SECTION 504 ELIGIBILITY
AFTER THE ADA AMENDMENTS ACT

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A note about these materials: These materials are not intended as a comprehensive review of all case law or rules on Section 504 eligibility, but as an overview of the changes and a response to some of the most frequently asked (or interesting) questions. These materials are not intended as legal advice, and should not be so construed. State law, local policy and unique facts make a dramatic difference in analyzing any situation or question. Please consult a licensed attorney for legal advice regarding a particular situation. References to the U.S. Department of Education will read "ED."

A little back-story on the Americans with Disabilities Act Amendments Act of 2008 or ADAAA…

From time to time, Congress revisits legislation to ensure that it has the intended impact. Upon review of the Americans with Disabilities Act (ADA), Congress determined that rather than providing a mechanism to make the workplace more accessible one lawsuit at a time, the ADA had become bogged down in disputes over eligibility. Faced with employee challenges to workplace rules and requests for sometimes expensive or inconvenient accommodations, employers had taken to attacks on 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. The result was not to Congress' liking — the litigation focus on eligibility (rather than on an accessible workplace) and the new court-created barriers to eligibility had to go.

A. What prompted Congress to make the changes? Eligibility rather than accommodation had become the focus.

The findings and purposes section of the ADAAA clearly articulates Congress' rejection of the reasoning used by the U.S. Supreme Court in various important ADA cases including *Sutton v. United Air Lines Inc.*, 30 IDELR 681, 527 U.S. 471 (1999) (and its companion cases addressing the effect of mitigating measures on ADA eligibility) and *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 102 LRP 6137, 534 U.S. 184 (2002) (denying ADA eligibility when the activity substantially limited is a narrow one, as opposed to one normally required in the daily life of most people). From the preamble statements included in the ADAAA, it is clear that Congress believed that the Supreme Court's recent interpretations of the eligibility provisions of the ADA have been overly stringent. Indeed, the Court's position that ADA eligibility provisions set up a "demanding" standard for eligibility meant that employees with a variety of impairments would be unable to access the federal courts to raise claims that an employer failed to provide reasonable accommodations that would enable them to perform the essential functions of their jobs.

> **Disagreement with the *Sutton* rationale**. The problem, as outlined in the ADAAA, arises from two types of cases. In one, a person has a bona fide physical or mental impairment, but takes appropriate and effective measures to treat, or mitigate, the impact of the impairment on his daily life. In the *Sutton* line of cases, the Court held that when determining eligibility, one must take into account the effect of these mitigating measures. Thus, if the mitigating measures are effectively addressing the impairment to the point that it does not pose a substantial limitation on a major life activity, then there

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

Disagreement with the *Toyota* limitation. In the second type of case, a person has a physical or mental impairment, and it does substantially limit a certain activity required in the workplace, but the activity limited is a narrow one not normally required in the daily life of most people. Thus, in the *Toyota* case, the Supreme Court held that since the plaintiff's impairment affected only her ability to perform certain manual tasks required only for unique aspects of automotive manufacturing jobs, she was not substantially limited in a "major life activity." The Court noted, by example, that the plaintiff was able to perform manual tasks normally required in daily life, such as cleaning, doing laundry, going shopping, etc.

With those concerns guiding the effort, Congress amended the ADA making a variety of changes to impact eligibility and restore the necessary dynamic to improve workplace accessibility. The various changes are discussed below in more detail.

