

**SECTION 504 ELIGIBILITY -  
NOW WHAT?**  
Determining Eligibility In Light Of  
The Amendments To The  
ADA Regulations

IAASE Winter Conference  
February 16, 2017

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SECTION 504 ELIGIBILITY - NOW WHAT?

**A. Applicable Laws,  
Regulations and Guidance**

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APPLICABLE LAWS, REGULATIONS  
AND GUIDANCE

**Section 504 of the *Rehabilitation Act of 1973*:**

“No otherwise qualified individual with a disability in the united states...shall, by solely by reason of her or his disability, be excluded from the 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.

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APPLICABLE LAWS, REGULATIONS  
AND GUIDANCE

U.S. Department of Education's (DOE)  
Regulations Implementing Section 504 at 34 C.F.R.  
Part 104:

This Part applies to any program or activity (e.g., school) that receives federal financial assistance from the DOE.

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APPLICABLE LAWS, REGULATIONS  
AND GUIDANCE

34 C.F.R. Part 104:

- **Subpart A** of Section 504 regulations sets forth the general non-discrimination provisions of the law.
- **Subpart D** of Section 504 regulations applies to preschools, elementary, secondary, and adult education programs and includes requirements for:
  - Location and notification (a.k.a., "child find");
  - FAPE and LRE;
  - Procedural safeguards; and
  - Equal opportunity to participate in non-academic services and activities.

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APPLICABLE LAWS, REGULATIONS  
AND GUIDANCE

See Parent and Educator Resource Guide  
to Section 504 in Public Elementary and  
Secondary Schools (OCR 12/2016)

<https://www2.ed.gov/about/offices/list/ocr/docs/504-resource-guide-201612.pdf>

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**APPLICABLE LAWS, REGULATIONS  
AND GUIDANCE**

- Title II and Title III of the *Americans With Disabilities Act of 1990* ("ADA")
- *ADA Amendments Act of 2008* ("ADAAA")
- DOJ's Regulations Implementing the ADA at 28 C.F.R. Parts 35 and 36

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**APPLICABLE LAWS, REGULATIONS  
AND GUIDANCE**

U.S. Department of Justice's (DOJ)  
Amendments to the ADA Regulations  
(effective 10/11/16)



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**APPLICABLE LAWS, REGULATIONS  
AND GUIDANCE**

DOJ's Notice of Proposed Rulemaking to Amend  
the Section 504 Regulations (DOJ 01/13/17):

- 28 C.F.R. Part 42.
- Nondiscrimination based on disability in programs or activities that receive federal financial assistance from the DOJ.

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SECTION 504 ELIGIBILITY - NOW WHAT?

**B. FAPE Under Section 504**

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FAPE UNDER SECTION 504

Under Section 504, FAPE is the provision of regular or special education and related aids and services that are designed to meet the individual educational needs of students with disabilities as adequately as the needs of non-disabled students are met and are based on adherence to procedures governing educational setting, evaluation and placement, and procedural safeguards.

*Parent and Educator Resource Guide to Section 504 in Public Elementary and Secondary Schools (OCR 12/2016).*

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FAPE UNDER SECTION 504

Section 504 FAPE Eligibility:	IDEA FAPE Eligibility:
1. Student has "mental or physical impairment" as defined under §504	1. Student has 1 or more of 14 IDEA-recognized "disabilities"
2. Substantial limitation on 1 or more major life activities ( <u>not limited to learning</u> )	2. Adverse affect on <u>educational performance</u>
3. Need for special education <u>or</u> related aids and services	3. Need for special education and related services

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FAPE UNDER SECTION 504

The ADA/Section 504 defines an "individual with a disability" as a person who has a physical or mental impairment that substantially limits one or more major life activities.

The ADAAA **broadened** the interpretation of an individual with a disability under Section 504.

*Protecting Students With Disabilities, Frequently Asked Questions About Section 504 and the Education of Children with Disabilities (OCR 10/16/15).*

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FAPE UNDER SECTION 504

"Substantial limitation" is not defined in Section 504 regulations.

