PULLMAN
&COMLEY LLC
ATTORNEYS

THE NEW NORMAL: SECTION 504 IN THE WAKE OF OCR'S JULY 2016 DEAR COLLEAGUE LETTER

MICHAEL P. MCKEON, ESQ.
PULLMAN & COMLEY LLC
90 STATE HOUSE SQUARE
HARTFORD, CONNECTICUT 06103
(860)-424-4386
MMCKEON@PULLCOM.COM
WWW.PULLCOM.COM

I. BACKGROUND

Prior to the 1973 enactment of Section 504 of the Rehabilitation Act, many states had laws which permitted school districts to refuse to enroll any student they considered "uneducable." Similarly, those districts that did offer educational services to cognitively and physically disabled students often did so in segregated settings. As a consequence of these practices, it has been estimated that approximately one million children were deprived of an education and an additional 3.5 million were "warehoused."

In Brown v. Board of Education, 347 U.S. 483 (1954), the United States Supreme Court held that it was illegal to arbitrarily discriminate against any group of people and applied this principle to the schooling of children, holding that a separate education for African-American students was not an equal education.

Subsequently, students with disabilities cited Brown as precedent to argue that their segregation and exclusion from school also violated their opportunity for an equal education under Equal Protection clause of United States Constitution.

II. SECTION 504 OF THE REHABILITATION ACT

A. THE STATUTE

1. Section 504 of the Rehabilitation Act of 1973 provides in pertinent part:

> No otherwise qualified individual with a disability in the United States, as defined in Section 7(8) [29 U.S.C. §706(8)], shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

29 U.S.C. §794.

B. THE ELEMENTS

1. "Federal financial assistance" means any grant, loan, contract (other than a procurement contract or a contract of insurance or guaranty), or any other arrangement by which the United States Department of Education provides or otherwise makes

available assistance in the form of:

- (1) Funds;
- (2) Services of Federal personnel; or
- (3) Real and personal property or any interest in or use of such property, including:
- (i) Transfers or leases of such property for less than fair market value or for reduced consideration; and
- (ii) Proceeds from a subsequent transfer or lease of such property if the Federal share of its fair market value is not returned to the Federal Government.

34 CFR 104.3;

2. **"Program or activity"** means all programs and activities of a state and local educational agency receiving federal funds, regardless of whether the specific program or activity involved is a direct funding recipient. 29 U.S.C. §794(b). Furthermore, Section 504's implementing regulations provide in part:

> A recipient that operates a public elementary or secondary education program shall provide a free appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction, regardless of the nature or severity of the person's handicap.

34 C.F.R. §104.33(a).

Consequently, local or regional school districts are covered under Section 504, as are charter schools and interdistrict magnet schools. Additionally, private and parochial schools that receive any form of federal financial assistance are covered under Section 504.

3. **"Qualified Individual With a Disability"** is an individual who:

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

29 U.S.C. §706(8)(B).

4. **Exceptions to Status as "Qualified Individual With a Disability"**

> **a.** The phrase "qualified individual with a disability" does ***not*** include: "[A]n individual who is currently engaging in the illegal use of drugs, when a covered entity acts on the basis of such use."

29 U.S.C. §706(C).

NOTE: This exception for individuals who are currently engaging in illegal drug use does ***not*** include individuals currently participating in, or who have successfully completed, a supervised drug rehabilitation program ***and*** are no longer engaging in such drug use.

ADDITIONAL NOTE: Section 504's definition of a student with a disability does ***not*** **exclude** users of alcohol.

In any event, Section 504 allows schools to take disciplinary action against students with disabilities using drugs or alcohol to the same extent as students without disabilities.

See *Protecting Students With Disabilities: Frequently Asked Questions About Section 504 and the Education of Children with Disabilities*, by Office of Civil Rights (OCR) of U.S. Department of Education. (March 17, 2011).

b. Other conditions that do not, in and of themselves, serve as grounds for Section 504 eligibility: homosexuality, bisexuality, transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, other sexual identity disorders, compulsive gambling, kleptomania, pyromania, illegal drug aided psychoactive substance disorders.

BUT NOTE: Although gender-identity "disorder" is not considered a disability under either Section 504 or the Americans with Disabilities Act ["ADA"], **gender dysphoria** – which can manifest as anxiety or depression resulting from gender-identity issues -- is included in the DSM-V and has been recognized as the basis for a Section 504 designation.

