Determining Eligibility Under Section 504: Fundamentals and New Challenge Areas

by
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The Interplay of Special Education and §504

Fundamentally, Section 504 is a civil rights law passed by the Congress in 1973 to protect persons with disabilities from discrimination based on disability. When federal regulations were promulgated to implement Section 504 in the late 1970's, provisions were included to address protections for students with disabilities in the public schools. Those §504 regulations included requirements for child-find, evaluation, procedural safeguards, and development of individualized accommodation plans for students determined to be eligible under §504 because their impairments rose to the level of substantially limiting their ability to function in the school setting. By the time the regulations were issued, however, the Congress had passed the original version of the IDEA, which ensured that students with fairly severe disabilities would receive special education services by means of properly developed IEPs.

Thus, the evolution of §504, in tandem with IDEA, meant that students with disabilities could enjoy non-discrimination protections under §504, as well as a right to special education services and IEPs under the IDEA, if their disabilities were severe enough to need IDEA services. And, this legal framework also meant that students whose disabilities were not severe enough to warrant IDEA services might nevertheless receive an individualized plan of accommodations to ensure that their educational needs were met as adequately as those of non-disabled students.

In sum, what developed over time was a system whereby students with disabilities that substantially affected their functioning in the school setting would receive accommodation plans under §504, while students with more severe disabilities requiring the provision of specially designed instruction through special education programs would receive those services under IDEA, with a more detailed and intricate set of procedures and requirements.

Eligibility under §504

Under IDEA, "children with disabilities" are those who have been formally evaluated in accordance with the statute's requirements and have been found to have one or more of the 13 recognized disabling conditions listed above. 34 C.F.R. §300.7(a)(1). Each disabling condition then has certain eligibility criteria that must be fulfilled in order for a child to qualify for IDEA services as a result of that condition. 34 C.F.R. §300.7(b)(1-13).

Under §504, there is no list of "approved" disabling conditions. A person with a "disability" is simply one who (1) **"has a physical or mental impairment which substantially limits one or more major life activities,"** (2) has a **record of** such an impairment, or (3) is **regarded as having** such an impairment. 34 C.F.R. §104.3(j)(1).

Excerpt from OCR Q & A Document (revised 2009)

> ***What is a physical or mental impairment that substantially limits a major life activity?***
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> *The determination of whether a student has a physical or mental impairment that substantially limits a major life activity must be made on the basis of an individual inquiry. The Section 504 regulatory provision at 34 C.F.R. 104.3(j)(2)(i) defines a physical or mental impairment as 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 mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. The regulatory provision 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.*
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> *Major life activities, as defined in the Section 504 regulations at 34 C.F.R. 104.3(j)(2)(ii), include functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. This list is not exhaustive. Other functions can be major life activities for purposes of Section 504. In the Amendments Act (see FAQ 1), Congress provided additional examples of general activities that are major life activities, including eating, sleeping, standing, lifting, bending, reading, concentrating, thinking, and communicating. Congress also provided a non-exhaustive list of examples of "major bodily functions" that are major life activities, such as the functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions. The Section 504 regulatory provision, though not as comprehensive as the Amendments Act, is still valid–the Section 504 regulatory provision's list of examples of major life*

activities is not exclusive, and an activity or function not specifically listed in the Section 504 regulatory provision can nonetheless be a major life activity.

Eligibility and the Domains of School Functioning—Thus, the definition of "impairment" under §504 is a wide open one—any physical or mental impairment generally recognized by the community of physicians or psychologists can qualify a student, as long as that impairment **substantially limits one or more of their major life activities** in a way that requires the provision of accommodations or services in the school setting. The major life activity most relevant in the educational context is, of course, learning, although disabilities can affect a student's ability to function in school in ways other than academically. In the school setting, students must function behaviorally, socially, and physically, in addition to academically. A disability can substantially limit a student's ability to function in any one of those key domains, to the point of eligibility under §504.

