

AN OVERVIEW OF SECTION 504

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A note about these materials: These materials are not intended as a comprehensive review of all Section 504 case law, rules and regulations, but as an overview of some of the basic issues, concerns, and dynamics involved in compliance with the law. The issues are approached in question and answer format, with an emphasis on the most common issues and questions raised by educators. These materials are not intended as legal advice, and should not be so construed. State law, local policy, and unique facts make a dramatic difference in analyzing any situation or question. Please consult a licensed attorney for legal advice regarding a particular situation. References to the U.S. Department of Education will read “ED.”

In addition to the Section 504 regulations and OCR Letters of Finding, these materials will also cite guidance from two important OCR documents. First, a Revised Q&A document has been posted on the OCR website since March of 2009 addressing some of the ADAAA changes. This document, *Protecting Students with Disabilities: Frequently Asked Questions about Section 504 and the Education of Children with Disabilities* (March 27, 2009, last modified October 15, 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 2012)(hereinafter “2012 DCL”). Finally, In July of 2016, OCR released a guidance document/resource letter on ADHD. U.S. Department of Education, Office for Civil Rights, *Students with ADHD and Section 504: A Resource Guide*, 68 IDELR 52 (July 2016)(hereinafter “ADHD Resource Guide.”) In addition to addressing issues related to students with ADHD, the Guide also addresses parent referral, parent-procured evaluation and other related topics.

I. The Background and Purpose of Section 504

Question #1: What is Section 504? The single paragraph we now refer to as §504 of the Rehabilitation Act provided that

“No otherwise qualified individual with a disability in the United States... shall, solely by reason of her or his disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service....” 29 U.S.C. § 794(a).

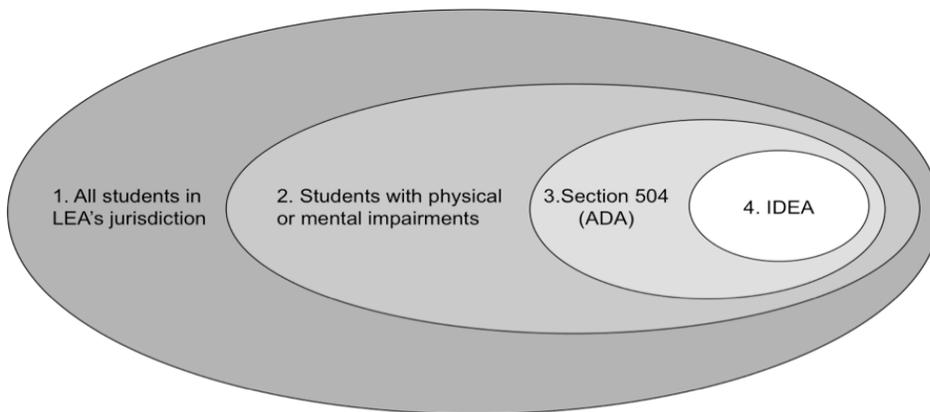
In §504, the focus is on non-discrimination. As applied to the schools, the language broadly prohibits the denial of participation or enjoyment of the benefits offered by a public school’s programs or activities because of a child’s disability. The law recognizes that the impact of disability can mean that equal treatment and equal services may not be sufficient to convey equal benefit. For some eligible §504 students to have equal opportunity to participate and benefit, they must receive services and/or accommodations that level the playing field. Further, since this is a civil rights law, Section 504 also provides protections against discrimination in the form of rights to complain and sue in response to discrimination on the basis of disability.

Question #2: Who or what is a recipient? A recipient is an entity receiving federal funds. Note that once an entity, like a school district, receives federal funds, it is a recipient and every program of activity

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

Question #3: What does the law require of recipients? In the plain language of the statute, three things are required—or perhaps better stated, three things are prohibited. First, recipients are prohibited from excluding eligible students from the recipient’s programs and activities on the basis of disability. Second, recipients are prohibited from denying eligible students the benefits of the recipient’s programs and activities on the basis of disability. Finally, the law provides an umbrella-like protection of nondiscrimination on the basis of disability, **including prohibitions on retaliation, intimidation, threats and coercion for the purpose of interfering with any right or privilege secured by Section 504.** 34 C.F.R. §100.7(e), incorporated by reference in 34 C.F.R. §104.61.

Question #4: How does Section 504 fit with regular education and special education? The following diagram and *bare-bones* summary are provided as a way to visualize the relationship among regular education, Section 504 and the IDEA.



1. All students in the LEA’s jurisdiction. The outside oval represents all the students who have a right to attend school in the school district (Local education agency or “LEA” in fed-speak). These are students within the age-range served by the school, and who are qualified to attend there due to residency, transfer tuition or other means. All of the other ovals are subsets of this group of students. Since all students are regular education students first, each group of students in the diagram has the rights and privileges of a regular education student *together with* any additional rights resulting from eligibility under ovals 3 or 4.

2. Students with physical or mental impairments. This group is actually co-extensive with the first oval, but is shown as smaller to aid understanding of the various relationships. Note that having a physical or mental impairment, even an impairment diagnosed by a medical doctor, does not automatically make a student Section 504- or IDEA-eligible (*discussed below in Question #17*).

3. Section 504 (ADA). These are students who have a right to attend the public schools of the district and have a physical or mental impairment that substantially limits one or more major life activities, have a record of such impairment or are regarded as impaired. Some, but not all, students with current impairments will receive a Section 504 Plan in addition to the regular education services available to all students. All Section 504-eligible students receive protection from discrimination (described previously) and a short list of procedural safeguards “that includes notice, an opportunity for the parents or guardians of the person to examine relevant records, an impartial hearing with opportunity for participation by the person’s parents or guardian and representation by counsel, and a review procedure.” 34 C.F.R. §104.36.

