

**An Overview of Section 504  
FAPE Eligibility  
Compliance Conference 2021**

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**A little housekeeping...**

- These slides are intended to summarize rules and cases that are often very complex. Neither the slides nor the presentation are legal advice.
- Please consult your school attorney for questions with respect to a particular set of facts.

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**Question #1: What is Section 504?**

- "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).

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**Question #2: Who is "otherwise qualified"? (p. 2)**

- Two considerations:
  - Are you within the age range of students served by the school?
  - Do you live within the geographical boundaries, are a son/daughter of an employee or attend by virtue of tuition, transfer, open-enrollment or some other policy.

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**Question #3: Who makes the eligibility determination? (p. 2)**

- **The §504 Committee– A group of persons, including persons**
  - knowledgeable about the child,
  - the meaning of the evaluation data,
  - and the placement options. § 104.35(c)(3).
- Parents?

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**Question #4: What is a Section 504 evaluation? (p. 2-3)**

- In Section 504, "evaluation" does not necessarily mean "test" or "assessment."
- Instead, "evaluation" refers to a "gathering of data" or a "drawing together" of data from a variety of sources so that the committee can make the required determinations. §104.35(c)(1).

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**Question #4: What is a Section 504 evaluation? (p. 2-3)**

- What types of data?
  - 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).

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**Question #5: What is the Section 504 eligibility standard? (p. 3)**

- A person must be both qualified and handicapped.
- “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.” 34 CFR § 104.3(j)(1).

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**Question #6: Did that change with the ADAAA in 2008? (p. 3)**

- The Americans with Disabilities Act (ADA) and Section 504 are sister-statutes sharing common eligibility language, approach and purpose.
- In 2008, Congress changed the way the eligibility language should be utilized in both ADA & 504.

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**Question #6: Did that change with the ADAAA in 2008? (p. 3-4)**

- Congress amended the ADA (and applied the changes to Section 504) to protect more individuals.
- “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).

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**Question #7: Can I have a list of qualifying impairments? (p. 4-5)**

- No *list* of impairments “because of the difficulty of ensuring the comprehensiveness of any such list.”
- “The term *includes*, however, such diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, and, as discussed below, drug addiction and alcoholism.”

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**Question #7: Can I have a list of qualifying impairments? (p. 5)**

- **The definition of physical or mental impairment:**
  - (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, genito-urinary; 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)

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**Question #7: Can I have a list of qualifying impairments? (p. 5)**

- “The Department continues to believe, however, that it has no flexibility within the statutory definition to limit the term to persons who have those severe, permanent, or progressive conditions that are most commonly regarded as handicaps.” Appendix A, to Part 104, Subpart A

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**Question #8: What about things that impact or look like impairments? (p. 5)**

- The first of the three parts of the definition specifies that only physical and mental handicaps are included. “Thus, environmental, cultural, and economic disadvantage are not in themselves covered, nor are prison records, age, or homosexuality.” Appendix A.
- Pregnancy? Limited English Proficiency?

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**Question #8: What about things that impact or look like impairments? (p. 5)**

- “The definition of the term ‘impairment’ does not include physical characteristics such as eye color, hair color, left-handedness, or height, weight, or muscle tone that are within ‘normal’ range and are not the result of a physiological disorder.” EEOC, 76 FEDERAL REGISTER, No. 58, March 25, 2011 p. 17007.

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**Question #8: What about things that impact or look like impairments? (p. 6)**

- "The definition of an impairment also does not include common personality traits such as poor judgment or a quick temper where these are not symptoms of a mental or psychological disorder." Id.
- "poverty, lack of education, or a prison record are not impairments. Advanced age, in and of itself, is also not an impairment." Id.

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**Question #8: What about things that impact or look like impairments? (p. 6)**

- "homosexuality and bisexuality are not impairments and as such are not disabilities under this chapter." 42 U.S.C. §12211(a).
- Nor are "(1) transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders; (2) compulsive gambling, kleptomania, or pyromania; or (3) psychoactive substance use disorders resulting from current illegal use of drugs. § 12211(b);

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**Question #8: Eligibility for current illegal opioid use? NO. (p. 6)**

- "Are current illegal users of drugs excluded from protection under Section 504?"
- Generally, yes. Section 504 excludes from the definition of a student with a disability, and from Section 504 protection, any student who is currently engaging in the illegal use of drugs when a covered entity acts on the basis of such use. (There are exceptions for persons in rehabilitation programs who are no longer engaging in the illegal use of drugs)." Revised Q&A, #15.

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**Question #8: Eligibility for current illegal opioid use? NO. (p. 7)**

- Addition to Opioids, *but no current use* changes the answer. EEOC explains it this way:
- "a person who no longer engages in the illegal use of drugs could meet the definition of "disability" if he: has successfully completed a supervised drug rehabilitation program or has otherwise been rehabilitated successfully, or is participating in a supervised rehabilitation program (e.g., alcoholics or narcotics anonymous). (See current regulation section 1630.3(a)-(b).)" EEOC, Questions and Answers on the Notice of Proposed Rulemaking for the ADA Amendments Act of 2008, p. 6-7.