So, under §504 in the public schools, we look for kids with physical or mental impairments that substantially limit their major life activities in a way that impacts their functioning in the school setting to the point of needing an individualized and systematic plan of accommodations and services.

Examples ADD kids who do not qualify for, or need, special education

Students with Diabetes, Asthma, other chronic conditions affecting physical ability to function at school

Dyslexic kids who are not LD, but who are substantially limited in their academic functioning at school as a result of their dyslexia

Temporarily disabled kids (if the temporary disability substantially limits a major life activity relevant in the school setting, and if the disability will be present more than 6 months—based on ADA amendments of 2009)

Certain chemical sensitivities or allergies substantially limiting students' ability to access, or function in, the school setting

Not Examples LEP kids

Low socioeconomic status

Family/social circumstances

Kids with low-average IQs (not MR, not LD)—i.e., "Slow Learners" without suspected disabilities

Kids with impairments that do not substantially limit their learning such that they require individualized accommodation plans

The Evaluation Process to Determine Eligibility

Under §504, public schools must conduct evaluations of students whom they suspect are disabled and potentially in need of §504 services in order to determine if in fact they are eligible under §504. 34 C.F.R. §104.35. The applicable regulation tells us that the evaluation consists of gathering of data from various sources regarding the student and considering that data in a team process, with the team including persons knowledgeable about the child. The OCR Q & A document provides additional guidance:

> ***How much is enough information to document that a student has a disability?***
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> *At the elementary and secondary education level, the amount of information required is determined by the multi-disciplinary committee gathered to evaluate the student. The committee should include persons knowledgeable about the student, the meaning of the evaluation data, and the placement options. The committee members must determine if they have enough information to make a knowledgeable decision as to whether or not the student has a disability. The Section 504 regulatory provision at 34 C.F.R. 104.35(c) requires that school districts draw from a* ***variety of sources*** *in the evaluation process so that the possibility of error is minimized.* ***The information obtained from all such sources must be documented and all significant factors related to the student's learning process must be considered.*** *These sources and factors may include aptitude and achievement tests, teacher recommendations, physical condition, social and cultural background, and adaptive behavior. In evaluating a student suspected of having a disability,* ***it is unacceptable to rely on presumptions and stereotypes regarding persons with disabilities or classes of such persons****. Compliance with the IDEA regarding the group of persons present when an evaluation or placement decision is made is satisfactory under Section 504.*

Thus, although tests may be conducted along the lines of IDEA evaluations, it is not required for §504 compliance. The keys are collection of information from various sources, documentation and consideration of the collective data, and an eligibility determination based on the regulations and not on presumptions or stereotypes. Each team has to determine when it has sufficient information to render the eligibility determination.

What about private evaluation data, such as a medical diagnoses provided by the parent?—It is not uncommon or inappropriate for parents to submit reports of private evaluations of their child, or medical diagnoses made by the child's pediatrician. These are pieces of data to be reviewed and considered together with school-based data. But we must keep in mind that the nature of the eligibility determination has to do with the degree of the disability's impact on the student's functioning at school, and thus, school-based data is likely to be more useful to the committee's determination. In its Q & A document, OCR comments as follows:

> *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. As noted in FAQ 22, the Section 504 regulations require school districts to draw upon a variety of sources in interpreting evaluation data and making placement decisions.*
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> ***Does a medical diagnosis of an illness automatically mean a student can receive services under Section 504?***
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> *No.* ***A medical diagnosis of an illness does not automatically mean a student can receive services under Section 504.*** *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 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.*
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> ***How should a recipient school district handle an outside independent evaluation? Do all data brought to a multi-disciplinary committee need to be considered and given equal weight?***
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> *The results of an outside independent evaluation may be* ***one of many sources*** *to consider. Multi-disciplinary committees must draw from a variety of sources in the evaluation process so that the possibility of error is minimized.* ***All significant factors related to the subject student's learning process must be considered.*** *These sources and factors include aptitude and achievement tests, teacher recommendations, physical condition, social and cultural background, and adaptive behavior, among others. Information from all sources must be documented and considered by knowledgeable committee members.* ***The weight of the information is determined by the committee*** *given the student's individual circumstances.*

