A BRIEF INTRODUCTION TO SECTION 504 AND TITLE II

Section 504 of the Rehabilitation Act of 1973 ("Section 504") is a federal law that is designed to eliminate discrimination on the basis of disability in any program or activity receiving federal financial assistance from the United States Department of Education. 34 C.F.R. § 104.4.[1] The Americans with Disabilities Act ("ADA"), passed by Congress in 1990, serves the similar purpose of eliminating discrimination on the basis of disability. More specifically, Title II of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132.[2] Public schools are public entities. Title II of the ADA applies only to those public entities that employ fifteen or more persons.

Pursuant to Section 504 and the ADA, a person with a disability is defined as a person with a mental or physical impairment that substantially limits one or more major life activities. Per federal regulation, students in public elementary and secondary educational programs who satisfy this first definition of disability are entitled to a free appropriate public education ("FAPE"). 34 C.F.R. § 104.33. Under 504 and the ADA, the definition of a person with a disability also includes (a) a person who has a record of a physical or mental impairment that substantially limits a major life activity, and (b) a person who is regarded as having a physical or mental impairment that substantially limits a major life activity. Pursuant to guidance from the United States Department of Education, Office for Civil Rights ("OCR"), students in public schools who satisfy these additional two definitions have no FAPE entitlement. *OCR Senior Staff Memorandum* (OCR Aug. 3, 1992); *Frequently Asked Questions About Section 504* (OCR March 4, 2005 and March 27, 2009) ("OCR FAQ"). These additional two definitions are "legal fictions," intended to address situations where individuals never were or are not currently disabled but are treated by others as if they were. *Id.*

In 2008, Congress significantly amended the ADA and Section 504. This amending legislation, known as the Americans with Disabilities Act Amendments Act ("ADAAA"), was signed into law by President George W. Busch on September 25, 2008. The amended law became effective January 1, 2009. A copy of the 2008 ADAAA is included in the Appendix to this publication.

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[1] C.F.R. stands for the Code of Federal Regulations, which contains regulations duly promulgated by agencies of the federal government, including the Office for Civil Rights, United States Department of Education. A copy of the relevant Section 504 regulations is included in the Appendix to this publication.

[2] U.S.C. is the acronym for the United States Code that contains legislation passed by Congress and signed into law by the President.

In enacting the ADAAA, Congress explicitly overturned prior judicial precedent that, in Congressional opinion, "narrowed the broad scope of protection intended to be afforded by the ADA." More specifically, Congress rejected the Supreme Court's interpretation of "disability" in the cases of *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), and *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002). In rejecting the holdings and rationale of those cases, Congress noted that "lower courts have incorrectly found in individual cases that people with a range of substantially limiting impairments are not people with disabilities." Accordingly, Congress' stated purpose in enacting the 2008 amendments was to expand the class of individuals who are entitled to protection under the ADA and Section 504 and "[t]o restore the intent and protections of the Americans with Disabilities Act of 1990." As noted by Congress, the definition of disability "shall be construed . . . in favor of broad coverage of individuals . . . to the maximum extent permitted by the terms of this Act."

Although Congress did not modify the definitions of disability in the ADAAA, it modified past interpretations of those definitions in several ways. For example, in the ADAAA, Congress explicitly rejected the Supreme Court's prior *Sutton* holding that "whether an impairment substantially limits a major life activity is to be determined with reference to the ameliorative effects of mitigating measures." As a result of the ADAAA, the determination of whether an impairment substantially limits a major life activity must be made ***without regard*** to the ameliorative (positive) effects of mitigating measures.

Mitigating measures are devices or practices that a person uses to correct for or reduce the effects of that person's mental or physical impairment. Mitigating measures, per the ADAAA, include measures such as medication, low-vision devices (not including ordinary eyeglasses or contacts), prosthetics, hearing aids and cochlear implants, mobility devices, use of assistive technology, reasonable accommodations and learned behavioral or adaptive neurological modifications. The list, however, is not exhaustive and whether other measures (including individual health plans, classroom interventions and aids and services provided by the student's parent) constitute mitigating measures must be determined on a case-by-case basis.

Additionally, in the ADAAA and although the law continues to require a "substantial limitation," Congress concluded that the Supreme Court, in the *Williams* case, required a higher degree of limitation than Congress originally intended. While Congress did not provide a definition of "substantially limits" in the 2008 amendments, it explicitly rejected the definition of "significantly restricted" as previously applied by the Equal Employment Opportunity Commission ("EEOC"). As a result of this specific change to the interpretation of "substantial limitation," "[s]tudents who, in the past, may not have been determined to have a disability under Section 504 and Title II may now in

fact be found to have a disability under those laws." *Dear Colleague Letter* (OCR Jan. 19, 2012).

