

Section 504 Eligibility: Keeping Current with Cases, Trends and the ADA

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I. INTRODUCTION

Since the late 1980's/early '90's, there has been an apparent misunderstanding on the part of public school educators (and others) with respect to the educational provisions of Section 504 of the Rehabilitation Act of 1973 ("Section 504"), particularly provisions related to "eligibility." It is incumbent that school districts have compliant procedures in place to support school team determinations as to whether a student is or is not covered by the provisions of Section 504. This presentation will explore many facets of Section 504 "eligibility," including an analysis of key cases and OCR Findings, 504 trends and the implications of the 2008 ADA Amendments Act (ADAAA) related to the issue of "eligibility" under Section 504. In addition, suggestions for guiding school districts as they face increasing demands for "504 eligibility" and "504 Plans" will be provided.

II. REMEMBERING SECTION 504's PROVISIONS

A good understanding of "eligibility" under Section 504 necessarily begins with a good understanding of what Section 504 is and what its provisions require. For all intents and purposes, Section 504 is simply an antidiscrimination statute that provides, in pertinent part, that:

No otherwise qualified individual with a disability in the United States...shall, solely by reason of his or her 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(a).

III. "ELIGIBILITY" FOR WHAT?

As an initial matter, it is important to define "eligibility" under Section 504 and, in order to do that, it is important to understand for what exactly a student is considered "eligible." According to the language of the statute, an "otherwise qualified individual with a disability" is "eligible" to participate in, be provided the benefits of and to be free from discrimination under any program or activity operated by a federal fund recipient, i.e., a school district.

It seems that there are two potential forms of discrimination (and, therefore, resulting protections) that arise under Section 504 relative to students with disabilities in public schools: (1) **Active Discrimination** and (2) **Inactive Discrimination**. Active Discrimination on the part of a school district would include action to deny a student equal participation in programs or activities solely on the basis of disability. Inactive Discrimination on the part of a school district would include the failure to act or to provide certain educational services or other accommodations to a student that would ensure equal access

to or participation in the school district’s programs or activities. All disabled individuals are “eligible” to be free from Active Discrimination, while only some disabled individuals are “eligible” to be free from Inactive Discrimination via the receipt of services/accommodations.

Although it is important to ensure that educators understand the concepts of both Active and Inactive Discrimination, in terms of “eligibility,” most of the perplexing scenarios facing school personnel involve the question of Inactive Discrimination or, in other words, whether the student is “eligible” for the provision of certain services—either in the form of (1) non-educational accommodations to ensure access to all school activities (non-FAPE accommodations) or (2) *educational services* from the school district or, as the 504 regulations refer to it: “free appropriate public education.” 34 C.F.R. § 104.33 (FAPE accommodations).

Though Section 504 is not to be interpreted as an “affirmative action” statute, it may be necessary for school districts to take affirmative steps to provide either “504 non-FAPE” accommodations or “504 FAPE” in the form of educational services to ensure that a student is not subjected to discrimination and is afforded equal access to education. Typically, instructional/educational services needed to access instruction (or 504 FAPE) are the services that are reflected in a “Section 504 Plan.” However, some school districts also develop “504 Plans” to reflect other accommodations to ensure access to noneducational services, such as non-academic and extracurricular activities.

IV. WHO IS “ELIGIBLE” FOR 504 FAPE?

Again, all students who meet the definition of an “individual with a disability” under Section 504 are “eligible” to be free from Active Discrimination. Most, but not all, of those students will also be “eligible” to be free from Inactive Discrimination or to receive needed 504 FAPE or non-FAPE services/accommodations.

To begin the analysis of who is a disabled person for purposes of 504 FAPE and non-FAPE, we turn generally to 504’s definitions. Unfortunately, Section 504 itself does not provide definitions of its terms nor does it provide much clarity in terms of entitlements. In 1977, however, regulations were enacted to provide the necessary “teeth” for determining discrimination in the provision of education at 34 C.F.R. §§ 104.1-104.61. Subpart A of the education regulations contains general provisions, including pertinent definitions; Subpart B addresses employment practices; Subpart C addresses facilities/accessibility; and Subpart D contains the Preschool, Elementary and Secondary Education regulations.

A. Definition of “Otherwise Qualified Individual with a Disability”

With respect to public preschool, elementary, secondary, or adult educational services (FAPE), the 504 regulations provide that a “qualified handicapped person”¹ means a “handicapped person”:

- (i) of an age during which nonhandicapped persons are provided such services;
- (ii) of an age during which it is mandatory under state law to provide such services to handicapped persons; or
- (iii) to whom a state is required to provide a free appropriate public education under section 612 of the Education of the Handicapped Act.”

¹ Unfortunately, the 504 regulations have not been updated since their original enactment and currently use the outdated and politically incorrect terminology of “handicapped person” rather than “individual with a disability.”

34 C.F.R. § 104.3(l)(2). With respect to non-educational services (non-FAPE ones), a “handicapped person” is one “who meets the essential eligibility requirements for the receipt of such services.” 34 C.F.R. § 104.3(l)(4).

B. Definition of “Individual with a Disability”

The next general definition pertinent to determining 504 “eligibility” is that of “individual with a disability.” Under the 504 regulations, a person is "handicapped" under Section 504 if he or she:

- a. Has a physical or mental impairment which substantially limits one or more major life activities;
- b. Has a record of such an impairment; or
- c. Is regarded as having such an impairment.