Brief Summary of the Background of the ADA Amendments Act of 2008

The legislative purpose of the ADA Amendments—The findings and purposes section of the Act makes clear that the Congress' focus in the Act was to reject the restrictive eligibility reasoning used by the U.S. Supreme Court in various important ADA cases including *Sutton v. United Air Lines* (and its companion cases addressing the effect of mitigating measures on §504 eligibility) and *Toyota Manufacturing v. Williams* (denying §504 eligibility when the activity substantially limited is a narrow one, as opposed to one normally required in daily life).

A rebuff of Supreme Court's interpretation of ADA/§504 eligibility—From the preamble statements included in the Act, it is clear that the Congress believed that the Supreme Court's recent interpretations of the eligibility provisions of §504 established an overly stringent standard. Indeed, the Court's position that §504 eligibility provisions set up a "demanding" standard for eligibility meant that persons with a variety of impairments would be unable to access the federal courts to raise claims that an employer failed to provide reasonable accommodations that would enable them to perform the essential functions of their jobs.

Do the ADA amendments apply in the public school context?—It appears that, contrary to initial opinion, the Congress in fact envisioned that the ADAAA would work to expand eligibility for students in the public school context under §504, in addition to "correcting" the courts' restrictive view of eligibility for employees in the work context. But, the law offers little guidance on how its intent is to be effectuated in the school setting, setting up the potential for confusion and increased litigation.

Major Question—Does the expanding eligibility definition under §504 mean that a student with disabilities who is functioning adequately in the school setting (in all relevant domains) must be made §504-eligible and receive a §504 accommodation plan? Apparently not. For students to receive §504 accommodation plans, they must need those plans in order for their educational needs to be met as adequately as the needs of non-disabled students. The OCR Q & A explains this point as follows:

> *School districts may always use regular education intervention strategies to assist students with difficulties in school. Section 504 requires recipient school districts to refer a student for an evaluation for possible special education or related aids and services or modification to regular education if the student, because of disability,* ***needs or is believed to need*** *such services.*

Major Changes to the ADA/Section 504 in the ADAAA

1. **Expands the list of major life activities to include major bodily functions (immune system, normal cell growth), and to include sleeping, standing, lifting, bending, reading, concentrating, thinking, communicating, and working.**

We have always understood that the list of "major life activities" found in the §504 regulations are meant as examples, and not an exclusive or exhaustive listing. Commonly, we understand the term "major life activity" to encompass all activities humans must engage in to fully function. Viewed in this matter, it is hardly surprising that the Congress added examples as central to human life as sleeping, thinking, and communicating. In fact, activities such as eating and socially interacting with others are possible additional examples of major life activities.

But, the Congress' disagreement with the Court's narrow interpretation of major life activity in the *Toyota* case tells us that the term should not be "over-interpreted" in the school context. Thus, if an impairment substantially limits reading, or thinking, although perhaps not learning in the global sense, the student is nevertheless eligible under §504. The narrowing of the concept of major life activities may mean that a student who is substantially limited in their ability to concentrate due to their ADHD may be §504-eligible even if they perform well academically.

Does the expansion of major life activities expand §504 eligibility?— Writing on the expansion of major life activities, a law professor commented that "The ADAAA's repeal of *Sutton* and statutory recognition of thinking, concentrating, reading, and communicating as major life activities will undoubtedly increase the number of students with learning disabilities who qualify for legal protection." Hensel, at 41. She notes, however, that "the requirement that students with disabilities be compared to the "most people" stands unaltered, and it is unclear how courts will apply this language going forward." *Id*. at 42. Thus, it remains unclear how the impact of the ADAAA will be interpreted in the educational context. On the one hand, the Congress is telling schools that the fact that a student generally functions well academically may not exclude §504 eligibility, but on the other, it keeps in place the doctrine that schools must compare students with impairments to "most people" when determining whether a substantial limitation exists.

