximum eligibility allowed under the law.
2. Treatment of conditions that are episodic or in remission;
3. Expansion of the non-exhaustive listing of major life activities;
4. Relaxation of the substantial limitation component of eligibility.
5. Requirement that the ameliorative effects of mitigating measures, with the exception of eyeglasses, not be taken into account in determining eligibility.

*A little commentary:* While addressed in guidance letters, these significant changes made by Congress (and various dynamics created by these changes) should comprise part of the new regulations.

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## **Incorporation of ADAAA changes from 2008** **Philosophy of maximum eligibility allowed under the law.**

“The definition of disability in this Act shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act.” 42  
U.S.C. § 12102(4)(A).

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## Incorporation of ADAAA changes from 2008

### Treatment of conditions that are episodic or in remission

“An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.”

*A little commentary:* Note that OCR has held that failure to plan for the predictable, but occasional, impact of episodic impairments can constitute denial of FAPE. *Traverse City (MI) Pub. Schs.*, 59 IDELR 144 (OCR 2012).

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## Incorporation of ADAAA changes from 2008

### Expansion of the non-exhaustive listing of major life activities

- Prior to 2008, the term “major life activities” included “functions such as caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.” 34 C.F.R. §104.3(j)(2)(ii). This list was not exhaustive.
- **Congress added to the list in 2008, identifying eating, sleeping, standing, lifting, bending, reading, concentrating, thinking, and communicating** as additional major life activities. 42 U.S.C. §12102(2)(A).
  - Other major life activities are possible such as “**interacting with others**” (a major life activity adopted by the EEOC, but curiously, not recognized by Congress).

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## Incorporation of ADAAA changes from 2008

### Expansion of the non-exhaustive listing of major life activities

- In the definition section of the ADAAA, Congress provided that “**a major life activity also includes the operation of a major bodily function**, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.” 42 U.S.C. §12102(2)(B).
- *A little commentary:* One of the problems encountered in eligibility is pinning down the major life activity impacted by the impairment. **To ease the burden and make the analysis more eligibility-friendly, major bodily functions are helpful.** Note that for some impairments, like diabetes, the addition of major bodily functions (specifically here, the endocrine function) makes tying the impairment to a life activity very simple.

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## Incorporation of ADAAA changes from 2008

### Relaxation of the substantial limitation component of eligibility.

- **ED never created a definition of substantial limitation in the regs. Instead, commentary to ED’s regulations provided this explanation.**
  - “Several comments observed the lack of any definition in the proposed regulation of the phrase ‘substantially limits.’ The Department does not believe that a definition of this term is possible at this time.” Appendix A, p. 419.
- **Letter to McKethan, 23 IDELR 504 (OCR 1995).**
  - “neither the regulation nor this office has defined the word substantially.”
  - The decision about whether the student is substantially limited is “made by the school district not OCR.”
  - *A little commentary:* Every school creates its own standard?

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**Incorporation of ADAAA changes from 2008**  
**Relaxation of the substantial limitation component of eligibility.**

- **“21. Does OCR endorse a single formula or scale that measures substantial limitation?”**
- No. The determination of substantial limitation must be made on a case-by-case basis with respect to each individual student. The Section 504 regulatory provision at 34 C.F.R. 104.35 (c) requires that a group of knowledgeable persons draw upon information from a variety of sources in making this determination.” Revised Q&A #21.

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**Incorporation of ADAAA changes from 2008**  
**Relaxation of the substantial limitation component of eligibility.**

- **Many schools looked to EEOC’s pre-ADAAA regulations defining substantial limitation.**
- A person is substantially limited when he is
  - “Unable to perform a major life activity that the average person in the general population can perform;”  
— OR—
  - “Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.” 29 C.F.R. § 1630.2(j)(1)(i)&(ii).