5. "Physical Impairment" means any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following systems:

- Neurological;
- Musculoskeletal;
- Special sense organs;
- Respiratory, including speech organs;
- Cardiovascular;
- Reproductive,
- Digestive,
- Genito-urinary;
- Hemic and lymphatic; skin; and
- Endocrine

34 C.F.R §104.3

NOTE: Impairments that are "transitory and minor" do ***not*** qualify as the basis for a disability. See ADA Amendments Act of 2008, §3(4)(B). A "transitory impairment is an impairment with an actual or expected duration of six months or less." Id. At the same time, however, an "impairment that is episodic or in remission ***is*** a disability if it would substantially limit a major life activity ***when active***." Id., §3(5)(C). Accordingly, an individual may now be disabled even if the individual's impairment or condition does not ***currently*** substantially limit a major life activity.

6. **"Mental Impairment"** means any mental or psychological disorder, such as:

- Cognitive Impairment
- Organic Brain Syndrome
- Emotional or mental illness
  - ADHD, ADD
  - Bi-Polar
  - OCD, ODD, Dysthymia, Anxiety
  - Other DSM Diagnosis
- "Specific learning disabilities"

34 C.F.R §104.3

7. "**Major Life Activities**" include, but are not limited to:

- Caring for oneself
- Performing manual tasks
- Seeing
- Hearing
- Eating
- Sleeping
- Walking
- Standing
- Lifting
- Bending
- Speaking
- Breathing
- Learning
- Concentrating
- Thinking
- Communicating
- Working

34 C.F.R. §104.3(j)(ii).

8. **"Has a record of such an impairment"** means a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or

more major life activities. See 34 C.F.R. §104.3(j)(iii). Potential sources for this "record" include:

- Prior 504 plans
- Prior IEPs
- Achievement Tests
- Teacher recommendations/observations
- Medical reports
- Prior Assessments

9. "Is regarded as having such an impairment" pertains to situations in which the individual is not actually disabled, but is "regarded" as being disabled. For example, when an individual:

- 1. Has a physical or mental impairment that does not substantially limit major life activities but that is treated by a recipient as constituting such a limitation;
- 2. Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or
- 3. Has none of the impairments defined above but is treated by a recipient as having such an impairment.

34 C.F.R. §104.3(j)

In fact, the United States Department of Education's Office for Civil Rights ["OCR"] has opined on this classification as follows:

> The [ADA] Amendments Act clarifies that the statutory protections apply whether or not the individual actually has the impairment, and also whether or not the impairment is perceived to be a substantial limitation on a major life activity. ... For example, consider a nondisabled student whose mother is a well-known AIDS activist in the community. After the student transfers schools at mid-year, he is harassed by other students based on their mistaken assumption that he has AIDS. This student, who is regarded as having an impairment, would be protected by the ADA and Section 504.

"Dear Colleague Letter"/Questions and Answers on the ADA Amendments of 2008 for Students with Disabilities Attending Public Elementary and Secondary Schools, 58 IDELR 79 (OCR, January 19, 2012).

10. "Substantially Limits" in the context of education generally refers to a student who is:

- Unable to Perform a Major Life Activity that the average student of approximately the same age can;

- Significantly restricted as to the condition, manner or duration under which a particular life activity is performed as compared to the average student of approximately the same age.

The standard that is commonly used to determine whether a physical or mental impairment results in a substantial limitation ***is average performance in the general population.***

11. Although a "**reasonable accommodation/undue hardship**" standard is provided in the portion of the regulations pertaining to employment opportunities, it is ***not*** contained in the regulations pertaining to schools.

a. Standard: Traditionally, the law provided that schools generally must make reasonable accommodations for students with physical or mental limitations unless the school can demonstrate undue hardship. In determining undue hardship, focus is on the size of recipient's program (employees, facilities, budget), the type of operations, and nature/cost of accommodation. See 34 C.F.R. §104.12.

b. A school district is not required to fundamentally alter the school's program or curriculum, although it may have to provide commensurate opportunity.

c. Pertinent Court Cases:

The accommodations do not have to be "optimal." Moody ex rel. J.M. v. NYC Department of Education, 2013 WL 906110 (2d Cir. 2013).

