

ADA & SECTION 504 UPDATE

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A note about these materials: These materials are not intended as a comprehensive review of all new case law on Section 504 and the ADA in public schools but as an identification and summary of some of the more interesting trends and issues arising from the last few years. For ease of reading, quotations will typically not include citations to the record or to other supporting authority. 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,” to the Equal Employment Opportunity Commission will read “EEOC,” and to the U.S. Department of Justice will read “DOJ.”

In addition to the ADA and Section 504 regulations from ED, EEOC and the DOJ 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*, 67 IDELR 189 (OCR March 27, 2009, last modified Oct. 16, 2015), is available on the OCR website at www.ed.gov/about/offices/list/ocr/504faq.html and is referenced herein as “Revised Q&A.” In January 2012, OCR released a guidance document on the 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 01/19/12) (hereinafter “2012 DCL”).

I. A few Section 504 issues “tapas” style to get started...

A. Eligibility by the numbers is a bad IDEA (and bad under 504 as well).

You might have read or at perhaps heard of the HOUSTON CHRONICLE’S story on the Texas’ limiting eligibility in special education by means of a cap. Here’s a few relevant pieces of the story.

“More than a dozen teachers and administrators from across Texas say they **delayed or denied special education to disabled students in order to stay below the benchmark** state officials set for the number of students who should get such services.

A Houston Chronicle investigation found the **Texas Education Agency’s enrollment benchmark for special education services of 8.5 percent has led to the systematic denial of services by school districts**. In the years since Texas’ 2004 implementation of the benchmark, the rate of students getting special education dropped from near the national average of 13 percent to the lowest in the country. It fell to 8.5 percent in 2015....

The TEA acknowledged in its statement that there is no research establishing 8.5 percent as ideal. Kathy Clayton, among the agency employees who set the benchmark, said **the percentage wasn’t based on research**. Instead, she said, it was driven by the statewide average special education enrollment. Reminded that the statewide average was nearly 12 percent at the time, Clayton said, ‘Well, it was set at a little bit of a reach. Any time you set a goal, you want to make it a bit of a reach because you’re trying to move the number.’

Teachers and administrators say many Texas school districts have interpreted the TEA monitoring protocol as a strict ban on serving more than 8.5 percent of students in special education.” *Report: Benchmark led to special education services denials*, HOUSTON CHRONICLE, Online edition, Sunday, September 11, 2016 (emphasis added).

A little commentary: While the issues involved are complex, one conclusion seems indisputable: when federal law requires eligibility decisions to be made individually for a student, **the imposition of an arbitrary statistical cap that has the power to deny eligibility to a student who is otherwise eligible, or the power to prevent the referral of a student who is suspected to be eligible raises serious compliance concerns.** Eligibility under both IDEA and Section 504 cannot be determined for a child on the basis of how many other students have been determined “disabled” in the school district. The eligibility of others, even many others, has no bearing on whether an evaluation of *this* child will meet the established eligibility criteria. As long as the school’s eligibility process is compliant, decisions will be made one student at a time as the law intended.

See also, U.S. Department of Education, Office for Civil Rights, *Students with ADHD and Section 504: A Resource Guide*, (July 2016). “While research has shown that boys are more likely than girls to have ever been diagnosed with ADHD (13.2 percent of boys were diagnosed with ADHD as opposed to 5.6 percent of girls), and that black and Hispanic children are less likely to be diagnosed with ADHD than white children, a school district could inappropriately ignore the incidence of ADHD in girls, or in students of color, if it makes assumptions about sex, race or ethnicity.... More importantly, in acting upon such assumptions, school districts put such students at risk of delayed referral for evaluation, which would violate Section 504.” p. 20.

B. Transfer students & Section 504.

OCR provides the following guidance in the Revised Q&A.

“38. What is the receiving school district's responsibility under Section 504 toward a student with a Section 504 plan who transfers from another district? If a student with a disability transfers to a district from another school district with a Section 504 plan, the receiving district should review the plan and supporting documentation. If a group of persons at the receiving school district, including persons knowledgeable about the meaning of the evaluation data and knowledgeable about the placement options determines that the plan is appropriate, the district is required to implement the plan. If the district determines that the plan is inappropriate, the district is to evaluate the student consistent with the Section 504 procedures at 34 C.F.R. 104.35 and determine which educational program is appropriate for the student. There is no Section 504 bar to the receiving school district honoring the previous IEP during the interim period. Information about IDEA requirements when a student transfers is available from the Office of Special Education and Rehabilitative Services at <http://idea.ed.gov/explore/view/p/%2Croot%2Cdynamic%2CQaCorner%2C3%2C>

A little commentary: The receiving school should assume that upon the transferring student’s arrival, the sending school knows the school better than the receiving school and that the sending school’s actions with respect to eligibility and placement were appropriate. Consequently, the receiving school should honor those decisions by implementing the 504 Plan, to the extent possible, until such time as the receiving school has sufficient knowledge and data to perform its own re-evaluation.

C. Transition & Section 504

One of the more interesting areas of §504 involves students who are transitioning to post-secondary life, and thus face a different world of legal protections than what they experienced in the K-12 public schools. While Section 504 and the ADA protect students in colleges and universities and some

employers, the rules are not as “friendly” as those for elementary and secondary students in public schools. The differences are important for K-12 school personnel to understand as they assist college- and career-bound §504 students. OCR noted the difference in Question 14 of the Revised Q&A.

“14. Does the nature of services to which a student is entitled under Section 504 differ by educational level?” Yes. Public elementary and secondary recipients are required to provide a free appropriate public education to qualified students with disabilities. Such an education consists of regular or special education and related aids and services designed to meet the individual educational needs of students with disabilities as adequately as the needs of students without disabilities are met.

At the postsecondary level, the recipient is required to provide students with appropriate academic adjustments and auxiliary aids and services that are necessary to afford an individual with a disability an equal opportunity to participate in a school’s program. Recipients are not required to make adjustments or provide aids or services that would result in a fundamental alteration of a recipient’s program or impose an undue burden.”

Not only are the services themselves different, but the process of determining eligibility and accommodation changes as well.

1. Colleges and Universities operate in a different legal world from K-12 public schools. There are significant differences between the legal requirements applicable to K-12 schools and those of higher education. At the risk of over-simplification, here’s a quick summary of the key differences.

No Duty to Child Find. Elementary and secondary schools have an affirmative duty to conduct a “child-find” at least annually, during which the school must make efforts to notify disabled students and their parents of the school district’s obligations to provide a free appropriate public education. 34 C.F.R §104.32. The requirement places the burden of identifying potentially eligible students squarely on the shoulders of the school district. Postsecondary institutions have no child find requirement. Like employers, they have no duty to provide accommodations until a student presents evidence to the school of his eligibility and the need for services.

Eligibility is harder to establish. In addition to being “disabled,” an individual must show that he or she is “qualified” in order to receive §504 protections. While the term “disabled” is no different after graduation, being “qualified” is a whole new ball game. For purposes of elementary and secondary education, “qualified” means the child has a legal right to education from the district (typically arising from state compulsory attendance laws) and is within the age range of students (both disabled and nondisabled) whom the school is legally obligated to serve. 34 C.F.R §104.3(k)(2). “With respect to postsecondary and vocational education services, a handicapped person who meets the academic and technical standards requisite to admission or participation in the recipient’s education program or activity” is qualified. 34 C.F.R §104.3(k)(3). Clear from this regulation is that institutions of higher education can screen out students (whether disabled or not) who do not meet other eligibility requirements.

For example, a college refused to admit an applicant with a severe hearing problem to its nursing program. The college claimed that modifying the program to allow her participation would essentially prevent her from realizing the benefits of the program. The Supreme Court agreed. In the postsecondary world, Section 504 “does not compel educational institutions to disregard the disabilities of handicapped individuals or to make substantial modifications in their program to allow disabled persons to participate.” *Southeastern Community College v. Davis*, 442 U.S. 397, 405 (1978). Even with a hearing aide, the student could not understand speech directed at her without lip-reading. Since in some cases, a nurse would have to instantly follow a doctor’s directions for medication or instruments, and since masks in many settings would prevent lip-reading, her disability prevents her from safely performing the functions of a nurse in the both the

training program and in the profession upon graduation. No accommodation solves that problem. She is simply not qualified.

No duty to evaluate. “A recipient that operates a public elementary or secondary education program 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 a regular or special education program and any subsequent significant change in placement.” 34 C.F.R. §104.35(a). The burden is on the public school (at its expense) to investigate areas of suspected disability and determine whether the student is eligible. *Letter to Mentink*, 19 IDELR 1127 (OCR 1993); *Letter to Parker*, 18 IDELR 965 (OCR 1992). No corresponding regulation exists for postsecondary education. Instead, students can be required to provide their own evidence of disability (at their own expense). *Halasz v. University of New England*, 816 F.Supp. 37 (D.Me. 1993). While the institution is allowed to determine the types of evaluation instruments it will accept as evidence of impairment (and the credentials of evaluators) the requirements cannot be so burdensome that they “preclude or unnecessarily discourage individuals with disabilities from establishing that they are entitled to reasonable accommodation.” *Guckenberger v. Boston University*, 957 F.Supp. 306, 26 IDELR 573, 587 (D.Me. 1997).

Reasonable Accommodation is the higher ed standard. Many educators mistakenly believe that the accommodations they create for students in elementary and secondary programs are limited to “reasonable” accommodations. In response to a question on the subject, OCR concluded that reasonableness is not a factor in §504 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 (FAPE) a ‘reasonable accommodation’ standard, or other similar limitation. The clear and unequivocal answer to that is no.” *Response to Zirkel*, 20 IDELR 134 (OCR 1993).

For employment situations and postsecondary students, the answer is different. In support of its conclusion, OCR notes that the §504 regulations on employment and postsecondary education include specific references to a reasonable accommodation standard while the elementary and secondary regulations do not. That omission was intentional because of the uniqueness of elementary and secondary education. **A critical factor identified by OCR is the voluntary nature of postsecondary study as opposed to the compulsory attendance rules that require students, both disabled and nondisabled, to attend elementary and secondary schools.** As a result of the higher education reasonable accommodation standard, “Academic requirements that the recipient can demonstrate are essential to the program of instruction being pursued by such student or to any directly related licensing requirement will not be regarded as discriminatory within the meaning of this section.” 34 C.F.R. §104.44(a). The appendix to the regulation makes clear that this requirement “does not obligate an institution to waive course or other academic requirements... It should be stressed that academic requirements that can be demonstrated by the recipient to be essential to its program of instruction or to particular degrees need not be changed.” Appendix A, part 31.

2. No formal transition process under §504.

Unlike the IDEA, §504 has no formalized transition process to mark the path between the K-12 world and the adult working or post-secondary world beyond. That is not to say that §504 students have no need for help and the Accommodation Plan has no role in that journey. On the contrary, as a nondiscrimination statute, §504’s expectation is that the transition needs of §504-eligible students are met as adequately as the transition needs of nondisabled peers. So, to the extent that the public school provides services to assist students in identifying career paths, finding and securing scholarships, applying for colleges and universities, etc., students eligible under §504 will have equal opportunity to access and benefit from those services. This requirement is highlighted by a regulation addressing

career path counseling, prohibiting counselors from counseling disabled students to “more restrictive career objectives that nondisabled students with similar interests and abilities.” §104.37(b).

Some common sense thoughts on transition. In the absence of specific requirements, and assuming that the school has satisfied the nondiscrimination duty as briefly articulated above, what else should a school be considering? The §504 rules change dramatically as the student moves to college (summarized above). The student moves from a somewhat sheltered environment where the adults have the duty to identify, assess and serve him to a harsher adult world where he must demonstrate to the satisfaction of the institution that he is disabled (the child “finds” himself and provides his own assessment), and must negotiate the services he needs (with or without help from the institution as disability services and support vary dramatically). That said, the efforts of K-12 schools to teach self-advocacy skills through the §504 process can be extremely helpful. For example, the §504 Committee must include a person with knowledge of the child. This requirement can certainly be met, as appropriate, with the attendance of the child. Not only will the student have the opportunity to speak on his or her own behalf to explain the impact of the impairment or preferences for a particular accommodation to assist current FAPE efforts, the skills learned through participation in the meeting can assist the student’s self-advocacy efforts later. The Committee might also consider having the student talk with one of his or her teachers following a §504 meeting to explain the disability and any changes to the required accommodations. Of course, the school’s efforts to encourage and teach students self-advocacy cannot transfer the school’s responsibility to provide FAPE to the student. The school remains responsible for the creation of an appropriate §504 plan and for its implementation.

What about the students going on to the workplace rather than college? While the materials have focused on the college-bound student, the nondiscrimination rules described (and transition steps urged above) apply with equal force to the student with vocational aspirations as well. To the extent that the school offers school-work programs, vocational classes, and other assistance to students to help them enter the work force after high school, 504 students should receive equal access to those activities. Similarly, efforts at self-advocacy will be beneficial to the student who must explain his disability to a boss, just as the skill is helpful when addressing a professor.

D. Special education students seeking additional services and devices through ADA/Section 504

Increasingly, students already served under IEPs are seeking additional services and devices under the equal access and effective communication requirements of ADA and Section 504. *See for example, K.M. v. Tustin Unified Sch. Dist.*, 61 IDELR 182 (9th Cir. 2013), *cert. denied*, 114 LRP 9909, 134 S. Ct. 1494 (2014) (*D.H.*); *cert. denied*, 114 LRP 9688, 134 S. Ct. 1493 (2014) (*K.M.*)(CART services requested under ADA effective communication regulations despite lower court finding that both Plaintiffs had received IDEA FAPE); *Fry v. Napoleon Cmty. Schs.*, 65 IDELR 221 (6th Cir. 2015), *petition for cert. granted* (U.S. 10/15/15)(IDEA-eligible Student’s request to attend with service animal viewed by court as an implicit attack on the IDEA FAPE).

It is the author’s opinion that in such cases, it is the IEP Team (or Texas ARDC) that should examine such requests under ADA/504 and determine how to proceed. After all, when a device or new service is added outside the IEP process, how is the school to ensure that ultimately it is still providing FAPE? When the service animal performs a function for the child that the student was learning as part of the IEP, what happens to FAPE? When the parent’s selection of CART services is imposed on an existing IEP, does the mix of services still work as intended? These are decisions that must be made by the IEP Team that has reviewed the data and knows the child, the child’s needs, and the things necessary for FAPE. These are decisions that should not, in the author’s opinion, be delegated to a 504 Committee or a 504 or ADA Coordinator.

What to do? Where Section 504 equal access or ADA Title II effective communication demands can result in services, accommodations, or access to devices without an IEP Team review, these demands

could implicate and frustrate IDEA FAPE. Consequently, when demands are made by IDEA-eligible students for services, accommodations, or devices pursuant to the ADA Title II or Section 504, consider involving the school attorney in the discussion to ensure that the IDEA FAPE is preserved and the other two laws (ADA/504) are respected as well.

