

## SECTION 504 QUESTIONS & ANSWERS

Presented by David M. Richards, Attorney at Law  
RICHARDS LINDSAY & MARTIN, L.L.P.  
13091 Pond Springs Road • Suite 300 • Austin, Texas 78729  
Telephone (512) 918 -0051 • Facsimile (512) 918-3013 •www.504idea.org  
© 2012 RICHARDS LINDSAY & MARTIN, L.L.P. All Rights Reserved.

**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 the issues, concerns, and dynamics involved in compliance with the law. The issues are approached in question and answer format, with an emphasis on the most common issues and questions raised by educators. 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 OCR Letters of Finding, these materials will also cite guidance from two important OCR documents. First, a Revised Q&A document has been posted on the OCR website since March of 2009 addressing some of the ADAAA changes. This document, *Protecting Students with Disabilities: Frequently Asked Questions about Section 504 and the Education of Children with Disabilities* (March 27, 2009, last modified March 17, 2011), 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, OCR released a long-awaited guidance document on the 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”).

### Learning Objectives:

1. Understand the language and purpose of Section 504 of the Rehabilitation Act of 1973.
2. Understand the school’s duties to identify, evaluate, serve and protect students from discrimination on the basis of disability.
3. Understand the role of the Office for Civil Rights with respect to Section 504 compliance.

## I. The Background and Purpose of Section 504

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

In 1973 when the Rehabilitation Act was passed, little was being done on a federal level to encourage participation and equal access to federally funded programs by folks with disabilities. 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 public education participation, or enjoyment of the benefits offered by public school programs because of a child’s disability. The law recognizes that the impact of disability can mean that equal treatment and equal services may not be sufficient to convey equal benefit. For some eligible §504 students to have equal opportunity to participate and benefit, they must receive services and/or

accommodations that level the playing field. Further, since this is a civil rights law, Section 504 also provides protections against discrimination in the form of rights to complain and sue in response to discrimination on the basis of disability.

**Question #2: Who or what is a recipient?**

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

**Question #3: What does the law require of recipients?**

In the plain language of the statute, three things are required—or perhaps better stated, three things are prohibited. First, recipients are prohibited from excluding eligible students from the recipient’s programs and activities on the basis of disability. Second, recipients are prohibited from denying eligible students the benefits of the recipient’s programs and activities on the basis of disability. Finally, the law provides an umbrella-like protection of nondiscrimination on the basis of disability. The contours of the three prohibitions are explained throughout these materials.

**Question #4: That sounds very similar to the Americans with Disabilities Act (ADA). Are the two laws related?**

Yes, the two laws are sometimes referred to as sister-statutes. Because they share common eligibility language and a civil rights approach to disability discrimination, doctrines and lessons from one law are frequently applied to the other. *Bragdon v. Abbott*, 118 S.Ct. 2196 (1998). Consequently, when the Congress amended the ADA in 2008 with the ADA Amendments Act, it applied the changes to Section 504 as well. Specifically, the conforming amendments to the ADAAA apply the rules of construction as well as the definitional changes to the Rehabilitation Act of 1973, 29 USC §705, which creates the definition of disability used in 29 USC §794(a), the statutory provision upon which the ED’s K-12 Section 504 regulations are premised.

**Question #5: I don’t see the FAPE requirement in the statute, am I missing something?**

The requirement that the school district provide FAPE to Section 504-eligible students is certainly not apparent in the language of the Rehabilitation Act itself. Instead, the Section 504 FAPE arises from the Section 504 regulations created and enforced by the U.S. Department of Education.

**Question #6: Is that why the ADA changes create such confusion in the K-12 Section 504 world?**

Yes. While the source of the Section 504 FAPE requirement may seem unimportant, it does help explain why Congress’ changes to the Americans with Disabilities Act in 2008 created such interesting complications in the K-12 public school application of Section 504. In short, Congress wasn’t thinking much about the impact of increased eligibility with respect to FAPE or complicating the §504 duty to child find and evaluate since those duties arise from the ED’s regulations and are unique to K-12 schools. Instead, Congress was focused on fixing a problem in employment litigation where courts were erecting additional barriers to eligibility 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. 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).

## **II. The Section 504 Free Appropriate Public Education or FAPE**

### **Question #7: Does Section 504 have a child find requirement like that in IDEA?**

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

### **Question #8: When should the school refer for a Section 504 evaluation?**

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

### **Question #9: Can you give me some examples where the required factors are present to trigger the duty to evaluate?**

**The school's receipt of a psychological assessment triggers the duty to evaluate.** The parents provided the school with a psychological evaluation which, based on a variety of formal assessments and batteries, identified significant deficits in writing and spelling, together with anxiety, depression and a few other impairments. The psychologist recommended a variety of services, as well as the assistance of an autism specialist to determine additional supports in socialization, language and behavior. OCR determined that the parent's presentation of the assessment to the school provided sufficient notice of suspected disability and need for services to trigger the duty to evaluate. "Because the school had before it the evidence described above, it was required to promptly determine whether the Student needed to be referred for further evaluation or considered for eligibility for services as a student with a disability." *Chesterfield County (SC) Public Schools*, 54 IDELR 299 (OCR 2009).

**School's knowledge of the student's need for medication, coupled with school troubles triggers the duty to evaluate.** "In this case, the School specifically had information relating to the Student's asthma condition and his need for medication every four hours, as specified in the Medications Form and in a

letter from the Student's physician[;] his frequent absences from School and hospitalization due to his asthma; his academic failure; and his behavior. While the School convened two S-Team meetings and identified intervention strategies, a Section 504 eligibility evaluation was warranted to determine whether the Student had a disability that substantially limited one or more major life activities under Section 504." *Metro Nashville (TN) Public Schools*, 110 LRP 49252 (OCR 2009).

**Student's need for homebound services because of disability triggers duty to evaluate.** 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)." *Lourdes (OR) Public Charter School*, 57 IDLER 53 (OCR 2011).

#### **Question #10: What is the school's duty with respect to a parent referral?**

Upon receipt of a parent request for an evaluation, the school has two options. *See, for example, Bryan County (GA) School District*, 53 IDELR 131 (OCR 2009) ("Under Section 504, upon receiving notice of a parent's belief that a child has a disability triggering Section 504 protection, the district should determine whether there is reason to believe that the child, because of a disability, may need special education or related services and thus would need to be evaluated. If the district does not believe that the child needs special education or related services, and thus refuses to evaluate the child, the district must notify parents of their due process rights").

#### **Question #11: Is the public school required to evaluate a student placed by his parents in a home school or private school?**

Yes. The school district's duty to evaluate does not evaporate when parents withdraw the student from the public school. *See, for example, West Seneca (NY) School District*, 53 IDELR 237 (OCR 2009)(The parent of a private school student with migraines complained to OCR that the school district where her daughter's private school was located had the duty to conduct a Section 504 evaluation. OCR disagreed, recognizing that while special education has such a rule, in the Section 504 world, the district of residence has the duty to evaluate).

