

# Latest Developments in Section 504/ADA and Student Accessibility Issues

*40<sup>th</sup> Annual School Client  
Conference*



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# “Big Three” of Federal Disability Legislation



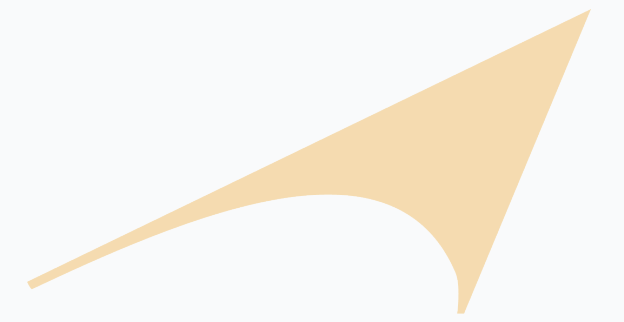
- Section 504 of the Rehabilitation Act of 1973
  - 29 U.S.C. § 794
  - Prohibits discrimination against individuals with disabilities by programs receiving federal funding.
- Individuals with Disabilities in Education Act (“IDEA”) (1975)
  - 20 U.S.C. 1400 *et seq.*
  - Requires that students with disabilities receive a free and appropriate public education in the least restrictive environment.
- Americans with Disabilities Act (“ADA”) (1990)
  - 42 U.S.C. §12101 *et seq.*
  - Prohibits discrimination against individuals with disabilities by state and local government services and places of public accommodation.

# Section 504 and the ADA



- **Section 504:** “No otherwise qualified individual with a disability . . . shall, 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
- **ADA, Title II:** “[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.”
  - 42 U.S.C. § 12132.

# ADA Amendments Act of 2008 (“ADAA”)



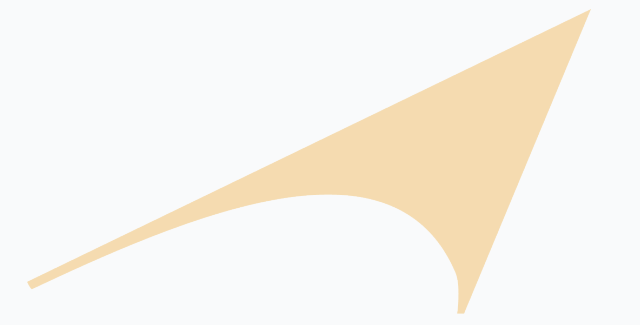
- In 2008, the ADAA amended both the ADA and the Rehabilitation Act.
- These amendments were a congressional response to a series of Supreme Court decisions that had narrowed the applicability of the ADA and the definition of “disability.”
- This amendment had two significant affects on determining a student’s coverage under the statutes:
  - The ADA’s definition of “disability” was clarified and expanded.
  - The Rehabilitation Act incorporated the ADA’s newly-expanded disability definition.

# Student Eligibility



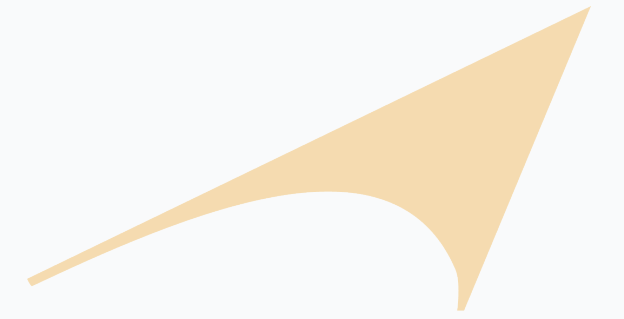
- Section 504 incorporates the ADA's definition of "disability" – 29 U.S.C. § 705(20)(B)
- An individual with a disability is any person who has:
  - A physical or mental impairment that substantially limits one or more major life activities of such individual;
  - A record of such an impairment; **or**
  - Is regarded as having such an impairment.
- After the ADAA, whether an impairment substantially limits a major life activity must be determined by evaluating the impairment in its **unmitigated state**.
  - Exception for ordinary eyeglasses or contact lenses.

# Student Eligibility



- The most common category has three primary components:
  - A **physical** or **mental impairment**
  - That **substantially limits**
  - One or more **major life activities.**
- Note the differences between the above and the IDEA, which generally applies to disabilities which necessitate special education and related services.
  - Section 504 and the ADA require that the disability substantially limits one or more major life activities – the IDEA does not.
  - The IDEA requires that the disability necessitate special education and related services – Section 504 and the ADA do not.