Section 504 does not mandate "substantial" changes to a school's programs. There needs to be a balance between the rights of the student and the legitimate financial and administrative concerns of the school district. Ridley School District v. M.R., 680 F.3d 260 (3d Cir. 2012).

A "reasonable" accommodation is one that gives the individual with a disability "meaningful access" to the program or services sought. Mark H. v. Lemahieu, in his official capacity of Superintendent of Hawaii Public Schools, 513 F.3d 922 (9th Cir. 2008).

"There is no precise reasonableness test, but an accommodation is unreasonable if it either imposes undue financial or administrative burdens, or requires a fundamental alteration in the nature of the program." Allen DeBord and Debra DeBord o/b/o Kelly DeBord v. Board of Education of the Ferguson-Florissant School District, 126 F.3d 1102 (8th Cir. 1997).

An "effective" accommodation, as an alternative to a specific demand, can be reasonable. T.B. by and through Allison Brenneise v. San Diego Unified School District, 2012 WL 1611021 (S.D. Ca. 2012).

C. ENFORCEMENT

1. United States Department of Education, Office for Civil Rights ["OCR"] OCR jurisdiction is mainly focused on procedural compliance involving placement and evaluations, along with discrimination and retaliation. Absent unusual circumstances, OCR does not examine disputes over appropriateness of educational services. OCR believes that the appropriate forum for resolving such a dispute is through due process proceedings. OCR has its own complaint and investigatory procedures. It can make findings regarding the existence of discrimination/Section 504 violations, attempt to conciliate and cause the recipient to take measures to correct the violation, or, if the recipient refuses to correct, take enforcement measures such as (a) referral to the Justice Department for judicial proceedings, or (b) administrative proceedings to suspend or terminate USDOE financial assistance to recipient. OCR will not accept complaints filed more than 180 days after the alleged violation, unless there is a "continuing violation."

D. THE ADA AMENDMENTS OF 2008

1. Section 504 and the ADA

As previously noted, there is a three-step process for determining whether an individual has a disability under Section 504:

1. Whether the individual suffers from a physical or mental impairment.
2. Whether the activity in question is "a major life activity."
3. Whether the individual's impairment "substantially limits" the major life activity identified in step two.

Section 504's definition of disability is "identical to the one provided by the [Americans with Disabilities Act of 1990, specifically 42 U.S.C. §12102(2)(A-C) ["ADA"]]. Sepulveda v. Glickman, 167 F.Supp.2d 186, 192 (D.P.R. 2001)(*citing* Tardie v. Rehabilitation Hosp. of Rhode Island, 168 F.3d 538, 542 (1st Cir. 1999)). See also 28 C.F.R. §36.104.

In fact, "Congress drew the ADA's definition of disability almost verbatim from the definition of 'handicapped individual' in the Rehabilitation Act." Toyota Motor Manufacturing v. Williams, 534 U.S. 184, 193-94 (2002). Additionally, the ADA provides in relevant part: "Except as otherwise provided in this chapter, nothing in this chapter shall be construed to apply a lesser standard than the standards applied under [29 U.S.C. §§790 *et seq.*] of the Rehabilitation Act of 1973." 42 U.S.C. §12201(a).

Consequently, it is not uncommon for courts to apply the same standards to claims brought pursuant to the ADA and to Section 504. See, e.g., Forest City Daly Housing, Inc. v. Town of North Hempstead, 175 F.3d 144, 150-52 (2d Cir. 1999).

As such, and as expressly stated by OCR in its post-ADA Amendments Act guidance, amending the ADA's disability definitions had the effect of amending Section 504.

2. The Effect of the ADA Amendments of 2008

The definition of the term **"Substantially Limits"** was modified by the ADA Amendments Act of 2008 ["ADAAA"], which was designed, in part, to "depart from the strict and demanding standard applied by the Supreme Court in Toyota Motor Manufacturing, Kentucky, Inc. v. Williams and by numerous lower courts." See ADAAA, §2(b)(5). In Toyota, the Supreme Court had held that in determining whether an individual is disabled for purposes of the ADA: "[T]he central inquiry must be whether the claimant *is unable to perform* the variety of tasks central to most people's daily lives." 534 U.S. 184, 200-201 (2002)(emphasis added).