4. IDEA. The final oval represents your district’s special education population. These are students with impairments that fit one of the recognized categories for eligibility under the IDEA (Learning Disabled, Other Health Impaired, etc.) and, because of disability, need special education and related services. Compared to their Section 504 counterparts, these students are typically more severely disabled and due to that level of disability need access to specially designed instruction in order to receive educational benefit. IDEA eligibility always results in the creation of an IEP—an individualized plan based on evaluation data and designed to provide the student with meaningful progress. Substantial parent and student rights (with corresponding school obligations) and extensive procedural requirements ensure that a student’s IDEA rights are protected.

Note that IDEA students, in addition to their IDEA rights, also enjoy the nondiscrimination protections of Section 504. Put simply, all IDEA students would also meet the eligibility standard of Section 504. “In order to be eligible for services under the IDEA, a child must be found to have one or more of the 13 disability categories specified *and* must also be found to need special education. OCR can not conceive of any situation in which these children would not also be entitled to the protections extended by Section 504.” *Letter to Mentink*, 19 IDELR 1127 (OCR 1993). That’s why the IDEA oval fits inside the Section 504 oval, and why special education students can, under Section 504 and the ADA, sue alleging disability harassment or bring service animals to school.

Can a student ever be served *simultaneously* through both a Section 504 Plan and an IEP provided under special education? No. While all students who are eligible under IDEA are also eligible under Section 504, decisions with respect to a special education student’s identification, evaluation and placement have to be made pursuant to IDEA requirements. Put simply, an IDEA-eligible student cannot be served by a Section 504 plan, since that Section 504 plan is neither created nor maintained through the more stringent procedural protections of the IDEA. A school attempting to comply with its IDEA duties to a child by offering a §504 Plan denies the IDEA-eligible student the procedural protections due under IDEA. The Revised Q&A addresses the issue quite simply. “If a student is eligible for services under both the IDEA and Section 504, must a school district develop both an individualized education program (IEP) under the IDEA and a Section 504 plan under Section 504? No. If a student is eligible under IDEA, he or she must have an IEP. Under the Section 504 regulations, one way to meet Section 504 requirements for a free appropriate public education is to implement an IEP.” Revised Q&A, Question 36 In other words, while a Section 504 Plan will not satisfy the school’s duty to serve an IDEA-eligible student, an IEP would satisfy the school’s duty to serve a Section 504 student.

Question #5: I don’t see the FAPE requirement in the Rehabilitation Act language, am I missing something? The requirement that the school district provide a free appropriate public education (FAPE) to Section 504-eligible students is certainly not apparent in the language of the Rehabilitation Act itself. Instead, the Section 504 FAPE arises from the Section 504 regulations created and enforced by the U.S. Department of Education.

Question #6: Section 504 and the Americans with Disabilities Act (ADA) seem kind of similar. Are the two laws related? Yes, the two laws are sometimes referred to as sister-statutes. Because they share common eligibility language and a civil rights approach to disability discrimination, doctrines and lessons from one law are frequently applied to the other. *Bragdon v. Abbott*, 118 S.Ct. 2196 (1998). Consequently, when the Congress amended the ADA in 2008 with the ADA Amendments Act, it applied the changes to Section 504 as well. Specifically, the conforming amendments to the ADAAA apply the rules of construction as well as the definitional changes to the Rehabilitation Act of 1973, 29 USC §705, which creates the definition of disability used in 29 U.S.C. §794(a), the statutory provision upon which the ED’s K-12 Section 504 regulations are premised.

Question #7: Is that why the ADA changes ordered by Congress in 2008 apply to Section 504? Yes, and they are significant. In 2008, Congress was focused on fixing a problem in employment litigation

where courts were erecting additional barriers to eligibility under the ADA and employers were seen as escaping their duties to accommodate in the workplace. Faced with employee challenges to workplace rules and requests for sometimes expensive or inconvenient accommodations, employers had taken to attacks on the employee's ADA eligibility. As long as the employee was not eligible, the lawsuit would die and the employer would not be called upon to provide accommodation. The courts, faced with this defensive strategy by employers, focused more on eligibility, and created new barriers to employees seeking the ADA's protection. **Congress amended the ADA to change this unhealthy litigation dynamic by making ADA eligibility easier to achieve.** The changes targeted the employment world where employers have no FAPE duty (instead, it's a reasonable accommodation duty), and have no obligation to identify and evaluate eligible employees (employees start the process and provide their own evidence of disability). **For schools, the result of the ADA changes is a renewed interest in Section 504 and a larger number of Section 504-eligible students.**

II. The Office for Civil Rights & Section 504 Compliance

The due process hearings and state complaints that are common in special education are largely missing in the Section 504 world. While federal court cases on Section 504 issues occur, they are certainly not common outside of disability harassment and money damages claims, and even these claims are typically filed on behalf of special education students. In Section 504, compliance is largely focused on satisfying the Office for Civil Rights. OCR investigates complaints and conducts its own compliance reviews on Section 504.

Question #8: What is the Office for Civil Rights (OCR)? OCR is the Office for Civil Rights, a subdivision of the U.S. Department of Education. "The mission of the Office for Civil Rights is to ensure equal access to education and to promote educational excellence throughout the nation through vigorous enforcement of civil rights" including Section 504. OCR enforces Section 504 through compliance reviews and complaint investigations, and provides technical assistance "designed to develop creative approaches to preventing and addressing discrimination." Overview of the Agency, OCR website at <http://www2.ed.gov/about/offices/list/ocr/index.html>.

Question #9: When OCR investigates a complaint, what does it look for? The short answer: procedural compliance. OCR provides this response to the question of whether OCR examines individual placement or other educational decisions for students with disabilities.

"OCR will examine procedures by which school districts identify and evaluate students with disabilities and the procedural safeguards which those school districts provide students. OCR will also examine incidents in which students with disabilities are allegedly subjected to treatment which is different from the treatment to which similarly situated students without disabilities are subjected. Such incidents may involve the unwarranted exclusion of disabled students from educational programs and services." Revised Q&A, Question 5.

