UNDERSTANDING THE LAW: AN OVERVIEW OF SECTION 504 ELIGIBILITY

Presented by David M. Richards, Attorney at Law
RICHARDS LINDSAY & MARTIN, L.L.P.
13091 Pond Springs Road • Suite 300 • Austin, Texas 78729
Telephone (512) 918 -0051 • Facsimile (512) 918-3013 •www.504idea.org

A note about these materials: These materials are not intended as a comprehensive review of all Section 504 case law, rules and regulations, but as an overview of some of the basic issues, concerns, and dynamics of interest to public educators seeking to comply with the law. The issues are approached in question and answer format, with an emphasis on the most common issues and questions. These materials are not intended as legal advice and should not be so construed. State law, local policy, and unique facts make a dramatic difference in analyzing any situation or question. Please consult a licensed attorney for legal advice regarding a particular situation. References to the U.S. Department of Education will read "ED."

In addition to the Section 504 regulations and Office for Civil Rights (OCR) Letters of Finding, these materials will also cite guidance from two important OCR documents. First, a Revised Q&A document has been posted on the OCR website since March of 2009 addressing some of the ADAAA changes. This document, *Protecting Students with Disabilities: Frequently Asked Questions about Section 504 and the Education of Children with Disabilities* (March 27, 2009, last modified September 25, 2018), is available on the OCR website at *www.ed.gov/about/offices/list/ocr/504faq.html* and is referenced herein as "Revised Q&A." In January 2012, OCR released a guidance document on the Americans With Disabilities Act Amendments Act of 2008 (ADAAA) and its impact on Section 504. The "Dear Colleague Letter" consisted of a short cover letter and a lengthy new question and answer document. *Dear Colleague Letter,* 112 LRP 3621 (OCR 2012)(hereinafter "2012 DCL"). Finally, In July of 2016, OCR released a guidance document/resource letter on ADHD. U.S. Department of Education, Office for Civil Rights, *Students with ADHD and Section 504: A Resource Guide,* 68 IDELR 52 (July 2016)(hereinafter "ADHD Resource Guide.)" In addition to addressing issues related to students with ADHD, the Guide also addresses parent referral, parent-procured evaluation and other related topics.

I. The Background and Purpose of Section 504

Question #1: What is Section 504? The single paragraph we now refer to as §504 of the Rehabilitation Act provided that

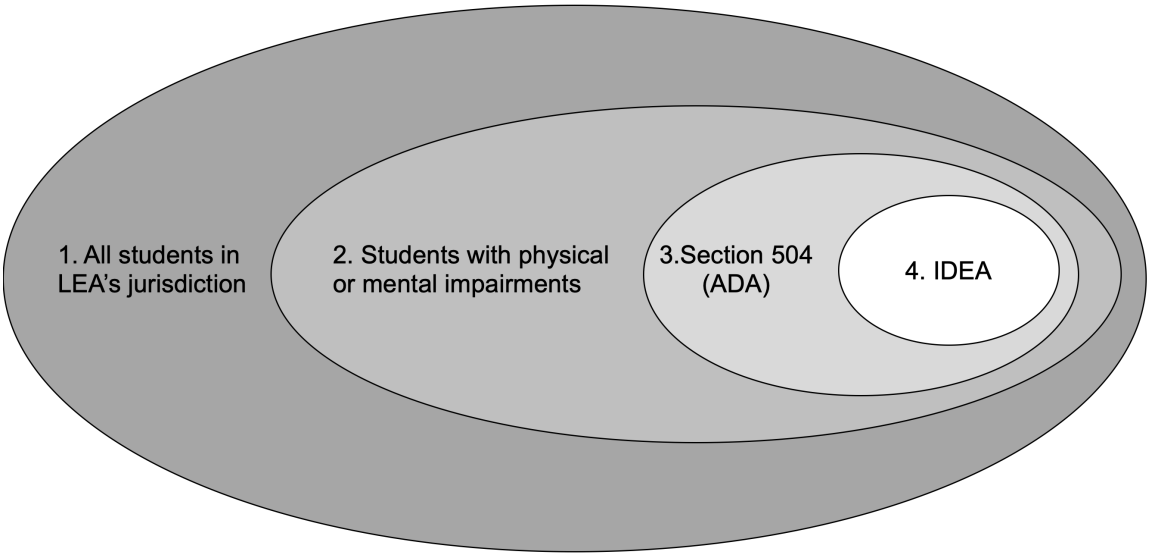
> "No otherwise qualified individual with a disability in the United States… shall, solely by reason of her or his disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service...." 29 U.S.C. § 794(a).

In §504, the focus is on non-discrimination. As applied to the schools, the language broadly prohibits the denial of participation or enjoyment of the benefits offered by a public school's programs or activities because of a child's disability. The law recognizes that the impact of disability can mean that equal treatment and equal services may not be sufficient to convey equal benefit. For some eligible §504 students to have equal opportunity to participate and benefit, they must receive services and/or accommodations that level the playing field. Further, since this is a civil rights law, Section 504 also provides protections against discrimination in the form of rights to complain and sue in response to discrimination on the basis of disability.