In sharp contrast, however, the ADAAA provides that the definition of disability "shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act." Furthermore, it asserts that the EEOC's regulatory definition of "substantially limits" was overly strict.

3. What is the Current Standard for Determining "Substantially Limits"?

Under the ADAAA, Congress defined "substantially limits" as meaning "materially restricts." ADAAA, §3(2).

The term "material" has been defined as "important," as "more or less necessary," and as "having influence or effect." *Black's Law Dictionary* (5th Ed. Abridged 1983), p. 504. Given the stated intent of the Amendments, and in light of OCR's subsequent guidance, it would appear that courts would tend to apply a lesser standard, such as **"having influence or effect"** rather than the more stringent "more or less necessary." Specifically, an impairment need ***not*** prevent, or severely or significantly restrict, a major life activity. See *Dear Colleague Letter*, 58 IDELR 79 (OCR, January 19, 2012).

Consequently, "[t]o determine whether an impairment substantially limits a major life activity, courts consider the analysis under the ADA: (1) the nature and severity of the impairment; (2) the duration or expected duration of the impairment; and (3) the permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment."

29 C.F.R. § 1630.2(j)(2). See also R.N. ex rel. Nevill v. Cape Girardeau 63 Sch. Dist., 858 F. Supp. 2d 1025, 1031 (E.D. Mo. 2012).

4. Additional Consequences of the ADAAA

The ADAAA:

- Prohibits the consideration of mitigating measures such as medication, assistive technology, accommodations, or modifications, when determining whether an impairment substantially limits a major life activity.
- Provides that impairments that are episodic or in remission are to be assessed in their "active state."

III. APPLICATION OF SECTION 504

A. CHILD FIND UNDER SECTION 504

A recipient of federal funds that operates a public elementary or secondary education program or activity shall annually:

> (a) Undertake to identify and locate every qualified handicapped person residing in the recipient's jurisdiction who is not receiving a public education; and
> (b) Take appropriate steps to notify handicapped persons and their parents or guardians of the recipient's duty under this subpart.

1. Pertinent Cases

D.L. ex rel. K.L. v. Baltimore Bd. of School Com'rs, 706 F.3d 256 (4th Cir. 2013)(recognized the [504] child find obligation as an affirmative obligation, and further holding that the affirmative obligation under Section 504 child find is to ensure universal access and awareness, not universal provision).

P.P. ex rel. Michael P. v. West Chester Area School Dist., 585 F.3d 727 (3d Cir. 2009) (stating that "Section 504 of the Rehabilitation Act is parallel to the IDEA in its protection of disabled students: it protects the rights of disabled children by prohibiting discrimination against students on the basis of disability, and it has child find, evaluation, and FAPE requirements, like the IDEA.").

W.B. v. Matula, 67 F.3d 484, 501 (3d Cir. 1995) (recognizing child find requirement of Section 504 by citing to the regulation).

Kimble v. Douglas County School Dist. RE-1, 925 F.Supp.2d 1176 (D. Colo. 2013) ("Although the statutory language [of 504] is framed as a negative prohibition on discrimination, the regulations clarify that a school district has an affirmative duty to identify, locate, and evaluate all children with disabilities in order to ensure that they receive a FAPE").

Vicky M. v. Northeastern Educational Intermediate Unit, 2009 WL 4044711, *6,(M.D. Pa. 2009) ("The federal regulations implementing Section 504 state that a school district shall "undertake to identify and locate every qualified handicapped person residing in the recipient's jurisdiction." 34 C.F.R. § 104.32(a). While this creates an affirmative duty under Section 504 to those students residing within a school district's geographic boundaries, it does not explicitly exclude other students from being protected.").

B.H. v. Portage Public School Bd. of Educ., 2009 WL 277051 (W.D. Michigan 2009) (Under the regulations to Section 504, "a school district has an affirmative duty to identify, locate, and evaluate all children with disabilities. This duty is often referred to as the "child find" obligation").

W.H. ex rel. B.H. v. Clovis Unified School Dist., 2009 WL 1605356, *6 (E.D. Cal. 2009) (stating that with respect to 504 "The cross-referenced U.S. DOE regulations impose requirements similar to the IDEA with respect to identification, evaluation and placement of disabled student," and under Section 504 regulations, elementary schools must evaluate the student and ensure proper placement).