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## **Incorporation of ADAAA changes from 2008**

### **Relaxation of the substantial limitation component of eligibility.**

- **What was wrong with EEOC's substantial limitation definition?**
  - Congress didn't like EEOC's "significantly restricts" standard for substantial limitation— it was too high.
  - Congress told EEOC to make the standard "less demanding." FEDERAL REGISTER, Vol. 76, No. 58, Friday, March 25, 2011, p. 17008.

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## **Incorporation of ADAAA changes from 2008**

### **A new mitigating measures rule.**

- **Congress had additional ideas about substantial limitation. A new mitigating measures rule. 42 USC §12102(4)(E):**

"The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures such as —

- (I) medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies;
- (II) use of assistive technology;
- (III) reasonable accommodations or auxiliary aids or services; or
- (IV) learned behavioral or adaptive neurological modifications."

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## **Incorporation of ADAAA changes from 2008 Relaxation of substantial limitation & mitigating measures**

- **Two substantial limitation tasks for the new regs**

- Define what “substantially limits” means after implementation of a standard lower than “significant restriction”
- Reference the mitigating measures change

*A little commentary:* While it would make sense to include both elements in the new regs, the author would not be surprised if the decades-long refusal by OCR to define “substantially limits” continues.

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## **Can OCR address an old but persisting question? Use of term “special education” in the 504 FAPE regulation.**

**The Section 504 FAPE requirement didn’t change in 2008. 34 C.F.R. 104.33(c)(1).**

“(1) For the purpose of this subpart, the provision of an appropriate education is the provision of regular or **special education** and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of § § 104.34, 104.35, and 104.36.”

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**Can OCR address an old but persisting question?  
Use of term “special education” in the 504 FAPE regulation.**

- **The use of the term “special education” in the §504 regulations has been a source of endless confusion among schools and parents.** IDEA fiscal, procedural, and placement requirements preclude the access of non-IDEA students to IDEA-funded “specially designed instruction.”
- Could not the regulations clarify that options for §504 plans include accommodations, services, and modifications to school policies, practices or procedures as §504 services, and thus avoid the confusing dual terminology?

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**Can OCR address an old but persisting question?  
Use of term “special education” in the 504 FAPE regulation.**

- Note this comment to the 2006 proposed IDEA regulations:  
  
“One commenter requested modifying the definition of special education to distinguish special education from other forms of education, such as remedial programming, flexible grouping, and alternative education programming.” 71 Federal Register No. 156 p. 46,577.

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**Can OCR address an old but persisting question?  
Use of term “special education” in the 504 FAPE regulation.**

“The commenter stated that **flexible grouping, diagnostic and prescriptive teaching, and remedial programming have expanded** in the general curriculum in regular classrooms and the expansion of such instruction will only be encouraged with the implementation of early intervening services under the Act.” *Id.*

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**Can OCR address an old but persisting question?  
“Special education” in the 504 regulations.**

•ED’s response to the comment was almost too simple:

“We do not believe it is necessary to change the definition to distinguish special education from the **other forms of education** mentioned by the commenter.” 71 Federal Register No. 156 p. 46,577.

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**Can OCR address an old but persisting question?  
Use of term “special education” in the 504 FAPE regulation.**

- *A little commentary:* a modern definition of “specially designed instruction” is desperately needed for purposes of child find and eligibility to take into account robust regular education efforts.
- Does 504 have the power to provide “specially designed instruction” (SDI) as defined in IDEA?
  - Does the use of the term “special education” in the 504 regulations mean that 504 can provide SDI to a 504 student who is *not* eligible under IDEA?
  - If so, how do we know when to refer a student to 504 vs. IDEA or know when a student is IDEA-eligible rather than 504 eligible?

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**Can OCR address an old but persisting question?  
Students’ rights to 504 FAPE after refusal of IDEA IEP.**

- ED declined to weigh in when it created the problem by
  1. Allowing parents to revoke or refuse IDEA consent for services and
  2. Removing the school’s ability to override that refusal via due process.
  - “these final regulations implement provisions of the IDEA only. They do not attempt to address any overlap between the protections and requirements of the IDEA, and those of Section 504 and the ADA.” 73 Fed. Reg. 73,013 (December 1, 2008)(emphasis added).
    - Note the 504 regulations provide at 104.33(b)(2): “Implementation of an Individualized Education Program developed in accordance with the Education of the Handicapped Act is one means of meeting the [504 FAPE] standard established in paragraph (b)(1)(i) of this section.”