Question #2: Who or what is a recipient? A recipient is an entity receiving federal funds. Note that once an entity, like a school district, receives federal funds, it is a recipient and every program of activity of the district is subject to Section 504, even if a particular district program or activity is not itself funded by federal dollars. The duty flows to the entire recipient and all that it does, even if federal dollars do not reach every program or activity of the district. *See, for example, Dwayne A. Dupre, et al., v. The Roman Catholic Church of the Diocese of Houma-Thibodaux, et al.,* 31 IDELR 129 (E.D. La. 1999)(school operating as part of a diocese receiving federal funds from Title II, III, IV and VI was subject to Section 504 duties). Note that these materials will focus on the Section 504 duties of public schools.

Question #3: What does the law require of recipients? In the plain language of the statute, three things are required—or perhaps better stated, three things are prohibited. First, recipients are prohibited from excluding eligible students from the recipient's programs and activities on the basis of disability. Second, recipients are prohibited from denying eligible students the benefits of the recipient's programs and activities on the basis of disability. Finally, the law provides an umbrella-like protection of nondiscrimination on the basis of disability, **including prohibitions on retaliation, intimidation, threats and coercion for the purpose of interfering with any right or privilege secured by Section 504.** 34 C.F.R. §100.7(e), incorporated by reference in 34 C.F.R. §104.61.

Question #4: How does Section 504 fit with regular education and special education? The following diagram and *bare-bones* summary are provided as a way to visualize the relationship among regular education, Section 504 and the IDEA.



1. All students in the LEA's jurisdiction. The outside oval represents all the students who have a right to attend school in the school district (Local education agency or "LEA" in fed-speak). These are students within the age-range served by the school, and who are qualified to attend there due to residency, transfer tuition or other means. All of the other ovals are subsets of this group of students. Since all students are regular education students first, each group of students in the diagram has the rights and privileges of a regular education student *together with* any additional rights resulting from eligibility under ovals 3 or 4.

2. Students with physical or mental impairments. This group is actually co-extensive with the first oval, but is shown as smaller to aid understanding of the various relationships. Note that having a physical

or mental impairment, even an impairment diagnosed by a medical doctor, does not automatically make a student Section 504- or IDEA-eligible. *Revised Q&A Questions 23 & 25.*

3. Section 504 (ADA). These are students who have a right to attend the public schools of the district and have a physical or mental impairment that substantially limits one or more major life activities, have a record of such impairment or are regarded as impaired. Some, but not all, students with current impairments will receive a Section 504 Plan in addition to the regular education services available to all students. All Section 504-eligible students receive protection from discrimination (described previously) and a short list of procedural safeguards "that includes notice, an opportunity for the parents or guardians 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 procedure." 34 C.F.R. §104.36.

4. IDEA. The final oval represents your district's special education population. These are students with impairments that fit one of the recognized categories for eligibility under the IDEA (Learning Disabled, Other Health Impaired, etc.) and, because of disability, need special education and related services. Compared to their Section 504 counterparts, these students are typically more severely disabled and due to that level of disability need access to specially designed instruction in order to receive educational benefit. IDEA eligibility always results in the creation of an IEP—an individualized plan based on evaluation data and designed to provide the student with meaningful progress. Substantial parent and student rights (with corresponding school obligations) and extensive procedural requirements ensure that a student's IDEA rights are protected.

Note that IDEA students, in addition to their IDEA rights, also enjoy the nondiscrimination protections of Section 504. Put simply, all IDEA students would also meet the eligibility standard of Section 504. "In order to be eligible for services under the IDEA, a child must be found to have one or more of the 13 disability categories specified *and* must also be found to need special education. OCR can not conceive of any situation in which these children would not also be entitled to the protections extended by Section 504." *Letter to Mentink,* 19 IDELR 1127 (OCR 1993). That's why the IDEA oval fits inside the Section 504 oval, and why special education students can, under Section 504 and the ADA, sue alleging disability harassment or bring service animals to school.

Can a student ever be served *simultaneously* through both a Section 504 Plan and an IEP provided under special education? No. While all students who are eligible under IDEA are also eligible under Section 504, decisions with respect to a special education student's identification, evaluation and placement have to be made pursuant to IDEA requirements. Put simply, an IDEA-eligible student cannot be served by a Section 504 plan, since that Section 504 plan is neither created nor maintained through the more stringent procedural protections of the IDEA. A school attempting to comply with its IDEA duties to a child by offering a §504 Plan denies the IDEA-eligible student the procedural protections due under IDEA. The Revised Q&A addresses the issue quite simply.