# Student Eligibility



- A **physical** or **mental impairment**:
  - Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine; or
  - Any mental or psychological disorder, such as intellectual disability, organic brain syndrome, emotional or mental illness, and specific learning disabilities.



# Student Eligibility



- What is a **Major Life Activity**?
- Major life activities include the following **non-exhaustive** list:
  - Caring for oneself
  - Performing manual tasks
  - Seeing
  - Hearing
  - Eating
  - Sleeping
  - Walking
  - Standing
  - Lifting
  - Bending
  - Speaking
  - Breathing
  - Learning
  - Reading
  - Concentrating
  - Thinking
  - Writing
  - Communicating
  - Working
  - Interacting with others
- Notably, these activities are NOT limited to learning or cognition.

# Student Eligibility



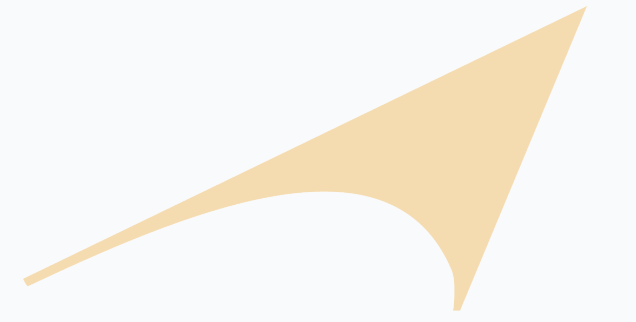
- A **major life activity** also includes the **operation of a major bodily function**, such as:
  - The functions of the immune system; special sense organs and skin; normal cell growth; and digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal, and reproductive systems.
  - The operation of a major bodily function includes the operation of an individual organ within a body system.

# Student Eligibility



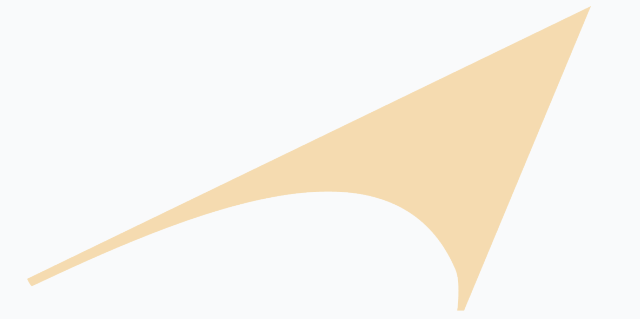
- When does an impairment **substantially limit** a major life activity?
- The regulations do not specifically define substantial limitation.
- Instead, the ADA regulations provide several “rules of construction” for the term, including:
  - It shall be construed broadly; not meant to be a demanding standard.
  - An impairment that is episodic or in remission counts if it substantially limits a major life activity when active.
  - The determination requires an individualized assessment.
  - The individual’s performance of the major life activity should be compared to that of most people in the general population, but usually will not require scientific, medical, or statistical evidence.

# Student Eligibility



- A **record** of having such an impairment.
  - An individual has a **record** of an impairment if the individual has a history of—or has been misclassified as having—a mental or physical impairment that substantially limits one or more major life activities.

# Student Eligibility



- Or is **regarded** as having such an impairment:
  - Does not have a physical or mental impairment, but is treated by the school as having such an impairment;
  - Has a physical or mental impairment that does not substantially limit major life activities, but is treated by the school as constituting such a limitation;
  - Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment;
    - 34 C.F.R. § 104.3(j)(2)(iv)
  - Individual is subjected to a prohibited action because of an actual or perceived impairment, whether or not the impairment substantially limits, or is perceived to substantially limit, a major life activity.
    - 28 C.F.R. § 35.108(f)

# Student Eligibility Scenarios



- Which of the following students would likely be eligible for evaluation under the ADA/Section 504?
  - Student A is a high-schooler who has been diagnosed with ADHD since they were in elementary school. Their condition is well-managed through prescribed medication, and the student consistently achieves A-grades.
  - Student B uses a cochlear implant to help them hear. Neither the implant nor any underlying condition pose any cognitive impairment. The student regularly obtains B-grades.
  - Student C has a severe allergy to peanuts and tree nuts. The allergy has no effect on educational performance, and the student regularly maintains C-grades.