J.W. ex rel. J.E.W. v. Fresno Unified School Dist., 570 F.Supp.2d 1212 (E.D. California 2008) (recognizing that IDEA and 504 have similar child find obligations).

Burke v. Brookline School Dist., 2007 WL 268947 (D.N.H. 2007) (noting that Section 504 requires school districts to locate qualified handicapped persons and notify their parents of the district's obligation to provide a free and appropriate public education).

Alex K. v. Wissahickon School Dist., 2004 WL 286871, *5 (E.D. Pa. 2004) (Section 504 similarly requires public schools receiving federal financial assistance to annually undertake to identify every qualified handicapped person residing in their jurisdiction who is not receiving a public education).

Lower Merion School Dist. v. Doe, 593 Pa. 437, 931 A.2d 640 (Pa. 2007) (stating that the regulations go so far as to place an affirmative duty upon schools to identify qualified recipients).

B. THE SECTION 504 PROCESS

1. Students Who are Covered:

Under Section 504, all school aged children who have physical/mental impairments which substantially limit any major life activity, who have a record of such an impairment, or who are regarded as having such an impairment are covered.

2. Specific Impairments

a. Attention Deficit Disorder: Although students with ADD or ADHD may not qualify for IDEA identification and the consequent special education and related services, they would almost undoubtedly be found eligible for reasonable accommodations under Section 504. This is particularly the case in light of the ADA Amendments Act of 2008, which has added "concentrating" and "thinking" as major life activities.

b. Chronic Fatigue Syndrome: Schools may need to accommodate students with Chronic Fatigue Syndrome by shortening the school day, providing additional time to take tests, and providing written notes and assignments.

c. Severe Allergies and Asthma: Schools may need to accommodate students with severe allergies through air filtration, removal of carpeting, special cleaning of classroom, and the administration of medication. **BUT NOTE:** Mild allergies are not covered by Section 504. See Letter to Rahall, 21 IDELR 575 (OCR 1994).

d. Communicable Diseases: Examples: AIDS and Hepatitis-B.

e. **Physical Disabilities.**

f. **Diabetes**: A diagnosis of diabetes does not constitute a covered disability in the absence of a substantial limitation. See Shields v. Robinson-Van Vuren Assocs., Inc., 2000 WL 565191, at *2-5 (S.D.N.Y. 2000)(individual controlling diabetes with diet and exercise not substantially limited in ability to eat when only impact involved modifications of diet and eating habits); Ingles v. Neiman Marcus Group, 974 F. Supp. 996, 1001-1002 (S.D. Tex. 1997)(individual managing diabetes with oral medications and "a 'normal, good healthy diet'" and with meals "at regular intervals" was not substantially limited in eating).

3. Food Allergies

Previously, food allergies were not considered to constitute a basis for identification under Section 504. In considering physical impairments related to the major life activity of eating, courts held that individuals "who must follow the simple 'dietary restrictions' that medical conditions sometimes entail" are not substantially limited within the meaning of the ADA or Section 504. Lawson v. CSX Transportation, Inc., 245 F.3d 916, 924-25 (7th Cir. 2001), *citing* Weber v. Strippit, 186 F.3d 907, 914 (8th Cir. 1999), *cert. denied*, 528 U.S. 1078 (2000)(unspecified "dietary restrictions" prescribed for treatment of heart disease were only a "moderate limitation" on eating).

Creating an individualized medical or health plan for a student with a food allergy had been the preferred approach. In light of the ADAAA, however, OCR recently noted:

> 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.

Dear Colleague Letter," *supra* (emphasis added).

NOTE: Conn. Gen. Stat.§10-212c requires the State Department of Education, in conjunction with the Department of Public Health, to develop and make available to each school district guidelines for the management of students with life-threatening food allergies.

The guidelines shall include, but need not be limited to:

> (1) Education and training for school personnel on the management of students with life-threatening food allergies, including training related to the administration of medication with a cartridge injector;
> (2) procedures for responding to life-threatening allergic reactions to food;
> (3) a process for the development of individualized health care and food allergy action plans for every student with a life-threatening food allergy; and
> (4) protocols to prevent exposure to food allergens. Each school district must implement a plan for the management of students with life-threatening food allergies enrolled in its schools based on these guidelines.