> "If a student is eligible for services under both the IDEA and Section 504, must a school district develop both an individualized education program (IEP) under the IDEA and a Section 504 plan under Section 504? No. If a student is eligible under IDEA, he or she must have an IEP. Under the Section 504 regulations, one way to meet Section 504 requirements for a free appropriate public education is to implement an IEP." *Revised Q&A, Question 36.*

In other words, while a Section 504 Plan will not satisfy the school's duty to serve an IDEA-eligible student, an IEP would satisfy the school's duty to serve a Section 504 student.

Question #5: Section 504 and the Americans with Disabilities Act (ADA) seem kind of similar. Are the two laws related? Yes, the two laws are sometimes referred to as sister-statutes. Because they share common eligibility language and a civil rights approach to disability discrimination, doctrines and lessons

from one law are frequently applied to the other. *Bragdon v. Abbott,* 118 S.Ct. 2196 (1998). Consequently, when the Congress amended the ADA in 2008 with the ADA Amendments Act, it applied the changes to Section 504 as well. Specifically, the conforming amendments to the ADAAA apply the rules of construction as well as the definitional changes to the Rehabilitation Act of 1973, 29 USC §705, which creates the definition of disability used in 29 U.S.C. §794(a), the statutory provision upon which the ED's K-12 Section 504 regulations are premised.

Is that why the ADA changes ordered by Congress in 2008 apply to Section 504? Yes, and they are significant. In 2008, Congress was focused on fixing a problem in employment litigation where courts were erecting additional barriers to eligibility under the ADA and employers were seen as escaping their duties to accommodate in the workplace. Faced with employee challenges to workplace rules and requests for sometimes expensive or inconvenient accommodations, employers had taken to attacks on the employee's ADA eligibility. As long as the employee was not eligible, the lawsuit would die and the employer would not be called upon to provide accommodation. The courts, faced with this defensive strategy by employers, focused more on eligibility, and created new barriers to employees seeking the ADA's protection. **Congress amended the ADA to change this unhealthy litigation dynamic by making ADA eligibility easier to achieve.** The changes targeted the employment world where employers have no FAPE duty (instead, it's a reasonable accommodation duty), and have no obligation to identify and evaluate eligible employees (employees start the process and provide their own evidence of disability). **For schools, the result of the ADA changes is a renewed interest in Section 504 and a larger number of Section 504-eligible students.**

II. The Office for Civil Rights & Section 504 Compliance

The due process hearings and state complaints that are common in special education are largely missing in the Section 504 world. While federal court cases on Section 504 issues occur, they are certainly not common outside of disability harassment and money damages claims, and even these claims are typically filed on behalf of special education students. In Section 504, compliance is largely focused on satisfying the Office for Civil Rights. OCR investigates complaints and conducts its own compliance reviews on Section 504.

Question #6: What is the Office for Civil Rights (OCR)? OCR is the Office for Civil Rights, a subdivision of the U.S. Department of Education. "The mission of the Office for Civil Rights is to ensure equal access to education and to promote educational excellence throughout the nation through vigorous enforcement of civil rights" including Section 504. OCR enforces Section 504 through compliance reviews and complaint investigations and provides technical assistance "designed to develop creative approaches to preventing and addressing discrimination." Overview of the Agency, OCR website at http://www2.ed.gov/about/offices/list/ocr/index.html.

Question #7: When OCR investigates a complaint, what does it look for? The short answer: procedural compliance. OCR provides this response to the question of whether OCR examines individual placement or other educational decisions for students with disabilities.

"OCR will examine procedures by which school districts identify and evaluate students with disabilities and the procedural safeguards which those school districts provide students. OCR will also examine incidents in which students with disabilities are allegedly subjected to treatment which is different from the treatment to which similarly situated students without disabilities are subjected. Such incidents may involve the unwarranted exclusion of disabled students from educational programs and services." Revised Q&A, Question 5.

Note that the focus of complaint investigation is typically not on the ultimate result of the Committee's decision-making (was the student determined eligible? what accommodations and services were provided to the student?), but instead, on the manner in which school decisions are made. OCR continues:

> "Except in extraordinary circumstances, OCR does not review the result of individual placement or other educational decisions so long as the school district complies with the procedural requirements of Section 504 relating to identification and location of students with disabilities, evaluation of such students, and due process. Accordingly, OCR generally will not evaluate the content of a Section 504 plan or of an individualized education program (IEP); rather, any disagreement can be resolved through a due process hearing. The hearing would be conducted under Section 504 or the IDEA, whichever is applicable." Id.

This same or similar language appears in the Appendix to the Section 504 regulations as well as any number of OCR Letters of Finding. In short, OCR's focus is not on the decision reached by the Section 504 Committee but whether the decision was made by the required people (the group of knowledgeable people), looking at the required data, asking the required questions, and providing the required notices (Notice of Parent Rights under Section 504, notice proposing evaluation and request for consent, notice prior to evaluation meeting, notice following evaluations, etc). The CESD Section 504 Forms are designed to document a school's compliance with the Section 504 process.