# What is required of schools?



- Recall: Section 504 and the ADA both prohibit:
  - Excluding from participation;
  - Denying benefits; and
  - Discriminating on the basis of a disability.
- Federal regulations promulgated under both statutes further clarify a school's obligations.
- **Substantive requirements** are similar under both statutes. **Procedural requirements** are more stringent under Section 504.

# What is required of schools?

- Under Title II of the **ADA**:
  - A school must make **reasonable modifications** in policies, practices, or procedures when the modifications are necessary to avoid disability discrimination, **unless** the entity can demonstrate that the modifications would **fundamentally alter the nature** of the service, program, or activity.
    - 28 CFR § 35.130
- Under **Section 504**:
  - A covered entity that operates a public elementary or secondary education program shall provide a **free appropriate public education** to each qualified handicapped person who resides in the covered entity's jurisdiction, regardless of the nature or severity of the person's handicap.
    - 34 CFR § 104.33(a)



# Identification and Child Find under Section 504



- Schools have a continuing, affirmative obligation under Section 504 to identify and evaluate all students suspected of having a disability.
- Specifically, schools must:
  - Annually “identify and locate every qualified handicapped person residing in [the school district’s] jurisdiction who is not receiving a public education.” 34 CFR §104.32(a);
  - Evaluate students “who, because of handicap, need or [are] believed to need special education or related services.” 34 CFR §104.35(a).
- Schools must also take appropriate steps to notify students and parents of the school’s obligations under 504, but there is considerable latitude for how to do so.

# Identification of Nonpublic School Students



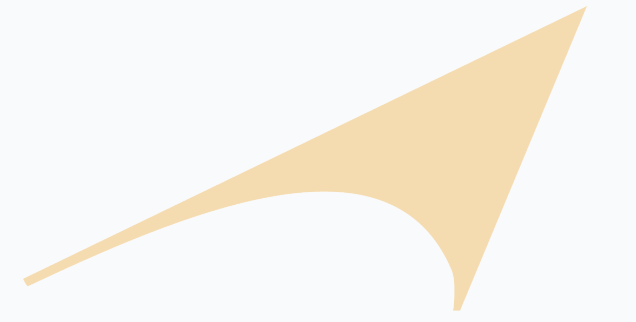
- Public elementary or secondary education programs must annually:
  - Undertake to **identify** and **locate** every student eligible under 504 who resides in the district and is not receiving a public education; and
  - Take appropriate steps to **notify** covered students of the district's duty under 504.
    - 34 C.F.R. 104.32.
- But a district has no duty to provide educational **services** to a student whose enrollment in a non-public school is based on the personal choice of the parent or guardian. *Letter to Veir*, 20 IDELR 864 (OCR 1993).
- While there is an affirmative obligation to ensure universal access and awareness, there is not an affirmative obligation to ensure universal provision of services. *D.L. v. Baltimore City Bd. Sch. Comm'rs* (4th Cir. 2013).

# Section 504 Referrals



- Anyone, including a parent, may refer a child to the 504 team.
  - Often occurs when a parent expresses concern that their child needs accommodations or related services.
- All of the District's professional staff are also responsible for initiating referrals to the relevant team of any student who they suspect has a disability under Section 504.
- Remember, the District has an **affirmative responsibility** to refer students suspected of having "academic, social, or behavioral problems that substantially affect the student's overall performance at school." *See Karnes City ISD, 31 IDELR 64 (1999).*

# Section 504 Referrals



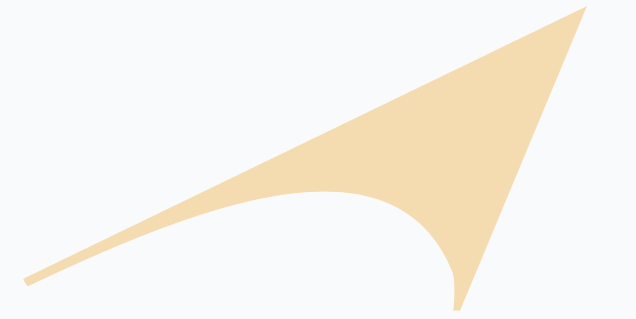
- Typically, to determine whether a school properly evaluated a student under Section 504, the U.S. Department of Education's Office of Civil Rights ("OCR") will look at whether the school:
  - Had evidence indicating that the student might have a disability for which 504 might require that the school provide the student with special education or related aids and services;
  - If so, promptly determined whether the student needed to be evaluated; and
  - If it determined that the student needed to be evaluated, promptly conducted an evaluation.