As of 2013, neither the EEOC nor the OCR has defined "substantially limits." In its 2011 regulations, however, the EEOC created several "rules of construction" in lieu of a definition. One such rule provides that "[t]he determination of whether an impairment substantially limits a major life activity requires an individualized assessment. However, in making this assessment, the term "substantially limits" shall be interpreted and applied to require a degree of functional limitation that is lower than the standard for "substantially limits" applied prior to the ADAAA." 29 C.F.R. § 1630.2(j)(1)(iv). Importantly, an additional rule provides that ***"[a]n impairment is a disability within the meaning of this section if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population.*** An impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting. ***Nonetheless, not every impairment will constitute a disability within the meaning of this section.***" 29 C.F.R. § 1630.29(j)(1)(ii) (emphasis added). Although the OCR has not addressed this issue via formal regulation, it has stated in the context of other guidance that a school district could comply with Section 504 and Title II by including the following language in its revised procedures and forms: "'substantially limits' means unable to perform a major life activity that the average person in the general population can perform." *E.g., Oxnard (CA) Union High Sch. Dist.*, 55 IDELR 21 (OCR Oct. 13, 2009); *see also Sequoia (CA) Union High Sch. Dist.*, 110 LRP 4676 (July 31, 2009) (comparison is to the average peer).

Further, in the ADAAA, Congress rejected the *Williams* Court's analysis that the term "major" as used in the definition of disability must be interpreted strictly so as to create a demanding standard for disability. In relation to the phrase "major life activities," Congress extensively expanded the prior non-exclusive list of what constituted a major life activity and further clarified that an impairment that substantially limits one major life activity need not limit other major life activities. Under the ADAAA, major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, working and the operation of major bodily functions. In the context of public elementary and secondary schools, learning alone (including a student's grades) is an insufficient basis on which to determine whether a student has a disability. *OCR FAQ* (OCR 2009). All major life activities that may be impacted by the student's impairment(s) must be considered.

The ADAAA also provides that an impairment that is episodic or in remission constitutes a disability if, when active, the impairment substantially limits a major life

activity and without regard to the ameliorative effects of mitigating measures. In addition and pursuant to the ADAAA, the "regarded as" definition of disability does not apply to impairments that are transitory ***and*** minor.

In the ADAAA, Congress expressed that "whether an individual's impairment is a disability under the ADA should not demand extensive analysis." 42 U.S.C. § 12101(b)(5). However it is important to note that Subpart D of the current Section 504 regulations continues to require recipients of federal financial assistance that operate public elementary or secondary educational programs or activities to conduct evaluations prior to determining a student's eligibility and placement under Section 504. 34 C.F.R. §§ 104.35(a)-(c). These regulatory provisions require, among other things, that the school district draw upon information from a variety of sources, establish procedures to ensure that information from all such sources be documented and carefully considered and ensure that all such decisions are made by a group of knowledgeable persons. *Id.* OCR rigorously enforces these provisions and, thus, to comply with Section 504 and Title II, it appears that a more extensive analysis may be necessary than is statutorily required under Title II.

Although the ADAAA does not address whether the positive effects of mitigating measures can be taken into account once a disability is determined to exist, the EEOC, in its 2011 regulations, opined that the ADAAA ***does*** permit the consideration of such effects in determining whether an individual requires reasonable accommodation in the workplace. More recently and consistent with the EEOC, OCR has stated that "[a]lthough school districts may no longer consider the ameliorative effects of mitigating measures when making a disability determination, mitigating measures remain relevant in evaluating the need of a student with a disability for special education or related services. . . . Once a school district determines that a student has a disability, however, that student's use of mitigating measures could still be relevant in determining his or her need for special education or related services." *Dear Colleague Letter* (OCR Jan. 19, 2012). If, after a proper evaluation, a knowledgeable group of persons determines that a student does not require special education or related services, neither the ADAAA nor the 504 regulations obligate a school district to provide aids or services that the student does not need. *Dear Colleague Letter* (OCR Jan. 19, 2012). The student, however, is still considered to be a person with a disability and is protected by 504 and Title II's nondiscrimination prohibitions. *Dear Colleague Letter* (OCR Jan. 19, 2012); *see also Letter to Veir* (Dec. 1, 1993). In the public school context, students who have disabilities but have no need for services are sometimes referred to as "technically eligible."

OCR enforces Title II and Section 504 with respect to public schools and has authority to promulgate regulations interpreting those two laws. Initially, OCR's predecessor agency (Health, Education and Welfare) promulgated regulations that

became effective in 1977. Those regulations were adopted without change when the Department of Education was created in 1980. No significant changes to the regulations have been made since the late 1970's and OCR's most recent guidance specifically indicates that the current regulations (adopted primarily in the 1970's) remain consistent with the ADAAA. *OCR FAQ* (OCR March 27, 2009)("The Amendments Act does not require ED 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."); *Dear Colleague Letter* (OCR Jan. 19, 2012) ("The Amendments Act does not require the Department to revise its existing Section 504 regulation or to create new regulatory provisions. . . . [N]othing in the Section 504 statute or current regulation contradicts the Amendments Act.").