For example, consider *Bradley County (TN) Schools,* 43 IDELR 143 (OCR 2004). A high school senior with high grades and no record of misconduct was involved in a motorcycle accident on July 31, 2003. He injured his spine, broke 11 ribs, and suffered collapsed lungs, a lacerated liver and a broken arm. The student's doctor provided the school with a medical diagnosis and in the space requesting a date when the student could return to school, the doctor simply inserted a question mark. The doctor indicated that the student could not attend school but could receive homebound instruction. Due to a variety of post surgery complications, regular homebound did not begin until late September of 2003 and ceased in November 2003. After experiencing difficulty in reading comprehension, the student was provided with a tutor. When he failed to respond to the tutoring, he complained about the tutors, who in turn, complained that he was disrespectful and lacked intelligence. He returned to school on November 3, 2003. Due to continued medication for pain, the student was tired and easily frustrated. The district continued to provide tutoring, allowed for flexibility in attendance, work completion and extra time to complete tests.

Despite the extra assistance, the student did not complete the English 12 work from homebound and failed the first semester of that class. Along with the obvious lingering physical problems, other residual effects were significant. OCR found that he experienced difficulty with comprehension and underwent an apparent change in personality, evidenced by his confrontation of a teacher (disrespect and bad language) in April, resulting in his placement in an alternative school. He refused to attend the alternative school, and failed both English 12 and Algebra I. He did not graduate. The student was never evaluated for Section 504. OCR focused on the lack of §504 in the school's response to the student's sudden and growing needs. "Based on the extent and duration of the Student's injuries, the evidence suggests that the Student was a qualified individual with a disability at least through his return full-time to classes, and perhaps for an additional period of time during the remainder of his senior year." The District failed to timely evaluate the student.

A little commentary: OCR did not overlook the school's obvious continued efforts to assist the student. On the contrary, **OCR recognized the efforts extended on the student's behalf, but noted that the 504 regulations required something more.**

> "The District had numerous meetings with the complainant and the Student in efforts to help him complete course requirements for English 12. But the fact remains that these evaluation and placement decisions were not made by a Section 504 review committee in accordance with the

evaluation and placement procedures required by OCR's regulations. The purpose of these requirements is to assure that an informed decision is made as to a student's eligibility and need for services. As the District did not follow these procedures, there is no way to know if the services that were provided to the Student actually were appropriate."

Process clearly matters to OCR: did the right people look at the right data, provide the right notices and ask the right questions.

III. The Section 504 Free Appropriate Public Education or FAPE

Question #8: Does Section 504 have a child find requirement like that in IDEA? Yes. The District cannot wait until eligible children present themselves and request services. The District has an affirmative duty to conduct a "child-find" at least annually, during which the District must make efforts to notify disabled students and their parents of the District's obligations to provide a free appropriate public education. 34 C.F.R. §104.32. Schools can efficiently satisfy this duty by adding the Section 504 child find notice to that required under IDEA, so that wherever the IDEA notice is published, the Section 50 notice is there as well. The public school also has a duty to look for potentially eligible students and refer for Section 504 evaluation as described in Question 11.

Question #9: When should the school refer for a Section 504 evaluation? The school's duty to evaluate under Section 504 is triggered by the school's suspicion that the student is disabled and in need of services. The Section 504 regulation on evaluation provides: "A recipient that operates a public elementary or secondary education program or activity shall conduct an evaluation in accordance with the requirements of paragraph (b) of this section of any person 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 regular or special education and any subsequent significant change in placement." 34 CFR §104.35(a). **In short, a student should be referred to §504 when the District believes that the student may be eligible, i.e., when the District believes that the student has a physical or mental impairment that substantially limits one or more major life activities, AND believes that the student is in need of either regular education with supplementary services or special education and related services.** *Letter to Mentink,* 19 IDELR 1127 (OCR 1993). The duty does not depend on parent request for evaluation. *West Contra Costa (CA) Unified School District,* 42 IDELR 121 (OCR 2004)("The District had this obligation under Section 504 whether or not the parent made a request for an assessment.")

Question #10: What is the school's duty with respect to a parent referral? Upon receipt of a parent request for an evaluation, the school has two options. *See, for example, Bryan County (GA) School District,* 53 IDELR 131 (OCR 2009) ("Under Section 504, upon receiving notice of a parent's belief that a child has a disability triggering Section 504 protection, the district should determine whether there is reason to believe that the child, because of a disability, may need special education or related services and thus would need to be evaluated. If the district does not believe that the child needs special education or related services, and thus refuses to evaluate the child, the district must notify parents of their due process rights"). **That position has now grown into a version of prior written notice.** In the ADHD Resource Guide OCR adds a requirement that schools explain a refusal to evaluate.