Consider this basic framework in discussions between school and school attorney:

1. For the IDEA-eligible student, requests for services, devices, or notice of use of a service animal should go through the IEP Team first. Since the duty to consider effective communication is ongoing, the author believes that the IEP Team should add discussion of effective communication to annual reviews.
2. The IEP Team should determine:
 - a. Is it necessary for IDEA FAPE? If so, the IEP Team adds it to the IEP and provides it.
 - b. If not necessary for IDEA FAPE, is it required under Section 504 or ADA Title II?
 - (1) If required under Section 504 or ADA Title II, and the request does not negatively impact IDEA FAPE, provide the appropriate accommodation, changes to policy, and practice and procedure to make the request possible. Talk your school attorney about documenting the school's response.
 - (2) If required under Section 504 or ADA Title II, what does the school do if the request negatively impacts IDEA FAPE? Talk with your school attorney about the appropriate options. For example, should the school refuse the request on the basis of fundamental alteration? Should the school provide notice to the parent identifying areas where growth under the IEP will be prevented or limited due to the ADA choice? What other options might be available?

II. The Supreme Court & Continued Confusion over the IDEA-Section 504/ADA relationship

Section 504 and ADA protections extend to IDEA students because of the high hurdle for IDEA eligibility and the lower hurdle (relatively speaking) for Section 504/ADA eligibility. According to ED, students determined to be IDEA-eligible are also eligible 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).

A. IDEA rights and Section 504/ADA rights for the IDEA-eligible student.

By its own language, the IDEA provides that special education eligibility does not foreclose other rights the student may have under Section 504 or the ADA.

“Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990, title V of the Rehabilitation Act of 1973, or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (f) and (g) shall be exhausted to the same extent as would be required had the action been brought under this subchapter.” 20 U.S.C. §1415(l).

What rights (and limitations) do Section 504 and the ADA add to the mix? OCR provides a nice summary of the applicable rights as follows in response to a complaint in California. *Lodi (CA) Unified Sch. Dist.*, 116 LRP 21759 (OCR 2015) (emphasis added).

Prohibition on exclusion from participation and denial of benefit. “Under the Section 504 regulations ... no qualified individual with a disability shall, on the basis of disability, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives Federal financial assistance.”

Equally effective aids, benefits and services. “The Title II regulations ... create the same prohibition against disability-based discrimination by public entities A recipient public school district may not, directly or through contractual, licensing, or other arrangements, on the basis of disability, provide a qualified disabled individual with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others.

Under both the Section 504 regulations ... and the Title II regulations ... school districts, in providing any aid, benefit or service, may not deny a qualified person with a disability an opportunity to participate, afford a qualified person with a disability an opportunity to participate in or benefit from an aid, benefit or service that is not equal to that afforded to others, or provide a qualified person with a disability with an aid, benefit or service that is not as effective as that provided to others.”

Reasonable modifications in policy, practice, and procedure. “In addition, the Title II regulations ... require public entities to make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability **unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.**” (Emphasis added).

Title II Fundamental Alteration & Undue Burden. “Whether or not a particular modification or service would fundamentally alter the program or constitute an undue burden is determined on a case-by-case basis. **While cost may be considered, the fact that providing a service to a disabled individual would result in additional cost does not of itself constitute an undue burden on the program.**” (Emphasis added).

B. An IDEA IEP AND a Section 504 plan for the IDEA-eligible student?

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 the IDEA. OCR’s online Q&A addresses the issue quite simply.

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

In other words, a Section 504 plan will not satisfy the school’s duty to serve an IDEA-eligible student due an IEP. The IDEA student receives an IEP and is also entitled to the nondiscrimination protections of Section 504 and the ADA.

C. What about additional aids and services under ADA/504 for the IDEA student?

When a student has a FAPE already developed by way of an IEP, what happens when the parent wants more services or aids and looks to 504/the ADA? The author will address the question first in the context of nondiscrimination generally, and then with respect to specific ADA/504 provisions.

1. Once IDEA FAPE is provided via IEP, is there anything left for §504 and the ADA to do?

Given the substantial obligations placed on schools with respect to IDEA-eligible students, it's easy to think that there is nothing left for other laws to provide in terms of protections or services for a special education student's disability-related needs. An examination of the extent of the IDEA's IEP protections is required as the basis of this determination. The IDEA statute provides:

“(i) In general The term ‘individualized education program’ or ‘IEP’ means a written statement for each child with a disability that is developed, reviewed, and revised in accordance with this section and that includes—

(I) a statement of the child's present levels of academic achievement and functional performance, including—

(aa) how the child's disability affects the child's involvement and progress in the general education curriculum;

(bb) for preschool children, as appropriate, how the disability affects the child's participation in appropriate activities; and

(cc) for children with disabilities who take alternate assessments aligned to alternate achievement standards, a description of benchmarks or short-term objectives;

(II) a statement of measurable annual goals, including academic and functional goals, designed to—

(aa) meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; and

(bb) meet each of the child's other educational needs that result from the child's disability;

(III) a description of how the child's progress toward meeting the annual goals described in subclause (II) will be measured and when periodic reports on the progress the child is making toward meeting the annual goals (such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards) will be provided;

(IV) a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided for the child—

(aa) to advance appropriately toward attaining the annual goals;

(bb) to be involved in and make progress in the general education curriculum in accordance with subclause (I) and to participate in extracurricular and other nonacademic activities; and

(cc) to be educated and participate with other children with disabilities and nondisabled children in the activities described in this subparagraph;

(V) an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and in the activities described in subclause (IV)(cc);”

20 U.S.C. §1414(d)(1)(A)(i) (Emphasis added). The section continues beyond the quoted language to address access and participation in the state assessment, logistical specifics for the services and accommodations provided, and transition services.

A little commentary: Note that the required IEP elements contain a number of nondiscrimination and equal access-like provisions (highlighted in bold), from curricular access to participation in extracurricular and nonacademic activities. If the IEP is appropriate, note that some non-discrimination and equal access has already been addressed by the IDEA. Note further that the meaningful benefit/educational benefit standard focuses on the student with disability and her potential rather than on a comparison to nondisabled peers.

2. The impact of IDEA FAPE on Section 504 obligations. Interestingly, unlike the IDEA FAPE with its focus on meaningful or educational benefit (at least until the Supreme Court rules otherwise), the 504 FAPE is an expression of nondiscrimination — a comparison to how well the school meets the educational needs of the average nondisabled student. 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).

A little commentary: To most observers, a special education FAPE is far more valuable and results in far more intensive and individualized services than what is provided to the average nondisabled student to meet his educational needs. In short, services provided via the IDEA FAPE surpass in quality and impact those necessary to meet the educational needs of nondisabled students and, thus, surpass that required by simple nondiscrimination protection under 504.

ED on the overlap of rights. In the context of a somewhat different problem, ED had the chance to explain once and for all how it sees the rights of kids to 504 services when an IEP has been offered but rejected. The question would look something like this: 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 FEDERAL REGISTER, No. 231, December 1, 2008, p. 73,013. In the absence of a direct answer from ED, two schools of thought have developed on the issue.

If IDEA FAPE is rejected, 504 FAPE is required. 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). This position is roughly that underlying the *Kimble* decision in Colorado, requiring the 504 committee to offer FAPE under 504 even when the parent had already rejected the offer of a FAPE under the IDEA via an IEP. *Kimble v. Douglas County Sch. Dist.*, 60 IDELR 221 (D. Colo. 2013). Another approach makes more sense, especially in light of the 504 regulations.

The much maligned but really logical *Letter to McKethan*. The other school of thought is that rejection of FAPE under the 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, but the student would continue to receive 504’s nondiscrimination protection. *See, e.g., Letter to McKethan*, 25 IDELR 295, 296 (OCR 1996) (When parents reject the IEP developed under the 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.”). For purposes of overlap discussion, that would seem to indicate that an IEP satisfies the school’s Section 504 obligation to meet the educational needs of the student with disabilities as adequately as it meets the educational needs of nondisabled students. That position is plainly spelled out in the 504 regulations at 34 C.F.R. §104.33(b)(2): **“Implementation of an Individualized Education Program developed in accordance with the Education of the Handicapped Act is one means of meeting the standard established in paragraph (b)(1)(i) of this section [the Section 504 FAPE].”** (Bracketed material added by the author).

A little commentary: The author’s suggestion here is not that §504 and the ADA are completely satisfied when the IEP is appropriate, but that §504 and the ADA will have a very limited role in

such a situation since all the student's educational needs are deemed to have been met by the offered IEP per the regulation. Unless specific ADA or §504 regulations provide something beyond that available under the IDEA (think effective communication or service animal regulations under ADA), the range of services or accommodations available under 504/the ADA to a student with an appropriate IEP would seem rather narrow.

3. Simple decisions can impact IDEA FAPE. While IDEA students are simultaneously protected by the IDEA, Section 504, and the ADA, the intersection of those laws can result in conflicting duties. We begin with a couple of examples of simple choices (one by the parent, the other by the school) frustrating FAPE.

Choosing the wrong accommodation can impact FAPE. You can use a calculator, just not THAT calculator. *Sherman v. Mamaroneck Union Free Sch. Dist.*, 39 IDELR 181, 340 F.3d 87 (2d Cir. 2003). A student with a learning disability in math was allowed through his IEP to use a scientific/graphing calculator in class. The plan did not designate a particular model of calculator but provided that the student's teachers would determine the appropriate device. In the past, he had utilized a TI-82 that required the student to work through various steps before getting to an answer. The student's parent insisted that he be allowed to use a TI-92 that would provide the final answer but not require the student to work through the various steps (the factoring) necessary to get there. The student's teachers were convinced that he could learn to factor and that use of the TI-92 would be inappropriate because it would circumvent the learning process by doing too much of the work for him. According to his teachers, factoring is a significant component of the Math 3A curriculum. **"It is educationally beneficial for Grant to acquire new skills, well within his capability. It would, therefore, be inappropriate for him to retake tests using the TI-92 to factor." The TI-92 is inappropriate because "it would allow Grant to answer questions without demonstrating any understanding of the underlying mathematical concepts."** The court concluded that the student's failing grades in math did not mean that the assistive technology provided was inappropriate. Instead, the failing grades were the result of the student's lack of effort. "The IDEA does not require school districts to pass a student claiming a disability when the student is able, with less than the assistive aides requested, to succeed but nonetheless fails. If a school district simply provided that assistive device requested, even if unneeded, and awarded passing grades, it would in fact deny the appropriate educational benefits the IDEA requires." The student did not need the advanced calculator. In fact, a more advanced calculator was inappropriate on these facts.

Accommodations cannot replace direct instruction. *City of Chicago Sch. Dist. 299*, 62 IDELR 220 (SEA IL 2013). The student is IDEA-eligible, diagnosed with autism, multiple learning disabilities, and speech and language impairments. As a result, the student struggles in comprehension of basic math. For example, the student can only count up to the number five, cannot complete most addition and subtraction calculations above a basic level, has problems with visual and spatial reasoning, and is unable to complete basic math facts. **Further, his IEP reflects that his level of performance in basic math skills have not changed significantly since 2010.** In its post-hearing brief, the district took the position that **"Student will never be able to understand abstract mathematical concepts so that Student could understand the meaning behind basic math."**

The hearing officer was unconvinced, believing that the student's lack of progress was not due to lack of capability but poor choices in terms of teaching strategies and inappropriate accommodations. For example, during a summer of compensatory services provided by a special education teacher (required due to a settlement agreement with the parent arising from an earlier dispute), the student made progress in math.

"District Summer Teacher testified that by using some of the techniques in multi-sensory instruction, Student was able to make progress on basic math. Moreover, Student's IEPs suggest that 'hands on learning' is a way in which Student can learn. Hands on learning is a key component

of multi-sensory researched based instruction. Therefore, the undersigned makes an inference that Student can learn basic math concepts when provided with an appropriate methodology which meets Student's unique needs.”

These successes convinced the hearing officer that the student could make better progress on math goals, given appropriate services and in the absence of some inappropriate accommodation. The student’s current math teacher testified that the **“Student is currently not being taught basic math skills. Rather, Student is being provided the accommodations to make up for Student’s failure to understand basic math in an attempt to teach advance math skills.”** Translated: The student is using a calculator to handle basic math skills but does not understand the basic functions handled by the calculator.

A little commentary: While the case is in reverse posture to the concerns we’re discussing here (it’s the school substituting a calculator for specialized instruction rather than the parent), the case summary is provided to illustrate the negative impact to FAPE that is possible if devices or accommodations are added without concern for the impact on the IDEA FAPE.

4. ADA and Section 504 rights exercised by parents can conflict with the IDEA FAPE. As the two calculator cases illustrated, an improper use of an otherwise worthwhile accommodation can implicate FAPE. When that accommodation decision is made for an IDEA-eligible student outside of the IEP team process, similar conflict is possible. When parents make decisions with respect to whether to send a service animal to school with the student or whether to request a device or service under Title II effective communication regulations (discussed below), the choice can interfere with the IDEA FAPE. A couple of service animal cases and an OCR letter introduce the problem.

A service animal and potential conflict with the IDEA IEP. *E.F. v. Napoleon Cmty. Schs.*, 62 IDELR 201 (E.D. Mich. 2014). E.F. is an 8-year-old IDEA-eligible student, born with spastic quadriplegic cerebral palsy. Her pediatrician wrote a prescription for a service animal, as she requires physical assistance in daily activities. Her service animal is named “Wonder.” **Wonder is a Goldendoodle, trained to retrieve dropped items, help her balance when using a walker, open/close doors, turn on/off lights, transfer to and from toilet, etc. Wonder also “enables [EF] to develop independence and confidence and helps her bridge social barriers.”** Parents allege that Wonder is specially trained and certified, although Department of Justice service animal regulations do not require formal training or certification for service animals. Both before and after a trial period during which Wonder performed without any apparent problem, the school refused to allow Wonder to attend school with the student.

What is exhaustion and why does it matter? The parents sued, alleging violations of Section 504, the ADA, and a Michigan civil rights law protecting people with disabilities. They sought a declaratory judgment, monetary damages, and attorneys’ fees. Defendants argued that the parents failed to exhaust their administrative remedies by not first filing for IDEA due process with the Michigan ED. **“States are given the power to place themselves in compliance with the law, and the incentive to develop a regular system for fairly resolving conflicts under the [IDEA]. Federal courts — generalists with no experience in the educational needs of handicapped students — are given the benefit of expert fact-finding by a state agency devoted to this very purpose.”**

But the parents didn’t argue that the school failed to provide FAPE under the IDEA. Instead, they argued that the school failed to meet its ADA/Section 504 burden to accommodate a student with a disability in a place of public accommodation (the school). The court looked past the parent’s legal position, to the implications of the parents’ demand on the student’s IEP.

“The Court concludes that IDEA’s exhaustion requirement was triggered here. **Despite the light in which Plaintiffs cast their position, the Court fails to see how Wonder’s presence would not — at least partially — implicate issues relating to EF’s IEP** It appears conceivable that E.F.’s IEP would undergo some modification, for example, to accommodate the ‘concerns of allergic students and teachers and to diminish the distractions [Wonder’s] presence would engender.’ Moreover, having Wonder accompany EF to recess, lunch, the computer lab and the library would likewise require changes to the IEP. Again, by way of example, the IEP would need to include plans for handling Wonder on the playground or in the lunchroom. Defendants (i.e., the school and school district) would also have to make certain practical arrangements — such as developing a plan for Wonder’s care, including supervision, feeding, and toileting — so that the school continued to maintain functionality. All of these things undoubtedly implicate EF’s IEP and would be best dealt with through the administrative process.” (Emphasis added).

The school’s motion to dismiss for failure to exhaust administrative remedies was granted.