# The 504 Team



- Placement decision must be made by group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options.
  - 34 C.F.R. § 104.35(c)(3)
- Other than the above, there are no express statutory or regulatory requirements for composition of the 504 Team.
  - May include the student's parent, teacher, principal, counselor, psychologist, physician, or other school support staff.
- A parent is not a required member of the 504 team.

# Evaluation and the “504 Plan”



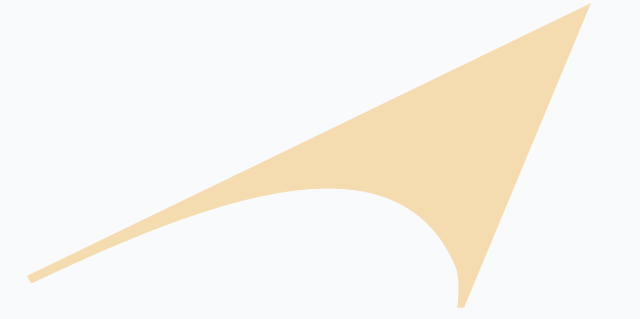
- To determine if a student is eligible under the ADA or Section 504, the school must evaluate the student.
- The 504 Team must ensure that:
  - All test/evaluation materials are validated for the purpose for which they are used;
  - All evaluations are administered by trained personnel; and
  - All evaluations accurately reflect the factors they purport to measure.
    - For instance, if a test is administered to a student with impaired sensory, manual, or speaking skills, the test results may not accurately reflect the factor it purports to measure if it only reflects the student’s impaired sensory, manual, or speaking skills.

# Elements of the 504 Plan



- **Evaluation Results:**
  - The plan should describe why the 504 team suspects that the student is eligible for services under Section 504.
- **Eligibility:**
  - The plan should specify how the identified disability substantially limits a specific major life activity.
- **Behavior Management Plan:**
  - If a student exhibits recurrent behaviors that significantly detract from the student's ability to benefit from educational services, and these behaviors cannot be curtailed by regular disciplinary procedures, OCR's position is that the school must develop and implement a behavioral management plan.

# Elements of the 504 Plan



- **Accommodations:**
  - The plan should describe both the necessary accommodations and the responsibilities of those implementing the accommodations.
  - Examples may include:
    - Building accommodations;
    - Classroom accommodations;
    - Support services;
    - Environmental accommodations;
    - Testing accommodations.



# The Limits of Accommodations



- Under ADA Title II, a school need not provide a modification that would **fundamentally alter the nature** of the service, program, or activity.
  - 28 CFR § 35.130.
- Although not expressly included in the 504 regulations, OCR has applied an **undue burden** limitation on a school's obligations.
- Neither the fundamental alteration nor undue burden defense serve to absolve elementary and secondary schools of the affirmative obligation to provide FAPE under Section 504.
  - *Dear Colleague Letter*, 60 IDELR 167 (OCR 2013).



# Reasonable Accommodations/Modifications

- An accommodation is not unreasonable just because a parent disagrees with it.
- *Doe v. Regional Sch. Unit 21*, (D. Me. Sep. 6, 2024)
  - Parents requested for their child with anxiety to attend school via a “telepresence robot.”
  - District’s position, which was supported by the district’s educational specialists, was that the student could more plausibly overcome anxiety through reacclimating into the classroom environment.
  - Court denied parents’ request for preliminary injunction.

# 504 Plan Scenarios

- Recall our three students from earlier. What might be **reasonably** included in their 504 plans?
  - Student A has ADHD. Their condition is well-managed through prescribed medication and does not hinder academic performance.
  - Student B uses a cochlear implant to help them hear. Neither the implant nor any underlying condition cause any cognitive impairment.
  - Student C has a severe allergy to peanuts and tree nuts. The allergy has no effect on academic performance.



# Re-Evaluation, Change of Placement, and Annual Reviews

- Schools are required to establish procedures for **periodic reevaluations** of students with 504 plans.
- No express requirement for what constitutes “periodic.”
  - Re-evaluations that are compliant with the IDEA will satisfy this requirement. (i.e. no less than once every three years).
- Change of Placement
  - The 504 team **must** re-evaluate student prior to any significant change in placement.