"If a parent requests an evaluation to address a student's academic or behavioral difficulty that is the result of a suspected disability, then **a district must either conduct an evaluation** to determine whether the student has a disability and, because of the disability, needs special education or related services, **or explain its refusal to evaluate the student to the requesting parent and notify parents**

of their right to dispute that decision through the due process procedures that must be made available under Section 504's implementing regulation."

Question #11: Who conducts a Section 504 evaluation? While the regulations refer to the group conducting the evaluation (and other tasks under Section 504) as the "group of knowledgeable people," the title "Section 504 Committee" is more commonly used. The §504 Committee is responsible for §504 evaluation and placement. Unlike the IDEA, §504 does not dictate the titles of people who must be members of the Committee. **Instead, the regulations require that the §504 Committee is a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options. §104.35(c)(3).** The regulations provide no guidance as to the number of members, and no guidance on the level of knowledge required of the members. An OCR letter of finding has addressed the knowledge requirement with respect to the person with knowledge of the child. To "have knowledge of the child" for purposes of the Section 504 Committee, one must be "personally familiar with the child." *Letter to Williams,* 21 IDELR 73 (OSEP/OCR 1994).

What about parents? The Section 504 regulations do not require parent membership on Section 504 Committees although best practice dictates that parents are involved in the evaluation and placement process. Consequently, schools are free to establish their own practices with respect to inviting parents to Committee meetings. Should the school decide to invite all parents to meetings, however, the school cannot fail to invite a particular parent without running the risk of a retaliation or discrimination claim. On occasion, OCR has determined that the group of knowledgeable people was not properly constituted due to the parent's nonattendance. For example, in *Sequoia (CA) Union High School District,* 110 LRP 4676 (OCR 2009), a student with ADHD transferred to the district already Section 504-eligible. Said OCR "By excluding the parents, the district was limited to in-class performance without knowledge of things such as how long the student took to complete homework assignments at night, his adaptive behavior at home as it related to his experiences at school, or the degree of parental intervention in homework assignments."

A little commentary: Note that, based on the author's non-scientific survey, the majority of schools across the country invite parents to attend Section 504 meetings.

Question #12: What is a Section 504 evaluation? OCR provides the following introduction. "At the elementary and secondary school level, determining whether a child is a qualified disabled student under Section 504 begins with the evaluation process. Section 504 requires the use of evaluation procedures that ensure that children are not misclassified, unnecessarily labeled as having a disability, or incorrectly placed, based on inappropriate selection, administration, or interpretation of evaluation materials." *Revised Q&A introduction to Question 18.* In Section 504, "evaluation" does not necessarily mean "test" or "assessment." In the §504 context, "evaluation" refers to a gathering of data or information from a variety of sources so that the committee can make the required determinations. §104.35(c)(1). Since specific or highly technical eligibility criteria are not part of the §504 regulations, formal testing is not required to determine eligibility. *Letter to Williams,* 21 IDELR 73 (OCR 1994). If formal testing is pursued, the regulations require that the tests are properly selected and performed by trained personnel in the manner prescribed by the creator of each test. §104.35(b)(2).

Question #13: What kinds of data and how much data are required for a Section 504 evaluation? Perhaps the best approach to determining what types of information and how much information is required is to focus on what a Section 504 evaluation should do. Section 504 evaluation precedes eligibility and precedes the delivery of services. **The §504 regulations require that the school evaluate the student "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." §104.35(a).** In

other words, there are no initial services without an evaluation, nor changes in the services provided under §504 without a reevaluation. The rational is quite simple: without data we do not know whether the student is a student with a disability (is he eligible?) nor would we know how to serve him (how does the disability impact his ability to access the school's programs and activities?). **An appropriate evaluation is then "designed to identify the specific nature of the student's disabilities and to identify the services necessary to meet her individual needs."** *West Contra Costa (CA) Unified School District,* 42 IDELR 121 (OCR 2004). Once the information has been reviewed by the §504 Committee, it will determine eligibility based on the criteria previously addressed. If the child is found to be eligible and in need of services, the Committee will create a Section 504 plan for the child that describes the child's "placement."

Common sources of evaluation data for §504 eligibility are the student's grades, disciplinary referrals, health information, language surveys, parent information, standardized test scores, teacher comments, etc. If the student has been evaluated for special education (and either did not qualify, or was evaluated, determined eligible, served and later dismissed), special education assessments and data should be part of what is reviewed for Section 504 evaluation purposes. When interpreting evaluation data and making placement decisions, the District is required to "draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior." Information obtained from all such sources is to be documented and carefully considered. §104.35(c)(1)&(2). "[This] paragraph requires a recipient to draw upon a variety of sources in the evaluation process so that the possibility of error in classification is minimized." Appendix A, p. 430.