A little commentary: While the court understands the potential for conflict with the IEP, the examples cited seem extremely generic — applicable to any student with an IEP. **The author wonders what goals and objectives were in place for the student with respect to independent living, mobility, self-care etc., and how Wonder’s service to the child would interfere with the student making progress on those goals.** It does not appear that the district raised the issue or argued any such conflict, leaving the court to speculate. A similar dynamic is sometimes created where the student is not allowed to use skills learned at school. *See, for example, Montgomery County Pub. Schs.*, 23 IDELR 852 (SEA MD 1996) (“The evidence is strongly suggestive that the young adult-soon-to-be in this case may be engaging (not unexpectedly) in a form of ‘learned helplessness’ while in the home. Skills or behaviors that he independently performs at school or in the work setting are apparently being provided by [] in the home. Such actions on the part of the mother or other family members only serve to exacerbate dependencies and prolong the road to independence.”).

The 6th Circuit affirmed the *Napoleon* decision. *Fry v. Napoleon Cmty. Schs.*, 65 IDELR 221 (6th Cir. 2015), *cert. granted*, 116 LRP 27666, 136 S. Ct. 2540 (2016). The 6th Circuit agreed with the District Court approach on exhaustion. The rationale embraced by the court is that regardless of the parents’ argument that IDEA FAPE was not at issue, their insistence that the service animal be allowed at school evidences their belief that the school’s services are inadequate and, thus, an inference of denial of FAPE is inherent in the demand.

“The exhaustion requirement applies to the Frys’ suit because the suit turns on the same questions that would have determined the outcome of IDEA procedures, had they been used to resolve the dispute. **The Frys allege in effect that E.F.’s school’s decision regarding whether her service animal would be permitted at school denied her a free appropriate public education.** In particular, they allege explicitly that the school hindered E.F. from learning how to work independently with Wonder, and implicitly that Wonder’s absence hurt her sense of independence and social confidence at school. The suit depends on factual questions that the IDEA requires IEP team members and other participants in IDEA procedures to consider. This is thus the sort of dispute Congress, in enacting the IDEA, decided was best addressed at the first instance by local experts, educators, and parents ...

The primary harms of not permitting Wonder to attend school with E.F. — inhibiting the development of E.F.’s bond with the dog and, perhaps, hurting her confidence and social experience at school — fall under the scope of factors considered under IDEA procedures. Developing a bond with Wonder that allows E.F. to function more independently outside the classroom is an educational goal, just as learning to read braille or learning to operate an automated wheelchair would be. The goal falls squarely under the IDEA’s purpose of ‘ensur[ing] that children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further

education, employment, and independent living.’ 20 U.S.C. § 1400(d)(1)(A). **Thus developing a working relationship with a service dog should have been one of the ‘educational needs that result from the child’s disability’ used to set goals in E.F.’s IEP.** *Id.* § 1414(d)(1)(A)(i)(II). ‘Educational needs’ is not limited to learning within a standard curriculum; the statute instructs the IEP team to take into account E.F.’s ‘academic, developmental, and functional needs,’ which means that the IEP should include what a student actually needs to learn in order to function effectively. *Id.* § 1414(d)(3)(A). ‘A request for a service dog to be permitted to escort a disabled student at school as an “independent life tool” is hence not entirely beyond the bounds of the IDEA’s educational scheme.’ *Cave v. E. Meadow Union Free Sch. Dist.*, 514 F.3d 240, 248 (2d Cir. 2008). The Frys’ stated argument for why E.F. needed Wonder at school would have provided justification under the IDEA for allowing Wonder to accompany E.F.”

A little commentary: The dissent took aim at the speculative nature of the court’s concerns. How could the court determine, for example, that the IEP was implicated? “The Frys’ complaint was dismissed on the pleadings before any discovery could occur. Moreover, in terms of a school-age child, virtually any aspect of growth and development could be said to ‘partially implicate’ issues relating to education. If flimsy, however, the district court’s ‘implication’ analysis was at least a test. On appeal, the majority offers no useful yardstick at all.” In the author’s opinion, the majority’s recognition of the potential for conflict with the IEP is appropriate (see previous commentary), but so is the dissent’s concern with the overbroad result. In the author’s mind, the question to be asked here should be “does this service animal interfere with the provision of FAPE for this student?” — a fact question that should be answered in the first instance by the student’s IEP team.

The Supreme Court reversed and remanded *Fry v. Napoleon*. *Fry v. Napoleon Community Schools*, 137 S.Ct. 743, 69 IDELR 116 (2017). At the Supreme Court, the focus was on the rights of IDEA students under Section 504/ADA and whether those rights can be pursued without first going through IDEA due process. The case focuses on the impact of the language added to IDEA in 2004 (previously provided on the bottom of page 1). The IDEA language does two things.

“The first half... reaffirm[s] the viability of federal statutes like the ADA or Rehabilitation Act ‘as separate vehicles,’ no less integral than the IDEA, ‘for ensuring the rights of handicapped children.’ According to that opening phrase, the IDEA does not prevent a plaintiff from asserting claims under such laws even if, as in *Smith* itself, those claims allege the denial of an appropriate public education (much as an IDEA claim would). But the second half of § 1415(l) ...imposes a limit on that ‘anything goes’ regime, in the form of an exhaustion provision. **According to that closing phrase, a plaintiff bringing suit under the ADA, the Rehabilitation Act, or similar laws must in certain circumstances—that is, when ‘seeking relief that is also available under’ the IDEA—first exhaust the IDEA’s administrative procedures. The reach of that requirement is the issue in this case.**” (Emphasis added).

Both the district court and court of appeals struggled with the connection between the parents’ concerns over access and socialization that were addressed by the service animal and the student’s right to FAPE as an IDEA-eligible student. “Because the harms to E.F. were generally ‘educational’—most notably, the court reasoned, because ‘Wonder’s absence hurt her sense of independence and social confidence at school’—the Frys had to exhaust the IDEA’s procedures. Daughtrey dissented, emphasizing that in bringing their Title II and § 504 claims, the Frys ‘did not allege the denial of a FAPE’ or ‘seek to modify [E.F.’s] IEP in any way.’”

A little commentary: While the court of appeals dissent indicates that the parents did not seek to modify the IEP in any way, there is no serious discussion of what the IEP included or the impact of the service animal on goals and objectives or overlapping services. Interestingly, the Supreme Court includes this snippet. “Under E.F.’s existing IEP, a human aide provided E.F. with one-on-one support throughout the day; that two-legged assistance, the school officials thought, rendered Wonder superfluous. In the words of one administrator, Wonder should be barred from Ezra Eby because all

of E.F.'s 'physical and academic needs [were] being met through the services/programs/accommodations' that the school had already agreed to." Put differently, if the equal access service animal goes to school, some IEP-required services are no longer required. More on this below.

The Supreme Court explains how exhaustion should work. Looking at the relief available under the IDEA, the Court noted "the primacy of a FAPE in the statutory scheme." That is, FAPE is central.

"The IDEA's administrative procedures test whether a school has met that obligation—and so center on the Act's FAPE requirement. As noted earlier, any decision by a hearing officer on a request for substantive relief 'shall' be based on a determination of whether the child received a free appropriate public education.... **For that reason, § 1415(l)'s exhaustion rule hinges on whether a lawsuit seeks relief for the denial of a free appropriate public education.** If a lawsuit charges such a denial, the plaintiff cannot escape § 1415(l) merely by bringing her suit under a statute other than the IDEA—as when, for example, the plaintiffs in *Smith* claimed that a school's failure to provide a FAPE also violated the Rehabilitation Act." (Emphasis added).

The focus should not be on the words of the complaint (since artful pleading could simply omit references to FAPE or the IEP). Instead, the court would be looking at the crux or the gravamen of the complaint. The IDEA "requires exhaustion when the gravamen of a complaint seeks redress for a school's failure to provide a FAPE, even if not phrased or framed in precisely that way." **So how does one determine the gravamen of the complaint?** The Supreme Court provided the following test.

"One clue to whether the gravamen of a complaint against a school concerns the denial of a FAPE, or instead addresses disability-based discrimination, can come from asking **a pair of hypothetical questions. First, could the plaintiff have brought essentially the same claim if the alleged conduct had occurred at a public facility that was not a school— say, a public theater or library? And second, could an adult at the school— say, an employee or visitor— have pressed essentially the same grievance?** When the answer to those questions is yes, a complaint that does not expressly allege the denial of a FAPE is also unlikely to be truly about that subject; after all, in those other situations there is no FAPE obligation and yet the same basic suit could go forward. But when the answer is no, then the complaint probably does concern a FAPE, even if it does not explicitly say so; for the FAPE requirement is all that explains why only a child in the school setting (not an adult in that setting or a child in some other) has a viable claim.

Take two contrasting examples. **Suppose first that a wheelchair-bound child sues his school for discrimination under Title II (again, without mentioning the denial of a FAPE) because the building lacks access ramps.** In some sense, that architectural feature has educational consequences, and a different lawsuit might have alleged that it violates the IDEA: After all, if the child cannot get inside the school, he cannot receive instruction there; and if he must be carried inside, he may not achieve the sense of independence conducive to academic (or later to real-world) success. But is the denial of a FAPE really the gravamen of the plaintiff's Title II complaint? Consider that the child could file the same basic complaint if a municipal library or theater had no ramps. And similarly, an employee or visitor could bring a mostly identical complaint against the school. That the claim can stay the same in those alternative scenarios suggests that its essence is equality of access to public facilities, not adequacy of special education. (describing OCR's use of a similar example). And so § 1415(l) does not require exhaustion.

But suppose next that a student with a learning disability sues his school under Title II for failing to provide remedial tutoring in mathematics. That suit, too, might be cast as one for disability-based discrimination, grounded on the school's refusal to make a reasonable accommodation; the complaint might make no reference at all to a FAPE or an IEP. **But can anyone imagine the student making the same claim against a public theater or library? Or, similarly, imagine an adult visitor or employee suing the school to obtain a math tutorial?** The

difficulty of transplanting the complaint to those other contexts suggests that its essence— even though not its wording— is the provision of a FAPE, thus bringing § 1415(l) into play.

A further sign that the gravamen of a suit is the denial of a FAPE can emerge from the history of the proceedings. **In particular, a court may consider that a plaintiff has previously invoked the IDEA’s formal procedures to handle the dispute— thus starting to exhaust the Act’s remedies before switching midstream.** Recall that a parent dissatisfied with her child’s education initiates those administrative procedures by filing a complaint, which triggers a preliminary meeting (or possibly mediation) and then a due process hearing. A plaintiff’s initial choice to pursue that process may suggest that she is indeed seeking relief for the denial of a FAPE— with the shift to judicial proceedings prior to full exhaustion reflecting only strategic calculations about how to maximize the prospects of such a remedy. Whether that is so depends on the facts; a court may conclude, for example, that the move to a courtroom came from a late-acquired awareness that the school had fulfilled its FAPE obligation and that the grievance involves something else entirely. **But prior pursuit of the IDEA’s administrative remedies will often provide strong evidence that the substance of a plaintiff’s claim concerns the denial of a FAPE, even if the complaint never explicitly uses that term.” (Emphasis added).**

The judgment of the Court of Appeals is vacated and the case is remanded to apply the appropriate test for exhaustion.

A little commentary: While the Supreme Court focused on the central role of FAPE, it neglected the fact that it is the IEP that documents and implements that FAPE. The IEP is the delivery device for FAPE. That IEP includes not only FAPE but the nondiscrimination features of the IDEA with respect to supplementary aides and services to provide equal opportunity to participate in extracurricular and nonacademic activities, as well as the manifestation determination requirement (also arising from 504’s nondiscrimination focus. Said the court: “A school’s conduct toward such a child—say, some refusal to make an accommodation—might injure her in ways unrelated to a FAPE, which are addressed in statutes other than the IDEA. A complaint seeking redress for those other harms, independent of any FAPE denial, is not subject to § 1415(l)’s exhaustion rule because, once again, the only ‘relief’ the IDEA makes ‘available’ is relief for the denial of a FAPE.”

Describing again the idea of the crux or gravamen of the complaint driving the exhaustion requirement, the Supreme Court seeks to distinguish the laws at issue.

“In addressing whether a complaint fits that description, a court should attend to the diverse means and ends of the statutes covering persons with disabilities—the IDEA on the one hand, the ADA and Rehabilitation Act (most notably) on the other. **The IDEA, of course, protects only ‘children’ (well, really, adolescents too) and concerns only their schooling.** And as earlier noted, the statute’s goal is to provide each child with meaningful access to education by offering individualized instruction and related services appropriate to her ‘unique needs.’

By contrast, Title II of the ADA and § 504 of the Rehabilitation Act cover people with disabilities of all ages, and do so both inside and outside schools. And those statutes aim to root out disability-based discrimination, enabling each covered person (sometimes by means of reasonable accommodations) to participate equally to all others in public facilities and federally funded programs.

In short, the IDEA guarantees individually tailored educational services, while Title II and § 504 promise nondiscriminatory access to public institutions. That is not to deny some overlap in coverage: The same conduct might violate all three statutes—which is why, as in *Smith*, a plaintiff might seek relief for the denial of a FAPE under Title II and § 504 as well as the IDEA. But still, the statutory differences just discussed mean that a complaint brought under Title II and § 504

might instead seek relief for simple discrimination, irrespective of the IDEA’s FAPE obligation.” (Paragraph breaks added by the author for clarity, emphasis added).

Unfortunately, while accepting that the laws may overlap, the Supreme Court did not address the issue of a potential conflict between equal access rights and IDEA FAPE. Even on the scant facts of *Napoleon*, it was clear that the service animal would perform functions previously provided by the aide. If the service animal or equal access choice replaces an IEP service, doesn’t that mean that the crux of the complaint is the parents’ desire that FAPE needs to be provided in a different way, and that exhaustion should be required? Doesn’t that mean that the IEP (the vehicle for implementation of the FAPE) is being re-written by the ADA/504 rights of the parents without the rest of the IEP Team?

An interesting concurrence by Justices Alito and Thomas points to the problems with the two-part test. First, the test only works if there is no overlap between the relief available under the IDEA and 504/ADA. Justice Alito writes that once the Court indicates that the same conduct might violate all three laws “And since these clues work only in the absence of overlap, I would not suggest them.” Continued Justice Alito:

“The Court provides another false clue by suggesting that lower courts take into account whether parents, before filing suit under the ADA or the Rehabilitation Act, began to pursue but then abandoned the IDEA’s formal procedures. This clue also seems to me to be ill-advised. It is easy to imagine circumstances under which parents might start down the IDEA road and then change course and file an action under the ADA or the Rehabilitation Act that seeks relief that the IDEA cannot provide. The parents might be advised by their attorney that the relief they were seeking under the IDEA is not available under that law but is available under another. Or the parents might change their minds about the relief that they want, give up on the relief that the IDEA can provide, and turn to another statute.

Although the Court provides these clues for the purpose of assisting the lower courts, I am afraid that they may have the opposite effect. They are likely to confuse and lead courts astray.”

The author agrees. Stay tuned....

III. “The Physical or Mental Impairment”

Background on the physical and mental impairment. 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 ADA Amendments Act (hereinafter, “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. “The Amendments Act does not alter these three elements of the definition of disability in the ADA and Section 504. But it significantly changes how the term ‘disability’ is to be interpreted.” 2012 DCL, p. 4.