34 C.F.R. § 104.3(j)(1).

C. Definition of “Physical or mental impairment”

The definition of physical or mental impairment is very broad and includes:

- a. 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; genitourinary; hemic and lymphatic; skin; and endocrine; or
- b. Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

34 C.F.R. § 104.3(j)(2)(i).²

D. Definition of "Major Life Activities"

Under the 504 regulations, “major life activities” are defined as “functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working.” 34 C.F.R. § 104.3(j)(2)(ii).³

E. Definition of “Substantially Limits”

² As noted by the Office for Civil Rights (OCR) in its updated FAQ document issued on March 27, 2009, the 504 regulatory provision defining “physical or mental impairment” “does not set forth an exhaustive list of specific diseases and conditions that may constitute physical or mental impairments because of the difficulty of ensuring the comprehensiveness of such a list.” *FAQs about Section 504 and the Education of Children with Disabilities* (2009), Question 12. [Note: the FAQ document can be accessed on the U.S. Department of Education’s website, ED.gov, by searching for the document entitled “Protecting Students with Disabilities”].

³ OCR has noted that this list of “major life activities” is also not exhaustive and that other functions can be major life activities for purposes of Section 504. For instance, in the ADA Amendments Act, “Congress provided additional examples of general activities that are major life activities, including eating, sleeping, standing, lifting, bending, reading, concentrating, thinking, and communicating.” OCR noted that “[t]he Section 504 regulatory provision, though not as comprehensive as the Amendments Act, is still valid...” *FAQs about Section 504 and the Education of Children with Disabilities* (2009), Question 12.

For purposes of determining 504 “eligibility,” this is one instance where 504’s definitions are lacking. As a result, we turn to available guidance from the Office for Civil Rights (OCR) and the Americans with Disabilities Act as to what constitutes a “substantial limitation.”

1. OCR guidance on determining “substantial limitation”

On March 27, 2009, OCR issued a revised FAQ document for the primary purpose of addressing the effect of the ADA Amendments Act of 2008 upon the provisions of Section 504. In its introductory statement, OCR notes that it “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.” *FAQs about Section 504 and the Education of Children with Disabilities* (2009) [Note: This FAQ document can be accessed on the U.S. Department of Education’s website, ED.gov, by searching for the document entitled “Protecting Students with Disabilities”].

When asked whether OCR endorses a single formula or scale that measures “substantial limitation,” OCR responded that it does not and that “[t]he determination of substantial limitation must be made on a case-by-case basis with respect to each individual student.” *FAQs about Section 504 and the Education of Children with Disabilities* (2009), Question 22. This is consistent with previous guidance issued by OCR. *See, e.g., Letter to McKethan*, 23 IDELR 504 (OCR 1995) (neither the regulations nor OCR have defined the word “substantially” and the decision as to whether a particular impairment “substantially limits” a major life activity for a child is a determination to be made by a school district, and not OCR); *Pinellas County Sch. Dist.*, 20 IDELR 561 (OCR 1993) (one of the purposes of Section 504 and Title II of the ADA is to improve opportunities for individuals with disabilities, who because of a generally acknowledged disabling condition, have been excluded from or experienced significant difficulty in obtaining the necessary education to be self-sufficient. The term “substantially limits” must be interpreted within that context); and *Saginaw City (MI) Sch. Dist.*, 352 IDELR 413 (OCR 1987) (“by definition, a person who is succeeding in regular education does not have a disability which substantially limits the ability to learn” but students with learning disabilities who pass from grade to grade while functioning further below norms for their age arguably are not succeeding in regular education).

2. Guidance from the ADA’s Current Regulations

Because ADA and Section 504’s antidiscrimination provisions generally mirror one another, the regulatory definitions applicable to Title I of the ADA have often been applied by analogy in the context of defining “substantially limits” in the area of education. *See, e.g., T.J.W. v. Dothan City Bd. of Educ.*, 26 IDELR 999 (M.D. Ala. 1997) (student’s learning ability must be compared to the average student and fact that student made passing grades is a factor to consider; while receiving “D”’s in spelling and deficiency reports may indicate that student’s ability to perform academically was affected, it does not indicate that his ability to learn was limited so that he was not able to learn as well as the average student).

Currently, ADA’s Title I regulations define “substantially limits” as:

Significantly restricted in the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner or duration under which the average person in the general population can perform that same major life activity.

29 C.F.R. § 1630.2(j). Based upon this language, defining whether a student has a “substantial limitation” in a major life activity would be based upon a comparison of how the particular student

performs a major life activity as compared to how the average student in the general population performs the same major life activity. Thus, any argument that a student is disabled simply because “he could do better but for a disability” would not suffice under the current ADA regulatory provisions.

3. Guidance from the ADAAA and the Proposed Employment Regulations on Definition of “Substantially Limits”

In 2008 (and effective January 1, 2009), Congress amended the ADA for the primary purpose of lowering the standard (in primarily the employment context) for determining whether an impairment constitutes a disability and affirming Congress’ intent that the ADA’s definition of disability be interpreted broadly and inclusively. In so doing, Congress directed the Equal Employment Opportunity Commission (EEOC) to amend its Title I ADA regulations to reflect changes made by the ADAAA, including a broadening of the term “substantially limits.”

On September 23, 2009, EEOC’s proposed amendments to the ADA regulations were published in the Federal Register,⁴ and EEOC has proposed that the concept of “substantially limits” be revised as follows:

An impairment is a disability within the meaning of this section if “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 a disability.

74 Fed. Reg. 183, p. 48440. It is doubtful that this proposed change, if it becomes final, would make much difference in the educational analysis, since a comparison to how “most people” perform is only slightly different in the student context to a comparison with “the average student in the general population.”