Question #14: Is a medical diagnosis required for Section 504 eligibility? No medical diagnosis is required for §504 eligibility. "Section 504 does not require that a school district conduct a medical assessment of a student who has or is suspected of having ADHD unless the district determines it is necessary in order to determine if the student has a disability." *Williamson County (TN) School District,* 32 IDELR 261 (OCR 2000). In fact, the regulations do not require medical evaluations for any impairment to qualify under §504. OCR confirmed this position in 2016. "Note, there is nothing in Section 504 that requires a medical assessment as a precondition to the school district's *determination* that the student has a disability and requires special education or related aids and services due to his or her disability. (In fact, as mentioned earlier, the determination of whether an individual has a disability need not demand extensive analysis.) " *ADHD Resource Guide, p. 23*, *emphasis added.*

So what's the rule? The Section 504 Committee may conduct the evaluation without a medical diagnosis if it believes it has other effective methods of determining the existence of a physical or mental impairment. On the other hand, should the school desire a medical diagnosis, it must pay for one or secure the evaluation at no cost to the parent.

What are "other effective methods"? Remember that the §504 Committee is not asked to diagnose impairments, but to identify impairments so that the Committee may meet the needs of the child arising from impairments. Committees can often accomplish this by a combination of methods such as observations, behavior checklists, screenings, test scores, grade reports, and review of other available data to (1) identify the impairment and (2) screen out nondisability causes for the student's struggles.

What if medical data is needed? If the §504 Committee determines that it needs medical data to evaluate the student for eligibility or to appropriately understand the impairment to create a plan, it must seek the necessary medical data to make the appropriate decisions. *Seattle (WA) School District No. 1,* 54 IDELR 34 (OCR 2009). The school has the duty to evaluate, at no cost to parent. *See, for example, Rose Hill (KS) Public Schools, USD #394,* 46 IDELR 290, 106 LRP 35103 (OCR 2006) ("A parent may choose to use his or her own resources to obtain an evaluation or arrange with the district

for reimbursement for evaluation costs; however, in no instance may a parent be required to arrange for and pay for such an evaluation").

Can a medical diagnosis suffice as an evaluation? No. "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." *Revised Q&A, Question 24. See, also Cle Elum-Roslyn (WA) School District No. 404,* 41 IDELR 271 (OCR 2004).

Who pays for evaluation data? Recall that the "F" in FAPE is the word "Free." In its ADHD Resource Guide, OCR highlighted its concern with respect to a parent offer to secure evaluation data for the school. When the "parent volunteers to pay for a private assessment, the district must make it clear that the parent has a choice and can choose to accept a school-furnished assessment. Compliance problems could arise when school districts and parents do not communicate clearly on this requirement." (p. 23). **The problem is the "F".** *Santa Rosa County (FL) School District,* 110 LRP 48657 (OCR 2009). Despite evidence that the student had an impairment affecting his educational performance (teacher emails indicate that this student's was "the worst case of ADD" they had seen) and a Connor's rating scale showed the student's inattention fell in the "very significant" range on all three scales, the school placed the burden on the student's parents to follow-up with their physician. "OCR still finds that the School's policy of requiring a parent to arrange and pay for a physician's evaluation for children with ADD and ADHD is inconsistent with Section 504." As part of the corrective action steps, the District agreed to revise its procedures "to ensure that *any medical evaluation or other assessment deemed necessary by the District for purposes of determining eligibility under Section 504 will be provided at no cost to parents." (Emphasis added).*

Question #15: What are the Section 504 timelines for an evaluation? Look to your state IDEA rules for analogous timelines. In *Rockbridge County (VA) School Division,* 57 IDLER 144 (OCR 2011), OCR provided the following guidance. "Section 504 does not contain a specific requirement for the period of time from a parental request or consent for an assessment to the actual assessment but requires that an evaluation be conducted within a reasonable period of time." A "reasonable time" is generally viewed as the time allowed by IDEA rules for similar events.

Question #16: The eligibility standard for Section 504 looks the same, so how does the ADAAA make so many more kids eligible now than before? To be eligible under Section 504, a student must be both "qualified" (the student is within the age range in which services are provided to disabled and nondisabled students under state law*, See 34 CFR §104.3(l)(2))*, and "handicapped." Pursuant to 34 CFR §104.3(j)(1), "Handicapped persons means any person who

(i) has a physical or mental impairment which substantially limits one or more major life activities;
(ii) has a record of such an impairment; or
(iii) is regarded as having such an impairment."

While the ADAAA expanded eligibility, it did not change the language of the three prongs. Instead, Congress added new meaning to various pieces of the existing language and some new approaches when applying the language of eligibility. A brief summary of the changes follows.