B. Was there a problem with K-12 Section 504 eligibility for FAPE?

Congress made no findings with respect to the public schools' duties to students under Section 504 or the ADA. Instead, Congress was focused on changes to the ADA in the context of employment relationships, specifically with respect to eligibility for reasonable accommodations and access to federal courts. Congress did not directly address or reference the ED's regulations with respect to student identification, eligibility, and FAPE in Section 504, and as OCR has indicated, Congress did not direct ED to change the Section 504 regulations. *(Introductory paragraph of the Revised Q&A.)* **Regardless, the ADAAA changes apply to Section 504.** The conforming amendments to the ADAAA apply the rules of construction as well as the definitional changes to the Rehabilitation Act of 1973, 29 USC §705, which creates the definition of disability used in 29 USC §794(a), the statutory provision upon which the ED's K-12 Section 504 regulations are premised. Consequently, the ADAAA changes made by Congress to address problems encountered by employees attempting to secure reasonable accommodation through the courts also apply to FAPE eligibility for students in the public schools. ED indicates that its regulations "as currently written are valid and OCR is enforcing them consistent with the Amendments Act." *(Introductory paragraph of the Revised Q&A).*

Problems arise from the differences between the employment world for which the changes were drafted and the K-12 Section 504 world where the changes are also applied. In the employment world, employers do not hire every applicant, do not exist for the benefit of the employees (but instead for the benefit of shareholders or owners) and seek to turn a profit. Consequently, for the ADA to be successful, it must somehow address the profit motive behind an employer's reluctance to hire an employee with a disability or to effect accommodations for an employee with a disability. The ADA accomplishes that goal by providing a mechanism for employees to sue reluctant employers to make reasonable accommodations and, by means of the ADAAA, greatly reducing the employee's task in proving ADA eligibility.

The K-12 public education world is quite different. No public school runs at a profit, nor are public schools generally allowed to pick and choose whom they educate. Public schools exist for the sole purpose of educating students. Built into the public school-student dynamic (and spurred by concerns for AYP) is a growing emphasis on individualized instruction and personalized attention when, due to disability or other factors, a student is not successful. Further different is that in the K-12 Section 504

world, the public school has a duty to identify and evaluate potentially eligible students and provide those eligible students with a free appropriate public education. Unlike the workplace, where employees request accommodation, K-12 public schools have an affirmative duty to look, find and accommodate or serve. Consequently, when Congress made it easier for employees to demonstrate their eligibility for reasonable accommodation, it also made it easier for K-12 students to qualify for FAPE (a higher level of services than reasonable accommodation) despite the absence of a finding that public schools were denying services to students believed by Congress to be eligible. Arising from these incongruities are questions and concerns about long-standing Section 504 doctrines and practices that arise from the ED's regulations and FAPE requirement.

Unfortunately, as of the date of this writing, no comprehensive guidance has been issued by ED with respect to the practical implementation concerns outlined below. A Revised Q&A document has been posted on the OCR website since the ADA Amendment changes went into effect, addressing some of the changes. This document, *Protecting Students with Disabilities: Frequently Asked Questions about Section 504 and the Education of Children with Disabilities* (March 27, 2009), revised a Frequently Asked Questions document from the Chicago Office of OCR, is available on the OCR website at *www.ed.gov/about/offices/list/ocr/504faq.html* and is referenced herein as "Revised Q&A." The Revised Q&A is not intended as the final ED guidance on these issues, as noted in its opening paragraph. "OCR is currently evaluating the impact of the Amendments Act on OCR's enforcement responsibilities under Section 504 and Title II of the ADA, including whether any changes in regulations, guidance or other publications are appropriate." As OCR has begun to enforce the changes, without comprehensive guidance to the field, these materials will provide some thoughts to schools on how to respond. Of course, these thoughts and strategies are subject to change should guidance be issued. Take these thoughts and strategies as talking points to discuss with your attorney prior to making any significant changes.

The following is provided as a summary of the major changes created by the ADA Amendments Act of 2008 (effective Jan. 1, 2009), and the potential impact of some of those changes on the K-12 public schools' efforts to provide a free appropriate public education to students eligible under Section 504 of the Rehabilitation Act of 1973.