Note that the focus of complaint investigation is typically not on the ultimate result of the Committee's decision-making (was the student determined eligible? what accommodations and services were provided to the student?), but instead, on the manner in which school decisions are made. OCR continues:

"Except in extraordinary circumstances, OCR does not review the result of individual placement or other educational decisions so long as the school district complies with the procedural requirements of Section 504 relating to identification and location of students with disabilities, evaluation of such students, and due process. Accordingly, OCR generally will not evaluate the content of a Section 504 plan or of an individualized education program (IEP); rather, any disagreement can be resolved through a due process hearing. The hearing would be conducted under Section 504 or the IDEA, whichever is applicable." *Id.*

This same or similar language appears in the Appendix to the Section 504 regulations as well as any number of OCR Letters of Finding. In short, OCR's focus is not on the decision reached by the Section 504 Committee but whether the decision was made by the required people (the group of knowledgeable people), looking at the required data, asking the required questions, and providing the required notices.

OCR: Budget & Mission. Like school districts, OCR is subject to budgetary pressures and changes in approach with new leadership. A couple of notes on recent changes underline the current importance of process, and the increasing importance of process in the future as OCR resources shrink and as its mission adapts to a new administration.

Budget. In May, LRP reported that President Trump's budget proposal would "cut 46 staff positions and \$203,000 from OCR." As of 2016, OCR employed 569 people. Jennifer Herseim, *Trump budget proposal includes cuts to OCR staff, funding*, Special Education Connection, May 13, 2017. That cuts looks to remove 7- 8% of OCR's staff. Note that while staff is reduced, the number of complaints to be reviewed continues to rise. In 2014, OCR received 9,950 complaints while in 2016, the number had risen to 16,720. Of the roughly 17,000 complaints in 2016, "approximately 36 percent... involved allegations of disability discrimination under Section 504 and Title II of the ADA." Id. The cuts *will* affect how OCR performs investigations. ED acknowledged that the cuts would require OCR "to make difficult choices, including cutting back on initiating proactive investigations[.]" Erica L. Green, *Education Department Says it Will Scale Back Civil Rights Investigations*, THE NEW YORK TIMES ONLINE, June 16, 2017.

A little commentary: A natural result of declining budget and personnel is not only a reduction in proactive investigations (where OCR, on its own determines to review a district's compliance) but a reduction of on-site visits in response to complaints as well. If more complaints will be reviewed at an OCR desk (rather than in the district), the school's evidence of procedural compliance will become even more important.

Mission and enforcement. U.S. Secretary of Education DeVos appears to be moving ED away from what some have described as a prosecutorial approach to civil rights enforcement.

"Ms. Devos has denounced discrimination in any form and has said schools that receive federal funds must follow federal laws. But she also believes in a limited federal role in education. She has signaled that her office is 'not going to be issuing any decrees' on civil rights and that those should come from Congress or the courts." THE NEW YORK TIMES, *supra*.

An internal memo from OCR Acting Assistant Secretary for Civil Rights provides some insight into what that shift will look like at OCR. Some highlights from the memo:

"Effective immediately, **there is no mandate that any one type of complaint is automatically treated any differently than any other type of complaint** with respect to the scope of investigation, the type or amount of data needed to conduct the investigation, or the amount or type of review or oversight needed over the investigation by Headquarters...."

"**There is no longer a 'one-size-fits-all' approach to the investigation of any category of complaints....** OCR will only apply a 'systemic' or 'class-action' approach where the individual complaint allegations themselves raise systemic or class-wide issues or the investigative team determines a systemic approach is warranted through conversations with the complainant."

"Please apply the instructions in this document with the understanding that **OCR's goal is to swiftly address compliance issues raised by individual complaint allegations, reach reasonable resolution agreements with defined, enforceable obligations** placed upon recipients directly

responsive to addressing the concerns raised in the individual complaint being resolved, **and encourage voluntary settlements wherever possible.**

I trust that you will apply these instructions in line with the attitude and approach we are proud to foster here in OCR: that OCR exists to robustly enforce the civil rights laws under our jurisdiction, and we will do so in a neutral, impartial manner and as efficiently as possible. **These instructions in particular are designed to empower our investigative staff to clear case backlogs and resolve complaints within a reasonable time frame,** thus providing effective resolution and justice to complainants and recipients.”

Candace Jackson, *OCR Instructions to the Field re Scope of Complaints*, June 8, 2017, available at PROPUBLICA: <https://www.propublica.org/documents/item/3863019-doc00742420170609111824.html>

Shortly after the memo was written, the **U.S. Commission on Civil Rights** issued its own statement, expressing concern over budget reductions and the change in investigatory vigor in a variety of federal agencies including the Departments of Justice and Education. The Commission is “an independent, bipartisan agency charged with advising the President and Congress on civil rights matters and issuing an annual civil rights enforcement report.” With respect to OCR’s budget, the Commission warned “The proposed budget itself reflects that the cutback would result in an untenable caseload of 42 cases per staff member. These proposed cuts are particularly troubling in light of Education Secretary Betsy DeVos’ repeated refusal in Congressional testimony and other public statements to commit that the Department of Education would enforce federal civil rights laws.” *U.S. Commission on Civil Rights Expresses Concerns Regarding Federal Civil Rights Enforcement Efficacy and Priorities* (June 16, 2017). With its statement, the Commission announced a two-year comprehensive assessment of federal civil rights enforcement to examine whether current budgets and practices are sufficient to address civil rights issues appropriately.

A little commentary: Fewer OCR staff, more complaints, higher caseloads and a less top-down approach to investigations could mean that complaints become easier to resolve without lengthy investigations and that reasonable resolutions (which do not require long-term supervision and years of subsequent data review by the investigator) become increasingly the new normal. Schools that can show legal compliance on paper should be able to benefit by way of quicker complaint resolution and more limited resolution agreements.

