

## AN OVERVIEW OF SECTION 504 FAPE ELIGIBILITY

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**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 understand Section 504 eligibility. 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 ADA 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 January 10, 2020), is available on the OCR website at [www.ed.gov/about/offices/list/ocr/504faq.html](http://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.”)

### I. Section 504 Background and Evaluation

**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 opportunity to participate or enjoy 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 is “otherwise qualified”?** For purposes of public elementary and secondary schools, a student is “otherwise qualified” if she has the right to attend the school. These are students within the age-range served by the school, and who are qualified to attend there due to residency, parents working for the LEA, a transfer or tuition policy or some other means. 34 C.F.R. §104.3(l)(2). Note that participation in some LEA programs or activities (for example, football team, magnet school attendance, gifted program) may require additional qualification beyond age and residency.

**Question #3: Who makes the Section 504 eligibility determination?** 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 #4: 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 17*. 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).

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 rationale 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 #5: What standard does the Section 504 Committee utilize to determine an individual with a disability?** 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.”

*A little commentary:* The Section 504 regulations have not been updated to change the now-antiquated usage of “handicapped” to “disabled.” When not quoting the regulation, the author will utilize the terms “disability” and “disabled.”

**Question #6: Didn’t changes to the Americans with Disabilities Act in 2008 impact the Section 504 eligibility language?** Yes, the ADA Amendments Act of 2008 changed ADA and Section 504 eligibility. The ADA and 504 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, 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.

**But the ADAAA didn't change the words of eligibility. It changed how the words are interpreted.** 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.**

**Congress wanted more people protected.** 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).

## II. Section 504 Eligibility after the ADAAA

### A. The Physical or Mental Impairment Requirement

The Section 504 eligibility language has been the subject of numerous letters of finding and pieces of OCR guidance predating the ADAAA. The author will review the highpoints of the guidance and then address Congress' changes.

**Question #7: Can I have a list of qualifying impairments?** When folks first began to examine the §504 regulations, there was some concern about the absence of a list of eligible physical or mental impairments. After all, wouldn't it be easier to identify §504 students if we could simply look up their impairment, and if on the list, go to the next criteria? In response to these concerns, the Department of Education indicated that no list of impairments was possible **"because of the difficulty of ensuring the comprehensiveness of any such list."** Appendix A to the §504 Regulations [hereinafter "Appendix A"], p. 419. In short, so many different physical or mental impairments existed (or would later be identified) and could qualify under §504 that ED was concerned that it might accidentally leave some out. Those familiar with special education point to a very brief list of qualifying disability classifications, and the security of knowing that is the universe of eligibility. No such security exists in §504. Instead of a list, the §504 regulations provide a rather broad definition of the phrase "physical or mental impairment." According to the Department of Education, the phrase means:

“(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)

While a short nonexclusive list of conditions follows the definition.

“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.*”). *Id.* (Emphasis added).

It is fairly clear that the phrase is meant to include physical or mental impairments of all kinds, since that is what Congress intended.

“A related issue raised by several comments is whether the definition of handicapped person is unreasonably broad. Comments suggested narrowing the definition in various ways. The most common recommendation was that only ‘traditional’ handicaps be covered. **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, emphasis added.

#### **Question #8: What about things that may look like, or impact a student like an impairment?**

Remember that the law seeks to protect individuals on the basis of disability, but there are many situations/factors that can create difficulty in life both in and out of school. Throughout the regulations there is repeated concern that great care be taken so that students are not misclassified. Of particular concern were students with no disabilities who because of other factors (such as poor English skills or lack of previous educational opportunity) may be incorrectly classified as disabled under §504.

“The definition of handicapped person also includes specific limitations on what persons are classified as handicapped under the regulation. 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.** Of course, if a person who has any of these characteristics also has a physical or mental handicap, the person is included within the definition of handicapped person.” Appendix A, p. 419 (emphasis added).

**What about pregnancy?** While not addressed in OCR’s regulation, the EEOC’s commentary to its ADA regulations provides the following guidance: “The Commission received several comments seeking explanation of whether pregnancy-related impairments may be disabilities. To respond to these inquiries, the final appendix states that **although pregnancy itself is not an impairment, and therefore is not a disability, a pregnancy-related impairment that substantially limits a major life activity is a disability under the first prong of the definition.**” 76 FEDERAL REGISTER, No. 58, March 25, 2011 p. 16980 (emphasis added).