#### **Question #12: Who conducts a Section 504 evaluation?**

While the regulations refer to the group conducting the evaluation (and other tasks under Section 504) as the "group of knowledgeable people," the title "Section 504 Committee" is more commonly used. The §504 Committee is responsible for §504 evaluation and placement. Unlike the IDEA, §504 does not dictate the titles or 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 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.

“The district convened a team of persons knowledgeable about the student, but it did not include the student’s parents, as is the routine practice, even though the parents were necessary in this case for the evaluation process. 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.”

Finally, 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).

**Question #13: What is a Section 504 evaluation?**

“Evaluation” does not necessarily mean “test.” In the §504 context, “evaluation” refers to a gathering of data or information from a variety of sources so that the committee can make the required determinations. §104.35(c)(1). Since specific or highly technical eligibility criteria are not part of the §504 regulations, formal testing is not required to determine eligibility. *Letter to Williams*, 21 IDELR 73 (OCR 1994). If formal testing is pursued, the regulations require that the tests are properly selected and performed by trained personnel in the manner prescribed by the creator of each test. §104.35(b)(2).

**Question #14: What kinds of data and how much data are required for a Section 504 evaluation?**

Perhaps the best approach to determining what types of information and how much information is required is to focus on what a Section 504 evaluation should do. Section 504 evaluation precedes eligibility, and precedes the delivery of services. The §504 regulations require that the school evaluate the student “before taking any action with respect to the initial placement of the person in a regular or special education program and any subsequent significant change in placement.” §104.35(a). In other words, there are no initial services without an evaluation, nor changes in the services provided under §504 without a reevaluation. The 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 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.

**How much data is required?** The Section 504 Committee decides. “At the elementary and secondary education level, the amount of information required is determined by the multi-disciplinary committee gathered to evaluate the student.” *Detroit (MI) Public School*, 110 LRP 66005 (OCR 2010).

**Does every piece of data have the same value? No.** The Section 504 Committee determines the weight to be given to outside evaluations including medical diagnoses, and all data that it reviews.

“Question 26. How should a recipient school district handle an outside independent evaluation? Do all data brought to a multi-disciplinary committee need to be considered and given equal weight? The results of an outside independent evaluation may be one of many sources to consider. Multi-disciplinary committees must draw from a variety of sources in the evaluation process so that the possibility of error is minimized. All significant factors related to the subject student’s learning process must be considered. These sources and factors include aptitude and achievement tests, teacher recommendations, physical condition, social and cultural background, and adaptive behavior, among others. Information from all sources must be documented and considered by knowledgeable committee members. **The weight of the information is determined by the committee given the student’s individual circumstances.**” Revised Q&A, Question 26 (emphasis added).

**Question #15: Does the school need parental consent for an initial Section 504 evaluation?**

Yes, even though the regulations do not include the requirement. “OCR has determined, through policy clarification, that the Section 504 regulation... requires parental consent prior to the conduct of initial student evaluation procedures[.] Parental discretion involving student assessment/evaluation is an inherent part of the regulation and parental discretion is an appropriate and necessary policy component at the initial evaluation stage.” *Letter to Durham*, 27 IDELR 380 (OCR 1997). *See also, Williamson County (TN) School District*, 32 IDELR 261 (OCR 2000); Revised Q&A, Question 41. “OCR has accepted written consent as compliance” and reminds schools that IDEA and some state laws require written consent prior to evaluation. Revised Q&A, Question 42.

**Question #16: Is a medical diagnosis required for Section 504 eligibility?**

No medical diagnosis is required for §504 eligibility. “Section 504 does not require that a school district conduct a medical assessment of a student who has or is suspected of having ADHD unless the district determines it is necessary in order to determine if the student has a disability.” *Williamson County (TN) School District*, 32 IDELR 261 (OCR 2000). In fact, the regulations do not require medical evaluations for any disability to qualify under §504.

**For context, consider that a medical diagnosis isn’t required by federal law for OHI under special education.** *See also Letter to Parker*, 18 IDELR 965 (OCR 1992)(“If a public agency believes that a medical evaluation by a licensed physician is needed as part of the evaluation to determine whether a child suspected of having ADD meets the eligibility criteria of the OHI category, the school district must ensure that this evaluation is conducted at no cost to parents. However, if a school district believes that there are other effective methods of determining whether a child suspected of having ADD meets the eligibility requirements of the OHI category under Part B, then it would be permissible to use other qualified personnel to conduct the evaluation, so long as all of the protection in evaluation requirements of 34 CFR §§300.530-300.534 are met.”). Note that state law can require a medical evaluation for purposes of OHI. Texas law includes such a requirement.

**So what’s the rule?** The §504 regulations require no medical diagnosis for eligibility. 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 disability, but to identify disability so that the Committee may meet the needs of the child arising from the disability. Committees accomplish this by a combination of methods such as student observations, behavior checklists, screening instruments, 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.

**When does the school have a duty to pursue medical data?** *Seattle (WA) School District No. 1*, 54 IDELR 34 (OCR 2009). Although the parent informed the school that the student had been diagnosed with ADD, was taking ADD medication and suffered from a seizure disorder, the parent did not provide medical documentation to the school. The school requested medical information from the parent, but the parent did not provide the information and the school did not seek to speak directly to the doctor. No medical documentation was reviewed, but the SIT team determined the student was Section 504 eligible, and developed a plan that does not list the interventions he would receive (staff continued to implement SIT Team accommodations including a seat cushion, weighted vest, and touching his shoulder to encourage attention). The plan indicated that the parent was responsible for follow-up with “behavioral/neurological assessment and treatment.” OCR determined that the school’s evaluation of the student was inappropriate, and the resulting §504 plan was also inappropriate.

“District staff suspected the student had a disability affecting his behavior, which in turn affected his learning, from the beginning of the school year. While the district staff met several times and attempted numerous interventions and accommodations, the district did not conduct an evaluation of the student’s disability-related needs that included a consideration of a medical or health care specialist’s evaluation regarding the nature, extent, and severity of the student’s disability. **District staff consistently indicated that they believed they needed this type of medical information in order to determine an appropriate educational program and placement for the student.**” (emphasis added).

*A little commentary:* Once the §504 Committee determines that it needs medical data to evaluate the student for eligibility or to appropriately understand the impairment to create a plan, it must seek the necessary medical data to make the appropriate decisions. The §504 Committee, having concluded that such data is required, cannot then shift the burden to the parent to provide appropriate medical records or data. The school has the duty to evaluate, at no cost to parent. *See, for example, Rose Hill (KS) Public Schools, USD #394*, 46 IDELR 290, 106 LRP 35103 (OCR 2006) (“A parent may choose to use his or her own resources to obtain an evaluation or arrange with the district for reimbursement for evaluation costs; however, in no instance may a parent be required to arrange for and pay for such an evaluation”).