1. Eligibility language is to be viewed expansively. In the ADAAA, Congress wrote that "it is the intent of Congress that the primary object of attention in cases brought under the ADA should be

whether entities covered under the ADA have complied with their obligations, and to convey that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis." *See,* Pub. L. No. 110-325, §2(b)(5). In short, Congress wants courts looking less at eligibility and focusing more intently on whether reasonable accommodations are provided to employees by covered entities. To that end, Congress provides as part of its rules of construction that **"The definition of disability in this Act shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act."** 42 U.S.C. §12102(4)(A)(emphasis added).

2. An expanded list of major life activities. Prior to the ADA Amendments, the U.S. Department of Education's regulations provided that the term "major life activities" included **"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). This list was not exhaustive. Congress added to the list in the ADAAA, identifying **eating, sleeping, standing, lifting, bending, reading, concentrating, thinking, and communicating** as additional major life activities**.** 42 U.S.C. §12102(2)(A). The list is not exhaustive, and other major life activities are possible such as "interacting with others" (a major life activity adopted by the EEOC, but curiously, not recognized by Congress).

> **And major bodily functions…** In the definition section of the ADAAA, Congress provided that "a major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions." 42 U.S.C. §12102(2)(B). One of the problems encountered in eligibility is pinning down the major life activity impacted by the impairment. To ease the burden and make the analysis more eligibility-friendly, major bodily functions are helpful. Note that for some impairments, like diabetes, the addition of major bodily functions (specifically here, the endocrine function) makes tying the impairment to a life activity very simple.

3. The rejection of the Equal Employment Opportunity Commission's (EEOC) regulatory definition of "significant restriction" as the standard for "substantial limitation." This change impacts many schools that looked to the EEOC definition in the absence of one from the U.S. Department of Education. ED never created a definition of substantial limitation in the Section 504 regulations. Instead, the Commentary to ED's regulations provided this note "Several comments observed the lack of any definition in the proposed regulation of the phrase 'substantially limits.' The Department does not believe that a definition of this term is possible at this time." Appendix A, p. 419. In later guidance, ED concluded that each LEA makes its own determination of substantial limitation. *Letter to McKethan,* 23 IDELR 504 (OCR 1995). While LEAs were not required to follow the EEOC definition, many did, as this was the definition most-frequently used and interpreted by the federal courts. In the ADAAA, Congress expressed its "expectation" that EEOC will change its current regulation defining substantial limitation as "significantly restricted" to something more consistent with the ADA Amendments' efforts to expand the protection of the ADA. *See,* Pub. L. No. 110-325, §2(a)(8) & 2(b)(6). EEOC's definition of substantial limitation, rejected by Congress in the ADAAA, was as follows:

> "(i) Unable to perform a major life activity that the average person in the general population can perform; or
>
> (ii) Significantly restricted as to 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)(1)(i)&(ii).

A little commentary: Congress' concern was not with the comparison of the person evaluated to the average person in the general population, but the *amount of difference required between the two* for substantial limitation to be found. Talk with your school lawyer about the following approach. Since Congress wants the eligibility language to be interpreted more expansively, and substantial limitation to be a less demanding standard (look for less than a "significant restriction"), if at the end of the 504 evaluation the Committee has determined that the physical or mental impairment impacts a major life activity, but is unsure if the impact is substantially limiting (the committee isn't sure if the student is disabled "enough"), then the student is eligible. When in doubt as to substantial limitation, err on the side of eligibility.

4. The ADAAA prohibits the consideration of the "ameliorative" effects of mitigating measures when determining whether a disability substantially limits a major life activity (with the exception of ordinary eye-glasses and contact lenses). The ADA Amendments provide at 42 USC §12102(4)(E):

> "The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures such as —
> (I) medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies;
> (II) use of assistive technology;
> (III) reasonable accommodations or auxiliary aids or services; or
> (IV) learned behavioral or adaptive neurological modifications."

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 utilized by the person with an impairment. Under the mitigating measures rule, the Section 504 Committee is asked to determine whether the student would be substantially limited in the absence of the ameliorative (positive or beneficial) effects of the mitigating measures. For example, when evaluating a student with ADHD who takes medication, the Section 504 Committee would ask whether, without his medication, the student is substantially limited in one or more major life activities.

5. Impairments that are "Episodic" and "In Remission." The ADAAA declares: "An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active."

> **Episodic impairments.** Schools have experience with students whose physical or mental impairments ebb and flow in their severity. Conditions such as seasonal allergies or asthma, migraines and cystic fibrosis are good examples of impairments that may be substantially limiting at times (in hot weather, when the student is stressed, when irritants or trigger factors are present), and have little impact at other times. Schools commonly qualify students under Section 504 if their condition while not constant, episodically rises to the level of substantial limitation on a major life activity. Congress' concern seems to be that accommodations are not denied simply because the disability, at the moment of evaluation, is not substantially limiting, when we know from experience that substantial limitation will recur. Section 504 committees should look carefully at data over a range of time (as opposed to a snapshot). For example, the student whose heat-induced asthma is not affecting him at the time of Section 504 evaluation in January may have experienced significant troubles as the school year started in August and September, and when the previous school year ended in April and May. The timing of the evaluation should preclude eligibility for students whose impairments are episodic and are not conveniently substantially limited at the time of evaluation.