# Procedural Safeguards



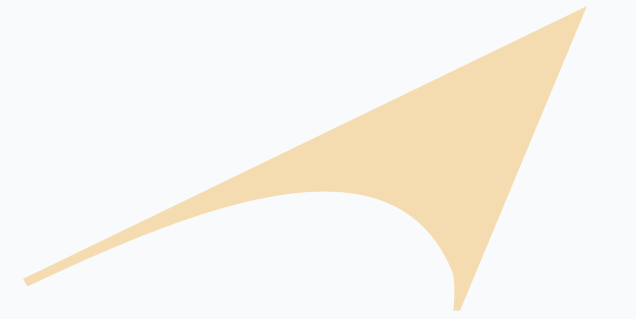
- A school must provide, with respect to any action regarding the identification, evaluation, or placement of a student pursuant to 504, a **system of procedural safeguards** that includes:
  - Notice of the action;
  - An opportunity for the parents or guardian of the student to examine relevant records;
  - An opportunity for an impartial hearing where the student's parents or guardian can participate and be represented by counsel; and
  - A review procedure.

# Procedural Safeguards cont'd



- There is no specific criteria under Section 504 regarding parent consent, but OCR has taken the position that a school should obtain parental consent for the initial implementation of a Section 504 plan. *See Letter to Durham, 27 IDELR 380 (1997).*
- Section 504 does not authorize a Parent to obtain an independent educational evaluation (“IEE”) at public expense when the parent disagrees with a 504 Team’s evaluation.
  - But where a parent obtains and provides an IEE at their own expense, the 504 Team should not ignore the results in conducting an evaluation.

# Enforcement



- Section 504 and the Title II of the ADA are both enforced by OCR.
  - ADA is also enforced by the Department of Justice.
- A parent has the right to an impartial hearing under Section 504, but the hearing requirements are less strict than the IDEA.
  - A District's Section 504 Policy should place the burden of proof in a hearing on the party seeking relief.

# Enforcement: Private Suits for Compensatory Damages



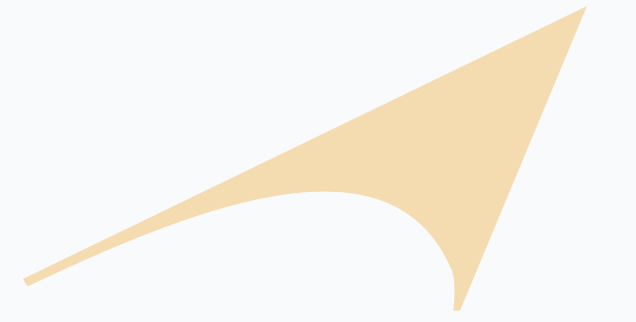
- In March 2023, the United States Supreme Court held that the IDEA's administrative exhaustion requirement does not apply to ADA/504 claims for compensatory damages, even if the claims arise out of the same underlying facts as a related IDEA violation.
  - *Luna Perez v. Sturgis Public Schools*, 598 U.S. 142 (2023)
- Since *Luna Perez*, appellate courts across the country have permitted claims for compensatory damages under ADA/504 to proceed in federal court without administrative exhaustion.
  - See *Farley v. Fairfax Cnty, Sch. Bd.* (4th Cir. Apr. 2023); *Shefke ex rel. Doe v. Macomb Intermediate Sch. Dist.* (6th Cir. May 2023); *F.B. v. Francis Howell Sch. Dist.* (8th Cir. Nov. 2023); *Chavez ex rel J.C. v. Brownsville Indep. Sch. Dis.* (5th Cir. June 2023); *Powell v. Sch. Bd. Volusia Cnty. Fla.* (11th Cir. 2023); *Simmons v. Murphy* (2d Cir. June 2024).



# Enforcement: Private Suits, Cont'd.

- Generally, courts have not equated denial of FAPE with disability discrimination.
- When a 504/ADA claim is related to educational services, most courts have required a parent to show that the district acted with bad faith or gross misjudgment.
  - *A.S. v. Mamaroneck Union Free Sch. Dist.* (S.D.N.Y. 2024);  
*A.J.T. v. Ossego Area Schs., Indep. Sch. Dis.* (8th Cir. 2024).
- In September 2024, the parents in the 8th Circuit Ossego case filed a petition to the United States Supreme Court, requesting that the Court lower that standard.
  - Case distributed for conference among the Justices on January 10, 2025.