**Question #17: “Can a medical diagnosis suffice as an evaluation for the purpose of providing FAPE?”**

“No. A physician’s medical diagnosis may be considered among other sources in evaluating a student with an impairment or believed to have an impairment which substantially limits a major life activity. Other sources to be considered, along with the medical diagnosis, include aptitude and achievement tests, teacher recommendations, physical condition, social and cultural background, and adaptive behavior. As noted in FAQ 22, the Section 504 regulations require school districts to draw upon a variety of sources in interpreting evaluation data and making placement decisions.” Revised Q&A, Question 24.

*See, also Cle Elum-Roslyn (WA) School District No. 404*, 41 IDELR 271 (OCR 2004), where 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 #18: What are the Section 504 timelines for an evaluation?**

Look to your state’s IDEA rules for analogous timelines. In *Rockbridge County (VA) School Division, 57 IDLER 144* (OCR 2011), OCR provided the following guidance. “Section 504 does not contain a specific requirement for the period of time from a parental request or consent for an assessment to the actual assessment, but requires that an evaluation be conducted within a reasonable period of time.” A “reasonable time” is generally viewed as the time allowed by IDEA rules for similar events—i.e., how long does your state allow between consent and completion of the evaluation? *See also, Rose Hill (KS) Public Schools, USD #394, 46 IDELR 290, 106 LRP 35103* (OCR 2006). (While there is no timeline in the §504 regulations with respect to completion of an initial evaluation, “the various steps in the process, which includes the evaluation, must be completed in a reasonable period of time. Unreasonable delay may be discrimination against a student with a disability because it has the effect of denying the student meaningful access to educational services.” The District agreed to corrective action including a §504 evaluation and a determination of whether compensatory services were owed for the evaluation delay.)

**Question #19: What is the eligibility standard for Section 504?**

To be eligible under Section 504, a student must be both “qualified” (the student is within the age range in which services are provided to disabled and nondisabled students under state law, *See 34 CFR §104.3(l)(2)*), and “handicapped.” Pursuant to 34 CFR §104.3(j)(1), “Handicapped persons means any person who

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

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

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

**2. An expanded list of major life activities.** Prior to the ADA Amendments, the U.S. Department of Education’s regulations provided that the term “major life activities” included **“functions such as caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.”** 34 C.F.R. §104.3(j)(2)(ii). This list was not exhaustive. Congress added to the list in the ADAAA, identifying **eating, sleeping, standing, lifting, bending, reading, concentrating, thinking, and communicating** as additional major life activities. 42 U.S.C. §12102(2)(A). The list is not exhaustive, and other major life activities are possible such as “interacting with others” (a major life activity adopted by the EEOC, but curiously, not recognized by Congress).

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

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

“(i) Unable to perform a major life activity that the average person in the general population can perform; or

(ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.” 29 C.F.R. §1630.2(j)(1)(i)&(ii).

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. For those school districts following EEOC, a change in the substantial limitation definition would be required. **The more interesting question, of course, is what definition to use?** A mere limitation is insufficient (as the word “substantial” would be rendered meaningless) and a significant restriction is too high a requirement. The answer lies somewhere between these two points. Regardless, the standard is lower than prior to the ADAAA.

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

“The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures such as —

(I) medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aids and

cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies;  
(II) use of assistive technology;  
(III) reasonable accommodations or auxiliary aids or services; or  
(IV) learned behavioral or adaptive neurological modifications.”

This part of the amendments clearly means to reverse the reasoning of the *Sutton* line of cases, where the Supreme Court held that eligibility determinations must take into account the effect of treatment or other mitigating measures utilized by the person with an impairment. Under the 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.

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

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

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

#### **Question #20: How does the Section 504 Committee deal with temporary impairments?**

The question arises from the recognition that some impairments are so temporary that it makes little sense to worry about eligibility and services since the student will likely recover before the parent returns the request for consent for Section 504 evaluation. OCR provides the following guidance. “A temporary impairment does not constitute a disability for purposes of Section 504 unless its severity is such that it results in a substantial limitation of one or more major life activities for an extended period of time.” Revised Q&A, Question 34. Hence, impairments that do not last “an extended period of time” would not create eligibility, and presumably, would not trigger the school’s duty to evaluate. OCR continues “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.” Id.

**Question #21: Does the student have to fail in order to be Section 504-eligible?**

No. OCR provides the answer in *Cleveland County (NC) Schools*, 110 LRP 4643 (OCR 2009). During a parent-teacher meeting early in the student’s third-grade year, the parent informed the teacher that the student had been diagnosed with ADHD, and the parent requested a §504 evaluation. The guidance counselor reviewed the student’s grades (the lowest was a “C”), but looked at no other data and was unaware of the medical diagnosis that triggered the requested evaluation. The guidance counselor informed OCR that: “She decided that the student was ineligible to receive 504 services based on her review of his grades, which she considered to be good. She made the decision alone. The teacher then reported by letter to the parent that the student did not qualify for a Section 504 plan because he does not have ‘a major deficit problem in *most or all areas*.’” Further, the teacher wrote that the student would have to receive Ds and Fs in his classes “in order to prove his ADD [sic] was affecting his classroom learning.” OCR found that the district did not follow proper procedure in determining Section 504 eligibility. Note OCR’s commentary on the guidance counselor’s reliance on grades:

“OCR is concerned that the school’s apparent reliance on the student’s grades/educational performance alone in making its evaluation decision is inconsistent with the definition of ‘disability’ set forth in the Section 504 regulation, and with recent amendments to the ADA and Section 504 (which, notably, were not in effect at the time of the school’s evaluation decision). It appears that the school did not consider whether the student was substantially limited in a major life activity in determining whether the Student could be eligible to receive services under Section 504. Rather, the school decided that the student was ineligible to receive services under Section 504 simply because he did not earn failing grades (Ds and Fs) in his classes.”

*A little commentary:* The guidance counselor here articulated what many public school employees are thinking as they approach Section 504 eligibility. OCR has been faced with this issue many times before, as parents have complained about unwritten school policies that restrict Section 504 eligibility to students who are failing, but rarely has OCR found a school willing to admit such a policy or practice. To resolve the complaint, the district agreed to evaluate the student, and if found eligible, determine whether compensatory services are necessary. The school also agreed to train administrators on the campus, including guidance counselors on relevant Section 504 rules and procedures including the ADA. A final note, the case and its result do not turn on the student’s ADHD. Any impairment is subject to the same rules. Failing grades are not required for eligibility. *See also, 2012 DCL*, p. 7 (“grades alone are an insufficient basis upon which to determine whether a student has a disability. Moreover, they may not be the determinative factor in deciding whether a student with a disability needs special education or related aids or services. Grades are just one consideration and do not provide information on how much effort or how many outside resources are required for the student to achieve those grades.”).