**Limited English Proficiency?** OCR has made the over-identification of minority students into disability programs an enforcement priority having recognized that some districts that are not

sophisticated in their identification and evaluation processes and may misclassify minority students due to language proficiency. See, for example, *San Luis Valley (CO) Board of Cooperative Services*, 21 IDELR 304 (OCR 1994)(OCR found discrimination against minorities in a district’s disability referral process where referral forms did not include information regarding primary language, student records failed to indicate procedures were followed to ensure that language proficiency was not a factor in the students’ disability evaluation process, committees failed to question validity of testing on language proficiency grounds, and parents were not always notified of their rights in their native language); *Ogden (UT) City School District*, 21 IDELR 387 (OCR 1994)(District failed to ensure that students were not placed in disability programs on the basis of criteria affected by their limited English proficiency. Students who were in need of both alternative language programming and disability assistance did not receive both modalities of services.).

**Anything else?** EEOC provides some additional detail on what is *not* an impairment.

“It is important to distinguish between conditions that are impairments and physical, psychological, environmental, cultural, and economic characteristics that are not impairments. 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.** The definition, likewise, **does not include characteristic predisposition to illness or disease....** 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. Environmental, cultural, or economic disadvantages such as poverty, lack of education, or a prison record are not impairments. **Advanced age, in and of itself, is also not an impairment.** However, various medical conditions commonly associated with age, such as hearing loss, osteoporosis, or arthritis would constitute impairments within the meaning of this part.” 76 FEDERAL REGISTER, No. 58, March 25, 2011 p. 17007.

**And finally, some impairments were excluded to make the ADA easier to pass in 1990.** For example, “homosexuality and bisexuality are not impairments and as such are not disabilities under this chapter.” 42 U.S.C. §12211(a). Further, the “disability” shall not include (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. 42 U.S.C. §12211(b); *1992 OCR Memorandum on Differences Between ADA Title II and §504 Regulations* (OCR 1992). Note that the government’s rationale in excluding these impairments from legal protection has come under recent challenge. See, for example, *Kate Lynn Blatt v. Cabela’s Retail Inc.*, Civil Action No. 5:14-CV-4822-JFL (E.D. Pa.)(A crucial element of the litigation is the claim that the gender identity disorder exclusion is a violation of the Equal Protection Clause, as it is based on moral disapproval or animus, as opposed to an appropriate governmental interest).

**What does that language mean for current illegal Opioid users?** It means that current illegal Opioid use is **not** an impairment that can create eligibility under Section 504. OCR explains as follows in the Revised Q&A.

**“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.*

**What if the student is addicted to Opioids, but not a current user?** The answer changes, as OCR indicated above. The student would receive the nondiscrimination protections of Section 504 due to drug addiction as the student has “a record of disability.” 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.

**Question #9: What’s the deal with “record of impairment” and “regarded as impaired” in the second and third prong of 504 eligibility?** In a 1992 Senior Staff Memorandum, OCR clarified that only the first prong of eligibility can create FAPE responsibility for the school in addition to nondiscrimination protection. Prongs two and three address those with a record of impairment or who are regarded as impaired, and only exist to provide nondiscrimination protection. Prongs two and three cannot give rise to a FAPE obligation/Section 504 Plan.

**“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. 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.

The use of these prongs of the definition of handicapped person arises most often in the area of employment, and sometimes in the area of postsecondary education. **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.” *OCR Senior Staff Memorandum*, 19 IDELR 894 (OCR 1992)(Emphasis added).

OCR confirms this position in the Revised Q&A, Question 36. **“In public elementary and secondary schools, unless a student actually has an impairment that substantially limits a major life activity, the mere fact that a student has a “record of” or is “regarded as” disabled is insufficient, in itself, to trigger those Section 504 protections that require the provision of a free appropriate public education (FAPE).”** The duty to provide FAPE only exists where there is a current, disability-related need for services. Students eligible due to a record of impairment or who are regarded as impaired would receive Section 504’s nondiscrimination protection only. Section 504 Committee focus their efforts on prong one of eligibility.