Question #10: Assuming, hypothetically, that my school is in violation of Section 504, what sanctions might OCR impose? A review of OCR letters reveals a variety of sanctions or remedies imposed following a violation of Section 504. A school may be required to update or change policies practices or procedures, provide staff training on compliance areas or school policy to ensure understanding and consistent application, conduct a reevaluation using the proper legal standard, and where FAPE has been denied or neglected, provide the student with compensatory education. Submission of data demonstrating continued compliance may also be required over a given time period to ensure that the violation was in fact remedied. Where a violation is found, OCR complaints and compliance reviews typically end with the district agreeing to the remedial steps. That may not always be the case... “OCR initially attempts to bring the school district into voluntary compliance through negotiation of a corrective action agreement. If OCR is unable to achieve voluntary compliance, OCR will initiate enforcement action. OCR may: (1) initiate administrative proceedings to terminate Department of Education financial assistance to the recipient; or (2) refer the case to the Department of Justice for judicial proceedings.” Revised Q&A, Question 10. **What about a federal court?** Of course, when courts get involved (as is the case in disability harassment situations where parents seek money damages under Section 504 and the ADA) costly damage awards are also possible for noncompliance. Because of the nature of OCR’s approach to compliance, as long as the school acts in a way that satisfies OCR, the school will also likely satisfy a federal court on a Section 504 or ADA issue involving a student with a disability.

III. The Section 504 Free Appropriate Public Education or FAPE

Question #11: Does Section 504 have a child find requirement like that in IDEA? Yes. The District cannot wait until eligible children present themselves and request services. The District has an affirmative duty to conduct a “child-find” at least annually, during which the District must make efforts to notify disabled students and their parents of the District’s obligations to provide a free appropriate public education. 34 C.F.R. §104.32. Schools can efficiently satisfy this duty by adding the Section 504 child find notice to that required under IDEA, so that wherever the IDEA notice is published, the Section 504 notice is there as well. The public school also has a duty to look for potentially eligible students and refer for Section 504 evaluation as described in Question 8.

Question #12: When should the school refer for a Section 504 evaluation? The school’s duty to evaluate under Section 504 is triggered by the school’s suspicion that the student is disabled and in need of services. The Section 504 regulation on evaluation provides: “A recipient that operates a public elementary or secondary education program or activity shall conduct an evaluation in accordance with the requirements of paragraph (b) of this section of any person who, because of handicap, needs or is believed to need special education or related services before taking any action with respect to the initial placement of the person in regular or special education and any subsequent significant change in placement.” 34 CFR §104.35(a). In short, a student should be referred to §504 when the District believes that the student may be eligible, i.e., when the District believes that the student has a physical or mental impairment that substantially limits one or more major life activities, AND believes that the student is in need of either regular education with supplementary services or special education and related services. *Letter to Mentink*, 19 IDELR 1127 (OCR 1993). **The duty does not depend on parent request for evaluation.** *West Contra Costa (CA) Unified School District*, 42 IDELR 121 (OCR 2004) (“The District had this obligation under Section 504 whether or not the parent made a request for an assessment.”)

Question #13: Can you give me some examples on 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).

Question #14: What is the school’s duty with respect to a parent referral? Upon receipt of a parent request for an evaluation, the school has two options. *See, for example, Bryan County (GA) School District*, 53 IDELR 131 (OCR 2009) (“Under Section 504, upon receiving notice of a parent’s belief that a child has a disability triggering Section 504 protection, the district should determine whether there is reason to believe that the child, because of a disability, may need special education or related services and thus would need to be evaluated. If the district does not believe that the child needs special education or related services, and thus refuses to evaluate the child, the district must notify parents of their due process rights”). That position has now grown into a version of prior written notice. In the ADHD Resource Guide OCR adds a requirement that schools explain a refusal to evaluate.

“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.”

Question #15: Is the public school required to evaluate a student placed by his parents in a home school or private school? Yes. The school district’s duty to evaluate does not evaporate when parents withdraw the student from the public school. *See, for example, West Seneca (NY) School District*, 53 IDELR 237 (OCR 2009)(The parent of a private school student with migraines complained to OCR that the school district where her daughter’s private school was located had the duty to conduct a Section 504 evaluation. OCR disagreed, recognizing that while special education has such a rule, in the Section 504 world, the district of residence has the duty to evaluate).

Question #16: Who conducts a Section 504 evaluation? While the regulations refer to the group conducting the evaluation (and other tasks under Section 504) as the “group of knowledgeable people,” the title “Section 504 Committee” is more commonly used. The §504 Committee is responsible for §504 evaluation and placement. Unlike the IDEA, §504 does not dictate the titles of people who must be members of the Committee. Instead, the regulations require that the §504 Committee is a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options. §104.35(c)(3).

The Section 504 regulations do not require parent membership on Section 504 Committees although best practice dictates that parents are involved in the evaluation and placement process. Consequently, schools are free to establish their own practices with respect to inviting parents to Committee meetings. Should the school decide to invite all parents to meetings, however, the school cannot fail to invite a particular parent without running the risk of a retaliation or discrimination claim. On occasion, OCR has determined that the group of knowledgeable people was not properly constituted due to the parent’s nonattendance. For example, in *Sequoia (CA) Union High School District*, 110 LRP 4676 (OCR 2009), a student with ADHD transferred to the district already Section 504-eligible.

“The district convened a team of persons knowledgeable about the student, but it did not include the student’s parents, as is the routine practice, even though the parents were necessary in this case for the evaluation process. By excluding the parents, the district was limited to in-class performance without knowledge of things such as how long the student took to complete homework assignments at night, his adaptive behavior at home as it related to his experiences at school, or the degree of parental intervention in homework assignments.”

Finally, the regulations provide no guidance as to the number of members, and no guidance on the level of knowledge required of the members. An OCR letter of finding has addressed the knowledge requirement with respect to the person with knowledge of the child. To “have knowledge of the child” for purposes of the Section 504 Committee, one must be “personally familiar with the child.” *Letter to Williams*, 21 IDELR 73 (OSEP/OCR 1994).