4. Ameliorative Effects of Mitigating Measures

OCR has now opined that under the ADAAA and for purposes of determining whether a student has a physical or mental impairment that substantially limits a major life activity, school districts may not consider the ameliorative effects of any mitigating measures that the student is using. *FAQs about Section 504 and the Education of Children with Disabilities* (2009), Question 21. Although the ADAAA does not specifically define “mitigating measures,” the ADAAA’s non-exhaustive list includes medication; medical supplies; equipment or appliances; low-vision devices (not including ordinary eyeglasses or contact lenses); prosthetics; hearing aids and cochlear implants or other implantable hearing devices; mobility devices; oxygen therapy equipment and supplies; use of assistive technology; reasonable accommodations or auxiliary aids or services; and learned behavioral or adaptive neurological modifications.

Based upon the ADAAA, then, schools must make the “eligibility” determination without regard to the ameliorative effects of a mitigating measure. So, where a student is on medication for ADHD, the determination of “substantial limitation” and whether a disability exists would need to be made based

⁴ As of the date of preparation of these materials, the proposed Title I regulations were not final, but it was expected that very few changes would be made to the proposed regulations. EEOC held several public hearings to take input on the regulations, which were completed in November 2009 and the period for public comment ended on November 26, 2009.

upon evidence (if it exists) of how the student performs major life activities when not on medication. It would be important to remember then that the school district can not take the position (assuming that it ever did) that the student is not an individual with a disability under Section 504 because the student has a “correctable” condition or one that can be resolved through the use of mitigating measures.

5. Conditions that are episodic or in remission

Another addition made by the ADAAA is that an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active. With respect to students, then, a school district would not want to assume that because a student’s condition is in remission, that student would not be protected against the anti-discrimination provisions of Section 504. In addition, that student may be in need of some accommodations, even when the condition is in remission.

F. What About the “Record of” and “Regarded As” Prongs of the Disability Definition?

In its March 27, 2009 FAQ document, OCR re-stated its position that school districts are not required to develop a Section 504 Plan for a student who either “has a record of a disability” or “is regarded as disabled.” With respect to these two prongs of the definition of disability, OCR noted that:

In public elementary and secondary schools, unless a student actually has an impairment that substantially limits a major life activity, the mere fact that a student has a “record of” or is “regarded as” disabled is insufficient, in itself, to trigger those Section 504 requirements that require the provision of free appropriate public education (FAPE). This is consistent with the Amendments Act...in which Congress clarified that an individual who meets the definition of disability solely by virtue of being “regarded as” disabled is not entitled to reasonable accommodations or the reasonable modification of policies, practices or procedures. The phrases “has a record of disability” and “is regarded as disabled” are meant to reach the situation in which a student either does not currently have or never had a disability, but is treated by others as such.

Q&A, Number 37. See also, OCR Senior Staff Memorandum, 19 IDELR 894 (1992) [unless a person actually has a disabling condition, the mere fact that he/she has a "record of" or is "regarded as" disabled is insufficient, by itself, to trigger 504's protections that require educational accommodations].

Clearly, individuals with a “record of” or who are “regarded as having” a disability are “eligible” to be free from Active Discrimination on the basis of disability, but are not eligible for 504 FAPE. For example, the high school basketball coach could be engaging in Active Discrimination if he refuses to allow a student who is a good basketball player to be on the Team solely because the student was treated for cancer in the past. That would constitute discrimination on the basis of a record of a disability.

Similarly, not choosing the student who gave the best audition to play Cinderella in the school play because she has noticeably terrible acne (i.e., a cosmetic disfigurement) would arguably be discrimination because she is being treated as if she has a disabling condition. Clearly, “regarding” a student as one with an impairment, whether they have one or not, could substantially affect a major life activity if the school district excludes him/her from a school activity as a result of that regard or attitude. This constitutes Active Discrimination under Section 504, but would not constitute Inactive Discrimination or denial of 504 FAPE.

V. WHAT IS 504 FAPE FOR WHICH MANY STUDENTS WITH DISABILITIES MAY BE ELIGIBLE?

As emphasized previously, the failure to provide certain educational services could constitute Inactive Discrimination in the form of a denial of 504 FAPE for some students with disabilities. Under the 504 regulations, a school district “shall provide a free appropriate public education to each qualified handicapped person who is in the [school district’s] jurisdiction, regardless of the nature or severity of the person’s handicap.” 34 C.F.R. § 104.33(a).

1. Definition of “appropriate education”

The 504 regulations define “appropriate education” as the provision of regular or special education and related aids and services that:

- (i) are designed to meet the individual *educational* needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and
- (ii) are based upon adherence to procedures that satisfy the requirements of [the 504 regulations mandating placement in the least restrictive environment; evaluation and placement; and a system of procedural safeguards].

34 C.F.R. § 104.33(b)(1) (emphasis added).

In 2008, the Ninth Circuit Court of Appeals noted that IDEA FAPE and 504 FAPE are “similar but not identical.” *Mark H. v. LeMahieu*, 49 IDELR 91, 513 F.3d 922 (9th Cir. 2008). *See also, J.W. v. Fresno Unif. Sch. Dist.*, 50 IDELR 42 (E.D. Cal. 2008) (504 claims dismissed where 504 requires a comparison between services provided to students with disabilities and services provided to nondisabled students and student’s FAPE claims focus only upon alleged IDEA violations). Based upon the regulatory definition of “appropriate education,” the *Mark H.* Court held that unlike IDEA FAPE, 504 FAPE “is defined to require a comparison between the manner in which the needs of disabled and non-disabled children are met, and focuses on the ‘design’ of a child’s educational program.” Relevant to 504 FAPE eligibility determinations, then, is the question as to whether the educational needs of a student in question are being met “as adequately” as the needs of his nondisabled peers are met.

2. Eligibility for a “504 Plan”

Neither 504 nor its regulations specifically require a written plan for the provision of 504 FAPE. Rather, the regulations provide that implementation of an Individualized Education Program developed in accordance with the [IDEA] is *one means* of meeting the standard for appropriate education. 34 C.F.R. § 104.33(b)(2) (emphasis added). Though not specifically required by law, it has become standard practice for school districts to document the provision of 504 FAPE via the use of a “504 Plan”, which reflects the educational services being provided to the student who has been determined eligible for 504 FAPE.