I. ADAAA Change 1: Construe Eligibility Language in Favor of Broad Coverage

Following its criticism of the Supreme Court cases and the federal Equal Employment Opportunity Commission's (EEOC's) definition of substantial limitation (discussed below), Congress writes, "It is the intent of Congress that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations, and to convey that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis." ADA Amendments Act of 2008, Section 2(b)(5)(2008). In short, Congress appears to want courts looking less at eligibility and focusing more intently on whether reasonable accommodations are provided by covered entities. To that end, Congress provides as part of its rules of construction that, **"The definition of disability in this Act shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act."**

A little commentary: In light of this provision, it seems that in cases where the eligibility question could go either way, Congress would have the Section 504 committee determine the student eligible.

II. ADAAA Change 2: Expansion of Major Life Activities (Including Major Bodily Functions)

Prior to the ADAAA, schools were accustomed to looking at a rather short list of major life activities during the Section 504 evaluation. **The Section 504 regulations initially listed major life activities such as "caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing,**

***learning*, and working."** 34 CFR §104.3(j)(2)(ii) (emphasis added). The list of major life activities was not exhaustive; that is, there was an understanding that other major life activities could be added to the list. As part of its effort to reduce the time spent on proving eligibility prior to proceeding to the accommodation question, Congress expanded the list of major life activities in the ADAAA and included major bodily functions as well.

Pursuant to the ADAAA, **major life activities now also include sleeping, standing, lifting, bending, reading, concentrating, thinking and communicating.** Commonly, we understand the term "major life activity" to encompass all activities humans must engage in to fully function. Viewed in this manner, it is hardly surprising that Congress added examples as central to human life as sleeping, thinking and communicating. In fact, a major life activity covering relationships with others is a possible major life activity that Congress could have added. The EEOC has already recognized "interacting with others" as a major life activity.

Congress' disagreement with the Supreme Court's narrow interpretation of major life activity in the *Toyota* case tells us that the term should not be "over-interpreted" in the school context. Further, the addition of new major life activities has an immediate impact on eligibility, especially as it creates major life activities that are smaller in scope than their predecessors. For example, a student with dyslexia may not be substantially limited in "learning" due to her ability to learn through methods that do not involve the printed word. But when the major life activity evaluated is "reading" rather than "learning," the same impairment is more likely to have greater impact, as we are no longer looking at other methods by which a student can learn. Thus, an impairment can substantially limit reading, although perhaps not "learning." The same result is possible with concentrating and thinking (which are also, arguably, smaller subsets of learning). The result of additional (and narrower) major life activities seems to be increased eligibility under Section 504.

What if the impairment doesn't substantially limit the major life activity of learning?
Memphis (MI) Community Schools, 54 IDELR 61 (OCR 2009).

The school had taken the position that a student could *only* qualify for Section 504 protections if the student's physical or mental impairment substantially limited the major life activity of learning. The student at issue here was asthmatic, and his disability did not impact his learning or education. The student received a medical management plan. The "District advised OCR that, prior to December 2008, it generally had been using medical management plans instead of Section 504 plans for students with disabilities who were not displaying difficulties in academic performance but who needed assistance with medical needs. If the disability was determined not to have an impact on the student's education, the District would determine that the student did not qualify for a Section 504 plan and would instead provide a medical management plan for medical needs."

However, after training on the ADA Amendments, "The District stated that it is now changing how it conducts eligibility determinations to ensure that they are based on whether one or more of a student's major life activities, not just learning, are substantially limited by a mental or physical impairment." To correct its error, the district sent a letter to parents of students on health plans indicating that it would be reviewing each child's situation under the correct standard. Additionally, under a resolution agreement, new Section 504 procedures were to be drafted and published to all parents and students, and training provided to relevant staff on Section 504. The district also agreed to reevaluate any student who was denied eligibility for disability services or terminated from a Section 504 plan during the 2008-09 school year using the correct definition of disability (as opposed to the school's previous understanding) slated in the Section 504 regulations and the ADA Amendments Act.