2. **Declares that an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.**

Schools certainly have experience with students with episodic conditions that ebb and flow with respect to their impact on educational performance. And, schools commonly qualify students under §504 if their conditions cycle but commonly reach the point of substantial limitation on learning.

The proposition that a student fully in remission from a condition that once substantially limited a major life activity should be provided an accommodation plan based on speculation over the degree of impact the condition would have were it presently active raises serious questions. How would such a student be identified? How would the student be evaluated? With what data? Even if eligible, why would an accommodation plan be developed or implemented for such a student?

Practical Note—At this time, given the questions surrounding the ADAAA's application, schools may wish to exercise care when addressing §504 eligibility for students with episodic conditions, such as students with variable conditions, those who respond to treatment inconsistently, or those who are being inconsistently medicated. Schools may want to qualify this type of student if the condition, when in its downward trend, would pose a substantial limitation on the student, even if at times the student's condition tends to improve temporarily.

3. Prohibits the consideration of the effects of remediation efforts when determining whether a disability substantially limits a major life activity (with the exception of ordinary eye-glasses and contact lenses).

This part of the amendments clearly means to reverse the reasoning of the *Sutton* line of cases, where the Supreme Court held that eligibility determinations must take into account the effect of treatment or other mitigating measures taken by the person with an impairment. Thus, under the Supreme Court's reasoning in *Murphy*, the fact that the truck driver with high blood pressure who was suing his employer was being effectively treated had to be taken into account in determining whether he was a person with a disability under §504. The Court found that, with treatment, the truck driver was not substantially limited in a major life activity and thus could not maintain a §504 lawsuit against his employer. The Congress here means to restore his ability to get to court to press his claim, rather than be dismissed at the "door" of the courthouse.

How is the §504 evaluation conducted for this type of student?—But, is it possible to assess a student for purposes of eligibility for a §504 accommodation plan while at the same time ignoring the effect of mitigation, treatment, or self-learned compensatory strategies? On what data would such an evaluation be based? The evaluation process, inescapably, would be a purely speculative one—an inquiry into the degree of limitation that the impairment *would* impose if mitigating measures were not in effect. This would mark a significant structural shift to the nature of §504 evaluations; from a process based on present data to one based on speculation and mental exercise.

Would a student whose condition is fully addressed by use of mitigating

measures, and thus performs adequately in all domains of school functioning, qualify and require an accommodation plan under §504?— Both common sense and the OCR Q & A document would say that an accommodation plan would not be required for such a student because the student would not need such a plan. Thus, such a student may be "technically" eligible for the non-discrimination protections of §504, but would not receive a §504 plan.

The Modern §504 Eligibility Definition—The point made above highlights that the modern formulation of the §504 eligibility formulation may be stated as the following series of questions:

1. Does the student have a physical or mental impairment, even one that is in remission or episodic?

2. Does the impairment substantially limit one or more of the expanded major life activities, without taking into account mitigating measures, or would the impairment substantially limit a major life activity it if were present in its full-blown state (for conditions in remission)?

3. Does the student need a §504 individualized accommodation plan to have their educational needs met as adequately as the needs of nondisabled students are met?

Thus, that last question ensures that students that are only "technically" eligible under the §504 definition as expanded by the ADA amendments, but who do not need an accommodation plan receive the protections of §504, but not unnecessary classroom accommodations.

What are the non-accommodation §504 protections for these students?— They are not insignificant, as they would include:

- the right to be free from actions that discriminate on the basis of disability,
- Right to manifestation determinations prior to disciplinary changes in placement
- Right to protection from accumulations of short-term disciplinary removals that, collectively, amount to a pattern of exclusion
- Right to make complaints to the Office for Civil Rights (OCR)
- Right to §504 due process hearings
- Right to periodic reevaluations (at least every three years, or more frequently, depending on District policy)
- Equal right to access extracurricular activities and nonacademic services.