**Question #10: What about temporary impairments?** The ADAAA provided a six-month rule with respect to certain impairments. That rule explained here in EEOC’s ADA regulations is frequently misunderstood.

“The six-month ‘transitory’ part of the ‘transitory and minor’ exception to ‘regarded as’ coverage in §1630.15(f) does not apply to the definition of “disability” under paragraphs (g)(1)(i) (the ‘actual disability’ prong) or (g)(1)(ii) (the ‘record of’ prong) of this section. The effects of an impairment lasting or expected to last fewer than six months can be substantially limiting within the meaning of

this section.” 29 C.F.R. 1630(2)(j)(ix).

*A little commentary:* For the 504 committee, the trick here is to not be confused, since prong three (“regarded as”) is not part of the 504 committee’s analysis. Students under prong three are eligible for nondiscrimination protection but not FAPE because they are not currently impaired. *OCR Senior Staff Memorandum*, 19 IDELR 894 (OCR 1992). In 2014, the 4th Circuit confirmed the limited application of the six-month rule to eligibility under only the “regarded as” prong. *Summers v. Altarum Institute Corp.*, 48 NDLR 95 (4th Cir. 2014) (“**while the ADAAA imposes a six-month requirement with respect to ‘regarded-as’ disabilities, it imposes no such durational requirement for ‘actual’ disabilities, thus suggesting that no such requirement was intended.**”).

Temporary disabilities, such as broken limbs, are not addressed under IDEA. The “Other Health Impaired” eligibility category addresses “chronic” health conditions, and the “Orthopedically Impaired” category addresses “permanent” disfigurements or anatomical losses. Nevertheless, **in various policy letters, the Department of Education has determined that a temporary disability can constitute a physical impairment that substantially limits a major life activity such that §504 services might be required.** See, e.g., *Ventura (CA) Unified School District*, 17 EHLR 854 (OCR 1991). The proper inquiry “is not whether the impairment is temporary or permanent; rather the appropriate inquiry is whether the impairment substantially limits one or more major life activities.” *Letter to Wright*, (OCR 1993). That determination must be made on “a case-by-case basis, considering the nature, severity, duration or expected duration and the permanent or long-term impact resulting from the impairment.” *Id.*

Some may say that schools always took care of these situations informally in the past, and that the §504 process just adds bureaucracy and paperwork to the school’s efforts to address the problem. Although it may be true that schools informally addressed these situations without §504, using the §504 process helps ensure consistency, accountability, better decision making and legal compliance. In addition, procedural compliance is necessary to satisfy OCR. There can be few results as unpalatable as one where the district provides sufficient modifications to a qualified disabled student, but nevertheless is found in violation for not jumping through the procedural hoops. That was the case where a school district provided a student who had undergone hip surgery with appropriate modifications but failed to have procedures in place to document the deliberation of, or provision of accommodations, or to inform parents of their rights. *Temple (TX) ISD*, 25 IDELR 232 (OCR 1996).

**Does this mean that every child who breaks a bone or sprains an ankle needs to be referred to §504? No.** Schools only need to refer and evaluate those children who are suspected of needing §504 services due to a physical or mental impairment that substantially limits one or more major life activities. If a child breaks his right wrist, and he is left-handed, the school may legitimately not suspect that §504 services will be necessary. The referral question must be taken up on a case-by-case basis, depending on the physical impairment, whether it substantially limits a major life activity (which may depend on the type of classes or activities the child is involved in at school), and whether it needs to be addressed with §504 services or accommodations of some kind. Should the impairment give rise to a change in LRE (for example, the impairment requires the student to be confined to home), that significant change in placement should trigger a 504 evaluation. See, for example, *Lourdes (OR) Public Charter School*, 57 IDELR 53 (OCR 2011)(Lacking appropriate staff and a health plan to address the medical needs of a student with diabetes, the school placed the student on homebound instruction. OCR determined that this was a significant change of placement for a student because of a physical impairment, requiring a Section 504 evaluation first. In essence, the school knew of the impairment and the resulting need for services. Thus, the school had a duty to conduct a Section 504 evaluation before it could place the student in homebound. “Further, because LPCS placed the student in an in-home tutoring environment, which was a more restrictive environment than what the student had previously

and subsequently been provided, LPSC failed to comply with [the Section 504 LRE requirement at] 34 C.F.R. §104.34(a).”). Finally, common sense dictates that if the disability will not outlast the process of evaluation and placement (a few weeks) 504 is probably not triggered.