In the same vein, OCR has noted:

> For example, consider a student who has Attention-Deficit/Hyperactivity Disorder ["ADHD"] but is not receiving special education or related services, and is achieving good grades in academically rigorous classes. School districts should not assume that this student's academic success necessarily means that the student is not substantially limited in a major life activity and therefore is not a person with a disability. In passing the Amendments Act, the managers of the Senate bill rejected the assumption that an individual with a specific learning disability who performs well academically cannot be substantially limited in activities such as learning, reading, writing, thinking, or speaking. Thus, grades alone are an insufficient basis upon which to determine whether a student has a disability. Moreover, they may not be the determinative factor in deciding whether a student with a disability needs special education or related aids or services. Grades are just one consideration and do not provide information on how much effort or how many outside resources are required for the student to achieve those grades. Additionally, the Committee on Education and Labor in the House of Representatives cautioned that "an individual with an impairment that substantially limits a major life activity should not be penalized when seeking protection under the ADA simply because he or she managed their own adaptive strategies or received informal or undocumented accommodations that have the effect of lessening the deleterious impacts of their disability." *See* H.R. Rep. No. 110-730, pt. 1, at 15 (2008).

See *Dear Colleague Letter*

BUT NOTE: Although school districts may no longer consider the ameliorative effects of mitigating measures when making a disability ***determination***, mitigating measures remain relevant in evaluating ***the need of a student with a disability for special education or related services or in determining the appropriate accommodations***. See *Dear Colleague Letter*.

C. SERVICES PROVIDED AND/OR REQUIRED FROM SCHOOL DISTRICT

A school is required to provide a "free appropriate public education" ["FAPE"] to each qualified disabled student, regardless of nature or severity of disability. 34 C.F.R. §104.33(a). Under Section 504, FAPE includes both regular ***and*** special education services, which in essence is whatever is necessary to meet the individual educational needs of disabled students as adequately as the needs of non-disabled students. See 34 C.F.R. §104.33(b). FAPE may also include a residential placement where necessary. See 34 C.F.R. §104.33(c).

1. Least Restrictive Environment Requirement ["LRE"]

School districts are required to educate disabled students with those who are not disabled to the maximum extent appropriate. 34 C.F.R. §104.34(a). This requirement

also applies to provision of non-academic and extracurricular services and activities. See 34 C.F.R. §104.34(b).

2. Nonacademic and extracurricular services

Schools must afford disabled students equal opportunity to participate in such services. 34 C.F.R. §104.37. Reasonable accommodations may include the waiver of neutral rules that apply to other students, such as an age-based rule. Dennin v. CIAC, 913 F. Supp. 663 (D. Conn. 1996).

IV. OCR'S JULY 26, 2016 DEAR COLLEAGUE LETTER

Despite the enactment of the ADAAA in 2008, school district approaches to Section 504 remained fairly consistent with the pre-ADAAA process. On July 26, 2016, however, OCR issued a Dear Colleague letter in conjunction with *Students with ADHD and Section 504: A Resource Guide* ["*Guide*"]. Although as the title suggests, the letter and the *Guide* address attentional disorders, its broad language is easily applicable to Section 504 as a whole and could, to a certain extent, influence parallel procedures under the Individuals with Disabilities Education Improvement Act of 2004 ["IDEA"]

A. DEAR COLLEAGUE LETTER

At the outset of its July 26, 2016 letter, OCR writes:

> Because the Americans with Disabilities Act Amendments Act . . . clarified the broad scope and definition of the term "disability," more students with ADHD are now clearly entitled to the protections under Section 504.

OCR goes on to assert that between the years 2011 and 2015, it received over 16,000 complaints of disability-based discrimination, of which approximately 2,000 involved students with ADHD. Consequently, OCR notes:

> [S]tudents with ADHD could be denied FAPE because of problems that school districts have in identifying and evaluating students who need special education or related services because of ADHD. Some of these problems are as follows:
>
> --- students never being referred for, or identified by the school district as needing, an evaluation to determine whether the student has a disability and needs special education or related services;
>
> --- students not being evaluated in a timely manner once identified as needing an evaluation; or
>
> --- school districts conducting inadequate evaluations of students.

According to OCR, school districts fail to meet their Section 504 obligations when they:

1. Make inappropriate decisions about the regular or special education, related aids and services, or supplementary aids and services the student needs, and the appropriate setting in which to receive those services based on a misunderstanding of ADHD and the requirements of Section 504;

2. Fail to distribute relevant documentation to appropriate staff; or

3. Consider inappropriate administrative and financial burdens in selecting and providing appropriate related aids and services.