**Question #22: Can the Section 504 student be receiving FAPE even if he’s not getting all A’s?**

Of course. A common misconception, especially among some parents, is that unless the Section 504-eligible student is making A’s, his Section 504 Plan is inadequate and a FAPE is not being provided. Section 504 does not guarantee a particular outcome or result, but instead, focuses on a level playing field. The Section 504 regulations provide

“For purposes of this part, aids, benefits, and services, to be equally effective, are not required to produce the identical result or level of achievement for handicapped and nonhandicapped persons, but must afford handicapped persons equal opportunity to obtain the same result, to gain the same benefit, or reach the same level of achievement, in the most integrated setting appropriate to the person’s needs.” §104.4(b)(2).

The Second Circuit explained the Section 504 duty in simple language. “The heart of J.D.’s opposition to the proposed accommodation is that it was not optimal. However, Section 504 does not require a public school district to provide students with disabilities with potential-maximizing education, only reasonable accommodations that give those students the same access to the benefits of a public education as all other students.” *J.D. v. Pawlet School District*, 224 F.3d. 60, 33 IDELR 34 (2<sup>nd</sup> Cir. 2000).

**Student effort matters.** Consider the facts in an OCR letter of finding from South Carolina. The parent complained to OCR that the student’s IEP had not been implemented causing the student to fail in keyboarding and Spanish class. The student had a learning disability. Classroom accommodations included extra time for written work, the chance to redo work deemed unacceptable by the teacher, and verbal clarification of instructions and assignments. The student failed keyboarding when he failed to complete, print, or turn in work. In the Spanish class (where no accommodations were required) the student nose-dived after the third 9-week session when he failed to make up three tests, a vocabulary poster and a major composition. The student left his final exam blank. When given the opportunity to redo papers or make corrections on assignments for a new grade (something the teacher did for all students), the student chose not to participate. OCR found no violation. “Student B’s failure to pass keyboarding and Spanish was not related to the District not implementing his IEP. The District tired [sic] to implement his IEP, however, the student would not attend make up or tutoring sessions and did not retake exams when the opportunity was available.” *Beaufort County (SC) School District*, 29 IDELR 75 (OCR 1998). See also, *Sequoia Union High School District*, 47 IDELR 209 (SEA CA. 2007)(“at all relevant times, the District offered Student the opportunity to retake any test on which she received a D or an F, but Student rarely chose to do so.” If she had low grades on tests, the Hearing Officer concluded, it was because she either didn’t re-take tests or she had low scores on the re-take. The student’s IEP was appropriate.).

**Question #23: Must the student have an impairment that substantially limits learning in order to be Section 504 eligible?**

No. 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 ADA 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.

#### **Question #24: Who are these “technically eligible” kids I’ve been hearing about?**

The “technically eligible” student is one who despite meeting Section 504 eligibility criteria (she has a physical or mental impairment that substantially limits one or more major life activities) does not need services from the school. Two types of technically eligible kids are possible: the student with an impairment in remission (who receives no services because the impairment does not create a need for services), and the student whose needs are met through mitigating measures that he or she controls (so services from the school are not required to meet the student’s needs). Here’s an OCR example of the mitigating “type” of technically eligible student.

“For example, suppose a student is diagnosed with severe asthma that is a disability because it substantially limits the major life activity of breathing and the function of the respiratory system. However, based on the evaluation, the student does not need any special education or related service as a result of the disability. This student fully participates in her school's regular physical education program and in extracurricular sports; she does not need help administering her medicine; and she does not require any modifications to the school’s policies, practices, or procedures. The school district is not obligated to provide the student with any additional services. The student is still a person with a disability, however, and therefore remains protected by the **general nondiscrimination provisions** of Section 504 and Title II.” 2012 DCL, p. 9, Question 11 (emphasis added).

**So what does the technically eligible student get from Section 504?** The technically eligible student would get no Section 504 Plan because there is no need for services, but what about procedural protections? Prior to the 2012 guidance letter, the author assumed that the technically eligible student would receive manifestation determination, procedural safeguards, periodic reevaluation or more often as needed, as well as the nondiscrimination protections of Section 504. Should need for a 504 plan develop, the Section 504 Committee would reconvene and develop an appropriate Section 504 services plan at that time. Note, however, that in OCR’s severe asthma example the student receives no services and remains protected by the *general nondiscrimination provisions* of Section 504 and the ADA. It would be helpful for OCR to identify precisely the rights due a technically eligible student.

#### **Question #25: Does OCR recognize a “disability per se” or an impairment that automatically results in eligibility under Section 504?**

No, in the Revised Q&A the ED took the position that there is no automatic eligibility.

“23. Are there any impairments that automatically mean that a student has a disability under Section 504? No. An impairment in and of itself is not a disability. The impairment must substantially limit one or more major life activities in order to be considered a disability under Section 504.” Revised Q&A,

Question #23.

The 2012 OCR guidance letter takes a step in the direction of “disability per se” recognizing that a handful of impairments will, in virtually every case, 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, Question 4 (emphasis added).

**Question #26: Does Section 504 require the school to provide \_\_\_\_\_ as part of the Section 504 Plan?**

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

“For the purpose of this subpart, the provision of an appropriate education is the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of Sec. 104.34, 104.35, and 104.36.” 34 CFR §104.33(b).

The particular services and/or accommodations a student will receive as part of his Section 504 Plan is a matter of individualized evaluation and decision-making. That is, the nature of the student’s disability and the student’s resulting need (to alleviate the impact of the disability on the student’s ability to access and benefit from the school’s programs and activities) determines what he gets. So in response to the common question, “does Section 504 require the school to provide \_\_\_\_\_ as part of the Section 504 Plan?” the obvious answer is “it depends on the evaluation data.”

**Question #27: Isn’t the school only required to provide “reasonable accommodations” to comply with its Section FAPE duty?**

It depends on whom you ask.... While the federal courts tend to apply the reasonable accommodation standard in K-12 Section 504 cases (*See, for example, J.D. v. Pawlet School District*, 224 F.3d. 60, 33 IDELR 34 (2d Cir. 2000), OCR has consistently maintained that “reasonable” is not the standard for K-12 FAPE. “OCR reviewed the district’s Section 504 FAPE policies, procedures and forms. OCR found two documents that indicate that the district utilizes legal standards that are inconsistent with Section 504 and Title II. The district’s Section 504 handbook at Page 14, limits FAPE to ‘reasonable accommodations. ... The ‘reasonable accommodations’ legal standard is not applicable to FAPE under Section 504.” *See, also Response to Zirkel*, 20 IDELR 134 (OCR 1993)(In response to a question on the subject, OCR concluded that reasonableness is not a factor in Section 504 FAPE on elementary and secondary campuses. “The key question in your letter is whether the OCR reads into the Section 504 regulatory requirement for a free

appropriate public education a ‘reasonable accommodation’ standard, or other similar limitation. The clear and unequivocal answer to that is no.”)

