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# School Law *Bullet*

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Education Law Practice Group  
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**To: Public Education Clients and Friends**

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## First Post-ADAAA Section 504 Guidance Issued *Here's Our Bulletproof Analysis*

On Friday, the Federal Office of Civil Rights (OCR) issued a revised version of its Q&A non-regulatory Section 504 guidance to incorporate changes made by the Americans with Disabilities Act Amendments Act (ADAAA). This is the first federal guidance to be issued on Section 504 since the ADAAA was enacted. The ADAAA went into effect earlier this year, and, in February, during a full-day legal training for district and IU administrators and faculty at the Greyfriars Conference Center, our attorneys analyzed and discussed in detail the changes and their impact on school districts and intermediate units. In case you missed it, here's our bullet-proof analysis of both the Section 504 changes and the new OCR guidance:

### **ADAAA Changes Apply to Section 504**

Section 504 was amended such that it now incorporates the ADAAA by reference. Where they formerly just mirrored each other, they now share provisions. Thus, the changes made to the ADAAA also apply to public school students under Section 504.

### **Scope of Section 504 FAPE Requirement Significantly Broadened**

Under Section 504, FAPE must be provided to all students who have a qualifying disability that substantially limits one or more major life activities.

*New Categories of "Major Life Activities"* – The new law lists new categories of activities that Congress has deemed to be "major life activities." This doesn't really change anything, though, since the previous list was non-exhaustive. Now the list is just more expansive, giving more specific examples of what is covered. It now lists just about everything and still

continues to be non-exhaustive. Presumably, the expansion was a reaction to ever-evolving and narrowing caselaw restricting categories of "major life activities."

*More Extensive List of Disabilities* – The list of disabilities has also been expanded, but, as explained above, the previous list was non-exhaustive, so while the expansion is somewhat helpful in pointing out things that were not previously on the list, it doesn't substantively conflict with the previous statute.

*Broadening of the Term "Substantially Limits"* – While the ADAAA does not specifically identify what the definition of "substantially limits" is, it does tell us what it is not. The term "substantially limits" had been whittled away by the U.S. Supreme Court until it narrowly included only those disabilities that "severely restrict" major life activity. The new law rejects that interpretation along with

**continued...**

It is important to note that FAPE under Section 504 is different than FAPE under the IDEA:

### **FAPE Under Section 504**

"[T]he provision of regular or special education and related aids and services that are designed to meet individual needs of handicapped persons as well as the needs of non-handicapped persons are met and based on adherence to procedural safeguards outlined in the law."

### **FAPE Under the IDEA**

"special education and related services that (A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the standards of the State educational agency; (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and (D) are provided in conformity with the [IEP]."

a less stringent EEOC interpretation of “significantly restricts.” A definition would have been more helpful, but this is better than nothing.

**Mandate to Ignore Mitigating Measures** – Under the caselaw that defined the previous Section 504, districts were permitted to take into account the ameliorative effects of any mitigating measures (such as hearing aids, drug treatments, etc.) to determine whether a disability resulted in substantial limitation. The ADAAA expressly rejected that idea and requires the opposite. Districts must now make their Section 504 determinations based upon the child’s disability as it presents itself without the mitigating measures.

**No Automatic Section 504 Plan for Students With Record of or Regarded as Having a Disability** Section 504 has always offered protections to those students who have a record of having a qualifying disability or who are regarded as having a disability. The new OCR Q&A clarifies that these individuals, however, are not entitled to FAPE under Section 504, which means that a Section 504 plan is not necessary. The OCR Q&A clarifies that, under the ADAAA, a student who is being “regarded as” having a disability “is not entitled to reasonable accommodations or the reasonable modification of policies, practices or procedures.”

**Temporary Disabilities Expressly Not Covered Under Section 504** The new law states and the OCR Q&A explains, that a student shall not be “regarded as” having a disability (one of the prongs that would allow a student to be protected

under Section 504) if the disability is “transitory and minor.” It defines transitory as “an impairment with an actual or expected duration of 6 months or less.”

### **OCR Determines that Section 504 Regulations Are Still Valid Under Amendments**

The OCR Q&A states that the ADAAA “does not require [the Education Department] to amend its Section 504 regulations. ED’s Section 504 regulations as currently written are valid, and OCR is enforcing them consistent with the Amendments Act.” In addition, the guidance document states that “OCR is currently evaluating the impact of the Amendments Act on OCR’s enforcement responsibilities under Section 504 and Title II of the ADA, including whether any changes in regulations, guidance, or other publications are appropriate.”

### **THE BOTTOM LINE:**

These significant changes in the law require changes in school district documents and procedures. School districts need to take a close look at and revise as necessary all of their Section 504-related documents to ensure compliance with the new law, especially:

- Nondiscrimination/Section 504 Board Policy
- Annual Section 504 Notice
- Internal Procedures / Guidelines Regarding Section 504 Implementation
- Section 504 Evaluation forms and other Section 504 forms
- Student Handbook

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