Unlike the IDEA, §504 does not list a few impairments (each with strict eligibility criteria) that result in eligibility. Instead, a broad formula is used to include many more impairments. Specific physical or mental impairments are not listed in the regulations, “because of the difficulty of ensuring the comprehensiveness of any such list.” Appendix A to the §504 Regulations [hereinafter “Appendix

A”], p. 419. The very narrow language used in the eligibility requirements under the IDEA reflects the fact that proportionally fewer children should qualify with the severe types of IDEA disabilities than the more general, less-severe disabilities that will qualify under §504. By contrast, the Section 504 regulations define the physical or mental impairment as follows:

“(A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine; or
(B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.” 34 C.F.R. §104.3(j)(2)

Does OCR recognize a “disability per se” or an impairment that automatically results in eligibility under Section 504? No, in the Revised Q&A ED took the position that there is no automatic eligibility. “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 took 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).

A presumption of eligibility follows some ADHD diagnoses. In what appears to be an extension of the “disability per se” discussion above, OCR wrote “a diagnosis of ADHD is evidence that a student may have a disability. OCR will presume, unless there is evidence to the contrary, that a student with a diagnosis of ADHD is substantially limited in one or more major life activities.” It appears that not every diagnosis will create that presumption. OCR provides this bit of clarifying detail. “Diagnosis of ADHD requires a comprehensive evaluation by a licensed clinician, such as a pediatrician, psychologist, or psychiatrist with expertise in ADHD.” National Institutes of Mental Health (NIMH publication), Attention Deficit Hyperactivity Disorder (Revised March 2016).” U.S. Department of Education, Office for Civil Rights, *Students with ADHD and Section 504: A Resource Guide*, 68 IDELR 52 (OCR 2016), p. 10, fn. 37.

A little commentary: Unless the diagnosis is based on a “comprehensive evaluation” and conducted by a licensed clinician with expertise in ADHD, the presumption does not apply. More on the issue of “evidence to the contrary” below in the discussion on substantial limitation.

Recall the main purpose of the ADAAA was to expand eligibility. Congress wrote, “**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.**” ADA Amendments Act of 2008, Section 2(b)(5)(2008). In short, Congress wants courts looking less at eligibility and focusing more intently on whether required accommodations are provided 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.**” OCR provided this additional explanation. “The Amendments Act does not alter the school district’s

substantive obligations under Section 504 and Title II. Rather... it amends the ADA and Section 504 to broaden the potential class of persons with disabilities protected by the statutes.” 2012 DCL, p. 4.

B. Exclusionary Language

While the “impairment” language is broad, eligibility depends on an underlying impairment. Throughout the regulations there is repeated concern that great care be taken so that students are not misclassified. Of particular concern were students with no disabilities who because of other factors (such as poor English skills or lack of previous educational opportunity) may be incorrectly classified as disabled under §504.

“The definition of handicapped person also includes specific limitations on what persons are classified as handicapped under the regulation. The first of the three parts of the definition specifies that only physical and mental handicaps are included. **Thus, environmental, cultural, and economic disadvantage are not in themselves covered, nor are prison records, age, or homosexuality.** Of course, if a person who has any of these characteristics also has a physical or mental handicap, the person is included within the definition of handicapped person.” Appendix A, p. 419 (emphasis added).

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

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

“It is important to distinguish between conditions that are impairments and physical, psychological, environmental, cultural, and economic characteristics that are not impairments. The definition of the term ‘impairment’ does not include physical characteristics such as **eye color, hair color, left-handedness, or height, weight, or muscle tone that are within ‘normal’ range and are not the result of a physiological disorder.** The definition, likewise, **does not include characteristic predisposition to illness or disease ...** The definition of an impairment also **does not include common personality traits such as poor judgment or a quick temper** where these are not symptoms of a mental or psychological disorder. Environmental, cultural, or economic disadvantages such as poverty, lack of education, or a prison record are not impairments. **Advanced age, in and of itself, is also not an impairment.** However, various medical conditions commonly associated with age, such as hearing loss, osteoporosis, or arthritis would constitute impairments within the meaning of this part.” 76 FEDERAL REGISTER, No. 58, March 25, 2011 p. 17007.

C. Transgender, Gender Dysphoria & the ADA’s Gender Identity Disorder Exclusion.

Of growing concern in the public schools is the appropriate treatment of transgender students amid what are sometimes very serious threats to their safety and education. Discrimination and harassment claims by transgender students and adults are being brought under various legal theories (with Title IX leading the mix). ED’s Guidance Letter on Title IX (requiring transgender students be allowed to use the restroom and locker room facilities that coincide with their gender identity despite their physical gender) is now subject to legal challenge by nearly half of the 50 states. *Dear Colleague Letter on Transgender Students*, 9 GASLD 32 (DOJ/OCR 2016). ED’s position on the application of Title IX protections to transgender students has been supported by at least one court of appeals, appealed to the

U.S. Supreme Court. *G.G. v. Gloucester County*, 116 LRP 15374 (4th Cir. 2016), *petition for cert. granted*, 116 LRP 45595 (10/28/16) (No. 16-273), and now remanded for further findings (see below). Section 504 and the ADA have only recently and quietly entered the picture.

One reason for the late arrival of an ADA/504 claim by a transgender individual is exclusionary language from the ADA itself. The statute, at 43 U.S.C. §12211(b)(1) reads “Under this chapter, **the term ‘disability’ shall not include** (1) transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, **gender identity disorders not resulting from physical impairments**, or other sexual behavior disorders;” [Emphasis added.] Homosexuality and bisexuality are not considered impairments under §504. *1992 OCR Memorandum on Differences Between ADA Title II and §504 Regulations* (OCR 1992). Transvestitism was excluded under §504 by the Fair Housing Amendments Act of 1988. The following are not disabilities under ADA, and **may or may not be disabilities under §504** “(1) ... pedophilia, exhibitionism, voyeurism, gender identity disorder not resulting from physical impairments, or other sexual behavior disorders; (2) compulsive gambling, (3) kleptomania, (4) pyromania.” Americans With Disabilities Act, 42 U.S.C. §12211. *1992 OCR Memorandum on Differences, see above*. The ADA language in essence excluded gender identity disorders from those physical or mental impairments that could give rise to eligibility, unless, the disorder resulted from a physical impairment (such as an individual born with both male and female genitalia).

Gender Dysphoria Defined. Since the language of the exclusion was written, gender identity disorder has now been replaced in the DSM with gender dysphoria. The diagnosis focuses on the anxiety and distress that comes from identifying as one gender despite having the physical attributes of another gender. **That an individual is transgender does not mean that gender dysphoria is also present. Gender dysphoria exists based on the impact (the clinically significant distress or impairment in functioning) due to the incongruence between physical gender and identified gender on the transgender individual.** In short, to be a transgendered person does not make one a disabled person.

The Department of Justice & the Gender Identity exclusionary language. Currently pending in the U.S. District Court for the Eastern District of Pennsylvania is a lawsuit brought by a transgender employee against her employer, alleging disability-based discrimination due to her transgender status. *Kate Lynn Blatt v. Cabela’s Retail Inc.*, Civil Action No. 5:14-CV-4822-JFL (E.D. Pa.). What makes the case interesting is that the allegations are pursued under the ADA despite the exclusionary language. A crucial element of the pending litigation is the claim that the gender identity disorder exclusion (GID exclusion) is a violation of the Equal Protection Clause, as it is based on moral disapproval or animus, as opposed to an appropriate governmental interest.

For our purposes here, the most significant development, apart from the allegation itself, is the Second Statement of Interest filed by the DOJ. Seeking to prevent the court from reaching a constitutional question (does the exclusion violate the equal protection clause?), the DOJ has taken the position that **“Plaintiff’s gender dysphoria falls outside of the scope of the GID Exclusion because a growing body of scientific evidence suggests that it may ‘result from a physical impairment.’”** Second Statement of Interest of the United States of America, (Nov. 16, 2015). The DOJ notes that “Numerous medical studies conducted in the past six years.... ‘point in the direction of hormonal and genetic causes for the in utero development of gender dysphoria.’” *Id.* **In light of that evidence “along with the remedial nature of the ADA and the relevant statutory and regulatory provisions directing that the terms ‘disability’ and ‘physical impairment’ be read broadly, the GID Exclusion should be construed narrowly such that gender dysphoria falls outside its scope.”** *Id.*

A little commentary: Based on that position by the DOJ in 2015, one could have expected OCR to take the same position. A change in administration and direction, however, highlighted by a series of decisions undercutting claims by transgender youth and adults will *at least* pause government support for the time being. Nevertheless, the logic of Ms. Blatt’s claims and the lack of evidence of an appropriate governmental interest will likely result in an eventual court finding that the ADA’s GID exclusion is unconstitutional. Despite the more difficult road to ADA/504 success (since the DOJ’s

support is currently unlikely) given the current climate it would appear far easier for parents of qualifying students with gender dysphoria to seek assistance by way of §504 than through the more hotly debated transgender route of Title IX. It might also prove less traumatic (for some schools and parents) to discuss supports needed to address a student’s disability (should the student suffer from gender dysphoria) rather than make sweeping policy changes to address the transgender debate more globally.

Status of ED Title IX guidance & cases. An excellent document from the National School Boards Association sums up the current state of the law. NSBA, *Transgender Students in Schools*, Version 10.0, updated 5/4/2017 (p. 5).

“Over the past several months, under different administrations, the United States Departments of Education and Justice have rendered two conflicting “Dear Colleague” letters on the issue of Title IX and its applicability to transgender students. There have also been numerous lawsuits filed—many in response to the Obama administration’s letter—as states, school districts, parents and students seek to determine what their rights and obligations are about transgender students. Now that the United States Supreme Court has vacated the Fourth Circuit Court of Appeals decision, in *Gloucester*, and remanded the case to the lower court for ‘further consideration in light of the guidance document issued by the Department of Education and the Department of Justice on February 22, 2017,’ **it appears that school districts will not receive any definitive guidance from the United States Supreme Court on this issue any time soon.** Even though it is hard to know what impact the existing lawsuits and the federal government’s guidance will have on school districts in the long-run, schools must continue to ensure that all students learn in a safe environment. Schools must implement policies that prevent transgender students from being bullied and harassed and they must address accusations of such bullying and harassment promptly. One immediate impact of the federal change of course is that the loss of federal funding for failing to accommodate transgender students in the manner outlined in the Obama administration’s guidance is removed; however, schools must make certain that they are following the laws of their states and the regulations of their state departments of education with regard to the accommodation of transgender students.”

D. Impairments, Medical Diagnoses and Section 504 Eligibility

Does OCR recognize a “disability per se” or an impairment that automatically results in eligibility under Section 504? No, in the Revised Q&A ED took the position that there is no automatic eligibility. “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 took 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).

A presumption of eligibility follows some ADHD diagnoses. In what appears to be an extension of the “disability per se” discussion above, OCR wrote “a diagnosis of ADHD is evidence that a student may have a disability. OCR will presume, unless there is evidence to the contrary, that a student with a diagnosis of ADHD is substantially limited in one or more major life activities.” It appears that not

every diagnosis will create that presumption. OCR provides this bit of clarifying detail. “Diagnosis of ADHD requires a comprehensive evaluation by a licensed clinician, such as a pediatrician, psychologist, or psychiatrist with expertise in ADHD.” National Institutes of Mental Health (NIMH publication), Attention Deficit Hyperactivity Disorder (Revised March 2016).” U.S. Department of Education, Office for Civil Rights, *Students with ADHD and Section 504: A Resource Guide*, 68 IDELR 52 (OCR 2016), p. 10, fn. 37.

A little commentary: Unless the diagnosis is based on a “comprehensive evaluation” meeting NIMH standards and conducted by a licensed clinician with expertise in ADHD, the presumption does not apply. More on the issue of “evidence to the contrary” below in the discussion on substantial limitation.

Recall the main purpose of the ADAAA was to expand eligibility. Congress wrote, “**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.**” ADA Amendments Act of 2008, Section 2(b)(5)(2008). In short, Congress wants courts looking less at eligibility and focusing more intently on whether required accommodations are provided 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.**” OCR provided this additional explanation. “The Amendments Act does not alter the school district’s substantive obligations under Section 504 and Title II. Rather... it amends the ADA and Section 504 to broaden the potential class of persons with disabilities protected by the statutes.” 2012 DCL, p. 4.

Having addressed the presumption of eligibility created by a compliant expert evaluation and identification of ADHD, a logical question remains. **Is a medical diagnosis required for a 504 committee to determine a student’s 504 eligibility?** No. 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) Sch. Dist.*, 32 IDELR 261 (OCR 2000). **In fact, the regulations do not require medical evaluations for any disability to qualify under §504.**

So what’s the rule? The §504 regulations require no medical diagnosis for eligibility. The school may conduct the §504 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 secure one at no cost to parent. **What are “other effective methods”?** Remember that the §504 committee is not asked to “diagnose” impairments, but to identify impairments so that the Committee may meet the needs of the child arising from the impairment. 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. The Resource Guide reaffirms this position.

“Note, there is nothing in Section 504 that requires a medical assessment as a precondition to the school district’s *determination* that the student has a disability and requires special education or related aids and services due to his or her disability. (In fact, as mentioned earlier, the *determination* of whether an individual has a disability need not demand extensive analysis.)” (p. 23) (emphasis added).

A little commentary: A piece of very old 504 mythology is that the 504 committee cannot identify an impairment without a doctor’s help — that to do so means that the committee is medically diagnosing the impairment. Note OCR’s consistent use of the “determine/determination” to describe the 504 committee’s decision on the impairment. OCR recognizes that the committee is authorized by federal law to make this decision, even in the absence of a medical diagnosis (if the committee believes it has

appropriate grounds to do so). That committee decision is not a diagnosis. It is an educational determination.

IV. The Section 504 Substantial Limitation Requirement—A Deep Dive

A. OCR Guidance on Substantial Limitation

Despite the fact that “substantially limits” is the hardest element of the eligibility rubric to understand, OCR has provided no significant guidance on the standard it creates. Instead, the Commentary to ED’s regulations included 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 what “substantial limitation” means. *Letter to McKethan*, 23 IDELR 504 (OCR 1995).

“You asked for further definition of ‘substantially limits’ and for a distinction between ‘substantially limits’ and ‘adversely affects’ (a phrase used in interpretation of the IDEA). Neither the regulation nor this office has defined the word ‘substantially.’

In the context of elementary and secondary education particularly, however, **the decision of whether a particular impairment ‘substantially limits’ a major life activity for any particular child is a decision to be made by the school district—not by OCR.** Section 504 and Title II require that if a school district believes a child has a disability, the district should evaluate the child before determining the appropriate education for the child (Section 104.35(a)); be sure that the evaluation (and placement) meet certain regulatory requirements (Section 104.35(b)); and be sure that parents are given the right to challenge any decisions that arise from their child’s identification, evaluation, or placement (Section 104.36).” (Emphasis added).

More recently, following Congress’ instruction to lower the standard (see the discussion on EEOC below), OCR provided this language in the Revised Q&A

“22. Does OCR endorse a single formula or scale that measures substantial limitation? No. The determination of substantial limitation must be made on a case-by-case basis with respect to each individual student. The Section 504 regulatory provision at 34 C.F.R. 104.35 (c) requires that a group of knowledgeable persons draw upon information from a variety of sources in making this determination.” (Emphasis added).