A little commentary: As OCR recognized, that an impairment substantially limiting a major life activity other than "learning" could trigger Section 504 eligibility was not "new" because of the ADA Amendments. Instead, this thinking represents long-standing guidance from OCR. *See, for example,*

Letter to McKethan, 23 IDELR 504 (OCR 1995) ("Students may have a disability that in no way affects their ability to learn, yet they may need extra help of some kind from the system to access learning. For instance, a child may have very severe asthma (affecting the major life activity of breathing) that requires regular medication and regular use of an inhaler at school. Without regular administration of the medication and inhaler, the child cannot remain in school."). Also interesting is the finding that the school's Section 504 forms do not comply with the Section 504 regulations because they do not "ensure that parent/guardians are provided with a meaningful opportunity to provide input into Section 504 decisions for their child." While meaningful participation is required under IDEA, and parental participation is certainly best practice, there is no such requirement under Section 504.

See also, Union City (MI) Community Schools, 54 IDELR 131 (OCR 2009) (District refused to provide accommodations for a student with bone cancer in a Section 504 plan because the child's impairment did not impact the major life activity of learning. OCR noted, however, that the impairment periodically affected the student's ability to walk, climb steps, participate in PE, attend field trips and obtain transportation services. OCR held that the district's use of an unduly restrictive definition of major life activities and its failure to evaluate the student in a timely manner denied the student FAPE.).

And major bodily functions too… 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." 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. In fact, the EEOC's proposed regulations include a connect-the-impairment-to-major-bodily-function paragraph of examples.

> "The link between particular impairments and various major bodily functions should not be difficult to identify. Because impairments, by definition, affect the functioning of body systems, they will generally affect major bodily functions. For example, cancer affects an individual's normal cell growth; diabetes affects the operation of the pancreas and also the function of the endocrine system; and Human Immunodeficiency Virus (HIV) infection affects the immune system. Likewise, sickle cell disease affects the functions of the hemic system, lymphedema affects lymphatic functions, and rheumatoid arthritis affects musculoskeletal functions." 76 Fed. Reg. 17007 (2011).

Don't overlook impact of the impairment on a major bodily function
Oxnard (CA) Union High School District, 55 IDELR 21 (OCR 2009).

Responding to a parent referral, a Section 504 committee addressed the potential Section 504 eligibility of a student who had irritable bowel syndrome (IBS) and another digestive condition. The team noted that the student was making good grades on advanced classes with the help of accommodations provided under a campus student services team (SST) process. Thus, the team determined that the student's condition did not substantially limit his learning, and that he was not eligible under Section 504. OCR found the district in violation of the law, since the team did not address whether the student's IBS substantially limited his major life activity of *digestive function*. In addition, OCR found that the team failed to consider that the condition caused frequent absences and a declining GPA, when it determined that his condition did not substantially limit his learning. In this case, therefore, the narrowing of the major life activities affected the framing of the eligibility questions in a way that had a major impact on the ultimate eligibility determination. *See also North Royalton (OH) City School District*, 52 IDELR 203 (OCR 2009) (school failed to properly consider eligibility of child with peanut allergy when it looked only at the degree the condition affected academic performance).

Recent OCR decisions likewise show a broadening view of where to look for impact on major life activities. *See for example, Hilliard City (OH) School District*, 110 LRP 67496 (OCR 02/10/10) (resolution agreement requires school to consider "whether any particular physical or mental impairment substantially limits one or more major life activities, *not solely learning or the ability to function in the school setting*" (emphasis added)); *Delaware City (DE) School District*, 110 LRP 66017 (OCR 04/14/10) (resolution agreement requires that school "consider all possible major life activities, including operation of major bodily functions, *and will not restrict consideration to only such activities or behavior as is demonstrated during the school day*" (emphasis added)).

A little commentary: Does this resolution agreement language suggest an OCR position that the impact of the impairment outside of school and in noneducational activities can give rise to Section 504 eligibility at school?