In enacting the ADAAA, Congress rejected a number of U.S. Supreme Court decisions which narrowly construed the term "substantial limitation" and the definition of disability.

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SECTION 504 ELIGIBILITY - NOW WHAT?

**C. DOJ's Amendments to  
ADA Regulations  
(effective 10/11/16)**

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AMENDMENTS TO ADA REGULATIONS

DOJ has made several revisions to Title II and Title III of the ADA regulations to set forth the proper meaning and interpretation of the definition of “disability” and make related changes to implement the ADAAA.

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AMENDMENTS TO ADA REGULATIONS

**DOJ explains (in part) that the amendments:**

- Clarify that the term “disability” should be interpreted broadly.
- Add rules of construction to be applied when determining whether an impairment substantially limits a major life activity.

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AMENDMENTS TO ADA REGULATIONS

- Indicate that a comparison of an individual’s performance of a major life activity to the performance of the same major life activity in the general population usually will not require scientific, medical or statistical evidence.

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AMENDMENTS TO ADA REGULATIONS

Definition of "Individual with a Disability":

By "broad coverage," DOJ means that the primary object of attention in cases brought under the ADA should be whether entities covered by the ADA [e.g., public schools and special education cooperatives] have complied with their obligations and whether discrimination has occurred, not whether the individual meets the definition of "disability."

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AMENDMENTS TO ADA REGULATIONS

Definition of "Individual with a Disability" (cont.):

A physical or mental impairment includes, but is not limited to, contagious and non-contagious diseases and conditions such:

- Orthopedic, visual, speech and hearing impairments
- Cerebral palsy
- Epilepsy
- Muscular dystrophy
- Multiple sclerosis
- Cancer
- Heart disease
- Diabetes
- Intellectual disability
- Emotional illness
- Dyslexia and other SLDs
- ADHD
- HIV infection
- Tuberculosis
- Drug addiction
- Alcoholism

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AMENDMENTS TO ADA REGULATIONS

Definition of "Individual with a Disability" (cont.):

▪ Major life activities ("MLAs") include, but are not limited to caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, **sitting, reaching,** lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, **writing,** communicating, **interacting with others,** and working.

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AMENDMENTS TO ADA REGULATIONS

Definition of "Individual with a Disability" (cont.):

■ MLAs also include the operation of a major bodily function, including but not limited to, functions of the immune system, **special sense organs and skin**, normal cell growth, and digestive, **genitourinary**, bowel, bladder, neurological, brain, respiratory, circulatory, **cardiovascular**, endocrine, **hemic**, **lymphatic**, **musculoskeletal**, and reproductive systems. The operation of a major bodily system includes the operation of an individual organ within a body system.

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AMENDMENTS TO ADA REGULATIONS

Definition of "Individual with a Disability" (cont.):

- In determining whether an impairment substantially limits a MLA, the term "major" may *not* be interpreted strictly to create a demanding standard.
- Whether an activity is a MLA is *not* determined by reference to whether the activity is of central importance to daily life.
- The threshold issue of whether an impairment substantially limits a MLA should *not* demand an extensive analysis.

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AMENDMENTS TO ADA REGULATIONS

Definition of "Individual with a Disability" (cont.):

- An impairment is a disability if it substantially limits the ability of an individual to perform a MLA as compared to most people in the general population.
- A comparison of an individual's performance of a MLA to the performance of the same MLA by most people in the general population usually will not require scientific, medical or statistical evidence.

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AMENDMENTS TO ADA REGULATIONS

**Definition of “Individual with a Disability” (cont.):**

The term “disability” does cover drug addiction but does *not* include psychoactive substance use disorders resulting from current illegal use of drugs.

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AMENDMENTS TO ADA REGULATIONS

Instead of scientific, medical or statistical evidence, other types of evidence that are less onerous to collect can be considered adequate to establish that an impairment is substantially limiting, such as statements or affidavits of affected individuals, school records, or determinations of disability status under other statutes.