Thus, OCR sets forth the following broad obligations:

> [S]chool districts must conduct individualized evaluations of students who, because of disability, including ADHD, need or are believed to need special education or related services, and must ensure that qualified students with disabilities receive appropriate services ***that are based on specific needs, not cost, and not based on stereotypes or generalized misunderstanding of a disability***.

B. THE *GUIDE*

1. Free Appropriate Public Education ["FAPE"]

> Under Section 504, FAPE is the provision of regular or special education and related aids and services that are designed to meet the individual educational needs of students with disabilities as adequately as the needs of students without disabilities are met and that satisfy certain procedural requirements related to educational setting, evaluation and placement, and procedural safeguards

Guide, p. 3. "An individualized education program ["IEP"] developed and implemented in accordance with the IDEA is one means of meeting the Section 504 FAPE standard."

2. Section 504 Plan

While there is no specific requirement for a Section 504 plan or what the plan should contain, if a student has a written Section 504 Plan, "**it is vital that teachers and appropriate staff have access to it**" so that the plan is implemented consistently.

OCR considers the failure to ensure appropriate access to the Section 504 plan or the student's accommodations is constitutes evidence that the school failed to provide FAPE and an equal educational opportunity.

ALSO NOTE: OCR considers the absence of a district representative who can ensure the district provides, or is able to provide, all services that are identified as necessary in the Section 504 plan could constitute the denial of FAPE.

3. The Effect Of The ADAAA

In accordance with the ADAAA, OCR warns that "the definition of disability [should] be construed broadly and that the determination of whether an individual has a disability [does] not demand extensive analysis." *Guide*, p. 5.

Furthermore, "mitigating measures ***shall not be considered*** in determining whether an individual has a disability. Mitigating measures include, for example, medications, coping strategies, and adaptive neurological modifications that an individual could use to eliminate or reduce the effects of an impairment." Id. (emphasis added)

Consequently:

> School districts cannot consider the ameliorative effects of mitigating measures when determining how the impairment impacts the major life activities under consideration.19 The impact, therefore, of a student's ADHD on a given major life activity, such as concentrating or thinking, must be considered in the student's unmitigated state to determine whether a substantial limitation exists. For example, if a student requires medication to address an impairment, the ameliorative effects of the medication cannot be considered when evaluating the student for a disability

Id.

4. The IDEA

A student can still be determined to be a child with a disability under IDEA if the student needs only a related service, if it consists of specially designed instruction and is considered special education, rather than a related service, under applicable State standards.

Although the IDEA's definition of "other health impairment" was amended in 1999 to expressly include ADHD, eligibility under the IDEA is not limited to other helath impairment, but rather, ADHD students can also be deemed eligible under the IDEA under the category of specific learning disability or emotional disturbance.

5. Determination of Disability

A determination that a student has any type of ADHD is a determination that a student has an impairment for purposes of meeting one of the prongs of Section 504's definition of disability. Furthermore, a diagnosis of ADHD is evidence that a student

may have a disability, and ***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***.

6. Basis for Evaluating Student for ADHD

OCR considers the following as signs that could trigger a school's obligation to assess a student for ADHD:

1. considerable restlessness or inattention inappropriate for their age and grade level;

2. trouble organizing tasks and activities; or

3. communication or social skill deficits.

No particular combination of the above is necessary for an evaluation to be required. For example, a school district must evaluate a student if it believes the student has a disability and believes the student needs special education or related services as a result of that disability, even if the student only exhibits behavioral (and not academic) challenges.

Thus, students who have a high number of discipline referrals as compared to their peers, for incidents such as disruptions in class, could also be students with a disability in need of services.

Similarly, indicia may arise from students who demonstrate significant difficulty beginning a task, organizing information, and completing assignments, as well as students who engage in excessive daydreaming; distracting oneself by socializing to the degree that doing so prevents, or significantly interferes with, completing work; inability to stay still or stay in a seat; repeatedly missing details or having difficulty processing information as quickly or accurately as expected for his or her age and grade level; repeatedly losing things; routinely interrupting conversations or other activities.