For students who are found eligible for IDEA FAPE, implementation of an IEP satisfies 504’s FAPE requirements and the IEP is the “504 Plan” for the IDEA student. Though every student with a disability is protected from Active Discrimination on the basis of disability, not every student with a disability is necessarily eligible for a 504 FAPE Plan. Rather, a student with a disability is eligible for 504 FAPE only if services are required to meet the student’s educational needs as adequately as the educational needs of nondisabled students are met.

VI. THE PROCESS FOR DETERMINING ELIGIBILITY FOR 504 FAPE

The 504 regulations contain procedures for determining eligibility for 504 FAPE, including requirements for “evaluation” and “placement.” 34 C.F.R. § 104.35. The 504 evaluation and placement provisions, however, are not nearly as extensive as those under the IDEA.

A. 504 FAPE “Evaluation” Provisions

Under the 504 regulations, school districts are required to conduct an evaluation of any student “who, *because of handicap, needs or is believed to need special education or related services* before taking any action with respect to the initial placement of the person in a regular or special education program and any subsequent significant change in placement.” 34 C.F.R. 104.35(a) (emphasis added). As part of the 504 FAPE evaluation process, “school districts must establish standards and procedures for the evaluation and placement of persons who, because of handicap, need or are believed to need special education or related services which ensure that:

- i. Tests and other evaluations materials have been validated for the specific purpose for which they are used and are administered by trained personnel in conformance with the instructions provided by their producers;
- ii. Tests and other evaluation materials include those tailored to assess specific areas of educational need and not merely those which are designed to provide a single general intelligence quotient; and
- iii. Tests are selected and administered so as best to ensure that, when a test is administered to a student with impaired sensory, manual, or speaking skills, the test results accurately reflect the student's aptitude or achievement level or whatever other factor the test purports to measure, rather than reflecting the student's impaired sensory, manual or speaking skills (except where those skills are the factors that the test purports to measure).”

34 C.F.R. § 104.35(b).

Based upon the above provisions, a school district is required to conduct a 504 FAPE “evaluation” (which may or may not consist of formal evaluative measures) of any student who needs or is believed to need special education or related services before it takes any action with respect to “placement” under Section 504. In addition, such an “evaluation” is required prior to any “subsequent significant change in placement,” such as discontinuation of 504 FAPE services (including disciplinary changes in placement).

B. 504 FAPE “Placement” Procedures

Although the 504 regulations use the term “placement,” the mandated procedures are really more in the nature of procedures for determining “eligibility” for 504 FAPE and then making a 504 FAPE “placement decision.” Specifically, the 504 regulations contemplate that in interpreting evaluation data and in making placement decisions, a school district shall:

- i. Draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior;
- ii. Establish procedures to ensure that information obtained from all such sources is documented and carefully considered;
- iii. Ensure that the placement decision is made by a group of persons including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and
- iv. Ensure that the placement decision is made in conformance with the LRE provisions.

34 C.F.R. § 104.35(c).

C. Reevaluation of 504 FAPE Eligibility

The 504 regulations also contemplate an eligibility reevaluation process. Specifically, a school district must establish procedures for “periodic” reevaluation of students who have been provided special education and related services. The regulations specifically state that “[a] reevaluation procedure consistent with [the IDEA] is one means of meeting this requirement.” 34 C.F.R. § 104.35(d). As a matter of best practice, it is typical that school districts “periodically review” 504 FAPE eligibility and attendant 504 Plans on an annual basis rather than every three years as prescribed by the IDEA.

D. Procedural Safeguards and Grievance Procedures

There are also 504 “procedural safeguards” for which 504-FAPE students are “eligible.” Specifically, a school district is required to establish and implement the following:

[w]ith respect to actions regarding the identification, evaluation, or educational placement of persons who, because of handicap, need or are believed to need special instruction or related services, a system of procedural safeguards that includes notice, an opportunity for the parents or guardian of the person to examine relevant records, an impartial hearing with opportunity for participation by the person’s parents or guardian and representation by counsel, and a review procedures. Compliance with the procedural safeguards of [the IDEA] is one means of meeting this requirement.

34 C.F.R. § 104.36. In addition to a system of procedural safeguards under 504 for FAPE-eligible students, school districts must have grievance procedures available to all students with disabilities (not just those who are 504 FAPE-eligible) to address claims of discrimination that provide for the “prompt and equitable resolution of complaints alleging any action prohibited by [the 504 regulations].” 34 C.F.R. § 104.7.

VII. WHAT ABOUT NON-FAPE “ELIGIBILITY”?

Access to non-FAPE (non-educational) activities requires only an analysis as to whether the student meets the definition of “individual with a disability” and the 504 FAPE evaluation and placement provisions do not apply. If the student meets the definition of “individual with a disability,” then the student is entitled to equal access to participate in all activities, including nonacademic and extracurricular activities. This question of access is not a “FAPE” question under Section 504 (though the provision of accommodations/supports to IDEA-eligible students is an IEP issue and, therefore, a component of IDEA FAPE for those with IEPs).

With respect to non-FAPE “eligibility,” such as that for non-academic and extracurricular activities, the Section 504 regulations require school districts to provide non-academic and extracurricular services and activities in such a manner as is “necessary to afford handicapped students an equal opportunity for participation in them.” These services and activities may include:

- i. counseling services;
- ii. physical recreational athletics;
- iii. transportation;
- iv. health services;
- v. recreational activities;
- vi. special interest groups or clubs sponsored by school systems;
- vii. referrals to agencies which provide assistance to handicapped persons; and
- viii. employment of students, including both employment by the school system and assistance in making available outside employment.