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AMENDMENTS TO ADA REGULATIONS

DOJ also notes that “self-mitigating measures” or undocumented modifications/accommodations for students who have impairments that substantially limit learning, reading, writing, speaking or concentrating may include things like:

- Arranging to have multiple reminders for task completion;
- Seeking help from others to provide reminders or to assist with organization of tasks;
- Selecting courses strategically;

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AMENDMENTS TO ADA REGULATIONS

- Devoting a far larger portion of the day, weekends, and holidays to study than students without disabilities;
- Teaching oneself strategies to facilitate reading connected text or mnemonics to remember facts;
- Being permitted extra time to complete tests;
- Receiving modified homework assignments; or
- Taking exams in a different format or in a less stressful or anxiety-provoking setting.

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AMENDMENTS TO ADA REGULATIONS

**Nine Rules of Construction for  
Determining Whether an Impairment  
“Substantially Limits” a MLA:**

1. Broad construction, not a demanding standard
2. No extensive analysis needed
3. Only major life activity must be substantially limited
4. Impairment that is episodic or in remission is a disability if it would substantially limit when active

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AMENDMENTS TO ADA REGULATIONS

**Rules of Construction (cont.):**

5. Compare to most people in the general population
6. Individualized assessment required
7. Scientific, medical or statistical evidence usually not required
8. Determine without regard to ameliorative effects of mitigating measures
9. Effects of a transitory impairment expected to last less than 6 months can be substantially limiting

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AMENDMENTS TO ADA REGULATIONS

**Rules of Construction (cont.):**

Given their inherent nature, some types of impairments will nearly always be found to substantially limit a MLA and any necessary individualized assessment should be particularly simple and straightforward. For example ~

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AMENDMENTS TO ADA REGULATIONS

- Deafness substantially limits hearing;
- Blindness substantially limits seeing;
- Intellectual disability substantially limits brain function;
- Partially or completely missing limbs or mobility impairments requiring the use of a wheelchair substantially limit musculoskeletal function;
- Autism substantially limits brain function;

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AMENDMENTS TO ADA REGULATIONS

- Cancer substantially limits normal cell growth;
- Cerebral palsy substantially limits brain function;
- Diabetes substantially limits endocrine function;
- Epilepsy, muscular dystrophy, and multiple sclerosis each substantially limits neurological function;
- HIV infection substantially limits immune function; and
- Major depressive disorder, bipolar disorder, post-traumatic stress disorder, traumatic brain injury, obsessive compulsive disorder, and schizophrenia substantially limit brain function.

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AMENDMENTS TO ADA REGULATIONS

Rules of Construction (cont.):

It may be useful to consider, as compared to most people in the general population:

- The conditions under which the individual performs the MLA;
- The manner in which the individual performs the MLA; or
- The duration of time it take the individual to perform the MLA, or for which the individual can perform the MLA.

However, it may often be unnecessary to conduct an analysis involving most of the facts related to condition, manner or duration.

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AMENDMENTS TO ADA REGULATIONS

Rules of Construction (cont.):

The focus is on how a MLA is substantially limited, and not on what outcomes an individual can achieve.

For example, someone with a learning disability may achieve a high level of academic success, but may nevertheless be substantially limited in one or more MLAs, including but not limited to reading, writing, speaking or learning because of the additional time or effort he/she must spend to perform those MLAs compared to most people in the general population.

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SECTION 504 ELIGIBILITY - NOW WHAT?

D. Practical Tips

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PRACTICAL TIPS

■ Determine when was the last time that your school district reviewed and updated its Section 504 policies and procedures.

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PRACTICAL TIPS

■ Ensure that your Section 504 forms are in compliance with the revised language of the *ADAAA* and *ADA* amended regulations as well as your Section 504 policies and procedures.

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PRACTICAL TIPS

■ Consider staff training on:

- Understanding the *ADAAA* and amendments to the *ADA* regulations, and how to interpret an individual (*i.e.*, student) with a disability under Section 504.
- The process for completing evaluations under Section 504.
- Improving documentation of Section 504 teams' eligibility determinations.

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PRACTICAL TIPS

■ Consider staff training on (cont.):

- Section 504 plan writing - clear and precise descriptions of student needs stemming from disability and the identified accommodations and supports to address those needs.
- Data collection and other proof of proper implementation of Section 504 plans.

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QUESTIONS



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