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**Question #9: What about prongs 2 & 3 of 504 eligibility? (p. 7)**

- "Those two prongs of the definition are legal fictions. They are meant to reach situations where individuals either never were or are not currently handicapped, but are treated by others as if they were. For instance, a person with severe facial scarring may be denied a job because she is 'regarded as' handicapped. A person with a history of mental illness may be denied admission to college because of that 'record' of a handicap." --1992 OCR Senior Staff Memorandum

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**Question #9: What about prongs 2 & 3 of 504 eligibility? (p. 7)**

- "The persons are not, in fact, handicapped, but have been treated by others as if they were. It is the negative action taken based on the perception or the record that entitles a person to protection against discrimination on the basis of the assumptions of others." Id.

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**Question #9: What about prongs 2 & 3 of 504 eligibility? (p. 7)**

- "It is rare for these prongs to be used in elementary and secondary student cases. They *cannot* be the basis upon which the requirement for FAPE is triggered. Logically, since the student is not, in fact, mentally or physically handicapped, there can be no need for special education or related aids and services." *Id.*

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**Question #10: What about temporary impairments? (p. 7-8)**

- "The relevant inquiry is not whether the impairment is temporary or permanent. Temporary impairments which necessitate the same kind of consideration as impairments of a permanent nature would also be considered as coming under the regulation as long as the temporary or chronic impairment substantially limits one or more major life activities." *Union Beach (NJ).*
- Don't be confused by ADA's six-month language. It doesn't apply to prong 1. 29 C.F.R. 1630(2)(j)(ix).

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**Question #10: What about temporary impairments? (p. 8)**

- "The 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." Revised Q&A, Question 33.
- LRE considerations. *Lourdes.*
- A common-sense rule to consider with the school attorney.

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**Question #11: Do any impairments automatically result in eligibility? (p. 9)**

- Supreme Court: No such thing as disability per se under ADA.
- EEOC: following ADAAA, some impairments will virtually always result in eligibility
- ED: We agree but have a shorter list.

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**Question #11: Do any impairments automatically result in eligibility? (p. 9)**

- "While there are no per se disabilities under Section 504 and Title II, the nature of many impairments is such that, in virtually every case, a determination in favor of disability will be made. Thus, for example, a school district should not need or require extensive documentation or analysis to determine that a child with **diabetes, epilepsy, bipolar disorder, or autism** has a disability under Section 504 and Title II." 2012 DCL, p. 5

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**Question #11: Do any impairments automatically result in eligibility? (p. 9)**

- Similar treatment for diagnosed ADHD?
- "a diagnosis of ADHD is evidence that a student may have a disability. OCR will presume, unless there is evidence to the contrary, that a student with a diagnosis of ADHD is substantially limited in one or more major life activities." 2016 OCR ADHD Resource Guide

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**Question #11: Do any impairments automatically result in eligibility? (p. 9)**

- Similar treatment for diagnosed ADHD?
- Not every diagnosis will create that presumption. OCR provides this bit of clarifying detail.
  - “Diagnosis of ADHD requires a comprehensive evaluation by a licensed clinician, such as a pediatrician, psychologist, or psychiatrist with expertise in ADHD.” Id.
- NIMH reference?

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**Question #12: Does a medical diagnosis create 504 eligibility? (p. 10)**

- “24. Does a medical diagnosis of an illness automatically mean a student can receive services under Section 504?
- 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.”

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**Question #12: Does a medical diagnosis create 504 eligibility? (p. 10)**

- “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.” OCR Revised Q&A #24 (emphasis added).

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**Question #13: Is a medical diagnosis required for Section 504 eligibility? (p. 10)**

- "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)*
- In fact, the regulations do not require medical evaluations for any impairment to qualify under §504.

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**Question #13: Is a medical diagnosis required for Section 504 eligibility? (p. 10)**

- 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."

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**Question #13: Is a medical diagnosis required for Section 504 eligibility? (p. 10)**

- So what's the diagnosis 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.

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**Question #14: ADAAA language on in remission & episodic impairments? (p. 11)**

- The ADAAA declares that, "An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active."
- Episodic: The impairment need not constantly impact the student in a substantially limiting way.
- In remission: When it was active, was it substantially limiting?

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**Question #15: What is a major life activity? (p. 12)**

- As used in ADA/504 eligibility, these are the areas where the 504 committee us looking for impact of impairment.
- Eligibility only requires a student to be substantially limited in one of the major life activities.

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**Question #16: Can I have a list of major life activities? (p. 12)**

- Pre-ADAAA: "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).
- Added in the ADAAA: "eating, sleeping, standing, lifting, bending, reading, concentrating, thinking, and communicating. 42 U.S.C. §12102(2)(A).
- The list is not exhaustive

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**Question #16: Can I have a list of major life activities? (p. 12)**

- Congress also expanded major life activities with “major bodily functions.”
- “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).