34 C.F.R. § 104.37. For obvious reasons, it is important to distinguish between accommodations/services that are provided for FAPE purposes versus those that are provided for non-FAPE purposes.

VIII. COMMON/CURRENT 504 ELIGIBILITY QUESTIONS/CONCERNS

A. 504 FAPE and Non-FAPE Eligibility Issues

1. The Role of a Medical Diagnosis/Condition

- a. Under DSM-IV, Johnny’s private psychiatrist has diagnosed him with ADHD and a Reading Disorder and has prescribed a 504 Plan. Are the DSM-IV diagnoses sufficient to establish a disability?**

OCR is clear that a diagnosis of a medical condition is not sufficient, in itself, to constitute a disability under Section 504. *See, e.g., FAQs about Section 504 and the Education of Children with Disabilities* (2009), Questions 23 & 24 (an impairment or medical diagnosis is not sufficient to constitute a disability and a physician’s medical diagnosis may be considered among other sources in evaluating a student with an impairment or believed to have an impairment which substantially limits a major life activity. Other sources to be considered, along with the medical diagnosis, include aptitude and achievement tests, teacher recommendations, physical condition, social and cultural background, and adaptive behavior); *Joint Memorandum from U.S. Department of Education*, 18 IDELR 116 (September 16, 1991) (a student diagnosed with ADD may be disabled under IDEA (as LD, SED or OHI); may be disabled under Section 504; or may not be disabled at all).

If the parent is demanding 504 FAPE/educational accommodations, school staff should consider the diagnoses and recommendations and determine whether there is a reason to believe the student needs special education because of a disability. If so, the school district should follow procedures for conducting an evaluation.⁵ If not, then the school district could refuse to conduct a 504 evaluation on the basis that there is no reason to believe that a disability or need exists and provide the parent with notice of the refusal. *See OCR Memorandum*, 19 IDELR 876 (OCR 1993).

If the consideration is whether the student is disabled for 504 non-FAPE purposes, it must be determined whether the student is a disability under 504’s definitions and, if so, whether the student needs any accommodations to access non-FAPE programs or activities. With respect to such non-FAPE activities, such as non-academic and extracurricular ones, it is important to remember that the school district will also need to determine whether the student is one who is “otherwise qualified” to participate in the non-educational services as one “who meets the essential eligibility requirements for the receipt of such services.” 34 C.F.R. § 104.3(1)(4).

b. Doesn’t a diagnosis of an illness automatically render a student eligible under 504?

OCR indicates that “[a] medical diagnosis of an illness does not automatically mean a student can receive services under Section 504.” Rather, OCR notes that the illness must cause a substantial limitation on the student’s ability to learn or another major life activity. For example, a student who has a

⁵ It is recommended that where it is suspected that a major life activity such as learning, reading, concentrating or thinking is impacted, a comprehensive evaluation should be done through the IDEA process in order to rule out a learning disability under the IDEA and in order to obtain the most comprehensive evaluative data. Should it be determined that the student is not educationally disabled under IDEA, a subsequent Team could use the evaluative information from the IDEA process to assist in determining whether the student is eligible for 504 FAPE.

physical or mental impairment would not be considered a student in need of services under Section 504 if the impairment does not in any way limit the student's ability to learn or other major life activity, or only results in some minor limitation in that regard. *FAQs about Section 504 and the Education of Children with Disabilities* (2009), Questions 25.

c. So, what about students on Health Plans? Isn't a Health Plan sufficient to serve as a 504 Plan?

It depends. Whether a Health Plan is sufficient to serve as a 504 Plan depends upon whether the Health Plan contains 504-FAPE services in addition to non-FAPE health services. If the Health Plan contains health services that are also designed to meet educational needs, then the school district's Health Plan could also constitute a 504 FAPE Plan, as long as it was developed in accordance with the 504 FAPE requirements set forth previously and procedural safeguards are afforded. For Health Plans that do not contain 504-FAPE services but merely list accommodations for the student's health/medical needs, it would not rise to the level of being a 504-FAPE Plan.

It is important to remember (and to remind school nurses) that students with health conditions who are in need of health accommodations at school, whether those accommodations are reflected in a "Plan" or not, are protected from discrimination under Section 504. In addition and under the ADA, school districts should not (if they ever did) take the position that a student is not an individual with a disability solely because he has a health plan that is "taking care of things" so that he is progressing academically. See, *North Royalton (OH) City Sch. Dist.*, 52 IDELR 203 (OCR 2009) (district's written policy that a student is not disabled unless his impairment limits his learning is not in compliance with Section 504).

d. What about students eligible for "Hospital/Homebound" services?

Sometimes, students with medical conditions that render them unable to attend school are in need of hospital/homebound services, most of which would be considered 504 FAPE services, whether the student is a regular education student or one identified under the IDEA. School attorneys need to ensure that their clients are aware that many, if not most, students receiving "hospital/homebound" programs for extended periods of time are disabled within the meaning of Section 504.

When a student is going to be out of school for a long period of time based upon a medical condition, this is significant to OCR. In *Cobb County (GA) Sch. Dist.*, 51 IDELR 54 (OCR 2008), OCR found that once the school district was informed that the student would be out of school for several months due to mononucleosis, it had a duty to evaluate her under Section 504. In so finding, OCR noted that temporary impairments may qualify as disabilities if they substantially limit a major life activity for more than a brief period of time.