Question #17: What is a Section 504 evaluation? “Evaluation” does not necessarily mean “test.” In the §504 context, “evaluation” refers to a gathering of data or information from a variety of sources so that the committee can make the required determinations. §104.35(c)(1). Since specific or highly technical eligibility criteria are not part of the §504 regulations, formal testing is not required to determine eligibility. *Letter to Williams*, 21 IDELR 73 (OCR 1994). If formal testing is pursued, the regulations require that the tests are properly selected and performed by trained personnel in the manner prescribed by the creator of each test. §104.35(b)(2).

Question #18: What kinds of data and how much data are required for a Section 504 evaluation? Perhaps the best approach to determining what types of information and how much information is required is to focus on what a Section 504 evaluation should do. Section 504 evaluation precedes eligibility, and precedes the delivery of services. The §504 regulations require that the school evaluate the student “before taking any action with respect to the initial placement of the person in a regular or special education program and any subsequent significant change in placement.” §104.35(a). In other words, there are no initial services without an evaluation, nor changes in the services provided under §504 without a reevaluation. The rationale is quite simple: without data we do not know whether the student is a student with a disability (is he eligible?) nor would we know how to serve him (how does the disability impact his ability to access the school’s programs and activities?). **An appropriate evaluation is then “designed to identify the specific nature of the student’s disabilities and to identify the services necessary to meet her individual needs.”** *West Contra Costa (CA) Unified School District*, 42 IDELR 121 (OCR 2004). Once the information has been reviewed by the §504 Committee, it will determine eligibility based on the criteria previously addressed. If the child is found to be eligible and in need of services, the Committee will create a Section 504 plan for the child that describes the child’s “placement.”

Common sources of evaluation data for §504 eligibility are the student’s grades, disciplinary referrals, health information, language surveys, parent information, standardized test scores, teacher comments, etc. If the student has been evaluated for special education (and either did not qualify, or was evaluated, determined eligible, served and later dismissed), special education assessments and data should be part of what is reviewed for Section 504 evaluation purposes. When interpreting evaluation data and making placement decisions, the District is required to **“draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior.”** Information obtained from all such sources is to be documented and carefully considered. §104.35(c)(1)&(2). “[This] paragraph requires a recipient to draw upon a variety of sources in the evaluation process so that the possibility of error in classification is minimized.” Appendix A, p. 430.

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

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

“Question 26. How should a recipient school district handle an outside independent evaluation? Do all data brought to a multi-disciplinary committee need to be considered and given equal weight? The results of an outside independent evaluation may be one of many sources to consider. Multi-

disciplinary committees must draw from a variety of sources in the evaluation process so that the possibility of error is minimized. All significant factors related to the subject student's learning process must be considered. These sources and factors include aptitude and achievement tests, teacher recommendations, physical condition, social and cultural background, and adaptive behavior, among others. Information from all sources must be documented and considered by knowledgeable committee members. **The weight of the information is determined by the committee given the student's individual circumstances.**" Revised Q&A, Question 26 (emphasis added).

Who pays for evaluation data? Recall that the "F" in FAPE is the word "Free." In its ADHD Resource Guide, OCR highlighted its concern with respect to a parent offer to secure evaluation data for the school. When the "parent volunteers to pay for a private assessment, the district must make it clear that the parent has a choice and can choose to accept a school-furnished assessment. Compliance problems could arise when school districts and parents do not communicate clearly on this requirement." (p. 23). **The problem is the "F".** *Santa Rosa County (FL) School District*, 110 LRP 48657 (OCR 2009). Despite evidence that the student had an impairment affecting his educational performance (teacher emails indicate that this student's was "the worst case of ADD" they had seen) and a Connor's rating scale showed the student's inattention fell in the "very significant" range on all three scales, the school placed the burden on the student's parents to follow-up with their physician. "OCR still finds that the School's policy of requiring a parent to arrange and pay for a physician's evaluation for children with ADD and ADHD is inconsistent with Section 504." As part of the corrective action steps, the District agreed to revise its procedures "to ensure that *any medical evaluation or other assessment deemed necessary by the District for purposes of determining eligibility under Section 504 will be provided at no cost to parents.*" (Emphasis added).

A little commentary: Of course, where the relationship is already established and existing medical data exists that can be accessed at no cost, the school should pursue consent to get records or speak with the doctor as part of the evaluation. Review of existing data is very different than forcing the parent to secure, at parent expense, new data from the doctor.

Question #19: Does the school need parental consent for an initial Section 504 evaluation? Yes, even though the regulations do not include the requirement. "OCR has determined, through policy clarification, that the Section 504 regulation... requires parental consent prior to the conduct of initial student evaluation procedures[.] Parental discretion involving student assessment/evaluation is an inherent part of the regulation and parental discretion is an appropriate and necessary policy component at the initial evaluation stage." *Letter to Durham*, 27 IDELR 380 (OCR 1997). *See also, Williamson County (TN) School District*, 32 IDELR 261 (OCR 2000); Revised Q&A, Question 41. "OCR has accepted written consent as compliance" and reminds schools that IDEA and some state laws require written consent prior to evaluation. Revised Q&A, Question 42.

Question #20: Is a medical diagnosis required for Section 504 eligibility? As a general rule, 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.

So what's the rule? The §504 regulations require no medical diagnosis for eligibility. The Section 504 Committee may conduct the evaluation without a medical diagnosis if it believes it has other effective methods of determining the existence of a physical or mental impairment. On the other hand, should the school desire a medical diagnosis, it must pay for one or secure the evaluation at no cost to the parent. **What are "other effective methods"?** Remember that the §504 Committee is not asked to diagnose impairments, but to identify impairments so that the Committee may meet the needs of the child arising from impairments. 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.