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**Question #17: Why can't the Committee focus on learning? (p. 12)**

- Because it takes more than learning to be a student
- “Students may have a disability that in no way affects their ability to learn, yet they may need extra help of some kind from the system to access learning. For instance, a child may have very severe asthma (affecting the major life activity of breathing) that requires regular medication and regular use of an inhaler at school. Without regular administration of the medication and inhaler, the child cannot remain in school.” *Letter to McKethan*

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**Question #17: Why can't the Committee focus on learning? (p. 12-13)**

- Because it takes more than learning to be a student
- “rather than considering only how an impairment affects a student’s ability to learn, a recipient or public entity must consider how an impairment affects any major life activity of the student and, if necessary, must assess what is needed to ensure that student’s equal opportunity to participate in the recipient’s or public entity’s program.” 2012 OCR Dear Colleague

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**Question #18: Is there a definition of substantial limitation? (p. 13)**

- "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.
- Each LEA makes its own determination of substantial limitation.  
*Letter to McKethan*
  - *Note: Lack of a uniform definition means dramatic difference in results of evaluations!*

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**Question #19: Where do I look for a definition of substantial limitation? (p. 13)**

- **How about EEOC's pre-ADAAA language?**
  - "(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).

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**Question #19: Where do I look for a definition of substantial limitation? (p. 14)**

- **Why can't we use EEOC's pre-ADAAA language?**
  - Congress expressed its "expectation" that EEOC would change its regulation defining substantial limitation as "significantly restricted" to something more consistent with the ADA Amendments' efforts to expand the protection of the ADA.
  - The concern? EEOC "significant" standard was too high.

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**Question #19: Where do I look for a definition of substantial limitation? (p. 14)**

- Consider the following with the school attorney:
  - Recognize Congressional desire for higher eligibility
  - Utilize EEOC's comparison to the average student, BUT Change your view of substantial limitation to a less demanding standard (look for less than a significant difference) when you participate in evaluations

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**Question #19: Where do I look for a definition of substantial limitation? (p. 14)**

- Consider the following with the school attorney:
  - If at the end of the 504 evaluation the Committee is unsure if the impact of impairment on a major life activity is substantially limiting (the committee isn't sure if the student is disabled "enough"), then the student is eligible.

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**Question #20: How does we address at mitigating measures? (p. 14)**

- The Supreme Court's *Sutton* Trilogy and the "evaluate as you find them" approach to mitigating measures.
- Congress's concern: why are you stripping away rights from folks attempting when they try to use medication or other measures to lessen the impact of disability? Doesn't that approach act as a disincentive to mitigate?

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**Question #20: How does we address at mitigating measures? (p. 14)**

- The new mitigating measures rule
- “The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures....
- Note the limited application to eligibility determinations

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**Question #20: How does we address at mitigating measures? (p. 14)**

- Examples of mitigating measures provided in the rule:
  - (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;

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**Question #20: How does we address at mitigating measures? (p. 14-15)**

- Examples of mitigating measures provided in the rule:
  - (II) use of assistive technology;
  - (III) reasonable accommodations or auxiliary aids or services; or
  - (IV) learned behavioral or adaptive neurological modifications.”

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**Question #21: Must the student need services to be 504-eligible? (p. 15)**

- Not after the ADA.
- “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.” *Letter to Memphis*

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**Question #22: How often are re-evaluations required? (p. 16)**

- Districts are considered to be in compliance if they complete re-evaluations “periodically” (104.35(d)), or at least every three years (as they do with IDEA students). OCR Revised Q&A, Questions 30-31.
- Annual review?

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**Question #23: What is the Office for Civil Rights? (p. 16)**

- OCR is the Office for Civil Rights, a subdivision of the U.S. Department of Education.
- OCR enforces Section 504 through compliance reviews and complaint investigations and provides technical assistance.
- OCR is the most common source of 504 enforcement.

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**Question #24: What does OCR look for when it investigates complaints? (p. 17)**

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- "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." OCR Revised Q&A, Question 5.

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**Question #24: What does OCR look for when it investigates complaints? (p. 17)**

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- "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.*

- The Lesson of *Bradley County*

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**The 504 Evaluation**

*Bradley County (TN) Schools, 43 IDELR 143 (OCR 2004), (p. 17)*

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- *Bradley County* & two common questions:
  - Why does evaluation always precede initial placement or a significant change of placement?
  - Why does the process matter if the school can provide what the student needs informally?

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### The 504 Evaluation

Bradley County (TN) Schools, 43 IDELR 143 (OCR 2004). (p. 17)

- "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.**"

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### The 504 Evaluation

Bradley County (TN) Schools, 43 IDELR 143 (OCR 2004). (p. 17-18)

- Why does the Section 504 process matter?
- "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."

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### The Practical Takeaway (p. 18)

- OCR review focuses on the process followed by the Committee to make the decision, and *not on the eligibility decision itself.*
- While the subjectivity of Section 504 eligibility can be frustrating, the lack of a uniform objective definition of substantial limitation means that as long as the right people look at the right data, ask the right questions, and provide the right notices, you and your child-centered colleagues have nothing to fear when making Section 504 eligibility decisions.

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Thanks for all that you do. Enjoy the rest of the conference!



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