OCR’s 2012 Dear Colleague letter on the ADAAA made no attempt to define the term, but did provide some help with mitigating measures (discussed below). Quoting the ADAAA itself, OCR reminds schools that “An impairment need not prevent or severely or significantly restrict a major life activity to be considered substantially limiting.” *2012 DCL*.

A little commentary: Based on the fact that ED made no effort to define “substantial limitation” at the time it created the Section 504 regulations, and the fact that OCR’s position on the question of substantial limitation in Question 22 is identical to its 2009 version of the Revised Q&A from six years earlier, it is unlikely that OCR will attempt a definition anytime soon. **That said, schools will need to look elsewhere for guidance on how to address this important standard, but can do so knowing that as long as they (1) are procedurally compliant; (2) do not select a definition rejected by Congress and (3) choose an approach consistent with congressional intent to expand eligibility, OCR is unlikely to object.**

B. EEOC Guidance on Substantial Limitation

While schools were not required to follow the EEOC definition of substantial limitation with respect to student, many did so in the absence of help from OCR. After all, the EEOC approach was the definition most-frequently used and interpreted by the federal courts, and schools were somewhat accustomed to it since this definition was applied by EEOC's regulations to the schools' relationships with employees. Prior to the ADAAA, the EEOC's definition was a two-part approach. A person was considered substantially limited if

“(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).

In the ADAAA, the Congress rejected EEOC's regulatory definition of “significant restriction” as the standard for “substantially limits,” and expressed its “expectation” that EEOC would 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). In response to Congress' expectation, EEOC examined how its definition must be changed. EEOC explains its conclusions with respect to Congress' intent in the Commentary.

“It is clear in the text and legislative history of the ADAAA that Congress concluded the courts had incorrectly construed ‘substantially limits,’ and disapproved of the EEOC's now-superseded 1991 regulation defining the term to mean ‘significantly restricts’.... Ultimately, Congress affirmatively opted to retain this term in the Amendments Act, rather than replace it. It concluded that ‘adopting a new, undefined term that is subject to widely disparate meanings is not the best way to achieve the goal of ensuring consistent and appropriately broad coverage under this Act.’ **Instead, Congress determined ‘a better way... to express [its] disapproval of Sutton and Toyota (along with the current EEOC regulation) is to retain the words ‘substantially limits,’ but clarify that it is not meant to be a demanding standard.’** To achieve that goal, Congress set forth detailed findings and purposes and ‘rules of construction’ to govern the interpretation and application of this concept going forward.” FEDERAL REGISTER, Vol. 76, No. 58, Friday, March 25, 2011 p. 17008. (Emphasis added).

So what was so wrong with *Sutton* and *Toyota*? The Supreme Court had raised the bar of ADA eligibility too high. The findings and purposes section of the ADAAA makes clear Congress' focus in the Act to reject the reasoning used by the U.S. Supreme Court in various important ADA cases including *Sutton v. United Air Lines*, 30 IDELR 681, 527 U.S. 471 (1999) (and its companion cases addressing the effect of mitigating measures on ADA eligibility) and *Toyota Motor Manufacturing v. Williams*, 102 LRP 637, 534 U.S. 184 (2002)(denying ADA eligibility when the activity substantially limited is a narrow one, as opposed to one normally required in the daily life of most people). From the preamble statements included in the Act, it is clear that the Congress believed that the Supreme Court's recent interpretations of the eligibility provisions of ADA have been overly stringent. Indeed, the Court's position that ADA eligibility provisions set up a “demanding” standard for eligibility meant that persons with a variety of impairments would be unable to access the federal courts to raise claims that an employer failed to provide reasonable accommodations that would enable them to perform the essential functions of their jobs.

Disagreement with the *Sutton* rationale. The problem stemmed from two types of cases. In one, a person has a bona fide physical or mental impairment, but takes appropriate and effective measures to treat, or mitigate, the impact of the impairment on their daily life. In the *Sutton* line of cases, the Supreme Court held that when determining eligibility, one must take into account the effect of these

mitigating measures. Thus, if the mitigating measures are effectively addressing the impairment, to the point that it does not pose a substantial limitation on major life activities, then there is no eligibility under ADA, and the person cannot maintain a legal action claiming an employer's failure to make reasonable accommodations or otherwise asserting discrimination on the basis of disability. *Sutton* addressed the problem of mitigating measures in the context of glasses and contact lenses. *Murphy v. United Parcel Service* applied the *Sutton* mitigation rule to medication, requiring that side effects of currently used medication be considered as well. *Murphy v. United Parcel Service*, 30 IDELR 694, 527 U.S. 516 (1999). The third case in the trilogy, *Albertsons, Inc. v. Kirkingburg* applied the *Sutton* mitigation rule to compensatory skills. *Albertsons, Inc. v. Kirkingburg*, 30 IDELR 697, 527 U.S. 555 (1999).

In the ADAAA, Congress reversed the analysis. No longer would evaluation look at the individual's impairment when mitigated. Instead, eligibility would be determined after "taking away" or "subtracting from the equation" the positive impact of mitigating measures. For the ADHD student on medication, for example, the question would become "without your medication, are you substantially limited by your ADHD in the major life activity of concentrating."

Disagreement with the *Toyota* limitation. In the second type of case, a person has a physical or mental impairment, and it does substantially limit a certain activity required in the workplace, but the activity limited is a narrow one not normally required in the daily life of most people.

In this case, a Toyota employee sued under the ADA, claiming that she was disabled by carpal tunnel syndrome, which limited her ability to perform a few specific physical tasks necessary in her assembly-line job (gripping of tools, repetitive work with hands and arms extended above shoulders for long periods). She claimed ADA eligibility under the major life activity of "performing manual tasks," although she was able to perform many tasks of daily life, such as personal hygiene, cleaning house, cooking, doing laundry, and gardening. The Court held that the issue of whether a person is disabled under the major life activity of "performing manual tasks" should not be determined by the impairment's limitation on the ability to perform certain limited job tasks, but with relation to manual tasks normally required in daily life. Evidence of the person's ability to perform most manual tasks in her daily life could not be disregarded. The Court thus found that the employee's impairment did not substantially limit her ability to perform most manual tasks central to daily life so she was not disabled under the ADA, even if she was unable to perform certain job-related tasks. *Toyota Motor Manufacturing v. Williams*, 534 U.S. 184 (2002).

In the ADAAA, Congress rejected both the necessity of impact on an area of the major life activity of central importance to most people, and rejected the requirement of substantial limitation as "significant impact" on a major life activity.

EEOC's changes with respect to substantial limitation were focused on two concerns from the Congress. First, the definition needed to change to provide "that a **limitation need not 'significantly' or 'severely' restrict a major life activity in order to meet the standard.**" **Secondly, the definition needed to delete** "reference to the terms 'condition, manner, or duration' under which a major life activity is performed, in order to effectuate Congress's clear instruction that 'substantially limits' is not to be misconstrued to require the 'level of limitation, and the intensity of focus' applied by the Supreme Court in *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184 (2002) (2008) Senate Statement of Managers at 6)." FEDERAL REGISTER, Vol. 76, No. 58, Friday, March 25, 2011 p. 16978. In light of those concerns, the two paragraph definition provided above has now been replaced by the following nine paragraphs that provide guiding principles (called rules of construction by EEOC) to understand the concept of "substantially limits." For ease of reading, the nine paragraphs of regulation will be italicized and followed immediately by commentary, case notes, etc.

(j) *Substantially limits*—

(1) *Rules of construction.* The following rules of construction apply when determining whether an

impairment substantially limits an individual in a major life activity:

(i) The term ‘substantially limits’ shall be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA. ‘Substantially limits’ is not meant to be a demanding standard.

(iv) The determination of whether an impairment substantially limits a major life activity requires an individualized assessment. However, in making this assessment, the term ‘substantially limits’ shall be interpreted and applied to require a degree of functional limitation that is lower than the standard for ‘substantially limits’ applied prior to the ADAAA.

A little commentary: These provisions emphasize a lower bar with respect to the difference seen between the performance of the major life activity by the person evaluated versus the average person in the general population. Instead of looking for a significant difference between the two, Congress wants a lesser amount of difference to be sufficient. Practically, a school that previously used the EEOC’s two paragraph standard could comply by looking for less of a difference than under that standard. Further, in cases where the group of knowledgeable people has determined a physical or mental impairment and impact on a major life activity, but the committee is unsure about whether there is enough impact (or enough difference) the author believes that Congress’ intent is that this student should be eligible.

(ii) An impairment is a disability within the meaning of this section if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population. An impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting. Nonetheless, not every impairment will constitute a disability within the meaning of this section.

A little commentary: Since 504 and ADA are civil rights laws, it makes sense that the group of knowledgeable people is comparing the person evaluated to the average person in the general population (a benchmark, or a comparison to “most people.”). *See, for example, Montgomery County Public Schools*, 40 IDELR 24 (SEA MD 2003). A student with ADHD sought eligibility despite average to above average academic performance compared to high achieving students. **The parents argued that the proper comparison was not the performance of average students in the general population, but to the group of “hyper-achieving students” at the exclusive high school where he attended (90% of the students go on to college).** Even when compared to that group of students, his performance was well within the average, if not above average for an 11th grader. Testimony demonstrated that he was able to access the general curriculum and perform on grade level. The hearing officer rejected the parents’ comparison argument, finding that the proper comparison is to the average person in the general population. “Attainment of a 2.85-3.28 grade point average, even in the presence of extreme achievers, does not render an individual ‘unable to perform a major life activity that the average person in the general population can perform.’” Student loses.

In that comparison, the 504 Committee need not find a significant or severe difference between the student evaluated and the benchmark in performance of the major life activity, nor find that the student is prevented from performing the major life activity. The final piece of the section is quite significant: having an impairment does not make one eligible.

(iii) The primary object of attention in cases brought under the ADA should be whether covered entities have complied with their obligations and whether discrimination has occurred, not whether an individual’s impairment substantially limits a major life activity. Accordingly, the threshold issue of whether an impairment ‘substantially limits’ a major life activity should not

demand extensive analysis.

A little commentary: One of Congress' concerns prompting the ADAAA changes was the focus of federal courts during ADA litigation. Employers' efforts to keep employees from eligibility had resulted in courts spending increasing amounts of time and thought on an issue that Congress believed should be a less-complex question. Further, the result of that eligibility-focus was an increasingly difficult path to eligibility for employees as they had to contend with cases like *Sutton* and *Toyota*. Congress believed that courts were giving too little attention to accommodations and employer compliance and thus not fulfilling Congress' desire that the workplace become more accessible to workers with disabilities. The mandate that eligibility not demand extensive analysis is somewhat ironic given the added complexity of the determining how impaired the student is in the absence of medication and other mitigating measures provided to the student, and the increasingly vague concept of substantial limitation after the ADAAA.

(v) The comparison of an individual's performance of a major life activity to the performance of the same major life activity by most people in the general population usually will not require scientific, medical, or statistical analysis. Nothing in this paragraph is intended, however, to prohibit the presentation of scientific, medical, or statistical evidence to make such a comparison where appropriate.

A little commentary: Strangely, public schools still struggle with this simple concept. No medical diagnosis is required for §504 eligibility. "Section 504 does not require that a school district conduct a medical assessment of a student who has or is suspected of having ADHD unless the district determines it is necessary in order to determine if the student has a disability." *Williamson County (TN) School District*, 32 IDELR 261 (OCR 2000). In fact, the regulations do not require medical evaluations for any impairment to qualify under §504. OCR's Resource Guide on ADHD makes the same point.

"Note, there is nothing in Section 504 that requires a medical assessment as a precondition to the school district's **determination** that the student has a disability and requires special education or related aids and services due to his or her disability. (In fact, as mentioned earlier, the determination of whether an individual has a disability need not demand extensive analysis.).... A specific diagnosis is not actually necessary if the school **determines** a student is substantially limited in a major life activity and that limitation is caused by a mental or physical impairment." *Students with ADHD and Section 504: A Resource Guide*, (July 2016), p. 23, fn. 70 (emphasis added).

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.

(vi) The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures. However, the ameliorative effects of ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment substantially limits a major life activity.

A little commentary: 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. The result is higher levels of eligibility and the possibility of technically eligible students, since the mitigating measures rule does not apply to the determination of whether the student is in need of services. OCR explains the rule as follows in the 2012 Dear Colleague Letter.

“In the phrase ‘a physical or mental impairment that substantially limits a major life activity,’ the term ‘substantially limits’ shall be interpreted without regard to the ameliorative effects of mitigating measures, other than ordinary eyeglasses or contact lenses. Amendments Act § 4(a) (codified as amended at 42 U.S.C. § 12102). **Mitigating measures are things like medications, prosthetic devices, assistive devices, or learned behavioral or adaptive neurological modifications that an individual may use to eliminate or reduce the effects of an impairment.** These measures cannot be considered when determining whether a person has a substantially limiting impairment. Therefore, impairments that may not have previously been considered to be disabilities because of the ameliorative effects of mitigating measures might now meet the Section 504 and ADA definition of disability. For example, a student who has an allergy and requires allergy shots to manage that condition would be covered under Section 504 and Title II if, without the shots, the allergy would substantially limit a major life activity.” *2012 DCL*. (Emphasis added).

The mitigating measures rule is not limited to measures used at school. OCR provided the following commentary in the 2016 ADHD Resource Guide. “In OCR’s experience, school districts have sometimes discounted off-campus, but school-related, activities that a student engaged in to mitigate the effects of his or her ADHD. For example, a student with ADHD might take extra time to complete one homework assignment because it takes the student longer to employ the strategies developed over time to break down a study question, conduct the research, and write an essay.” Consequently, the fact that the student “may be timely in turning in homework assignments, she or he may still be substantially limited in a major life activity, such as thinking or organizing, because of ADHD. In fact, the student’s use of those mitigating measures could be an indication to the school district that the student may have a disability.” (p. 21).

(vii) An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

A little commentary: 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 eligibility is not denied simply because the impairment, 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 ADAAA, an impairment “in remission is a disability if it would substantially limit a major life activity when active.” Note that instead of the episodic situation (where an impairment may from time to time reach substantial limitation), this provision applies to an impairment that was once active, and could return (such as cancer, hepatitis, etc.). This rule grants to some inactive impairments the same status that applies to active ones—assuming that the impairment in remission was substantially limiting at one time.

(viii) An impairment that substantially limits one major life activity need not substantially limit other major life activities in order to be considered a substantially limiting impairment.

A little commentary: This rule is pretty simple. It only takes substantial limitation in one major life activity to create eligibility. Of course, an impairment can always substantially limit more than one.

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

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

EEOC & OCR provide additional thoughts on twice-exceptional students and substantial limitation. One of the most interesting areas of evolution in the ADA (and thus §504) is recognition that identifying learning disabilities, including dyslexia, require some complex thinking. In the commentary to its ADA regulations implementing the ADAAA, the Equal Employment Opportunity Commission provides some excellent analysis on how to address eligibility for students with learning disabilities (for example, dyslexia) who despite the disability, experience educational success. Some of these students are likely twice-exceptional. Note that EEOC regulations and commentary are not binding on the K-12 public schools *with respect to their treatment of students* (the U.S. Department of

Education has jurisdiction for rules for students) but the EEOC's rules are instructive, especially in the absence of anything from ED. Note further that EEOC regulations are binding on K-12 schools *with respect to their employment relationships with district employees*. Cites are to the EEOC commentary to 2011 ADA regulations, 76 Federal Register, March 25, 2011 [*hereinafter*, "EEOC."].