Question #21: “Can a medical diagnosis be the entire evaluation for the purpose of providing FAPE?” “No. A physician’s medical diagnosis may be considered among other sources in evaluating a student with an impairment or believed to have an impairment which substantially limits a major life activity. Other sources to be considered, along with the medical diagnosis, include aptitude and achievement tests, teacher recommendations, physical condition, social and cultural background, and adaptive behavior. As noted in FAQ 22, the Section 504 regulations require school districts to draw upon a variety of sources in interpreting evaluation data and making placement decisions.” Revised Q&A, Question 24. *See, also Cle Elum-Roslyn (WA) School District No. 404*, 41 IDELR 271 (OCR 2004), where rather than conducting its own evaluation, the school relied on an outside neurologist’s report obtained by the parents to determine that the student was §504-eligible due to Tourette Syndrome and ADD, and created a §504 plan. The school did not attempt to evaluate areas of educational need nor did it apparently review any data other than the outside report. OCR found a variety of intertwined §504 violations related to the absence of an evaluation of the student’s educational needs.

Question #22: What are the Section 504 timelines for an evaluation? Look to your state’s IDEA rules for analogous timelines. In *Rockbridge County (VA) School Division*, 57 IDLER 144 (OCR 2011), OCR provided the following guidance. “Section 504 does not contain a specific requirement for the period of time from a parental request or consent for an assessment to the actual assessment, but requires that an evaluation be conducted within a reasonable period of time.” A “reasonable time” is generally viewed as the time allowed by IDEA rules for similar events—i.e., how long does your state allow between consent and completion of the evaluation? *See also, Rose Hill (KS) Public Schools, USD #394*, 46 IDELR 290, 106 LRP 35103 (OCR 2006). (While there is no timeline in the §504 regulations with respect to completion of an initial evaluation, “the various steps in the process, which includes the evaluation, must be completed in a reasonable period of time. Unreasonable delay may be discrimination against a student with a disability because it has the effect of denying the student meaningful access to educational services.” The District agreed to corrective action including a §504 evaluation and a determination of whether compensatory services were owed for the evaluation delay.)

Question #23: What is the eligibility standard for Section 504? To be eligible under Section 504, a student must be both “qualified” (the student is within the age range in which services are provided to disabled and nondisabled students under state law, *See 34 CFR §104.3(l)(2)*), and “handicapped.” Pursuant to 34 CFR §104.3(j)(1), “Handicapped persons means any person who

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

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

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

individuals under this Act, to the maximum extent permitted by the terms of this Act.” 42 U.S.C. §12102(4)(A)(emphasis added).

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

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

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

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

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

Congress’ concern was not with the comparison of the person evaluated to the average person in the general population, but the *amount of difference required between the two* for substantial limitation to be found. For those school districts following EEOC, a change in the substantial limitation definition would be required. **The more interesting question, of course, is what definition to use?** A mere limitation is insufficient (as the word “substantial” would be rendered meaningless) and a significant restriction is too high a requirement. The answer lies somewhere between these two points. Regardless, the standard is lower than prior to the ADAAA.

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

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

- (I) medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies;
- (II) use of assistive technology;
- (III) reasonable accommodations or auxiliary aids or services; or
- (IV) learned behavioral or adaptive neurological modifications.”

This part of the amendments clearly means to reverse the reasoning of the *Sutton* line of cases, where the Supreme Court held that eligibility determinations must take into account the effect of treatment or other mitigating measures utilized by the person with an impairment. Under the new mitigating measures rule, the Section 504 Committee is asked to determine whether the student would be substantially limited in the absence of the ameliorative (positive or beneficial) effects of the mitigating measures. For example, when evaluating a student with ADHD who takes medication, the Section 504 Committee would ask whether, without his medication, the student is substantially limited in one or more major life activities.

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

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

Impairments in Remission. Under the 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.

Question #24: Who are these “technically eligible” kids I’ve been hearing about? The “technically eligible” student is one who despite meeting Section 504 eligibility criteria (she has a physical or mental impairment that substantially limits one or more major life activities) does not need services from the school. Three types of technically eligible kids appear possible: the student with an impairment in remission (who receives no services because the impairment does not create a need for services), and the student whose needs are met through mitigating measures that he or she controls (so services from the school are not required to meet the student’s needs). The third type is explained below in Question 30 on parental consent for Section 504 services. Here’s an OCR example of the mitigating “type” of technically eligible student.

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

So what does the technically eligible student get from Section 504? The technically eligible student would get no Section 504 Plan because there is no need for services, but what about procedural protections? Prior to the 2012 guidance letter, the author assumed that the technically eligible student would receive manifestation determination, procedural safeguards, periodic reevaluation or more often as needed, as well as the nondiscrimination protections of Section 504. Should need for a 504 plan develop, the Section 504 Committee would reconvene and develop an appropriate Section 504 services plan at that time. Note, however, that in OCR’s severe asthma example the student receives no services and remains protected by the *general nondiscrimination provisions* of Section 504 and the ADA. Note that in the ADHD Resource Guide, OCR takes this explanation a step further and explains that the technically eligible student “is still a person with a disability, because the student has an impairment that substantially limits a major life activity, and so is protected by Section 504’s *general nondiscrimination prohibitions* (e.g., *no retaliation, harassment, unlawful different treatment, etc.*).” (p. 25). It would be helpful for OCR to identify precisely the rights due a technically eligible student within that “etc.”.

Question #25: Does OCR recognize a “disability per se” or an impairment that automatically results in eligibility under Section 504? No, in the Revised Q&A the ED took the position that there is no automatic eligibility.

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

The 2012 OCR guidance letter takes a step in the direction of “disability per se” recognizing that a handful of impairments will, in virtually every case, result in eligibility.

“In most cases, application of these rules should quickly shift the inquiry away from the question whether a student has a disability (and thus is protected by the ADA and Section 504), and toward the school district’s actions and obligations to ensure equal educational opportunities. While there are no per se disabilities under Section 504 and Title II, the nature of many impairments is such that, in virtually every case, a determination in favor of disability will be made. **Thus, for example, a school district should not need or require extensive documentation or analysis to determine that a child**

with diabetes, epilepsy, bipolar disorder, or autism has a disability under Section 504 and Title II.” 2012 DCL, p. 5, Question 4 (emphasis added).