**Question #28: Does the parent have the right to consent to initial Section 504 placement?**

Interestingly, the Section 504 regulations are silent on the issue (as they are silent on the consent to evaluation issue). Nevertheless, the Revised Q&A provides the following question and answer, which seems to recognize such a right.

“43. What can a recipient school district do if a parent withholds consent for a student to secure services under Section 504 after a student is determined eligible for services? Section 504 neither prohibits nor requires a school district to initiate a due process hearing to override a parental refusal to consent with respect to the initial provision of special education and related services. Nonetheless, school districts should consider that IDEA no longer permits school districts to initiate a due process hearing to override a parental refusal to consent to the initial provision of services.” Revised Q&A, Question 43.

The question and answer clearly accept, without citation to authority, the idea of a parental right to consent prior to initial placement. Further, the answer appears to indicate that when a parent rejects services, the school has no obligation to file for due process to override, and probably shouldn’t even try based on the IDEA prohibition. Note that the parent’s refusal to consent to services would likely create another type of technically eligible student, as OCR does not provide that a refusal to consent means that the student is no longer Section 504 eligible. Discuss how to address this situation with your school attorney.

**On a related issue, is there a parent right to revoke consent for Section 504 services once the student has been served?** Again, despite the absence of authority in the Section 504 regulation, OCR seems to recognize such a right.

“32. A student is receiving services that the school district maintains are necessary under Section 504 in order to provide the student with an appropriate education. The student’s parent no longer wants the student to receive those services. If the parent wishes to withdraw the student from a Section 504 plan, what can the school district do to ensure continuation of services? The school district may initiate a Section 504 due process hearing to resolve the dispute if the district believes the student needs the services in order to receive an appropriate education.” Revised Q&A, Question 32.

Again, the question and answer clearly accept, without citation to authority, the idea of a parental right to revoke consent for continued Section 504 services. Such a revocation does not appear to change the student’s Section 504 eligibility status, making the student technically eligible after the revocation. In both consent for services situations, the school should carefully consider providing the parent notice of the potential impact of the decision to refuse or withdraw consent for Section 504 services. The school should discuss these consent issues with the school attorney.

**Question #29: Can a student ever be served *simultaneously* through both a Section 504 Plan and an IEP provided under special education?**

No. The source of confusion on this issue arises from the question of eligibility. All students who are eligible under IDEA are also eligible under Section 504. “In order to be eligible for services under the IDEA, a child must be found to have one or more of the 13 disability categories specified *and* must also be found to need special education. OCR can not conceive of any situation in which these children would not also be entitled to the protections extended by Section 504.” *Letter to Mentink*, 19 IDELR 1127 (OCR 1993). However, the fact that a student is eligible for Section 504 protections as well as IDEA protections does not mean that he can be served by a Section 504 plan, since that Section 504 plan is neither created nor maintained through the more stringent procedural protections of the IDEA. A school attempting to

comply with its IDEA duties to a child by offering a §504 Plan denies the IDEA-eligible student the procedural protections due under IDEA. The Revised Q&A addresses the issue quite simply.

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

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

**Question #30: Does §504 require the public school to provide FAPE to students whose parents have placed them in a private school or home school?**

OCR has said no. With regard to those students, once the District has offered the child a free appropriate public education, it has no duty to provide “educational services to students not enrolled in the public school program based on the personal choice of the parent or guardian.” *Letter to Veir*, 20 IDELR 864 (OCR 1993); *Hinds Co. School Board*, 20 IDELR 1175 (OCR 1993). *But see, Lower Merion School District v. Doe*, 48 IDELR 255 (Pa. S.Ct. 2007)(While the student’s education is provided by the private school, the public school is required to *facilitate* the student’s access to appropriate education.”).

**Question #31: How often are re-evaluations required?**

Districts are considered to be in compliance if they complete reevaluations “periodically” (104.35(d).), or at least every three years (as they do with IDEA students). Revised Q&A, Questions 30-31. There is no language to suggest a substantive difference between evaluation and reevaluation. Consequently, the activities are the same. Where the student’s impairment has not changed since the last evaluation, the Committee will likely spend most of its time at a reevaluation discussing current needs and whether changes to the §504 plan are required. **So, annual reviews are not required?** Correct, but they are best practice. As a practical matter, and to ensure some continuity in the child’s program, Districts should consider an annual review of the child to determine whether changes are necessary due to differences in the child’s schedule or changes in the child’s abilities and disabilities. Reevaluation should also occur when changes in the student’s disability or needs for services require a change to the §504 Plan. Finally, some disciplinary removals also prompt the need for an evaluation, typically referred to as a manifestation determination review or MDR.

**Question #32: What happens when parents who revoke consent for special education services demand pieces or all of the student’s now-rejected IEP delivered by way of a Section 504 Plan?**

The answer is uncertain. When asked, ED said (in the commentary to the December 2008 regulations implementing the revocation of consent rules) “these final regulations implement provisions of the IDEA only. They do not attempt to address any overlap between the protections and requirements of the IDEA, and those of Section 504 and the ADA.” 73 Fed. Reg. 73,013 (December 1, 2008). In the absence of a direct answer from ED, two schools of thought have developed on the issue.

One school of thought is that a student leaving special education due to revocation of consent should be referred and evaluated under §504, since students with disabilities that are not IDEA-eligible may nevertheless have eligibility under §504. “In order to be eligible for services under the IDEA, a child must be found to have one or more of the 13 disability categories specified *and* must also be found to need special education. OCR can not conceive of any situation in which these children would not also be entitled to the protections extended by Section 504.” *Letter to Mentink*, 19 IDELR 1127 (OCR 1993).

Another, more logical, school of thought is that rejection of a FAPE under IDEA is tantamount to rejection of FAPE under §504, and thus, schools would have no FAPE obligations under §504 to children whose parents revoked consent to IDEA services. *See, e.g., Letter to McKethan*, 25 IDELR 295, 296 (OCR 1996)(When parents reject the IEP developed under IDEA, they “would essentially be rejecting what would be offered under Section 504. The parent could not compel the district to develop an IEP under Section 504 as that effectively happened when the school followed IDEA requirements.”). This view is consistent with various pieces of the commentary indicating that when consent for special education is revoked, the student will be subject to regular discipline.