Impairments in Remission. Under the ADAAA, an impairment "in remission is a disability if it would substantially limit a major life activity when active." Note that instead of the episodic situation (where an impairment may from time to time reach substantial limitation), this provision applies to an impairment that was once active, and could return (such as cancer, hepatitis, etc). This rule grants to some inactive impairments the same status that applies to active ones—assuming that the impairment in remission was substantially limiting at one time.

What about educational need? Prior to the ADAAA, most school districts operated under the assumption that Section 504 eligibility required (1) a physical or a mental impairment that substantially limits one or more major life activities, and (2) need for accommodations or services. Just as IDEA includes a "needs special education and related services" requirement for eligibility, the assumption was that Section 504 had a similar "needs services" requirement. This thinking logically followed from the regulatory trigger for the school's duty to evaluate under §504—the school has a duty to evaluate when it suspects disability (see Questions 8-9) together with the student's need for services. §104.35(a).

Post-ADAAA Section 504 eligibility is not contingent on a student's need for services. At least two OCR decisions (and the January 2012 Dear Colleague Letter) highlight a view of Section 504 eligibility not previously recognized by most public schools. In these decisions, OCR has separated the eligibility questions from the question of whether the student needs a Section 504 plan. *See, e.g., Memphis (MI) Community Schools,* 54 IDELR 61 (OCR 2009) **("The procedures also state that a student is not eligible under Section 504 as a student with a disability if the student does not need Section 504 services in order for the student's educational needs to be met, which conflates the determination of disability with placement and services decisions, which should be separate").** *See also, Oxnard (CA) Union High School District,* 55 IDELR 21 (OCR 2009)(applying similar analysis to mitigating measures, OCR wrote: "Though the positive impact of accommodations is pertinent in evaluating the effectiveness of those accommodations, their impact should not be conflated with the issue of eligibility"). Students who are eligible, but not in need of services under Section 504 are sometimes called "technically eligible" students. *See analysis below in Question 23.*

Question #17: Does the student have to fail in order to be Section 504-eligible? No. Failing grades are not required for eligibility. *See for example, 2012 DCL,* p. 7 ("grades alone are an insufficient basis upon which to determine whether a student has a disability. Moreover, they may not be the determinative factor in deciding whether a student with a disability needs special education or related aids or services. Grades are just one consideration and do not provide information on how much effort or how many outside resources are required for the student to achieve those grades.").

Question #18: Does Section 504 require the school to provide _____ as part of the Section 504 Plan? This is a question shared with the school attorney after a parent has made what the school considers to be a request for an expensive, inconvenient, or perhaps unreasonable accommodation. While the question itself seems sensible (do we have to provide what was requested?), it points to a misunderstanding of how accommodations and services are determined under Section 504. There is no list of approved accommodations or services that can be provided under Section 504 from which the 504 Committee can choose. Consequently, the parent cannot simply be told "no, what you request is not on the list." Instead, the law looks to need arising from disability, and focuses services and accommodations on meeting that disability-generated need. The Section 504 regulations provide the following "functional approach" to describing an appropriate Section 504 plan or the Section 504 FAPE.

"For the purpose of this subpart, the provision of an appropriate education is the provision of regular or special education and related aids and services that (i) are designed to meet 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 Sec. 104.34, 104.35, and 104.36." 34 CFR §104.33(b).

According to OCR, "An appropriate education for a student with a disability under the Section 504 regulations could consist of education in regular classrooms, education in regular classes with supplementary services, and/or special education and related services." Revised Q&A, Question 4. The particular services and/or accommodations a student will receive as part of his Section 504 Plan is a matter of individualized evaluation and decision-making. That is, the nature of the student's disability and the student's resulting need (to alleviate the impact of the disability on the student's ability to access and benefit from the school's programs and activities) determines what he gets. In response to the common question, "does Section 504 require the school to provide _____ as part of the Section 504 Plan?" the obvious answer is "it depends on the evaluation data."

Question #19: How often are re-evaluations required? Districts are considered to be in compliance if they complete reevaluations "periodically" (104.35(d).), or at least every three years (as they do with IDEA students). Revised Q&A, Questions 30-31. There is no language to suggest a substantive difference between evaluation and reevaluation. Consequently, the activities are the same. Where the student's impairment has not changed since the last evaluation, the Committee will likely spend most of its time at a reevaluation discussing current needs and whether changes to the §504 plan are required. **So, annual reviews are not required?** Correct, but they are best practice in some situations *(See CESD Section 504 Compliance System for further suggestions on annual review).* As a guidepost, a reevaluation should occur whenever changes to the disability or the demands on the student warrant such a review in order to ensure continued FAPE.