

ZIRKEL'S LEGAL ALERT

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This periodic legal alert provides, as a two-column table, highlights (on the left) and practical implications (on the right) of major new legal developments in the K–12 context, with particular attention to special education.

1. The New ADA Regulations Expand Sec. 504 Eligibility.	
Effective August 11, 2016, the new federal regulations for Title II of the ADA, which applies to public schools and other governmental entities, extend beyond the wording of the ADA Amendments Act of 2008 as follows:	The ADA eligibility standards apply to Section 504, which is the more common designation within the public schools, but the courts have been slower and stricter about interpreting these standards.
<ul style="list-style-type: none"> • for physical or mental impairments, adding to the express examples <i>dyslexia</i> 	<ul style="list-style-type: none"> • thus expanding this designation and maybe dyscalculia, dysgraphia, dysthymia, and dystonia in terms of parental requests for 504 plans
<ul style="list-style-type: none"> • for the major life activities (MLA), adding the following express examples: <ul style="list-style-type: none"> - <i>writing, speaking, and interacting with others</i> - <i>reaching, bending, and lifting</i> - <i>immune system, circulatory system, endocrine system and a few other bodily systems' functions</i> 	<ul style="list-style-type: none"> • The added examples not only trigger additional impairments but also seem to suggest a narrower scope for other, unlisted MLAs. <ul style="list-style-type: none"> - thus expanding requests for not only dysgraphia and Tourette syndrome but also Asperger disorder - thus expanding requests for various health conditions, some being of very low incidence
<ul style="list-style-type: none"> • for the final essential element of “substantially limits,” designating the following impairment as “easily” qualifying: <i>diabetes, bipolar disorder, and OCD</i> 	<ul style="list-style-type: none"> • Diabetes is no longer controversial or disputed, but bipolar disorder and OCD will be the source of more requests that are not so automatic.

2. A New Ninth Circuit Decisions Raises IDEA Eligibility Issues for RTI and Other Proactive Practices in General Education.

On September 16, 2016, this federal appeals court ruled, in *L.J. v. Pittsburg Unified School District*, that the student, who met the criteria for at least one IDEA classification (e.g., OHI based on ADHD), also met the disputed, other essential element for eligibility, the need for special education.

The Ninth Circuit covers eight states in the Far West from Arizona through Alaska, including California. Courts in other jurisdictions may, but not must, follow its logic depending on their interpretation of the scope and cogency of this ruling.

- The court based this need on the combination of the following items the student, who had behavioral problems, received in general education and that improved his behavior and academic performance:

- mental health counseling
- a one-on-one aide
- extensive behavior specialist interventions
- various classroom accommodations

- It is unclear to what extent the court relied on the full combination of all of these items and whether the underlying criteria were individualization, availability (to other students in general education), and/or extent (e.g., less extensive behavioral interventions or a part-time rather than full-time aide). Nevertheless, proactively instituting such practices in general education appears to run the risk, albeit limited and arguably worth the price, of judicial reversal of non-eligibility of a student who does well with these mitigating measures.

- The court applied the “snapshot” approach, which limits the information to what the IEP team knew or had reason to know at the time of its meeting, to IDEA evaluations.

- This decision is the first major one in which the courts extended this approach, which most jurisdictions used for FAPE cases, to eligibility cases.