**Question #11: Do any impairments automatically create Section 504 eligibility?** Prior to the ADAAA, both the Supreme Court and OCR concluded that regardless of the impairment, simply having an impairment was not enough to create 504 eligibility. *See, for example, Bragdon v. Abbott*, 118 S.Ct. 2196 (1998)(case-by-case eligibility determination required by the ADA); *Vineland (CA) Elementary School District*, 49 IDELR 20 (OCR 2007)(“A physician’s medical diagnosis may be considered as part of the evaluation process. However, a medical diagnosis of an illness does not automatically qualify a student for services under Section 504.”).

**The Post-ADAAA Approach.** When the Equal Employment Opportunity Commission (EEOC) issued its final regulations implementing the ADAAA (with respect to employees), it took a different position. In light of Congress’ desire that eligibility be viewed more broadly, together with the changes to eligibility (more major life activities, the addition of major bodily functions, a lower hurdle of substantial limitation, a new mitigating measures rule and special treatment for impairments in remission and episodic impairments), EEOC opined that some impairments, while not automatically resulting in eligibility, would virtually always result in eligibility. It appears that ED reviewed EEOC’s position and adopted it with respect to a small number of impairments. OCR’s January 2012 guidance letter indicates that a handful of impairments will almost always result in eligibility.

“In most cases, application of these rules should quickly shift the inquiry away from the question whether a student has a disability (and thus is protected by the ADA and Section 504), and toward the school district’s actions and obligations to ensure equal educational opportunities. 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 (emphasis added).

**And now, a limited presumption for some students diagnosed with ADHD.** 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*, (July 2016). While the document serves as a single-source reminder on positions taken by OCR with respect to ADHD in its myriad letters of finding, the guide also provides a few surprises and insights. In what appears to be an extension of the discussion above, OCR opines that **“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.”** (p. 10). It appears that 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.”** National Institutes of Mental Health (NIMH publication), *Attention Deficit Hyperactivity Disorder* (Revised Mar. 2016),” (p. 10, fn. 37).

*A little commentary:* Arguably, it would appear that unless the diagnosis is based on a “comprehensive evaluation” and conducted by a licensed clinician with expertise in ADHD, the presumption does not apply. Of course, a *presumption* of eligibility is not eligibility, but the notion that the student is likely to be eligible unless evaluation data from a variety of sources shows otherwise. In short, where the presumption applies, OCR presumes the student is eligible unless the data shows he’s not. To deny

eligibility for a student with a “comprehensive evaluation” of ADHD by a licensed clinician, the 504 Committee must determine that the ADHD does *not* substantially limit one or more major life activities.

**Question #12: Does medical diagnosis of impairment create Section 504 eligibility?** No. OCR explains as follows:

**“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. 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).

*A little commentary:* As a civil rights law, Section 504 in primary and secondary schools seeks to provide equality of opportunity between two groups of students: those with disabilities and those without. Note that the mere existence of an impairment, whether diagnosed or not, does not meet that requirement. The rationale is quite simple: we are all impaired physically or mentally, but cannot all be part of the protected class as that would render the civil rights comparison ridiculous (who is left as nondisabled peers to compare to?). Impairment must be present with substantial limitation in a major life activity. All students are impaired, but not all students are impaired enough to be eligible as a student with a disability. Further, the doctor is not a group of knowledgeable people and therefore lacks the legal authority to determine Section 504 eligibility. In short, a diagnosis provides data on the existence of impairment, but does not make the student eligible. *See also, Cle Elum-Roslyn (WA) School District No. 404*, 41 IDELR 271 (OCR 2004) (Rather than conducting its own evaluation, the school relied on an outside neurologist’s report obtained by the parents to determine that the student was §504-eligible due to Tourette Syndrome and ADD, and created a §504 plan. The school did not attempt to evaluate areas of educational need nor did it apparently review any data other than the outside report. OCR found a variety of intertwined §504 violations related to the absence of an evaluation of the student’s educational needs.).

**Question #13: Is a medical diagnosis required for a 504 Committee to determine a student’s 504 eligibility?** No. “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, 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.