“When a parent revokes consent for special education and related services under Sec. 300.300(b), the parent has refused services as described in Sec. 300.534(c)(1)(ii); therefore, the public agency is not deemed to have knowledge that the child is a child with a disability and the child may be disciplined as a general education student and is not entitled to the Act's discipline protections.... We expect that parents will consider possible consequences of discipline procedures when making the decision to revoke consent for the provision of special education and related services.” 73 Fed. Reg. 73,012 (emphasis added).

Of course, if the student is eligible for FAPE under Section 504, that eligibility includes manifestation determination protection (and thus no regular discipline for the child). Why would ED warn of the loss of manifestation protection if every student for whom consent were revoked is entitled to manifestation determination due to §504 FAPE eligibility? ED must resolve the issue, having declined the opportunity to do so in December of 2008. Talk with your school attorney to determine how to respond to this issue.

### **III. The Section 504 Duty to Not Discriminate**

#### **Question #33: Do the Section 504 nondiscrimination protections extend beyond the walls of the classroom?**

Yes. Under §504, **students with disabilities must be provided an equal opportunity to participate in extracurricular and nonacademic activities.** The §504 regulations, at 34 C.F.R. §104.37(a), provide

“(1) A recipient to which this subpart applies shall provide non-academic and extracurricular services and activities in such manner as is necessary to afford handicapped students an equal opportunity for participation in such services and activities.

(2) Nonacademic and extracurricular services and activities may include counseling services, physical recreational athletics, transportation, health services, recreational activities, special interest groups or clubs sponsored by the recipients, referrals to agencies which provide assistance to handicapped persons, and employment of students, including both employment by the recipient and assistance in making available outside employment.”

#### **Question #34: Does that include P.E and athletics?**

Yes. The Section 504 regulations provide additional language addressing the nondiscrimination duty as it applies to P.E. and athletics. 34 C.F.R. §104.37(c) provides

*“Physical education and athletics.*

(1) In providing physical education courses and athletics and similar aid, benefits, or services to any of its students, a recipient to which this subpart applies may not discriminate on the basis of handicap. A recipient that offers physical education courses or that operates or sponsors interscholastic, club, or intramural athletics shall provide to qualified handicapped students an equal opportunity for participation.

(2) A recipient may offer to handicapped students physical education and athletic activities that are separate or different from those offered to nonhandicapped students only if separation or differentiation is consistent with the requirements of § 104.34 and only if no qualified handicapped student is denied the opportunity to compete for teams or to participate in courses that are not separate or different.”

**Question #35: Does a “reasonable accommodation” limitation apply to extracurricular and nonacademic services?**

Yes. Although OCR does not recognize the “reasonable” limitation on accommodations that affect a FAPE, it appears to recognize that accommodations to allow for participation in extracurricular and nonacademic activities are subject to the “reasonable” limitation. *See, for example, Crete-Monee (IL) School District 201-U*, 25 IDELR 986 (OCR 1996)(analyzed below). Thus, there is a reasonableness limit to the type and scope of accommodations that districts will be obligated to provide students to assure their equal opportunity to participate in extracurricular/nonacademic activities.

**When does an accommodation in the field of extracurricular or nonacademic activities become an unreasonable accommodation?** When it would require a “fundamental alteration in the nature of a program,” which in turn means “undue financial and administrative burdens.” *See* OCR Senior Staff Memoranda, “Guidance on the Application of Section 504 to Noneducational Programs of Recipients of Federal Financial Assistance,” 17 IDELR 1233, (OCR 1990). For example, a 17-year-old student with Down Syndrome alleged that the district failed to allow him to participate in extracurricular activities to the maximum possible extent. The student was demoted from manager to co-manager of the varsity basketball team, was not allowed on away games, and was not allowed to sit with the team at home games. The school district showed that the student required too much supervision on away games, could not use the phone or count change, could not keep a shot chart, was not alert enough to get out of the way of an incoming play on the bench, and could not perform most of the duties of a manager, resulting in the need to replace him with someone who could perform the required duties. Despite accommodations, the student was unable to perform the essential functions of the position. OCR found no violation of §504. *Crete-Monee (IL) School District 201-U*, 25 IDELR 986 (OCR 1996). In short, he could not perform the essential duties for which the position existed, and the district had no obligation to dramatically change the position to fit the student’s abilities. Instead, the district created a position more suited to the student’s ability level. OCR agreed that the varsity basketball manager had to be able to perform varsity basketball manager tasks.

**Question #36: How about some examples of issues arising from extracurricular activities?**

**Might a school be required to provide accommodations during try-outs?** Yes. *See, for example, Marion County (FL) Sch. Dist.*, 37 IDELR 13 (OCR 2001)(School was required to provide accommodations to a girl with unspecified disabilities who wanted to try out for cheerleading. The school was required to allow her to videotape the sponsor’s instructions and demonstrations.).

**Can a student with disability be excluded from the team due to lack of the required baseball skills?** Yes. Students with disabilities may try out for any extracurricular activity they desire, but they must generally meet the regular performance standards applied to all students. For example, a student with Tourette Syndrome was not subjected to discrimination when he was allowed to try out, albeit unsuccessfully, for a school baseball team. The parent was concerned that having supervised the in-school-suspension room, the baseball coach had knowledge of the student’s behaviors, and had excluded him from the team because of that knowledge. OCR found otherwise. The coach ranked the students on a variety of performance criteria: speed, balance, coordination, hand-eye coordination, sprint speed, lateral movement, and softness catching the ball. Out of fourteen students vying for two openings, the claimant finished eighth, and did not receive a position on the team. OCR found no violation since the “student was given an equal opportunity to compete for a position.” *Maryville City (TN) School District*, 25 IDELR 154 (OCR 1996).

**Are independent walking and dressing essential to swim team eligibility?** No. A student with an intellectual disability and a neuro-degenerative disorder wished to participate in the swimming team. OCR found that the district was required under §504 to provide accommodations to the student, in the form of an aide to assist with walking and dressing. Since those functions were not essential eligibility standards for participation in swimming, requiring the accommodations would not constitute a fundamental alteration of the swimming program. *Quaker Valley (PA) School District*, 352 EHLR 235 (OCR 1986). **What about staying in the pool during competition?** That's different. *S.S. v. Whitesboro Central School District*, 112 LRP 5880 (N.D.N.Y. 2012) (“There is no reasonable accommodation that a swim team coach could make for an athlete who is suddenly and sporadically afraid of the water and thus has to exit the pool during practices and competitions.... [O]ne of the essential requirements of swim team members is the ability to enter, and remain in, the pool when required by the coach during practices and competitions. To require otherwise would fundamentally change the nature of the swim team and thus be unreasonable.”)