In addition to the four impairments identified above, a somewhat different presumption of eligibility follows some ADHD diagnoses. In what appears to be an extension of the “disability per se” discussion above, OCR opines that “a diagnosis of ADHD is evidence that a student may have a disability. OCR will presume, unless there is evidence to the contrary, that a student with a diagnosis of ADHD is substantially limited in one or more major life activities.” ADHD Resource Guide, p. 10. It appears that not every diagnosis will create that presumption. OCR provides this bit of clarifying detail. “Diagnosis of ADHD requires a comprehensive evaluation by a licensed clinician, such as a pediatrician, psychologist, or psychiatrist with expertise in ADHD.” National Institutes of Mental Health (NIMH publication), Attention Deficit Hyperactivity Disorder (Revised Mar. 2016),” (Id., p. 10, fn. 37).

A little commentary: Arguably, it would appear that unless the diagnosis is based on a “comprehensive evaluation” and conducted by a licensed clinician with expertise in ADHD, the presumption does not apply.

So does that mean that a medical diagnosis is required for a 504 Committee to determine a student’s 504 eligibility?

“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.) ” (ADHD Resource Guide, p. 23)(emphasis added).

“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.” (Id. p. 23, fn. 70)(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 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 a determination.

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

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

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

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

Question #27: Isn't the school only required to provide "reasonable accommodations" to comply with its Section FAPE duty? It depends on whom you ask.... While the federal courts tend to apply the reasonable accommodation standard in K-12 Section 504 cases (*See, for example, J.D. v. Pawlet School District*, 224 F.3d. 60, 33 IDELR 34 (2d Cir. 2000)), OCR has consistently maintained that "reasonable" is not the standard for K-12 FAPE. "OCR reviewed the district's Section 504 FAPE policies, procedures and forms. OCR found two documents that indicate that the district utilizes legal standards that are inconsistent with Section 504 and Title II. The district's Section 504 handbook at Page 14, limits FAPE to 'reasonable accommodations.... The 'reasonable accommodations' legal standard is not applicable to FAPE under Section 504." *See, also Response to Zirkel*, 20 IDELR 134 (OCR 1993)(In response to a question on the subject, OCR concluded that reasonableness is not a factor in Section 504 FAPE on elementary and secondary campuses. "The key question in your letter is whether the OCR reads into the Section 504 regulatory requirement for a free appropriate public education a 'reasonable accommodation' standard, or other similar limitation. The clear and unequivocal answer to that is no.")

Question #28: Does §504 require the public school to provide FAPE to students whose parents have placed them in a private school or home school? OCR has said no. With regard to those students, once the District has offered the child a free appropriate public education, it has no duty to provide "educational services to students not enrolled in the public school program based on the personal choice of the parent or guardian." *Letter to Veir*, 20 IDELR 864 (OCR 1993); *Hinds Co. School Board*, 20 IDELR 1175 (OCR 1993). *But see, Lower Merion School District v. Doe*, 48 IDELR 255 (Pa. S.Ct. 2007)(While the student's education is provided by the private school, the public school is required to *facilitate* the student's access to appropriate education.").

Question #29: How often are re-evaluations required? Districts are considered to be in compliance if they complete reevaluations "periodically" (104.35(d).), or at least every three years (as they do with IDEA students). Revised Q&A, Questions 30-31. There is no language to suggest a substantive difference between evaluation and reevaluation. Consequently, the activities are the same. Where the student's impairment has not changed since the last evaluation, the Committee will likely spend most of its time at a reevaluation discussing current needs and whether changes to the §504 plan are required. **So, annual reviews are not required?** Correct, but they are best practice. As a practical matter, and to ensure some continuity in the child's program, Districts should consider an annual review of the child to determine whether changes are necessary due to differences in the child's schedule or changes in the child's abilities and disabilities. Reevaluation should also occur when changes in the student's disability or needs for services require a change to the §504 Plan. Finally, some disciplinary removals also prompt the need for an evaluation, typically referred to as a manifestation determination review or MDR.

IV. The Section 504 Duty to Not Discriminate

Question #30: Do the Section 504 nondiscrimination protections extend beyond the walls of the classroom? Yes. Under §504, students with disabilities must be provided an equal opportunity to participate in extracurricular and nonacademic activities. The §504 regulations, at 34 C.F.R. §104.37(a), provide

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

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

Question #31: Does a “reasonable accommodation” limitation apply to extracurricular and nonacademic services? Yes. Although OCR does not recognize the “reasonable” limitation on accommodations that affect a FAPE, it appears to recognize that accommodations to allow for participation in extracurricular and nonacademic activities are subject to the “reasonable” limitation. *See, for example, Crete-Monee (IL) School District 201-U*, 25 IDELR 986 (OCR 1996)(analyzed below). Thus, there is a reasonableness limit to the type and scope of accommodations that districts will be obligated to provide students to assure their equal opportunity to participate in extracurricular/nonacademic activities.

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

Question #32: Does the Section 504 nondiscrimination duty apply to folks other than students? Yes. Employees of the school are protected by ADA/Section 504, as well as parents and other folks in the community. *See, for example, Lake-Lehman (PA) School District*, 20 IDELR 546 (OCR 1993)(sign language interpreter was required at school board meetings to enable a member of the community with a hearing impairment an equal opportunity to understand what was being said, to ask questions and make comments); *Sherburne-Earlville (NY) Sch. Dist.*, 353 EHLR 353:245 (OCR 1989)(school required to provide a sign language interpreter to parents with hearing impairments to enable participation in a school activity designed for parents).

Question #33: Section 504 requires schools to take action to prevent and remedy disability harassment. What is disability harassment and why is it addressed by Section 504? In a “Dear Colleague Letter” from 2000, the Office for Civil Rights together with OSERS provided the following definition.