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## Can OCR address an old but persisting question? Students' rights to 504 FAPE after refusal of IDEA IEP.

### Conflicting results from federal courts.

- **"One FAPE per customer."** *Lamkin v. Lone Jack C-6 School District*, 58 IDELR 197 (W.D. Mo. 2012). "Plaintiff's revocation of services under the IDEA was tantamount to revocation under Section 504 and the ADA." The court noted the parent's objection to applying the *McKethan* letter, but recognized that the parents "failed to cite any judicial or administrative decision that calls it into doubt."
- *Letter to McKethan*, 25 IDELR 295, 296 (OCR 1996): "by rejecting the services developed under the IDEA, the parent would essentially be rejecting what would be offered under Section 504. The parent could not compel the district to develop an IEP under Section 504 as that effectively happened when the school followed the IDEA requirements."

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## Can OCR address an old but persisting question? Students' rights to 504 FAPE after refusal of IDEA IEP.

### Conflicting results from federal courts.

- **Multiple FAPes available.** *Kimble v. Douglas CSD*, 60 IDELR 221 (D.C. Col. 2013). After revocation of IDEA consent, the parents requested a Section 504 meeting. The school held the § 504 meeting, the student was determined 504-eligible, and a § 504 plan was offered that was identical to the rejected IEP. Parents rejected the re-named IEP.
- Summary Judgment was granted to the school, but not because it had offered an IEP that satisfied the Section 504 FAPE duty. *The school won because the parents rejected a Section 504 Plan identical to the rejected IEP.*

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## Can OCR address an old but persisting question? Students' rights to 504 FAPE after refusal of IDEA IEP.

*A little commentary:* What we are left with is no real authority from a court with jurisdiction over much of the country. A regulation would help.

- In the author's opinion, the 504 regulation and *Letter to McKethan* are clear, as are some scary results from the *Kimble* case:
  - Parents of a student with an intellectual disability served in a life skills class could revoke consent under IDEA and demand a life skills class under 504?
  - Parents of a student with a serious behavioral disorder served in an ED unit with tight structure and low staff-student ratio revoke consent. What does 504 do about the behavior without specially designed instruction? How does MDR work when the school knows it needs to provide a more restrictive setting BUT CAN'T due to revocation?

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## Addressing Dynamics Created by ADA The § 504 rights of technically eligible students

**Who is a technically eligible student?** A Student who despite meeting Section 504 eligibility criteria (she has a physical or mental impairment that substantially limits one or more major life activities) does not need services from the school and does not get a 504 Plan.

- (1) the student with an impairment in remission (who receives no services because the impairment does not create a current need for services);
- (2) the student whose needs are met through mitigating measures that he or she controls (so services from the school are not required to meet the student's needs); and
- (3) The student for whom parents have refused Section 504 services.

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## Addressing Dynamics Created by ADA The § 504 rights of technically eligible students

### What does the technically eligible student get?

- A technically eligible 504 Student with Asthma doesn't need a 504 Plan, but would be protected by "general nondiscrimination provisions." (2012 DCL on ADA).
- Technically eligible 504 Student with ADHD doesn't need a Plan.
  - "that student is still a person with a disability ... and so is protected by Section 504's general nondiscrimination prohibitions (e.g., no retaliation, harassment, unlawful different treatment, etc.)." 2016 ADHD Resource Guide.
- *A little commentary:* Odd that MDR isn't listed? What about periodic reevaluation? A regulation would help.

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## It's in OCR guidance, shouldn't it be in the regs?