Major Questions Arising from the ADAA

Will eligibility expand under §504 in the public schools?

Some commentators are taking the position that "[t]he ADAAA will undoubtedly expand eligibility for students with disabilities in elementary and secondary school seeking accommodations pursuant to §504 of the Rehabilitation Act… to at least some extent." Hensel, at 44, 45. But, if a student with an impairment is generally functioning well at school (in all relevant domains), they may not need a structured accommodation plan.

Will schools be required to qualify students whose conditions are well-controlled with medication?

Some commentators are that such students would "have a significantly better chance of securing §504 coverage as a result of the new legislation." Hensel, at 46. But again, will such students have a need for structured accommodation plans? Would not accommodations for such students serve to maximize their potential? And, assuming a 504 committee can even evaluate how the impairment would limit the student were they not treated with medication, certainly they would not need the accommodations they would need were they not medicated.

Will schools be required to qualify students who have self-developed compensating strategies that allow them to function academically?

Initially, the question raises the significant secondary question of how schools are supposed to "child-find" these students, since they may not exhibit difficulties in the classroom. And, again, what accommodations would such students need? Some commentators advocate a compromise position, under which schools would discharge their responsibilities under ADAAA by identifying and qualifying such students under §504, but not provide accommodations unless a need existed. The students can then be monitored in case difficulties that may need accommodations arise later.

Will high schools be most likely to receive increased numbers of requests for §504 eligibility?

Perhaps. Since high school students are at the stage of considering postsecondary education, they may be interested in the process for obtaining accommodations in college entrance exams, as well as in college. Even before the passage of the ADAAA, a significant number of hearings, OCR complaints, and court cases dealt with parents of seemingly well-performing students who were seeking §504 eligibility and accommodations in the run up to the college entrance process. The ADAAA may accelerate this trend and create difficult cases for hearing officers and courts that will deal with how the ADAAA should be

interpreted in cases of eligibility disputes.

How do child-find obligations operate when students could qualify even without an exhibited need for assistance?

If regular education students with impairments that are fully treated or in remission must be treated as if they were presently disabled, without taking into account their remission or effective treatment, child-find would be rendered nearly impossible. Identification of potentially-eligible students has always hinged on whether there are *reasonable grounds to suspect* an impairment that substantially limits a major life activity. But undertaking child-find for students that show no outward signs of impairment due to effective treatment or remission of a condition would not be possible with external identification.

Thus, the ADAAA has cast into doubt how child-find should operate with respect to students who have successfully mitigated the impact of their impairments or those who are in remission from a past condition. The USDOE will have to set forth criteria for identifying such students for §504 evaluations.

Has the standard for determining need for accommodations changed under the ADAAA?

As far as can be determined, the ADAAA has not changed the inquiry for determining whether a student needs accommodations in a §504 plan. The operating standard has been whether the student needs a plan of structured accommodations in order to have their needs met as adequately as the needs of nondisabled students are met. A revised Q & A document issued by the Office for Civil Rights (OCR) still appears to indicate that accommodations are provided on the basis of presently exhibited need.

Practical Notes for Schools

- The USDOE may issue written guidance on the impact of the ADA amendments to the functions and duties of public schools under §504. Watch for this guidance.

- Be careful denying eligibility to students whose conditions, although episodic, can reach the point of substantial limitation. Err on the side of eligibility in these cases.

- More students with dyslexia may qualify under §504, since reading is now considered a major life activity. If a student's dyslexia substantially limits a student's ability to read, the student may qualify for §504 accommodations.

- Some students will technically qualify under the ADA amendment "relaxation" provisions, but will not exhibit a need for accommodation plans. They will have residual §504 rights, but will receive no §504

accommodation plans.

- Err on the side of eligibility when considering eligibility for students with physical or mental impairments when there is conflicting data as to whether the impairment substantially limits a major life activity.

- Consider changes to §504 forms (such as adding the newly-listed major life activities and adding sections to examine the effect of mitigating measures) to show compliance with the revised §504 standards.