2. The Impact of the ADA's "Expansion" of "Eligibility" and Coverage

More than likely, schools are facing requests of parents to re-visit determinations of ineligibility based upon ADA's arguable "expansion" of 504 eligibility and coverage. Such was the case in *Michael M. v. Board of Educ. of Evanston Township High Sch. Dist. #202*, 53 IDELR 21 (N.D. Ill. 2009). In this case, the school district agreed to reconvene the 504 team to determine whether the student with ADHD was eligible for accommodations under the ADA's revised standards, but had not yet done so. Until such meeting occurs, the court ruled, the case would not be dismissed as moot. It is important to understand that this case does not reflect whether the school district found the student eligible under the ADA's expanded provisions.

Where faced with a parent with a legitimate concern that the ADA's provisions would somehow change the determination made by a 504 team prior to the effective date of the ADA, it is advisable that the district agree to reconvene the team to re-visit the determination. This is not to say that the previous decision would be over-ruled, and the team may very likely conclude, again, that the student is not in need of 504 FAPE services/accommodations.

3. The Role of "Mitigating Measures"

Needless to say, the ADA has resulted in some interesting discussion regarding how school districts determine "eligibility" for students who are using mitigating measures, such as medication or reasonable accommodations. This is the case when determining "eligibility" for 504 FAPE and non-FAPE accommodations. While the ameliorative effects of mitigating measures can not be considered in making the disability determination, certainly such effects can be considered in determining whether a student is eligible for services or accommodations (and an attendant 504 Plan).

Although OCR did not address this question in its updated FAQ document, the EEOC addressed this question in the context of employment in proposing the new Title I regulations. With respect to any argument that "mitigating measures" (such as medication, private tutoring) can not be considered by a school district, the EEOC made it clear that:

The ADA's prohibition on assessing the positive effects of mitigating measures applies only to the determination of whether an individual meets the definition of "disability." All other determinations—including the need for a reasonable accommodation...—can take into account the positive and negative effects of a mitigating measure. For example, if an individual with a disability uses a mitigating measure which eliminates the need for a reasonable accommodation, then an employer will have no obligation to provide one.

See, Questions and Answers on the Notice of Proposed Rulemaking for the ADA Amendments Act of 2008, Question 11. [Note: This document, as well as the proposed Title I regulations and summary, can be obtained on the EEOC website at www.eeoc.gov/laws/statutes/adaaa_info.cfm].

Based upon this guidance, it can be argued that while any positive effects of mitigating measures used by a student can not be considered in answering the initial question as to whether the student is disabled, those effects *can* be considered when determining whether reasonable accommodations/services via a 504 Plan or otherwise are needed. For example, Johnny's ADHD may rise to the level of being a disability but his medication may negate the need for 504-FAPE or non-FAPE accommodations if he does not reflect the need for anything within the school environment and his educational needs are being met as adequately as those of his non-disabled peers. However, if Johnny's mother decides not to medicate him one morning and he violates the code of conduct, the district would want to ensure that any subsequent disciplinary action taken is not discriminatory on the basis of disability.

4. Typical Conditions/Impairments that May Constitute a Disability under Section 504

a. Alcoholics/drug addicts

Although alcoholism and drug addiction could be disabling conditions, in 1990, the ADA amended Section 504's definition of individual with a disability to exclude persons currently engaging in the illegal use of drugs. However, the term does include (a) former users; (b) successful participants in rehab programs; and (c) persons regarded erroneously as current users. In addition, the amendment allows for students engaged in

the illegal use of drugs at school to be tested for such use and allows for students who are using drugs *and alcohol* at school to be disciplined as non-disabled students for such behavior.

Recently, OCR confirmed that current illegal users of drugs are excluded from the protections of Section 504 generally but that 504's definition of a student with a disability does not exclude users of alcohol but does allow schools to take disciplinary action against students with disabilities using drugs or alcohol to the same extent as students without disabilities. *FAQs about Section 504 and the Education of Children with Disabilities* (2009), Questions 16 and 17.

b. Students with diseases/contagious conditions

- i. HIV-positive/AIDS
- ii. Tuberculosis
- iii. Hepatitis-B
- iv. H1N1

c. Students with medical conditions

- i. Juvenile rheumatoid arthritis
- ii. Asthma
- iii. Severe allergies
- iv. Diabetes
- v. Heart disease
- iv. Epilepsy
- vii. Sickle cell anemia
- ix. Chronic fatigue syndrome
- x. Tourette syndrome
- xi. Pregnancy
- xii. Obesity
- xiii. Attention Deficit Hyperactivity Disorder (ADHD); Oppositional Defiant Disorder (ODD)/Conduct Disorder and/or Social Maladjustment

d. Students who are physically disabled but not in need of IDEA services

- i. Cerebral palsy
- ii. Students who need catheterization or other health-related services

e. Students with Temporary Disabilities

OCR indicates that a temporary impairment does not constitute a disability under Section 504 unless its severity is such "that it results in a substantial limitation of one or more major life activities for an extended period of time." OCR also notes that "[t]he issue of whether a temporary impairment is substantial enough to be a disability must be resolved on a case-by-case basis, taking into consideration both the duration (or expected duration) of the impairment and the extent to which it actually limits a major life activity of the affected individual." *FAQs about Section 504 and the Education of Children with Disabilities* (2009), Question 34.

5. What about Students who Transfer in with a 504 Plan or Health Plan?

In *Prevail Academy (MI)*, 109 LRP 32521 (OCR 2009), OCR found that the Academy's lack of assessment procedures, among other things, for students who transfer in with a 504 Plan or IEP violated

Section 504. This was especially the case where the Academy had no overall coordinated evaluative procedures in place to address potential 504 situations. Thus, it is advisable that when a student transfers in with a 504 Plan or a Health Plan, that the school district follow appropriate “re-evaluation” procedures to collect current evaluative data, including medical data (where applicable) and records from previous school districts.