7. Irrelevance of Academic Success

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. OCR faults school districts that rely solely on a student's average, or better-than-average, grade point average (GPA), believing that doing so can result int the district making inappropriate decisions.

Consequently, Under Section 504, an evaluation must: consist of more than cognitive tests and must instead measure specific areas of educational need, such as speech processing issues, inability to concentrate, and behavioral concerns.

Thus, 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.

From OCR's perspective, students who achieve satisfactory, or even demonstrate above-average, academic performance may still have a disability that substantially limits a major life activity and be eligible for special education or related aids and services because the school district is not meeting their needs as adequately as the needs of nondisabled students are met.

8. Parent Requests for Evaluations

If a parent requests an evaluation to address a student's academic or behavioral difficulty that is the result of a suspected disability, then a district must either conduct an evaluation to determine whether the student has a disability and, because of the disability, needs special education or related services, or explain its refusal to evaluate the student to the requesting parent and notify parents of their right to dispute that decision through the due process procedures that must be made available under Section 504's implementing regulation.

9. Irrelevance of Intervention Strategies

If a school district believes a student has a disability and because of the disability needs special education or related aids and services, then Section 504 requires the school district to conduct a preplacement evaluation of that student. **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**.

Implementing an intervention strategy and evaluating for a disability ***do not have to occur sequentially, but could be implemented at the same time***, as parallel responses in an attempt to identify and address a student's needs. Interventions could be implemented while a student is being evaluated, and information gathered during the intervention protocol could be useful in the evaluation process.

If a student continues to experience academic or behavioral problems, even after the implementation of intervention strategies, this may indicate that the student has a disability.

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. Therefore, **school districts must not use the intervention system to delay**

or fail to make a decision to grant or refuse a parent's or teacher's request for an evaluation of a student under the IDEA.

10. Purpose of Evaluation

Generally, the evaluation and placement determinations regarding whether a student is eligible to receive services under Section 504 must address two questions:

1. Does the student have a disability under Section 504?

2. If so, does the student need regular ***or special education under Section 504***, related aids and services, or supplementary aids and services because of the disability, and in what setting should the student receive them?

NOTE: Although the district can request relevant information from parents, the district ***cannot*** require the parent to provide certain data or information before conducting an evaluation. It is the district's obligation to evaluate; it cannot shift the burden of that cost or obligation onto the parent.

11. Medical Assessments

If a school district determines, based on the facts and circumstances of the individual case, that a medical assessment is necessary to conduct a Section 504 individual evaluation in order to determine whether a child suspected of having ADHD has a disability under Section 504 and, therefore, needs special education or related services, ***the school district must ensure that the student receives this assessment at no cost to the student's parents.***

NOTE: If medication prescribed by a doctor needs to be taken during the school day, and a student cannot self-administer the medication, the school district must provide medication administration assistance to the student, as a part of FAPE.

12. Irrelevance of Ameliorative Measures

When a school district suspects a student has ADHD and conducts an evaluation to determine disability, it must consider the student, in an unmitigated state, both in and out of school. A student might not exhibit serious academic or behavioral challenges at school – perhaps due to self-management skills, or medication of which the school district may or may not be aware, or the nature of the impairment – but, in other settings, or later in the day, the limitations become more apparent and substantial.

Evidence showing that an impairment would be substantially limiting in the absence of the ameliorative effects of mitigating measures, e.g., medication, could include evidence of limitations that a person experienced prior to using a mitigating measure, or evidence concerning the expected course of a particular disorder absent mitigating measures. This is why it is also beneficial to involve the parent in the evaluation process, as parents would be an excellent resource to provide such evidence.

A student's use of mitigating measures can treat the impairment, thereby obscuring the substantial limitations of the impairment. 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. Even though that 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.

NOTE: The *non*-ameliorative effects of mitigating measures, such as negative side effects of medication or burdens associated with following a particular treatment regimen, may be considered when determining whether an individual's impairment substantially limits a major life activity.

13. Absence of Accommodations

If the student has a disability, but does not need any special education or related aids or services from the school district, e.g., the student is taking medication that adequately treats the student's ADHD, the school district is not required to provide aids or services. But, the student is still a person with a disability (that is, still has an impairment that substantially limits a major life activity), and so is protected by Section 504's general nondiscrimination prohibitions and Title II's statutory and regulatory requirements.