- Over the years, various elements of OCR guidance have solidified as "required doctrine" despite not appearing in the regulations
- Consequently, important details of the substantive content of §504 have developed as a sort of cumulative "lore" of ostensibly non-binding requirements that are nevertheless treated as akin to actual regulatory provisions in the context of OCR investigations.

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**It's in OCR guidance, shouldn't it be in the regs?  
Some examples**

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Parental Consent required for initial evaluation.

“26. What should a recipient school district do if a parent refuses to consent to an initial evaluation under the Individuals with Disabilities Education Act (IDEA), but demands a Section 504 plan for a student without further evaluation?”

A school district must evaluate a student prior to providing services under Section 504. Section 504 requires informed parental permission for initial evaluations. If a parent refuses consent for an initial evaluation and a recipient school district suspects a student has a disability, the IDEA and Section 504 provide that school districts may use due process hearing procedures to seek to override the parents' denial of consent.” OCR Revised Q&A#26.

**It's in OCR guidance, shouldn't it be in the regs?  
Some examples**

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Parent right to refuse services (initially or during provision of services).

“31. A student is receiving services that the school district maintains are necessary under Section 504 in order to provide the student with an appropriate education. The student's parent no longer wants the student to receive those services. If the parent wishes to withdraw the student from a Section 504 plan, what can the school district do to ensure continuation of services?”

The school district may initiate a Section 504 due process hearing to resolve the dispute if the district believes the student needs the services in order to receive an appropriate education.” OCR Revised Q&A, #31.

**It's in OCR guidance, shouldn't it be in the regs?  
Some examples**

**A number of other process elements are found in OCR guidance that, in author's opinion, our to be added to the regs.**

- Fundamental requirements of the impartial due process hearing
- Requirements for local grievance or complaint process & review procedure
- No need for consent for reevaluations unless assessments are to be administered
- Stay-put requirement in case of filing of a due process hearing
- Explanation of the "review procedure."

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**It's in OCR guidance, shouldn't it be in the regs?  
Some examples**

Impairments that will in "virtually every case" result in eligibility.

- **"22. Are there any impairments which automatically mean that a student has a disability under Section 504?"**
- No. An impairment in and of itself is not a disability. The impairment must substantially limit one or more major life activities in order to be considered a disability under Section 504." Revised Q&A #22.

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**It's in OCR guidance, shouldn't it be in the regs?  
Some examples**

Impairments that will in “virtually every case” result in eligibility.

- The Post-ADAAA Approach. When the Equal Employment Opportunity Commission (EEOC) issued final regulations on the ADAAA (with respect to employees), it took a different position.
  - In light of Congress' desire that eligibility be viewed more broadly, and significant changes lowering the eligibility standard, EEOC opined that some impairments, while not automatically resulting in eligibility, would virtually always result in eligibility.
  - It appears that ED reviewed EEOC's position and adopted it with respect to a small number of impairments. OCR's January 2012 guidance letter indicates that a handful of impairments will almost always result in eligibility.

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**It's in OCR guidance, shouldn't it be in the regs?  
Some examples**

**Impairments that in “virtually every case” result in eligibility.**

- “In most cases, application of these rules should quickly shift the inquiry away from the question whether a student has a disability (and thus is protected by the ADA and Section 504), and toward the school district's actions and obligations to ensure equal educational opportunities. While there are no per se disabilities under Section 504 and Title II, the nature of many impairments is such that, in virtually every case, a determination in favor of disability will be made. **Thus, for example, a school district should not need or require extensive documentation or analysis to determine that a child with diabetes, epilepsy, bipolar disorder, or autism has a disability under Section 504 and Title II.**” 2012 DCL, p. 5.

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**It's in OCR guidance, shouldn't it be in the regs?  
Some examples**

- **The regulations should incorporate the longstanding guidance with respect to disciplinary removals.**
- The regulations should make clear that manifestation determination reviews (MDRs) are required prior to disciplinary changes in placement, and should define what changes in placement consist of, including removals of over 10 consecutive school days, and cumulative short-term removals that create a pattern of removals.