“Disability harassment under Section 504 and Title II is intimidation or abusive behavior toward a student based on disability that creates a hostile environment by interfering with or denying a student’s participation in or receipt of benefits, services, or opportunities in the institution’s program. Harassing conduct may take many forms, including verbal acts and name-calling, as well as nonverbal behavior, such as graphic and written statements, or conduct that is physically threatening, harmful, or

humiliating.” *Dear Colleague Letter*, 111 LRP 45106 (OCR/OSERS 2000)[hereinafter, “*DCL 2000*”] p.2.

Hostile Environment: When harassment can violate rights under Section 504. “When harassing conduct is sufficiently severe, persistent, or pervasive that it creates a hostile environment, it can violate a student’s rights under the Section 504 and Title II regulations. A hostile environment may exist even if there are no tangible effects on the student where the harassment is serious enough to adversely affect the student’s ability to participate in or benefit from the educational program.” *Id.* It is also possible for the harassment to violate an eligible-student’s right to FAPE under either Section 504 or IDEA. “Harassment of a student based on disability may decrease the student’s ability to benefit from his or her education and amount to a violation of FAPE.” *Id.* **What is the school’s duty under §504 with respect to disability harassment?** “Schools, school districts, colleges, and universities have a legal responsibility to prevent and respond to disability harassment. As a fundamental step, educational institutions must develop and disseminate an official policy statement prohibiting discrimination based on disability and must establish grievance procedures that can be used to address disability harassment. A clear policy serves a preventive purpose by notifying students and staff that disability harassment is unacceptable, violates federal law, and will result in disciplinary action. **The responsibility to respond to disability harassment, when it does occur, includes taking prompt and effective action to end the harassment and prevent it from recurring** and, where appropriate, remedying the effects on the student who was harassed.” *DCL 2000*, p. 3 [emphasis added]. See also, *Willamina (Or) Sch. Dist.*, 30-J 27, IDELR 221 (OCR 1997)(“Under Section 504 of the Rehabilitation Act of 1973 and Title II of the Americans with Disabilities Act the district has the obligation to take all necessary steps to address and eliminate such harassment.”). **The legal duty “to end the harassment” is not recognized by the federal courts. Instead, the courts find liability for harassment when the school is aware of the harassment and is deliberately indifferent.** See, for example, *Davis v. Monroe County Board of Education*, 119 S.Ct. 1661 (1999)(Setting the legal standard for Title IX violations that has now been adopted for disability harassment as well, the Court concluded that to avoid liability “the recipient must merely respond to known peer harassment in a manner that is not clearly unreasonable.”). *Id.*, at 1674. The difference in approach and liability standards still remains between the courts and OCR. OCR explains that the difference rests on monetary damages. “As you know, *Davis* was a case involving a claim for monetary damages; it was not a case involving federal administrative enforcement by a federal agency.” *In re: Dear Colleague Letter of October 26, 2010*, 111 LRP 32298 (OCR 2011).

Question #34: What is the school’s ADA/Section 504 duty with respect to service animals? The general rule is that the school “shall modify its policies, practices, or procedures to permit use of a service animal by an individual with a disability.” 28 C.F.R. §35.136(a). The 2010 ADA regulations and commentary issued by the Department of Justice provide schools a good framework for compliance with their service animal obligations under federal law.

V. Section 504 & Discipline

Question #35: Why is discipline of students with disabilities different from discipline of nondisabled students? The essence of discrimination is excluding students from school because of disability. In its introduction to the IDEA (20 U.S.C. §1400, et. seq.), Congress made clear its desire that public schools serve children suffering from severe disabilities to ensure that they receive an appropriate public education. In its finding made at the time the original law was passed, Congress estimated that more than half of the roughly eight million children with disabilities in the United States [in 1976] were not receiving “appropriate educational services which would enable them to have full equality of opportunity.” **One million of the “children with disabilities in the United States are excluded entirely from the public school system and will not go through the educational process with their peers.”** 20 U.S.C. §1400(b)(4). And why were many of those students excluded from school? Because (1) they had disabilities affecting behavioral controls (emotional disturbances, ADHD, etc), (2) and they did things because of those disabilities affecting behavioral controls that violated student codes of conduct and were

expelled. In essence, many were excluded from school for lengthy periods of time for having disabilities that affected behavioral controls.

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

The manifestation determination questions (adapted from the IDEA rule) asks:

- (i) If the conduct in question was caused by, or had a direct and substantial relationship to, the student’s disability; or
- (ii) If the conduct in question was the direct result of the department’s failure to implement the Section 504 Plan.

The manifestation determination essentially decides whether the student can be subjected to long-term removal (or additional short-term removal). If the §504 committee properly determines that the behavior in question is not related to disability, then the student can be subjected to regular disciplinary procedures, as in the case of a similarly-situated nondisabled student. If the §504 committee determines that the behavior is related to disability, then a long-removal or an additional short-term removal cannot take place. Thus, the quality of the manifestation determination is crucial to a long-term removal. §504 members are well-advised to prepare and pre-staff for manifestation determinations.

Question #36: Does the IDEA’s exception for in-school suspension days apply to Section 504 kids?

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

Question #37: Isn’t there a unique Section 504 rule on current illegal drug or alcohol use? Yes there is. The procedural protections of manifestation determination do not apply to Section 504 students who are currently engaging in the illegal use of drugs or use of alcohol.

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

OCR has interpreted this phrase to mean that if a student is currently using illegal drugs or alcohol, and is to be disciplined by the school for use or possession, the student loses the procedural protections provided by §504, including the manifestation determination prior to a change in placement for disciplinary reasons

even if the child has another disability (for example, ADHD) that could be related to the misconduct. *1991 OCR Policy Memo on ADA Amendments to §504* (OCR 1991). **Important note: this exception does not apply to students who are IDEA-eligible.** See also *Revised Q&A, Question 16* (“Section 504 excludes from the definition of a student with a disability, and from Section 504 protection, any student who is currently engaging in the illegal use of drugs when a covered entity acts on the basis of such use.”) & *Question 17* (“Section 504 allows schools to take disciplinary action against students with disabilities using drugs or alcohol to the same extent as students without disabilities.”).