No. No medical diagnosis is required for §504 eligibility for a student with ADHD or any other impairment so long as the , as previously explained. The 2016 ADHD Resource Guide reaffirms this position.

**Question #14: Didn't the ADA include a provision on "impairments in remission" and "episodic impairments"?** Yes. The ADA 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 impairments.** Schools have experience with students with episodic conditions that ebb and flow in their severity. Conditions such as seasonal allergies or asthma, migraine 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. 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 not function to preclude eligibility for students whose impairments are episodic and are not conveniently substantially limited at the time of evaluation.

**The "in remission" portion of this provision is problematic.** The proposition that a student fully in remission from a condition that once substantially limited a major life activity is disabled now (transforming a prong two student into a prong one student) raises interesting concerns with respect to the school's duty to child find. In short, is the school required to identify and offer an evaluation to students with an impairment in remission? The school's duty to evaluate under Section 504 is triggered by the school's suspicion of the student's need. Section 104.35(a) 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).

Where the disability is in remission, there may be no suspicion of impairment or student need to trigger the school's evaluation. Consequently, the only duty to evaluate such students (where there is no current impairment or apparent need for services from the impairment in remission) would arise from parent request.

*A little commentary:* The author has yet to see concerns over "in remission child find" make their way into published OCR letters of finding.

## B. The Major Life Activity Requirement

**Question #15: What's a major life activity?** Think of major life activities, when viewed cumulatively, as the things that humans do that make us human. As used in ADA/504 eligibility, these are the areas where the 504 committee is looking for impact of impairment. Eligibility only requires a student to be substantially limited in one of the major life activities.

**Question #16: Can I have a list of major life activities?** Yes. 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.

**Question #17: Why can't the Committee just look at the major life activity of learning?** As early as 1995, OCR has warned schools not to limit their evaluation inquiry to the major life activity of learning.

"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*, 23 IDELR 504 (OCR 1995). Nevertheless, following the ADAAA with its expansion of the list of major life activities and the inclusion of major bodily functions, schools were still restricting their analysis to the major life activity of learning. *See, for example, Memphis (MI) Community Schools*, 54 IDELR 61 (OCR 2009) ("The District stated that it is now changing how it conducts eligibility determinations to ensure that they are based on whether one or more of a student's major life activities, not just learning, are substantially limited by a mental or physical impairment."); *Oxnard (CA) Union High School District*, 55 IDELR 21 (OCR 2009) (OCR found the school's evaluation inappropriate when it only considered whether the student's irritable bowel syndrome substantially limited his learning. The evaluation should also have looked at the student's digestive function, and presumably, bowel function as well.); *North Royalton (OH) City School District*, 52 IDELR 203 (OCR 2009) (school failed to properly consider eligibility of child with peanut allergy when it looked only at the degree the condition affected academic performance).

In the 2012 Dear Colleague Letter, OCR confirms this position.

“Nothing in the ADA or Section 504 limits coverage or protection to those whose impairments concern learning. Learning is just one of a number of major life activities that should be considered in determining whether a student has a disability within the meaning of those laws. 28 C.F.R. § 35.104; 34 C.F.R. § 104.3(j)(2)(ii). Some examples include: (1) a student with a visual impairment who cannot read regular print with glasses is substantially limited in the major life activity of seeing; (2) a student with an orthopedic impairment who cannot walk is substantially limited in the major life activity of walking; and (3) a student with ulcerative colitis is substantially limited in the operation of a major bodily function, the digestive system. These students would have to be evaluated, as described in the Section 504 regulation, to determine whether they need special education or related services.... Therefore, 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 DCL, p. 6, Question 7.

### C. The Substantial Limitation Requirement

**Question #18: Is there a definition of “substantially limits”?** That’s a great question that has never been answered by ED. There is no 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).

*A little commentary:* Note that the lack of a definition results in a very subjective eligibility decision by the 504 committee and the likelihood that the same student determined eligible by one committee, may not be eligible when reviewed by another committee. Further, this lack of uniformity in definitions between schools makes the author uncomfortable about efforts to calculate how many students or what percentage of students ought to be 504-eligible.