1. Successful performance does not rule out substantial limitation. "As Congress emphasized in passing the Amendments Act, "[w]hen considering the condition, manner, or duration in which an individual with a specific learning disability performs a major life activity, it is critical to reject the assumption that an individual who has performed well academically cannot be substantially limited in activities such as learning, reading, writing, thinking, or speaking." *EEOC*, p. 17012-13.

"Condition, manner, or duration may also suggest the amount of time or effort an individual has to expend when performing a major life activity because of the effects of an impairment, even if the individual is able to achieve the same or similar result as someone without the impairment. For this reason, the regulations include language which says that the outcome an individual with a disability is able to achieve is not determinative of whether he or she is substantially limited in a major life activity." *EEOC*, p. 17012.

2. Reading is effortless for most people, but not for folks with dyslexia. "For the majority of the population, the basic mechanics of reading and writing do not pose extraordinary lifelong challenges; rather, recognizing and forming letters and words are effortless, unconscious, automatic processes. Because specific learning disabilities are neurologically-based impairments, the process of reading for an individual with a reading disability (e.g. dyslexia) is word-by-word, and otherwise cumbersome, painful, deliberate and slow—throughout life." *EEOC*, p. 17013.

3. Time and effort must be considered. "Thus, someone with a learning disability may achieve a high level of academic success, but may nevertheless be substantially limited in the major life activity of learning because of the additional time or effort he or she must spend to read, write, or learn compared to most people in the general population." *EEOC*, p. 17012.

4. Typical eligibility for individuals with dyslexia. "Individuals diagnosed with dyslexia or other learning disabilities will typically be substantially limited in performing activities such as learning, reading, and thinking when compared to most people in the general population, particularly when the ameliorative effects of mitigating measures, including therapies, learned behavioral or adaptive neurological modifications, assistive devices (e.g., audio recordings, screen reading devices, voice activated software), studying longer, or receiving more time to take a test, are disregarded as required under the ADA Amendments Act." *EEOC*, p. 17009.

OCR applied this analysis to academically successful ADHD students. "Someone with ADHD may achieve a high level of academic success but may nevertheless be substantially limited in a major life activity due to his or her impairment because of the additional time or effort he or she must spend to read, write, or learn compared to others. In OCR's investigative experience, school districts sometimes rely on a student's average, or better-than-average, grade point average (GPA) and make inappropriate decisions." 2016 ADHD Resource Guide (p. 12). "Thus, for example, when making the determination as to whether to evaluate a student suspected of having a disability under Section 504 because of ADHD, or in conducting such an evaluation, school districts should ask how difficult it is or how much time it takes for a student with ADHD, in comparison to a student without ADHD, to plan, begin, complete, and turn in an essay, term paper, homework assignment, or exam." (*Id.*).

Final thoughts on substantial limitation: Discuss the following with your school attorney:

1. OCR has not provided a definition of substantial limitation.
2. Congress likewise did not provide a definition in the ADAAA, but did provide some instruction to EEOC on changing its definition.
3. Schools must not apply a substantial limitation standard requiring (1) a significant or severe

restriction on the performance of a major life activity nor (2) the ‘level of limitation, and the intensity of focus’ found in *Toyota*. The student need not be substantially limited in a part of the major life activity that is important to, or central to the lives of most people.

4. The CESD approach to substantial limitation addresses both issues by reminding schools of the lower standard, applying the ADA’s mitigating measures rule, and urging schools to determine students Section 504-eligible when the Committee is on the fence (where it cannot decide whether or not the student is substantially limited).

V. The 504 Duty to Refer: Health Plans & Rtl

A. Section 504 Duty to Refer

The school’s duty to offer evaluation 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). This trigger did not change with the ADA, as the 2012 OCR guidance makes clear, a school district must conduct an evaluation of any individual who because of disability “needs or is believed to need special education or related services.” 2012 DCL, Question 8, p. 7 (citing 34 CFR §104.35(a)).

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.”) What choices does the school have when parents request a Section 504 evaluation? There are two: evaluate the student OR refuse to evaluate and provide the parent with Section 504 notice of rights. *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.”).

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 IDELR 53 (OCR 2011).

In short, students on health plans have always been good candidates for Section 504 referral, but prior to the ADAAA, OCR seemed content as long as the health plan worked. The ADAAA changed things, as Congress expressed a desire for expanded eligibility and created a new mitigating measures rule. In response, OCR began to focus its attention on schools that provided health plans to students who should be receiving Section 504 Plans instead. Here's the long version...

B. Health Plans & Referral

1. What's a health plan? By way of reference, the author uses the phrase "health plans" as a catch-all term to describe protocols or processes the school puts in place to maintain a student's health at school or to respond to a health emergency at school. In everyday school usage, a "health plan" is limited to health issues and rarely addresses the educational supports or services that a student might need due to an impairment. Some schools use phrases like "individualized health care plan," "emergency plan," or a name that directly references the impairment like "allergy plan" to convey the same idea.

2. Health Plans Before and After the ADAAA. Prior to the ADAAA, some districts used something akin to tiered intervention thinking, and concluded that Section 504 was not necessary if a health plan could meet the student's needs. OCR seemed content with such an approach. For example, in a pre-ADAAA Indiana case, OCR found that the District's practice of not serving all students with diabetes under §504 or IDEA was appropriate, as long as such students had protocols in place to address their medical conditions, and the District included language in future student/parent handbooks that read "Section 504 plans may be developed for those students with a disability whose parents/guardians are able to provide sufficient medical documentation that indicates that there is a need for such services." *Hamilton Heights (IN) School Corp.*, 37 IDELR 130 (OCR 2002). **This "regular ed health plan makes §504 unnecessary" approach is of course complicated by the ADAAA's mitigating measures rule.**

Post-ADAAA, OCR determined that health plans and emergency plans are mitigating measures. *North Royalton (OH) City School District*, 52 IDELR 203 (OCR 2009). Prior to the effective date of the ADAAA, North Royalton initially found the student with an anxiety disorder and tree nut allergy ineligible for Section 504 due to the effectiveness of his emergency allergy plan (EAP). Nevertheless, in November 2008, prior to the ADAAA going into effect, the school reconsidered the eligibility question, and found the student Section 504-eligible under the new rules, with his EAP becoming his §504 plan on Jan. 1, 2009. **OCR did not dispute the school's claims that the student never had a reaction to nuts at school, and never visited the health services**

coordinator due to anxiety or allergy issues. As the student’s needs had been met throughout, OCR found no violation with respect to the child’s services (so no compensatory education was required) but did conclude that his initial evaluation was inappropriate as it only considered limitations to the major life activity of learning. With respect to health plans (or the EAPs here), OCR required the school to apply the ADAAA to future evaluations. **“In doing so, the district will also apply the new ADAAA standards and will not take into account mitigating measures, such as the use of medicine or the provision of related aids and services, such as those provided in EAPs, when determining students’ disability status.”**

A little commentary: A fact revealed during OCR’s investigation leads to an interesting question. “The district also stated, however, that no other student with a food allergy being served under an EAP — approximately 40 District students — has been identified as a student with a disability and provided a Section 504 plan since the ADAAA took effect on January 1, 2009.” **Interestingly, the resolution agreement with OCR did not require the school to review the files of the other students on EAPs to determine whether referral to Section 504 should be made.** Instead, OCR was satisfied with the following: “The district will issue a letter to the parents/guardians of all students in the District who are currently receiving services under Emergency Allergy Plans of the district’s Section 504 procedures and of their right to request an evaluation under Section 504, at no cost to them, if they believe that their child may have a disability because the child’s medical impairment substantially limits one or more major life activities.” In subsequent OCR letters, it became apparent that OCR expects schools to review students with health plans and determine which students are in need of Section 504 referral. *See Isle of Wight County (VA) Public Schools*, 111 LRP 1964 (OCR 2010) (as part of a resolution agreement, the school agrees to review all students on medical/health plans and determine which students need to be referred to Section 504); *Memphis (MI) Community Schools*, 54 IDELR 61 (OCR 2009) (as part of a resolution agreement, the school agrees to reevaluate all students on medical management plans denied 504 eligibility or dismissed from Section 504 during the 2008-09 school year). **Note that OCR has neither said that (1) all students on health plans are Section 504 eligible nor that (2) all students on health plans should be referred for Section 504 evaluation.**

Given the history described above, OCR provided the following language on the adequacy of health plans versus Section 504 plans in its 2012 guidance. The question focuses on students served on health plans prior to the ADAAA and whether that status can continue without Section 504 eligibility *after* the ADAAA.

“Q13: Are the provision and implementation of a health plan developed prior to the Amendments Act sufficient to comply with the FAPE requirements as described in the Section 504 regulation?”

A: Not necessarily. Continuing with a health plan may not be sufficient if the student needs or is believed to need special education or related services because of his or her disability. The critical question is whether the school district's actions meet the evaluation, placement, and procedural safeguard requirements of the FAPE provisions described in the Section 504 regulation. **For example, before the Amendments Act, a student with a peanut allergy may not have been considered a person with a disability because of the student’s use of mitigating measures (e.g., frequent hand washing and bringing a homemade lunch) to minimize the risk of exposure. The student’s school may have created and implemented what is often called an ‘individual health plan’ or ‘individualized health care plan’ to address such issues as hand and desk washing procedures and epipen use without necessarily providing an evaluation, placement, or due process procedures.** Now, after the Amendments Act, the effect of the epipen or other mitigating measures cannot be considered when the school district assesses whether the student has a disability. Therefore, when determining whether a student with a peanut allergy has a disability, the school district must evaluate whether the peanut allergy would be substantially limiting without considering amelioration by medication or other measures. For many children with peanut allergies, the allergy is likely to substantially limit the major life activities of breathing and respiratory

function, and therefore, the child would be considered to have a disability. **If, because of the peanut allergy the student has a disability and needs or is believed to need special education or related services, she has a right to an evaluation, placement, and procedural safeguards.** In this situation, the individual health plan described above would be insufficient if it did not incorporate these requirements as described in the Section 504 regulation.” 2012 DCL, Question 13, p. 9-10 (emphasis added).

A little commentary: If, on the other hand, there is *no* belief that the student needs special education or related services due to her peanut allergy, she has no right to evaluation, placement and the procedural safeguards. Her health plan would be sufficient. *See, for example, Cleveland (MT) Elementary School District No. 14*, 111 LRP 34458 (OCR 2011) (As part of a resolution agreement, the District agrees to draft policies and procedures that “provide each student with the diabetes management services the student needs, consistent with the student’s Section 504 plan, individualized education program, or individual health plan.”).

The Section 504 Right to an Equally Safe Environment—In response to a complaint by a student with a severe nut allergy, OCR reminded schools of the nondiscrimination duty in the context of student safety. *Washington (NC) Montessori Public Charter School*, 60 IDELR 78 (OCR 2012). On that point, OCR stated:

“OCR interprets the above provisions to require that public schools take steps that are necessary to ensure that the school environment for students with disabilities is as safe as the environment for students without disabilities. **As the vast majority of students without disabilities do not face a significant possibility of experiencing serious and even life-threatening reactions to their environment while they attend school, Section 504 and Title II require that the School provide students with peanut and/or tree nut allergy (PTA)-related disabilities with a medically safe environment in which they do not face such a significant possibility.** Indeed, without the assurance of a safe environment, students with PTA-related disabilities might even be precluded from attending school, i.e., may be denied access to the educational program. *See also, Saluda (SC) School District One*, 47 IDELR 22 (OCR 2006).

Thus, OCR interprets §504 as requiring schools to provide a school environment to §504-eligible students that is equally safe to that provided to nondisabled peers. The formulation is an extension of the §504 nondiscrimination duty. The requirement does not mean a guarantee that there will be no harmful incident, but it requires schools to take measures, through the §504 committees, to make the school environment as reasonably safe as it is for nondisabled peers.

3. So, which kids on health plans should be referred for Section 504 evaluation? While not all students on health plans have to be referred, schools must be aware of the impact a health plan has on the school’s duty to refer. After all, if the student is receiving services from the school because of an impairment and the impairment appears to be substantially limiting a major life activity, the student should be considered for referral even if the health plan is meeting the student’s needs. OCR’s January 2012 guidance warns schools that a pre-existing health plan does not satisfy the FAPE obligation if the student would be entitled to FAPE upon appropriate evaluation. “As described in the Section 504 regulation, a school district must conduct an evaluation of any student who, because of disability, needs or is believed to need special education or related services, and must do so before taking any action with respect to the initial placement of a person in regular or special education or any significant change of placement.” 2012 DCL, Question 11, p. 8-9.

The question then is which kids on health plans to refer? **The safest, most conservative position is to refer and evaluate under Section 504 all students on health plans. Any other approach is subject to some degree of risk and should be discussed with your school attorney prior to proceeding.** Should your district desire a more targeted response, consider developing an approach with your school attorney that includes the following considerations.

A review of OCR Letters of Finding where health plans are at issue reveals the following:

- Not all students with a health plan will need to be referred for Section 504 evaluation. (*See, for example, North Royalton, Isle of Wight County*).
- Students on health plans cannot be categorically excluded from consideration for Section 504 evaluation, even if their health plans appear to allow these students equal participation and benefit in the school's programs and activities (*see Tyler*).
- Each student on a health plan should be considered individually to determine whether a referral for Section 504 evaluation is appropriate. Put simply, significant differences exist among health plans, even for students with the same impairment (see factors below).
- The health plan provides evidence of the student's need for services from the school, as well as insight into the impact of disability, giving the school information that can contribute to its thinking on whether the student might be substantially limited by his impairment, and thus needs to be referred.

(1) Where the student needs the school to administer medication to meet a student's educational needs as adequately as the needs of nondisabled students are met, whether as part of a health plan or as a stand-alone service, OCR believes the student is receiving a related service triggering the duty to evaluate under Section 504. 2012 DCL, Question 8, p. 7.

(2) Where the student, in addition to a health plan, receives accommodations or services from the school to address academic, social, emotional, physical or behavioral needs, the student should be evaluated under Section 504 and no additional analysis is necessary.

(3) If the student is only receiving a health plan from the school (and no other services or accommodations), the school should consider the following factors as part of the decision to refer and evaluate the student, together with other factors as determined appropriate by the school:

- The frequency of the required health plan services. (For example, where services are rarely needed during the school year, the student is less likely to require a Section 504 evaluation than when health plan services are required on a daily or weekly basis.)
- The intensity of the required health plan services. (For example, where a student who self-tests and administers medication for diabetes needs access to the nurse for questions or occasional assistance, the student is less likely to require a Section 504 evaluation than a student who relies on the nurse or other school staff for daily testing and medication due to diabetes.)
- The complexity of the required health plan services. (That is, do the services require a complex or systematic approach to integrate or coordinate efforts of staff and others to meet the student's needs? For example, the more a student requires constant monitoring and exchange of information among staff, parents, and doctor to meet his health needs, the more likely he requires a Section 504 evaluation.)
- The health and safety risk to the student if health plan services are not provided or are provided incorrectly. (For example, the greater the risk of serious injury or death to the student from the failure to provide appropriate health plan services, the more likely the student requires a Section 504 evaluation.)