**Can a parent be required to attend a field trip in order for his/her student to attend?** No. The student's attendance cannot be contingent on the parent's willingness to go on a field trip, as that would be a discriminatory prerequisite to field trip attendance *unless* every student were required to have a parent attend. Here, despite the parent's allegation, OCR finds that the school provided a properly trained employee to attend field trips with the student in case of need for assistance with the student's diabetes. No discrimination was found. *Oxford Hills (ME) School District*, 57 IDELR 83 (OCR 2011); *See also, Conejo Valley (CA) Unified School District*, 109 LRP 54727 (SEA CA 2009).

**Question #37: Do the Section 504 nondiscrimination protections extend to After-School & Summer Programs?**

Yes. When a recipient operates a program before or after school, or during the summer, and the program is not required as part of a student's §504 Plan or IEP, “the District's obligation is to respond to requests for accommodations to ensure that students with disabilities are afforded equal access to participate in the Program.” As a result, the parent has the duty to notify the District, in a timely manner, of the student's disability “and make requests for accommodations based on supporting evaluations/documentation. The District is required to evaluate the request and to determine whether such a request would afford the student with equal access to participate in the Program.” *Douglas (MA) Public Schools*, 42 IDELR 209 (OCR 2004).

**Question #38: Does the Section 504 nondiscrimination duty apply to folks other than students?**

Yes. Employees of the school are protected by ADA/Section 504, as well as parents and other folks in the community. *See, for example, Lake-Lehman (PA) School District*, 20 IDELR 546 (OCR 1993)(sign language interpreter was required at school board meetings to enable a member of the community with a hearing impairment an equal opportunity to understand what was being said, to ask questions and make comments); *Sherburne-Earlville (NY) Sch. Dist.*, 353 EHLR 353:245 (OCR 1989)(school required to provide a sign language interpreter to parents with hearing impairments to enable participation in a school activity designed for parents).

**Question #39: Section 504 requires schools to take action to prevent and remedy disability harassment. What is disability harassment and why is it addressed by Section 504?**

In a “Dear Colleague Letter” from 2000, the Office for Civil Rights together with OSERS provided the following definition.

“Disability harassment under Section 504 and Title II is intimidation or abusive behavior toward a student based on disability that creates a hostile environment by interfering with or denying a student's

participation in or receipt of benefits, services, or opportunities in the institution's program. Harassing conduct may take many forms, including verbal acts and name-calling, as well as nonverbal behavior, such as graphic and written statements, or conduct that is physically threatening, harmful, or humiliating." *Dear Colleague Letter*, 111 LRP 45106 (OCR/OSERS 2000)[hereinafter, "DCL 2000"] p.2.

**Hostile Environment: When harassment can violate rights under Section 504.** "When harassing conduct is sufficiently severe, persistent, or pervasive that it creates a hostile environment, it can violate a student's rights under the Section 504 and Title II regulations. A hostile environment may exist even if there are no tangible effects on the student where the harassment is serious enough to adversely affect the student's ability to participate in or benefit from the educational program." *Id.* It is also possible for the harassment to violate an eligible-student's right to FAPE under either Section 504 or IDEA. "Harassment of a student based on disability may decrease the student's ability to benefit from his or her education and amount to a violation of FAPE." *Id.*

#### **Question #40: What is the school's duty under §504 with respect to disability harassment?**

"Schools, school districts, colleges, and universities have a legal responsibility to prevent and respond to disability harassment. As a fundamental step, educational institutions must develop and disseminate an official policy statement prohibiting discrimination based on disability and must establish grievance procedures that can be used to address disability harassment.

A clear policy serves a preventive purpose by notifying students and staff that disability harassment is unacceptable, violates federal law, and will result in disciplinary action. **The responsibility to respond to disability harassment, when it does occur, includes taking prompt and effective action to end the harassment and prevent it from recurring** and, where appropriate, remedying the effects on the student who was harassed." *DCL 2000, p. 3 [emphasis added]*.

*See also, Willamina (Or) Sch. Dist., 30-J 27, IDELR 221 (OCR 1997)*("Under Section 504 of the Rehabilitation Act of 1973 and Title II of the Americans with Disabilities Act the district has the obligation to take all necessary steps to address and eliminate such harassment."). **The legal duty "to end the harassment" is not recognized by the federal courts. Instead, the courts find liability for harassment when the school is aware of the harassment and is deliberately indifferent.** *See, for example, Davis v. Monroe County Board of Education*, 119 S.Ct. 1661 (1999)(Setting the legal standard for Title IX violations that has now been adopted for disability harassment as well, the Court concluded that to avoid liability "the recipient must merely respond to known peer harassment in a manner that is not clearly unreasonable."). *Id., at 1674.* The difference in approach and liability standards still remains between the courts and OCR. OCR explains that the difference rests on monetary damages. "As you know, *Davis* was a case involving a claim for monetary damages; it was not a case involving federal administrative enforcement by a federal agency." *In re: Dear Colleague Letter of October 26, 2010*, 111 LRP 32298 (OCR 2011).

#### **Question #41: What is the school's ADA/Section 504 duty with respect to service animals?**

The general rule is that the school "shall modify its policies, practices, or procedures to permit use of a service animal by an individual with a disability." 28 C.F.R. §35.136(a). The 2010 ADA regulations and commentary issued by the Department of Justice provide schools a good framework for compliance with their service animal obligations under federal law.

#### **Question #42: What about state laws on service animals?**

Applicable state law must also be consulted to determine whether additional protection is provided for individuals using service animals generally, as well as for broader coverage for animals other than trained dogs or miniature horses, etc. *See, for example, Kalbfleisch v. Columbia Community School District #4*, 53 IDELR 57 (Ill Ct. App. 2009) *affirmed*, 53 IDELR 266 (Ill App. 2009)(Upholding an injunction ordering the dog be allowed on campus, the Illinois Circuit Court of Appeals found that the student “will suffer irreparable harm if separated from his service dog during the school day in that he will be deprived of the full use and benefit of his service dog, he will be deprived of a clearly ascertained right under Illinois law, and he will be denied full access to Parkview Elementary School.”); *New York State Division of Human Rights v. East Meadow Union Free School District*, 108 LRP 15211 (Human Rights Comm. ALJ 2008)(recognizing preferential treatment under New York law for service animals when in conflict with the interests of other persons with disabilities).

*A little commentary:* The lesson? Learn the ADA rules, and talk with your school attorney to determine whether state law provides any additional detail. Note further that states may (but are not required) to adopt the limitations recognized by the 2010 ADA service animal regulations. States may also choose to continue to recognize species in addition to dogs or miniature horses in state disability or civil rights laws governing service animals.