**Question #19: So, if ED won’t say what “substantially limits” means, where can the school look for help?** Recall two things: (1) the ADA uses the same eligibility language as Section 504 and, (2) that the Equal Employment Opportunity Commission (EEOC) is responsible for creating regulations for the adult employment world under ADA. In fact, EEOC writes the regulations that govern public educators’ relationships with their school district employers. While LEAs were not required to follow the EEOC’s definition with respect to students, many did. The author encouraged the practice as the definition utilizes the educator-friendly skill of comparison of students to a benchmark. Prior to the ADA, EEOC instructed that a person was substantially limited when she was:

“(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 reviewed this definition in the ADAAA and 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. See, Pub. L. No. 110-325, §2(a)(8) & 2(b)(6). 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.

**Question #20: How does the Committee address mitigating measures during the 504 evaluation?**

Congress focused the ADAAA, in part, to reject the reasoning used by the U.S. Supreme Court in various important ADA cases including *Sutton v. United Air Lines*, 30 IDELR 681, 527 U.S. 471 (1999) (and its companion cases addressing the effect of mitigating measures on ADA eligibility). From the preamble statements included in the Act, it is clear that the Congress believed that the Supreme Court’s interpretations of the eligibility provisions of ADA have been overly stringent. Indeed, the Court’s position that ADA 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.

**Disagreement with the *Sutton* rationale.** Congress disagreed with the Supreme Court’s treatment of a person who has a bona fide physical or mental impairment, but takes appropriate and effective measures to treat, or mitigate, the impact of the impairment on their daily life. In the *Sutton* line of cases, the Court held that when determining eligibility, one must take into account the effect of these mitigating measures. Thus, if the mitigating measures are effectively addressing the impairment, to the point that it does not pose a substantial limitation on a major life activity, then there is no eligibility under ADA, and the person cannot maintain a legal action claiming an employer’s failure to make reasonable accommodations or otherwise asserting discrimination on the basis of disability. *Sutton* addressed the problem of mitigating measures in the context of glasses and contact lenses. *Murphy v. United Parcel Service* applied the *Sutton* mitigation rule to medication, requiring that side effects of currently used medication be considered as well. *Murphy v. United Parcel Service*, 30 IDELR 694, 527 U.S. 516 (1999). The third case in the trilogy, *Albertsons, Inc. v. Kirkingburg* applied the *Sutton* mitigation rule to compensatory skills. *Albertsons, Inc. v. Kirkingburg*, 30 IDELR 697, 527 U.S. 555 (1999).

The ADA Amendments provide at 42 U.S.C. §12102(4)(E) what could be called the *anti-Sutton* rule. The author simply refers to it as the mitigating measures rule. It reads:

“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. 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 final variation is found in the third case of the Sutton trilogy, *Kirkingburg*, where the Supreme Court determined that a compensatory skill developed and used by an individual with monocular vision was to be treated no differently for eligibility purpose than other mitigating measures. 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.

Under the new 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.

*A little commentary:* The mitigating measures rule brings some added complexity to eligibility where the school has never taught the student in an unmitigated state. For example, for the student on medication due to ADHD, subtracting the positive effects of the medication on the student’s concentrating may prove difficult if the student has been medicated for many years, and the school has no experience with the unmedicated student. In this situation, how the student currently performs at school is much less important for eligibility than how the student performed five years ago in school when medication was being contemplated. Contemplate with your school attorney the position that if the school cannot determine whether the student is substantially limited without the mitigating measure (that is, the school has no data or insufficient data to make the call), then the student is substantially limited. This conclusion is consistent with Congress’ intent to make eligibility easier, to lower the standard of substantial limitation, and to not punish individuals by taking away access to rights when they mitigate their impairments.

#### **D. Educational Need & Section 504 Eligibility**

**Question #21: Must a student need services from the school to be Section 504 eligible?** Prior to the ADA, 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.

## **E. Re-evaluation**

**Question #22: 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 28-29. 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. 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.

## **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 #23: 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 #24: 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.).

**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?

*A little commentary:* While the subjectivity of Section 504 eligibility can be frustrating, recognize that OCR review focuses on the process followed by the Committee to make the decision, and typically *not on the eligibility decision itself*. The lack of a standard objective definition of substantial limitation means that as long as the district is complying with Congress' desire to impose a standard less demanding than significant restriction, the fact that other minds might come to other conclusions on eligibility does not mean the Committee failed to comply with the law. Child-centered compliance with the Section 504 process is your goal and safe harbor.