# Disciplining a Student with a 504 Plan



- Where the IDEA requires a “manifestation determination” prior to issuing certain discipline, Section 504 requires an “evaluation” prior to any “significant change in placement.”
- The 504 regulations do not define “significant change in placement,” but OCR has typically relied on the IDEA’s standard for a disciplinary change in placement:
  - Long term suspension (More than 10 consecutive school days)
  - Shorter term suspensions that constitute a “pattern”:
    - Because the series of removals total more than 10 school days in a school year;
    - Because the child's behavior is substantially similar to the child's behavior in previous incidents that resulted in the series of removals; and
    - Because of such additional factors as the length of each removal, the total amount of time the child has been removed, and the proximity of the removals to one another.

# Disciplining a Student with a 504 Plan



- Where no manifestation is found, the discipline may be imposed as long as equal discipline would be imposed on a student without a disability.
- Similarly, where the proposed discipline would not constitute a substantial change in placement, discipline may be imposed so long as it would be equally imposed on a student without a disability.
- Remember, 504/ADA are **anti-discrimination** statutes.

# Application to Drug and Alcohol Use

- A student who is **currently engaged** in the **illegal use of drugs** is not an “individual with a disability” when a school acts on the basis of such use.
  - Therefore, a student engaged in the illegal use of drugs is not entitled to accommodations if their drug use would form the basis of their purported disability.
- A student currently engaged in the **use of illegal drugs or alcohol** may be **disciplined** for the use or possession of illegal drugs or alcohol to the same extent that such discipline is imposed equally on students with and without disabilities.
  - The 504 procedural safeguards (34 C.F.R. §104.36) do **not** apply to such discipline.
- Students with alcoholism may be entitled to reasonable accommodations if that alcoholism substantially limits one or more major life activities.

20 U.S.C. § 705(20)(c).

# Application to Drug and Alcohol Use



- Under Title II of the ADA, both **drug addiction** and **alcoholism** are expressly included in the definition of “physical or mental impairment.”
  - 28 C.F.R. § 35.108.
- However, covered entities are not prohibited from discriminating against an individual based on that individual’s **current illegal use of drugs**.
  - 28 C.F.R. § 35.131(a).

# Regulatory Update - ADA



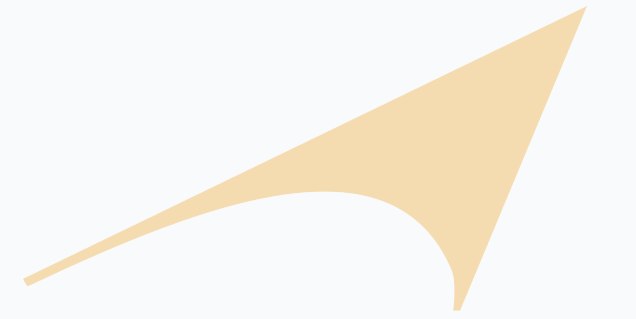
- In April 2024, the Department of Justice published a final rule under Title II of the ADA with new requirements on ensuring that web content and mobile apps are accessible.
- Web and app content will need to comply with WCAG 2.1, Level AA standards.
  - Districts with populations below 50,000 must comply by April 26, 2027.
  - Districts with populations at or above 50,000 must comply by April 24, 2026.
- WCAG = Web Content Accessibility Guidelines

# Regulatory Update - ADA



- Some key features of WCAG 2.1, Level AA:
  - Non-text content should have text alternatives;
  - Video and audio recordings should have captions and transcripts;
  - Avoid content prone to cause seizures (e.g. flashing elements);
  - Enable functionality through various inputs (e.g. keyboard, touch, voice);
  - Content should be clear, readable, and understandable;
  - Content should appear and operate in predictable and consistent ways.

# Regulatory Update - ADA



- **Exceptions:** Compliance will not be required for:
  - Archived web content;
  - Pre-existing electronic documents;
    - As long as they are not used to apply for, gain access to, or participate in the in the district's services, programs, or activities.
  - Content posted by a third party;
  - Individualized documents that are password-protected or otherwise secured.
- Exception where compliance would result in an undue burden or a fundamental alteration to the nature of a service, program, or activity.
  - District bears the burden of proof.



# Regulatory Update – Section 504



- In the Fall 2024 Agency Rule List, the U.S. Department of Education announced it was planning to propose new regulations for Section 504. The announcement indicated the proposed rules were to be published in December 2024.
  - As of early January 2025, no proposed rules have been published.
  - Given the coming administration change, we do not expect this to remain a priority for the Department.

# Questions?



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