- In analyzing the student’s needs with respect to these factors, no one factor is necessarily dispositive in every decision. The weight to be given any factor is to be determined by the school as appropriate in its case-by-case determination pursuant to the regulations.

(5) Where the student is Section 504-eligible (a student with a disability under Section 504) a health plan should be governed by the Section 504 procedural safeguards even if the health plan is separate from the Section 504 Plan and even if no Section 504 Plan of academic accommodations or services is provided.

What to do? The school needs to change its thinking about referral to Section 504 for students on health plans. Due to changes from the ADA Amendments and OCR’s concern over denial of rights to eligible students, schools cannot simply take the position that a student with a physical or mental impairment who is successful at school due to a health plan need not be *considered* for possible Section 504 referral. **Consider with the school attorney an approach that does not categorically remove from consideration for Section 504 referral students with physical or mental impairments whose disability-related needs are successfully met through health plans.**

C. RtI/Early Intervention for students with physical or mental impairments

1. IDEA & Early Intervention/RtI. Special education has clearly embraced RtI and early intervention in an effort to solve a variety of problems with respect to eligibility and to restore an appropriate, cooperative, relationship between special education and regular education. At the risk of over-simplification, consider the following elements in the successful relationship between IDEA and RtI/early intervention. First, the relationship arises from a desire to reduce IDEA eligibility caused by over-identification and improper identification by emphasizing the importance of regular education first, and beefing-up the resources and interventions available to struggling students through regular education. Second, IDEA reserves specially designed instruction for IDEA-eligible students who cannot benefit from education unless they have specially designed instruction. If the student’s needs can be met without special education, the student is not eligible for special education.

2. Section 504 & RtI. Unlike its efforts in IDEA (where it was concerned in part with over-identification), Congress made changes in the ADA to *increase* eligibility. Those changes apply to Section 504 as well. One of those changes was a new mitigating measures rule, which prohibits the consideration of the ameliorative effects of mitigating measures when determining whether an impairment substantially limits a major life activity. Specifically listed among the mitigating measures to be “filtered out” during the Section 504 Committee’s evaluation is “reasonable accommodation.” OCR has determined that the phrase “reasonable accommodations” includes things such as accommodations and assistance provided to students through a student services team or early intervention team, *Oxnard (CA) Union High School District*, 55 IDELR 21 (OCR 2009); and informal help provided consistently by classroom teachers, *Virginia Beach (VA) City Public Schools*, 54 IDELR 202 (OCR 2009). The inclusion of those two activities would seem to logically include RTI as well. **How does this impact the line between RtI and Section 504 eligibility for students who need support due to impairments?** Consider these two portions of the Revised Q&A.

“31. What is a reasonable justification for referring a student for evaluation for services under Section 504? School districts may always use regular education intervention strategies to assist students with difficulties in schools. Section 504 requires recipient school districts to refer a student for an evaluation for possible special education or modification of regular education if the student, because of disability, needs or is believed to need such services.” Revised Q&A, Question 31.

“40. What is the difference between a regular education intervention plan and a Section 504 plan? A regular education intervention plan is appropriate for a student who does not have a

disability or is not suspected of having a disability but may be facing challenges in school.” Revised Q&A, Question 40.

More recently, the **July 2016 ADHD Resource Guide** spends three pages on this issue, alerting schools that while RtI programs can be beneficial, they should not be applied in a way that unduly denies or delays evaluations when the suspicion of disability and need for services exists. U.S. Department of Education, Office for Civil Rights, *Students with ADHD and Section 504: A Resource Guide*, 68 IDELR 52 (July 2016). OCR states that **“school districts violate this Section 504 obligation when they deny or delay conducting an evaluation of a student when a disability, and the resulting need for special education or related services, is suspected.”** *Resource Guide* at p. 15. While OCR agrees that “interventions can be very effective and beneficial,” rigidity in implementing RtI can lead to problems with §504 child-find compliance. **“If the district suspects that a student has a disability and because of the disability needs special education or related aids and services, it would be a violation of Section 504 to delay the evaluation in order to first implement an intervention that is unrelated to the evaluation, or to determining the need for special education or related aids and services.”**

A little commentary: The key point is that RtI interventions should not be applied or viewed as a “prerequisite” to §504 evaluations, or as a required step prior to deciding to evaluate a student under §504. OCR thus states that districts tend to run afoul of §504 child-find and evaluation requirements when they “rigidly insist” on implementing RtI before conducting §504 evaluations, when they inflexibly apply tiered intervention strategies sequentially before considering evaluation, and when they “categorically require that data from an intervention strategy must be collected and incorporated as a necessary element of an evaluation.” *Id.* at p. 17. Interestingly, this position seems at odds with both the current RtI movement (emphasizing regular education intervention to ensure that students who get into special education are, in fact, disabled, and in need of special education) and older OCR thinking. For example, consider this 1999 case where OCR recognized that the school has the option of trying regular education interventions before Section 504 evaluation.

“Under Section 504, prior to evaluating a student’s need for special education or related services, the district must have reason to believe that the student is having academic, social or behavioral problems that substantially affect the student’s overall performance at school. A district, however, has the option of attempting to address these types of problems through documented school-based intervention and/or modifications, prior to conducting an evaluation. Furthermore, if such interventions and/or modifications are successful, a district is not obligated to evaluate a student for special education or related services.” *Karnes City (TX) Independent School District*, 31 IDELR 64 (OCR 1999).

Does early intervention/RtI = special ed services for purposes of the Section 504 duty to evaluate? It appears that some wiggle room exists between the two. Note the following finding in a Mississippi case. A student with ADHD referred by the parent for Section 504 evaluation was served under the school’s RtI program in Tier II. Because of the success of the interventions, the school believed that a Section 504 evaluation was not required as the student did not appear to need special education services. The interventions were significant. **The student was in Tier II and received, in both math and reading, five fifty-three minute computer lab sessions per week for remediation, together with one-to-one tutoring, and interventions to address his behaviors including an FBA, meetings with a behavioral specialist, behavioral timeouts, teaching of alternate behaviors, refocusing on work, and verbal praise.** Said OCR “The evidence was sufficient to give the district a reasonable belief that the complainant’s son did not need special education at the time of the request.” Consequently, there was no violation of the Section 504 duty to evaluate. OCR did find a violation due to the school’s failure to provide the parent with the notice of rights when the school determined that it would not be conducting an evaluation. *Stone County (MS) School District*, 52 IDELR 51 (OCR 2008). *Stone County* offers quite a different approach than the *more recently issued* Revised Q&A and ADHD Resource Guide.

Bottom line on the Section 504-RtI relationship: We're getting something of a mixed message, so caution is the order of the day. Due to changes from the ADA Amendments and OCR's concern over denial of rights to eligible students, schools cannot simply take the position that a student with a physical or mental impairment who is successful at school due to RtI or early intervention need not be *considered* for possible Section 504 referral. **Schools should consider with the school attorney an approach that does not categorically remove from consideration for Section 504 referral students with physical or mental impairments whose disability-related needs are successfully met through RtI or early intervention.** When a parent request for Section 504 evaluation is refused, the parent must be provided with notice of Section 504 rights.

VI. Transportation & Section 504

With respect to transportation, the public school district's duty to Section 504 students is two-fold: equal access and a possible duty to provide transportation as a related service.

Equal access to regularly offered transportation. A qualified student with a disability under §504 should not be denied access to transportation a similarly situated nondisabled student can access. In other words, a student should not be denied transportation for which he is otherwise eligible because he is disabled. If the district provides bus transportation to students who live a certain distance from the school or who must cross a dangerous road to get to school, that service must be offered equally to disabled and nondisabled students who meet the eligibility criteria for regular transportation.

Transportation as a §504 related service: Section 504 provides transportation as a related service when the eligible child's physical or mental impairment requires the district to provide transportation services so that the student with disability can access education at the school. Even if regular transportation services are not available to a population of students (because they live too close to school or the school does not offer regular transportation, for example), a qualified student with a disability within that population may be entitled to transportation as a related service under Section 504. "Under Section 504, a recipient is required to offer transportation services in such a manner as is necessary to afford students with disabilities an equal opportunity for participation in such services and activities." *Whitman-Hanson (MA) Regional Sch. Dist.*, 20 IDELR 775, 779 (OCR 1993).

What kind of impairments are we talking about? We're talking about any physical or mental impairment that prevents the student from getting to school or from benefiting from school if transportation is not provided. For example, a §504-eligible student whose asthma is aggravated by certain climates, seasons or temperatures may be unable to walk to school during certain times of the year without experiencing severe breathing problems. Similarly, a §504-eligible student who used to be able to walk to school but cannot do so now (due to broken leg or similar mobility impairment) may require transportation to school as a §504 related service. Note that in neither case would a special bus be required (unless the mobility impairment resulted in the temporary use of a wheelchair). Giving both students access to the regular bus (which they could not access earlier due to the short distance to school) is likely an appropriate accommodation. In short, mobility issues are not the only things to consider. *Donald B. v. Board of School Commr's of Mobile County*, 117 F.3d 1371 (11th Cir 1997). Asthma and allergies can also trigger the need for transportation.

§504 Committees should consider disability-related requests for transportation on an individual basis. "The group of knowledgeable persons is not required to provide transportation as a related aid or service simply at the request of the parent, but it must consider the request just as it would any other request, for related aids or services, and make a determination based on the individual educational needs of the student. OCR determined that the NYCDOE's practice of refusing to consider transportation services as a related aid or service, and requiring parents of disabled children to apply for a variance with

OPT is in violation of the regulation implementing Section 504.” *New York City (NY) Department of Education*, 49 IDELR 229 (OCR 2007).

Evaluation data indicates need for extra help on the bus. The student’s doctor reported that an EpiPen had to be administered “expeditiously” following the student’s exposure to peanut protein (whether ingested, touched or inhaled), and that should he have to wait for paramedics to be called and arrive to administer the EpiPen, “there is absolutely no way” he would survive. The Administrative Law Judge ordered that the school add someone to the bus to meet the need.

“Peanuts are a common food and people, especially children, who have eaten or contacted peanuts do not always wash or otherwise completely remove peanut proteins from themselves and it is almost impossible to make the school environment completely peanut-free. Therefore, it is probable that J.B., Jr., whether on a school bus or in class, will probably have some exposure to peanut proteins in his school day. A school bus driver, driving conscientiously, would not be able also to simultaneously monitor a severely allergic student and, if the student were to begin to experience an allergic reaction, expeditiously administer an EpiPen and, thereby allow the student to avoid the above-described problems. J.B., Jr., is too young to be responsible to monitor himself and to administer his own EpiPen. Therefore, a nurse, aide or other trained adult is required for those purposes.” *Manalapan-Englishtown Regional Board of Education*, 107 LRP 27925 (SEA NJ 2007).

Parent preference is not disability-related need. *Lincoln Elementary School District 156*, 47 IDELR 57 (SEA IL. 2006). “It is clear that it is inconvenient for the parent to bring the student to school. However, no testimony indicated that he had a medical or other disability which would require transportation.” The student lives within 6 blocks of the school, thus not qualifying for regular transportation available pursuant to school policy for students outside a 1.5 mile radius from the school. His IEP team at the March 21, 2006 meeting determined that transportation would not be needed as a related service. The parent did not bring any testimony indicating otherwise. While the student “has a nebulizer at school for asthma, however, he only used it at the request of the parent during a short period. He was never observed having difficulty breathing, even after strenuous activity.” No transportation was required as a related service.

If the student does not meet the requirements for regular transportation, and does not require transportation in order to access educational services, there is no §504 duty to transport. *Ossining (NY) Union Free Sch. Dist.*, 29 IDELR 73 (OCR 1998). In *Ossining*, the school had a policy of transporting students in grades K-3 if they lived more than a half mile from school, and students in grades 4-8 if they lived more than a mile from school. Parents of a fourth grader who lost transportation upon completing the third grade argued a §504 violation. “OCR found that the District denied the student bus transportation because, in accordance with the District’s policy, the student is in the fourth grade and resides less than a mile from the School. Additionally, the SEC [Special Education Committee] determined that the student does not require transportation due to his disability in order to access general education services.” *Id.*, at 75. No violation was found.

VII. Other Accommodation Issues

A. Accommodations for Extended Time on Tests – what’s reasonable?

Is the school required to provide sufficient services for the student to receives all “A’s?” No. This expectation assumes a standard (often referred to as a “maximizing potential standard”) that is not adopted in law. A few decisions have some wonderful language on maximizing potential. “The IDEA ‘does not secure the best education money can buy; it calls upon government, more modestly, to provide an appropriate education for each disabled child.’ *Lunceford v. District of Columbia Bd. Of Educ.*, 745 F.2d 1577, 1583 (D.C.Cir. 1984). There is ‘no requirement that services be sufficient to maximize each child’s potential commensurate with the opportunity provided other children.’The IDEA guarantees an ‘appropriate’ education, ‘not one that provides everything that might be thought

desirable by loving parents.” *Weixel v. Board of Education of the City of New York*, 33 IDELR 31 (S.D.N.Y. 2000). On a 504 claim, the Second Circuit provided this great 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 (2nd Cir. 2000). **Finally, the 504 regulations do not promise a particular result from accommodation.** “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 to reach the same level of achievement, in the most integrated setting appropriate to the person’s needs.” 34 C.F.R. 104.5(b)(2). The fact that the IDEA or 504 student does not get an “A” has little if any impact on the question of whether FAPE was provided.

How can you test speed without testing speed? A business education class (BEC) teacher failed to implement a portion of the student’s IEP that called for extended time on tests and other assignments. Specifically, the teacher refused to implement the provision with respect to computer keyboarding tests. “The BEC teacher explained that proficiency on the computer keyboard necessarily involves testing for speed and accuracy and that to allow extended time for testing in this situation would have defeated the test’s stated purpose.” **While the hearing officer was sympathetic to the teacher’s concerns, the self-help response was not appropriate. Instead of the teacher refusing to implement the provision, the IEP Team should have addressed the issue.** Similarly, the teacher unilaterally denied the student the opportunity to earn a letter grade, and instead, applied a pass/fail standard. “The complainant contended that the student should have been able to earn a letter grade in the BEC. The BEC teacher contends, however, that had she offered the student a letter grade, the student would have failed the course due to the student’s inability to master essential keyboarding skills, which is an essential element of the course. This dispute regarding what grading system to use should have been resolved through the IEPC meeting with attendant procedural safeguards.” *Ann Arbor (MI) Public School District*, 30 IDELR 405 (SEA MI. 1998).

A little commentary: It is not uncommon for regular education teachers to take issue with IEP teams on the issue of class grades where the special education student is not only receiving significant accommodations, but is also not responsible for all of the class curriculum—and is to be graded like everyone else. The Michigan teacher took matters into her own hands (and had the hands slapped). The better result is to discuss as an IEP Team how this particular student’s performance in the regular classroom should be graded where there are significant modifications to the curriculum (as opposed to differences in the delivery of instruction or classroom environment, but not changes to the curriculum itself), and make the decision part of the IEP.