B. 504 FAPE-Only Concerns

1. OCR Review of a School District’s FAPE Eligibility Determination

It is important to note that OCR generally will not review the result of educational decisions, as long as a school district complies with the procedural requirements of Section 504 in determining FAPE eligibility and placement. See, *FAQs about Section 504 and the Education of Children with Disabilities* (2009), Question 5; *Knox County (TN) Sch. Dist.*, 106 LRP 34781 (OCR 2006); and *OCR Senior Staff Memorandum*, 19 IDELR 891 (OCR 1992) (where a school district has found a child ineligible for 504 services and the parent files an OCR Complaint, OCR is to investigate only whether the school district conducted an evaluation under 504 and made a determination, as a result of that evaluation, that the child was not disabled under 504). As long as school districts establish and follow compliant procedures for determining 504 FAPE eligibility, OCR will not generally overrule an “eligibility” determination.

Recently, OCR made an “exception” to its general rule on reviewing eligibility. In *Gloucester County (VA) Pub. Schs.* 49 IDELR 21 (OCR 2007), OCR noted that while in most cases its review of discrimination complaints focuses on whether a district complied with Section 504’s procedures for determining eligibility, “extraordinary circumstances” were present in this student’s case, where a letter from his doctor indicated that he had experienced several life-threatening reactions after coming into contact with items that had once held tree nuts. Important to OCR was that the district did not have any information to contradict the doctor’s statements about the severity of the student’s allergies but nonetheless had found the student “ineligible” for accommodations. Thus, OCR indicated that the district could resolve the matter by reevaluating the student and providing written documentation of its ultimate findings to OCR.

2. Determining a Student is no Longer “Eligible”

Clearly, if a teacher or other member of the 504-FAPE placement team no longer sees evidence of a disabling condition in the educational environment or the educational need for accommodations, the team must convene and conduct a 504 FAPE re-evaluation by examining all relevant documentation and other information. If the determination is made that the student no longer needs educational accommodations, the team would recommend a “change in placement” in the form of the discontinuation of services. Of course, because this is a proposed “change in placement,” parents must be provided notice of the proposed change and a copy of the 504 procedural safeguards. *FAQs about Section 504 and the Education of Children with Disabilities* (2009), Question 15.

3. Students who are Referred for Special Education Consideration and Found Ineligible under IDEA

What about the argument that where a student is referred for an IDEA educational evaluation, that student is “regarded” as disabled and, therefore, eligible? While it is true that because the student was referred for an IDEA evaluation and eligibility determination, a school team must have *suspected* a disability or “regarded” the student as disabled, a finding that a student does not qualify for special education services does not automatically mean that the student is eligible for 504 FAPE. As a matter of best practice, however, a referral should be made back to the appropriate school team for *consideration* of whether the student’s difficulties are or could be caused by a disability under Section 504 and whether the

student is entitled to 504 FAPE. Clearly, the evaluative information collected as part of any evaluation to determine eligibility for special education under the IDEA can and should be used by the team considering 504 FAPE eligibility, in addition to other relevant information. See, *Letter to Veir*, 1 ECLPR ¶ 363 (OCR 1993) (students who do not meet IDEA’s eligibility criteria may or may not fit within the definition of Section 504 eligibility, as 504 eligibility is not automatically bestowed upon a student who has been referred for an IDEA evaluation); and *N.L. v. Knox County Schs*, 315 F.3d 688 (6th Cir. 2003) (the similarity between the substantive and procedural frameworks of the IDEA and Section 504 is such that if a disabled child is found ineligible for placement under the IDEA, he is also ineligible under Section 504).

4. IDEA Students and 504 FAPE Eligibility

One would presume that students identified as eligible for IDEA FAPE are automatically eligible for 504 FAPE. Not so in the Tenth Circuit! In *Ellenberg v. New Mexico Military Inst.*, 52 IDELR 181, 572 F.3d 815 (10th Cir.), cert. denied (U.S. 12/14/09) (No. 09-429), the court noted that the IDEA covers a broad range of disabilities and that the mere existence of an IEP does not, in itself, establish a substantial limitation on the student’s ability to learn. The court acknowledged, however, that “[o]f course an IDEA disability may—and in the majority of cases probably will—substantially limit a major life activity.”

It is difficult to imagine a situation where a student is “eligible” for IDEA FAPE but not 504 FAPE. However, for those students who are eligible under IDEA for FAPE, it is clear that their 504 FAPE needs can be met via the development of an IEP. Thus, the IEP for an IDEA student *is*, for all intents and purposes, his 504 Plan!

5. Parent Consent to 504 FAPE Evaluation

Nowhere in the 504 regulations is it required that school districts obtain parental consent to 504 FAPE evaluations or services. At question 41 of the March 2009 FAQ document issued by OCR, however, OCR notes that “OCR has interpreted Section 504 to require districts to obtain parental permission for initial evaluations. If a district suspects a student needs or is believed to need special instruction or related services and parental consent is withheld, the IDEA and Section 504 provide that districts may use due process hearing procedures to seek to override the parents’ denial of consent for an initial evaluation.” See also, Question 27. Interestingly, OCR notes that “Section 504 is silent on the form of parental consent required” but that “OCR has accepted written consent as compliance.” *FAQs about Section 504 and the Education of Children with Disabilities* (2009), Question 42. What about consent for 504 FAPE services?

6. Parent Consent to 504 FAPE

Obviously assuming (without specifically saying) that consent is required for 504 FAPE services, OCR notes that where a parent withholds consent for services, “Section 504 neither prohibits nor requires a school district to initiate a due process hearing to override a parental refusal to consent with respect to the initial provision of special education and related services. Nonetheless, school districts should consider that IDEA no longer permits school districts to initiate a due process hearing to override a parental refusal to consent to the initial provision of services.” *FAQs about Section 504 and the Education of Children with Disabilities* (2009), Question 43.