#### **IV. Section 504 & Discipline**

##### **Question #43: Why is discipline of students with disabilities different from discipline of nondisabled students?**

The essence of discrimination is excluding students from school because of disability. In its introduction to the IDEA (20 U.S.C. §1400, et. seq.), Congress made clear its desire that public schools serve children suffering from severe disabilities to ensure that they receive an appropriate public education. In its finding made at the time the original law was passed, Congress estimated that more than half of the roughly eight million children with disabilities in the United States [in 1976] were not receiving “appropriate educational services which would enable them to have full equality of opportunity.” **One million of the “children with disabilities in the United States are excluded entirely from the public school system and will not go through the educational process with their peers.”** 20 U.S.C. §1400(b)(4). And why were many of those students excluded from school? Because (1) they had disabilities affecting behavioral controls (emotional disturbances, ADHD, etc), (2) and they did things because of those disabilities affecting behavioral controls that violated student codes of conduct and were expelled. In essence, many were excluded from school for lengthy periods of time for having disabilities that affected behavioral controls.

**Manifestation determination is designed to identify those situations where removal will be discriminatory on the basis of disability.** As early as 1981, the Fifth Circuit held (under both IDEA and §504) that expulsion or other changes in placement are proper disciplinary tools for students with disabilities, if their behavior was unrelated to their disability. *S-I v. Turlington*, 635 F.2d 342 (5th Cir. 1981), *cert. denied*, 102 S.Ct. 566, 454 U.S. 1030. Since 1981, other federal courts that have encountered the issue are generally uniform in their support of the *Turlington* decision, at least insofar as it establishes that a disabled student’s placement may be changed for disciplinary reasons if the behavior is properly found to be unrelated to the disability.

##### **Question #44: Why don’t students with disabilities have to face the consequences of their behavior like nondisabled kids?**

This is a common question when an administrator is told that the behavior is related to disability and that no long-term removal or no additional short-term removal will be possible. The question reflects the

frustration of not being able to implement the desired sanction. The underlying point, however, is important. Appropriate consequences and response to misbehavior is necessary to discourage or prevent future recurrence. **That the preferred sanction is not available does not mean that consequences are avoided—it means that one option is off the table.** The key is to look at the available options and identify a response that, for this child, will have the desired effect on behavior. That’s where evaluation data and good Section 504 Committee discussion can help to identify appropriate positive behavioral supports, together with appropriate disciplinary sanctions.

**Question #45: Does the IDEA’s exception for in-school suspension days apply to Section 504 kids?**

In the commentary to the 2006 IDEA regulations, ED reasserts the position it took in the 1999 commentary with respect to use of in-school suspension. It states that “it has been the Department’s long term policy that an in-school suspension would not be considered a part of the days of suspension addressed in §300.530 as long as the child is afforded the opportunity to continue to appropriately participate in the general curriculum, continue to receive the services specified on the child’s IEP, and continue to participate with nondisabled children to the extent they would have in their current placement. This continues to be our policy.” Fed. Reg. 46,715. It appears that this exception applies to Section 504 students as well. *See, Fox (MO) C-6 School District*, 109 LRP 54751 (OCR 2009)(Letter of Finding suggests that the in-school suspension of a Section 504 student may not count toward the 10 cumulative days if the same conditions are met).

**Question #46: Isn’t there a unique Section 504 rule on current illegal drug or alcohol use?**

Yes there is. The procedural protections of manifestation determination do not apply to Section 504 students who are currently engaging in the illegal use of drugs or use of alcohol.

“For purposes of programs and activities providing educational services, local educational agencies may take disciplinary action pertaining to the use or possession of illegal drugs or alcohol against any handicapped student who currently is engaging in the illegal use of drugs or in the use of alcohol to the same extent that such disciplinary action is taken against nonhandicapped students. Furthermore, the due process procedures at 34 C.F.R. 104.36, Procedural Safeguard, shall not apply to such disciplinary action.” 29 U.S.C. §705 (20)(C)(iv) (*italics added*).

OCR has interpreted this phrase to mean that if a student is currently using illegal drugs or alcohol, and is to be disciplined by the school for use or possession, the student loses the procedural protections provided by §504, including the manifestation determination prior to a change in placement for disciplinary reasons even if the child has another disability (for example, ADHD) that could be related to the misconduct. *1991 OCR Policy Memo on ADA Amendments to §504* (OCR 1991). **Important note: this exception does not apply to students who are IDEA-eligible.** *See also Revised Q&A, Question 16* (“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.”) & *Question 17* (“Section 504 allows schools to take disciplinary action against students with disabilities using drugs or alcohol to the same extent as students without disabilities.”).

**V. The Office for Civil Rights or OCR**

**Question #47: What is OCR?**

OCR is the Office for Civil Rights, a part 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

**Question #48: 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.

**Question #49: Can you give me an example of “extraordinary circumstances?”**

In response to a complaint by parents of a student denied §504 eligibility despite providing evidence from the student’s doctor with respect to a peanut and tree nut allergy, OCR invoked the extraordinary circumstance language. While OCR determined that the school’s evaluation included data from a variety of sources as required, the §504 Committee was properly constituted, and the determination of ineligibility was made appropriately, OCR’s interest and involvement did not end at the procedural level. OCR reminded the school of the extraordinary circumstance exception, explaining that “the Department will place a high priority on investigating cases which may involve exclusion of a child from the education system or a pattern or practice of discriminatory placements or education.” In this case, substantive OCR analysis of the eligibility decision was required. **“When a school division’s decision that a student is ineligible for Section 504 services could result in the death or serious illness of the student, there is a basis for finding that the case involves “extraordinary circumstances” that support a substantive OCR review of the Division’s decision.”** *Gloucester County (VA) Public Schools*, 49 IDELR 21 (OCR 2007). Here, OCR’s substantive concerns arose from a non-eligibility decision when “the evidence from the Student’s doctor was not contradicted by any other evidence, and that neither the evaluation team members nor anyone with whom they consulted had qualifications approaching those of the Student’s doctor to diagnose the nature and severity of the Student’s PTAs and the likelihood, nature and severity of the harm that could result from the Division’s failure to find the Student eligible for Section 504 services.”

**Question #50: Assuming, hypothetically, that my district is in violation of Section 504, what sanctions might OCR impose?**

A review of OCR letters reveals a variety of sanctions or remedies imposed following a violation of Section 504. A school may be required to update or change policies practices or procedures, provide staff training on compliance areas or school policy to ensure understanding and consistent application, conduct a reevaluation using the proper legal standard, and where FAPE has been denied or neglected, provide the student with compensatory education. Submission of data demonstrating continued compliance may also be required over a given time period to ensure that the violation was in fact remedied.

Where a violation is found, OCR complaints and compliance reviews typically end with the district agreeing to the remedial steps. That may not always be the case...

“OCR initially attempts to bring the school district into voluntary compliance through negotiation of a corrective action agreement. If OCR is unable to achieve voluntary compliance, OCR will initiate enforcement action. OCR may: (1) initiate administrative proceedings to terminate Department of Education financial assistance to the recipient; or (2) refer the case to the Department of Justice for judicial proceedings.” Revised Q&A, Question 10.