A federal court, a gifted program and reasonable accommodation. *G.B.L. v. Bellevue Sch. Dist. #405*, 60 IDELR 186 (W.D. Wash. 2013). A special education eligible student with ADHD and sensorineural hearing loss was accepted into the school district’s PRISM program, an “accelerated program for highly gifted students with more advanced curriculum and a faster pace,” despite “an entrance score one point below the requirement.” **During the summer prior to PRISM, a new IEP was developed that included 48 accommodations and modifications and nine special education services.** While the year started well, “both his grades and mood quickly declined over the course of the school year.” When things got rough, the parents requested additional accommodations that were refused, and the district suggested that the student leave the program. Before the district took action to move the student, the parents unilaterally placed him in a private school and filed this action seeking reimbursement. The court explains the reasonable accommodation analysis that it will apply to resolve the dispute.

“Under the ADA and Section 504, ‘an educational institution is not required to make fundamental or substantial modifications to its program or standards; it need only make reasonable ones.’ *Zukle v.*

Regents of the Univ. of Cal., 166 F.3d 1041, 1046 (9th Cir. 1999) (citing *Alexander v. Choate*, 469 U.S. 287, 300 (1985)). If the Plaintiffs meet ‘the burden of producing evidence of the existence of a reasonable accommodation that would enable [the Student] to meet the educational institution's essential eligibility requirements,’ the burden shifts to the District ‘to produce evidence that the requested accommodation would require a fundamental or substantial modification of its program or standards.’ *Id.* at 1047. The District ‘may also meet its burden by producing evidence that the requested accommodations, regardless of whether they are reasonable, would not enable the student to meet its academic standards.’”

At issue here is the school’s refusal to provide two accommodations requested by the parents. Both requests arise from the student’s difficulty keeping pace with the required out-of-class work. Homework was a significant problem for the student. **In his regular education classes the previous year, “which has much less homework than the PRISM program, the Student spent four hours each night doing homework.”**

“The accelerated PRISM program has a critical component of homework and students are expected to develop understanding and comprehension of the material outside of class. **The homework is also more difficult than in the regular education program.** The PRISM program stresses the importance of keeping up with homework as class lessons are sequential and ‘catching up’ on homework creates problem.” [Emphasis added].

Faced with the more difficult curriculum and sheer volume of material in the PRISM program, the student was unable to keep up. **His “therapist Dr. Kwon suggested a two hour per night limitation on the amount of homework assigned.”** The therapist also argued that the homework burden was the student’s “greatest source of stress.” **The district denied the request, “finding that this would fundamentally alter the PRISM program curriculum standards, grading standards, and performance expectations.”** The ALJ believed that the student, even with the proposed limitation, would not be successful since “the Student was already doing partial homework and was not mastering the course material.” “Imposing a limitation that merely allowed for the already self-imposed time limit would have made no difference in the Student’s ability to continue in the program and learn the course material.” Both ALJ and District Court found the teacher’s testimony on the issue persuasive, especially with respect to the finding that completing the required homework was essential to the PRISM program.

The second request by the parents was to allow extended time on assignments. **Parents argue that the school failed to provide extended time as required in the IEP (“if extended time is need for assignment [Student] or his parent will indicate a suggested new date on the daily progress report”)** since the student was failing. “The ALJ found that the Student’s ‘teachers uniformly gave full credit for the Student’s homework regardless of when it was turned in.’” The court finds that the school provided reasonable accommodation and that the additional request for homework limitation was not reasonable. The parent’s action and demand for reimbursement of private school placement was denied.

A little commentary: Was the student “otherwise qualified for the program” if his entrance scores were below the established eligibility criteria? The court notes this fact in a single sentence, without any commentary. Assuming that eligibility criteria for the program are educationally-based and are appropriate and nondiscriminatory, did the school accomplish anything by ignoring the criteria for this student?

The court notes that the district did not discuss the requested two-hour homework limitation with teachers prior to rejecting the request. During the hearing, the teachers testified that *had they been told* to limit homework, they would have complied, despite their belief that homework is a necessary part of the PRISM program. “The teachers also testified that setting a time limit would not be a good option for helping the Student be successful in the program because of the educational value in each assignment and the specific processing difficulties faced by the Student in completing homework.” **The author would be concerned if the natural inclination of educators here to meet student needs overrode**

the school's obligation to provide educational benefit. A student who due to services and accommodations is denied opportunity for equal access and benefit in the school's programs and activities is not, by definition, receiving FAPE. In other words, excessive or inappropriate accommodation can deny FAPE if it takes away learning opportunities from the child. Here, without the necessary homework component, the student would simply not be able to keep up. Hence, this requested accommodation, if provided, would deprive the student of opportunity to benefit in the PRISM program.

B. School Anxiety & Doctors Making Placement Decisions

A few cases and OSERS guidance look at how the doctor's opinion is utilized in the placement decision.

The IEP team makes the call. *Questions and Answers on Providing Services to Children with Disabilities During the H1N1 Outbreak*, 53 IDELR 269 (OSERS 2009). "It has long been the Department's position that when a child with a disability is classified as needing homebound instruction because of a medical problem, as ordered by a physician, and is home for an extended period of time (generally more than 10 consecutive school days), an individualized education program (IEP) meeting is necessary to change the child's placement and the contents of the child's IEP, if warranted."

See, also Marshall Joint Sch. Dist. #2 v. C.D., 54 IDELR 307, 616 F.3d 632 (7th Cir. 2010)(physician's diagnosis and input on a child's medical condition is important and bears on the team's informed decision on a student's needs.... **But a physician cannot simply prescribe special education;** rather, the Act dictates a full review by an IEP team composed of parents, regular education teachers, special education teachers, and a representative of the local education agency[.]").

A diagnosis isn't enough—why is the student confined to home? *Bellingham Pub. Schs.*, 41 IDELR 74 (SEA MA 2004). When asked by the district to explain why a student was confined to the home and in need of homebound services, the doctor responded by listing the student's impairments. Student "has severe learning disabilities (reading, expressive and written language, and math), and also suffers from ADHD, ODD (Oppositional Defiant Disorder), Asperger's Syndrome, a mood disorder that has many of the hallmarks of bipolar illness, anxiety disorder, and obsessive-compulsive disorder." Neither the school district nor the court were satisfied.

"Nothing within Dr. Henry's original submission of May 16, 2003 or in his more recent letter of January 23, 2004 explains how any of Student's diagnoses impacts upon his ability to leave the home and receive educational services at a school. Dr. Henry has provided no basis for distinguishing Student (and his diagnoses) from all of the students with these same diagnoses who receive their educational services within a school setting. In other words, the diagnoses, without more, do not explain why Student must remain at home."

Why doctors don't make the homebound placement decision alone.... Not knowing the educational options and resources available to the school, the doctor may simply think that homebound is the only possible solution. A case from Texas provides insight into the analysis that goes into educational placement decisions, and why these decisions are made by an IEP team.

"Dr. [] is unfamiliar with the criteria for educational placements; educational programs, including special education; or state or federal criteria for determining the need for homebound placement. Dr. [] is unfamiliar with the term 'IEP' and does not know the difference between homeschooling and homebound placement. Dr. [] has never visited Student's home or school, or talked to anyone from Student's school. Dr. [] was unaware that Student's parent had refused to provide Student's school with her consent for the school to speak with Dr. [] about his treatment of Student. Dr. [] has provided no information to Student's school that could be confused as a medical and/or professional opinion in support of an eligibility determination of OHI, based on allergies or multi-chemical sensitivity.... The

standards for homebound placement do not exist in a vacuum, nor is it left up to the generalized opinion of a physician who is unfamiliar with the written State standards.” *Plano Indep. Sch. Dist.*, 62 IDELR 159 (SEA TX 2013).

See also, Brevard County Sch. Bd., 109 LRP 56512 (SEA FL 08/12/09)(With respect to a doctor’s opinion on the issue of returning a medically fragile student with autism from homebound to a small classroom in his neighborhood school, the hearing officer wrote, “Petitioner’s physicians are not experts on education generally or ESE in particular. Given the nature of their pediatric practices, their counsel on Petitioner’s physical capacity to attend public school should be taken into consideration, but only in light of their very limited understanding of what the public school was offering in this instance.”).

Who has the duty to evaluate the student’s need for homebound? IDEA tasks the school with the duty to provide appropriate evaluation. That duty is not one that the school can delegate to the parents, even when homebound is at issue. Homebound demands can create difficult evaluation dynamics, especially when the school does not have access to observe the child, and the doctor’s recommendations do not appear to satisfy the IEP Team’s concerns. Consider the federal district court’s ruling in *Rodriguez & Lopez v. Independent School District of Boise City, No. 1*, 63 IDELR 36 (D. ID. 2014), where parents of a student with autism kept him home, missing months of instruction, due to concerns about the school environment and allegations of an employee kicking the student on the bus. The IEP Team refused the parent’s request for homebound, since the student was not confined to home due to illness or accident. The result was a student not receiving services. Wrote the court: “During his absence, C.L.’s academic advancement was not just minimal or trivial; it was nonexistent. Meanwhile, BIRD had a continuing duty to provide FAPE to C.L.” The school’s position, wrote the court, was that the student should immediately return to school for services.

The parents provided data that an immediate return was inappropriate. For example, the student’s doctor recommended that the student receive homebound due to his fear of returning to school. When asked by the school to identify the benefits of homebound to the student, the doctor wrote

“Nothing, other than I thought that is what the family and the school were desiring until his IEP, behavior intervention plan, and the medication plan were in place such that his disruptive/concerning behaviors could be better helped/controlled. If you don’t find there is any issue, he’d be free to continue at Hillside.”

Following their evaluation of the student, two other doctors recommended a “gradual return to school supplemented with positive reinforcement, school scenario role playing, and efforts to build C.L.’s social and coping skills.” The student’s treating psychologist likewise recommended a gradual transition back to school. The court determined that C.L. has a long history of anxiety at school, and that the “although C.L. is not a reliable reporter of objective facts, the record nevertheless demonstrates that C.L. *perceived* he was abused in Ms. Badger’s classroom and on the bus... According to his parents, C.L.’s perceptions rendered him too anxious to return to Hillside, a reaction entirely consistent with C.L.’s long history of anxiety towards new environments.”

The problem came down to months of no instruction, and the school’s “**stubborn insistence the C.L. could simply return to Hillside at any time[.]**” The school’s position “**inappropriately shifted the burden of complying with the IDEA to C.L.’s parents. BSD embraced this position without seriously considering alternatives that might have addressed the Parent’s legitimate concern that their son would be harmed by returning to a school environment that he—rightly or wrongly—feared.**” The court found in favor of the parents and ordered briefing on appropriate relief, including compensatory services.

A little commentary: The problem here is that even if the student isn’t at home due to illness or accident, he’s at home and getting no services and the medical data speaks of transition not immediate return. There was no data, said the court, indicating that immediate return to school was possible. Once the student is at

home, and transition is necessary to bring him back, the school must provide transition service to effectuate the move, and the duty to provide FAPE has to be addressed. Some homebound instruction seems to be the place to start. Would the court's position have been different if the school has arranged for the teacher, Ms. Badger, to work with the student and home, allowing the school to gather information about his reaction to her and readiness to return? What if the school had provided counseling or school psychological services that addressed the student's anxiety and ability to return to school? Had those services occurred early, they might have bolstered the school's position that homebound was inappropriate, and that the student was able to return to immediately to school. See the discussion below on services, in addition to instruction, that might be necessary to return the student to a less-restrictive environment.

See also, Boston Public Schools, 40 IDELR 108 (SEA Mass. 2003)(Hearing Officer found a FAPE violation when a school failed to appropriately respond to an attendance problem by a student with an emotional disturbance. "BPS did not conduct any formal assessment of this problem (such as a functional behavioral assessment (FBA)) so that it could develop a systematic way to address it, or alternatively did not establish consistent contact with Student's outside therapist. Such assessment was particularly important here because Student's combination of disabilities made it very difficult for her to discuss the anxiety and panic that impeded her attendance, even with McKinley Tech staff members with whom she had close relationships... As a result, Student's teachers and counselor at McKinley Tech did not know what student was experiencing." And presumably, could not possibly respond appropriately.).

Home instruction is restrictive. So, what are you doing to get the student back to school? *See for example, Abington Heights Sch. Dist.*, 112 LRP 16163 (SEA PA 03/13/12). "Clearly, [due to] Student's physical/neurological conditions and anxiety, and the many years of instruction in the home, it is not feasible to meet the LRE goal of instruction in a regular classroom, or in any public school placement at present. That does not mean, however, that the District is justified in keeping Student in a very restrictive placement forever. Although the District expressed a vague aspiration to return Student to school, the District acknowledged that it never considered evaluations or services to address Student's needs in the areas of social skills and anxiety. **It is difficult to understand how the District could have any realistic or reasonable goal for developing a less restrictive placement without addressing any of the significant issues that currently require a very restrictive placement for Student in order to receive even the minimal educational services the District has been providing.**" (Emphasis added.)

A little commentary: Put differently, homebound is a very restrictive setting. Consequently, part of the school's focus while providing home instruction ought to be on helping the student return to school. Where there are barriers to the student's return that can be addressed through services or supports (for example, a student's anxiety or phobia can be addressed through counseling or psychological services), the IEP team ought to discuss the provision of those services.

School phobia and homebound. *Jason B. v. Floresville Indep. Sch. Dist.*, Nos. 043, 044, 045-SE-1093 (SEA TX 1993). Following an incident on the school bus, the parents of three special education students refused to return them to school, and sought homebound services. The rationale for homebound was post-traumatic stress disorder, major depression, and school phobia arising from the bus incident. Prior to the next school year, the IEP team met for each of the three, and proposed a transition back to school. The school likewise took other steps to reduce the possibility of a recurrence of trouble on the bus. The students did not return as scheduled, prompting the school's filing for due process and an order that the IEPs were appropriate and proposed services in the LRE. The hearing officer concluded that the IEPs were appropriate and that by keeping their students at home, the parents had "denied the district the opportunity to implement the agreed upon measures." While the parents' concerns were understandable, "a risk-free school environment is neither attainable nor required.... From the Hearing Officer's perspective... depriving children of educational services for such extended periods of time was not in their best interests."

See also, Bradley v. Arkansas Dep't of Educ., 45 IDELR 149, 443 F.3d 965 (8th Cir. 2006)(The IEP team rejected a parent request for homebound on the basis of one-page report from psychologist diagnosing student with school phobia. The team believed that student's socialization needs would not be met at home, and that the home was not the LRE. The school asked for additional information, and the opportunity to pursue a second opinion. Both requests were rejected by the parent who refused to send the student to school. A truancy court ordered the parent to return the student to school. No retaliation found for the truancy filing, as the principal only did what state law required him to do. The principal had actually even delayed filing against the parent in order to try to work out the matter as the principal knew that a truancy filing would further sour the parent-school relationship).

But see, Greenbush Sch. Cmty. v. Mr. & Mrs. K., 25 IDELR 200, 949 F.Supp. 934 (D. Me. 1996)(Student ostracized and persecuted in his resident school system sought placement in a neighboring school system. The District Court found that a student's "gripping fear" of a particular school, together with parental hostility, can prevent a student from receiving educational benefit there, and would make education there inappropriate).

A little commentary: An important point made in an Illinois case is that waiting for school phobia to subside is not a good strategy. "In contrast to normal school anxieties which tend to alleviate over time, school phobia becomes worse the longer the individual stays away from school. According to the report it was important to treat Student's school phobia aggressively, with the most immediate goal being to get Student back into the classroom as soon as possible." *Oak Park & River Forest High Sch. Dist. #200*, 34 IDELR 161 (SEA IL 2001).