So, can a school district initiate a 504 hearing upon refusal to provide initial consent to services? Must it do so?

7. Revocation of Consent to FAPE

When asked what a school district can do to ensure continuation of 504 FAPE services where the parent wishes to withdraw the student from a Section 504 Plan, OCR has responded that “[t]he school district may initiate a Section 504 due process hearing to resolve the dispute if the district believes the student needs the services in order to receive an appropriate education.” *FAQs about Section 504 and the Education of Children with Disabilities* (2009), Question 32. As noted previously, however, the IDEA does not permit school districts to initiate a due process hearing under its provisions to override parental refusal to services or revocation of consent to services. Query: Could a school district use 504’s hearing procedures to over-ride revocation of services under the IDEA?

Perhaps an equally perplexing question is whether 504 “eligibility” continues when a parent has revoked or refused to provide consent to services under the IDEA. While this question has not been addressed recently by OCR, it was addressed in *Letter to McKethan*, 25 IDELR 295 (OCR 1996). There, OCR opined that once a school district has found a student disabled and offered an IEP within the meaning of the IDEA, it is not permissible for the student’s parent to refuse to accept IDEA services and instead require the district to develop a Plan under Section 504. For students who qualify for services under both the IDEA and Section 504, OCR noted, the use of an IDEA IEP is the way to meet the requirement to provide FAPE under Section 504 regulation 104.33. Thus, a rejection of IDEA services would amount to a rejection of 504 services. But does it amount to a rejection of all of 504’s protections?

In some circumstances and on a case-by-case basis, it may be advisable for the school district to convene a 504 team to conduct an “evaluation” of a student who was found IDEA-eligible and follow the 504 evaluation and placement process to “re-offer” an IEP to the student and document parental rejection of it. This may particularly be the case where the parent is insisting that their child is “eligible” under Section 504 for purposes of discipline. In such cases, it would likely be very difficult for a parent to show discrimination solely on the basis of disability.

8. “Due Process Hearing” Rights and Challenges to “Eligibility”

Don’t the district’s internal grievance procedures suffice for a 504 hearing? Yes, for purposes of 504 non-FAPE issues, but not for purposes of 504 FAPE issues. According to OCR, typical internal grievance procedures are not an appropriate substitute for impartial hearings requested to address 504 FAPE issues (identification, evaluation, or placement). *Bossier Parish (LA) Sch. Sys.*, 53 IDELR 102 (OCR 2009) (district not in compliance when it assigned district employees to hear 504 due process complaints); *Collier County (FL) Sch. Dist.*, 52 IDELR 166 (OCR 2008) (504 procedures were flawed where they failed to make clear that a parent has right to a due process hearing at any time without first filing a grievance, submitting to mediation or going to the board of education and when they provided that filing a complaint with OCR made a request for a 504 hearing moot); *Leon County (FL) Sch. Dist.*, 50 IDELR 172 (OCR 2007) (grievance procedures which allow the board of education to determine whether a Section 504 or Title II violation occurred does not offer sufficient protections to parents).

Because the 504 regulations provide virtually no guidance as to 504 hearing procedural requirements, there is a lot of discretion afforded to districts as to the design of 504 FAPE hearing procedures, as long as the hearing is impartial, contemplates participation by parents and counsel and provides for a “review procedure.” School districts can use the IDEA hearing procedures (including the use of IDEA hearing officers) as their 504 hearing procedures (if allowed under district or state guidelines) but are not required to do so. See, *Miami-Dade Co. (FL) Sch. Dist.*, 52 IDELR 53 (OCR 2008) (where 504 hearing notice sent by the hearing agency to the parents referenced right to a copy of the transcript, it was a violation of Section 504 to refuse to provide it).

C. Non-FAPE 504 Eligibility Concerns

1. Non-academic/Extracurricular Participation

What if Johnny’s mother wants him to be on the Varsity football team and wants that written into the 504 Plan? Remember that participation in non-academic and extracurricular activities is generally a non-FAPE issue under Section 504. Technically, then, whether Johnny becomes a member of the Varsity football team is not for the 504 FAPE team to decide. Rather, the school district will need to decide whether Johnny is otherwise qualified to be on the Varsity football team and ensure that he is provided the equal opportunity to try out for and be judged under the same criteria as nondisabled students for participation on the Varsity football team.

2. Supports/accommodations Necessary for Participation in Non-FAPE Activities

Are non-FAPE 504 accommodations to be included on a 504 Plan? Where a student is IDEA-disabled and, therefore, has an IEP, the student’s IEP is required to address any supports necessary for a student to participate in non-academic or extracurricular activities. In addition, 504 requires the provision of such supports/accommodations for any “otherwise qualified” student with a disability to participate in non-FAPE activities such as sports, clubs and after-school programs, whether the student has an IEP or not. *See Winooski (VT) Sch. Dist.*, 46 IDELR 172 (OCR 2006) (while district was not required to provide a one-to-one aide to a student in an after-school skiing program or at student council meetings, since one-to-one services were not indicated on the IEP as needed to participate in such services; however, the district’s alleged statement to the parents that the student was not entitled to any services or accommodations in extracurricular activities was incorrect, as 504 requires needed accommodations for equal participation in any extracurricular activities, even if that activity is not included in the student’s IEP).

Although some districts include such accommodations on 504 Plans, they are not required to do so. In addition, they should be cautioned to be sure to distinguish between FAPE and non-FAPE issues, especially if asked to include actual participation in an activity in a 504 Plan (such as “he will be on the basketball team;” “she will be on the cheerleading squad;” etc.). *See, e.g., Garber (OK) Pub. Schs.*, 53 IDELR 100 (OCR 2009) (basketball coach had nondiscriminatory explanation for not providing student with Asperger’s a uniform or allowing him to participate in games: student was academically ineligible to play).