Some additional cases on major life activities…

Without *Toyota*, new hope for eligibility
Jenkins v. National Board of Medical Examiners, 109 LRP 7480 (6th Cir. 02/11/09, *unpublished*).

The 6th Circuit remanded to the District Court the determination of whether the plaintiff was entitled to accommodations on the U.S. Medical Licensing Exam. The District Court initially denied his request for injunction, due to his failure "to demonstrate how his reading difficulties limited his ability to perform tasks central to the lives of most people." Since he could read the kinds of things that matter to most people (menus and newspapers, for example) although he did so slowly, he was not ADA-eligible. The 6th Circuit found that the District Court was clearly led by *Toyota* in its analysis, and the intervening ADA Amendments undermine the court's holding. Consequently, "The resolution of this case will require the District Court to make a fresh application of the law to the facts in light of the amendments to the ADA."

Changes in major life activities can change eligibility
Michael M. v. Board of Education of Evanston Township High School District #202, 53 IDELR 21 (N.D. Ill. 2009).

Having previously been denied Section 504 eligibility in 2008 despite the student's ADHD, the parents appealed the hearing officer's decision to federal court. The parents argue a continuing failure to identify on the basis of the relaxed eligibility resulting from the ADAAA. The school argues that it plans to consider the student's eligibility in light of the change, but no such meeting has been held or even scheduled. The court refused, very elegantly, to dismiss the parents' claim of an ongoing Section 504 failure to evaluate. Wrote the court, "Until such a meeting occurs, Plaintiff's claim for relief is not moot."

A little commentary: As an interesting side note, **claims against individual school employees were dismissed by the District Court.** "Because the Section 504 and ADA obligations of the individual defendants in this case are derivative of the board's obligations, and any relief would come from the board itself, the claims against defendants Tauman, Madden, Canchola and Dr. Witherspoon are redundant and unnecessary, and are dismissed."

III. ADAAA Change 3: Impairments that Are Episodic or 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."** While the language covers two different types of impairments with similar treatment, the author will analyze these impairments separately as there are significant differences between the two.

A. Episodic impairments

Schools certainly 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.

Episodic Section 504 plans? An interesting result of the realization in law that a qualifying impairment need not rise to the level of substantial limitation every day is the corresponding logical conclusion that perhaps 504 plans need not provide constant services. If the impairment can be episodic, can not the plan be episodic as well? As a practical matter, the nature of the impairment likely will dictate whether such a plan is possible. After all, the Section 504 committee would need to be able to articulate what factors trigger the plan's provisions, and likewise, what factors (or the absence of factors) trigger the plan to turn off. The triggers would need to be fairly simple and as subject to objective verification as possible. For example, a student with heat-induced asthma who needs assistance when the temperature rises above 90 degrees could have a plan triggered by temperature. When the thermometer hits 90 degrees, the plan is on, otherwise, the student does not require services. Most students likely will not have such simple and objective triggers, making episodic plans impossible to implement. In those cases where the committee cannot articulate a simple objective trigger for the plan to turn on and off, the plan would simply be left in place all the time. *Note that OCR has not expressly addressed episodic plans in any published writing to date. Talk with your school attorney about the idea before attempting to implement it.*

B. Impairments "in remission"

Under the ADAAA, an impairment "in remission is a disability if it would substantially limit a major life activity when active." This portion of the provision is much more problematic than the application to episodic conditions. 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 has not returned. "In remission" does not apply to an impairment that has recurred, only to an impairment that could potentially recur (such as cancer, hepatitis, etc.). The new provision indicates that if the impairment was substantially limiting when active (prior to going into remission) it is a disability. Note that this grants to inactive impairments the same apparent status that applies to active ones — assuming that the impairment in remission was substantially limiting at one time. While this result works in the employment context where employees must seek accommodations from employers, it has some very strange results in K-12 where schools have a duty to find and evaluate potentially eligible students, and where eligibility traditionally has been tied to accessing services required by the disability. A few quick reminders…

1. The Section 504 duty to evaluate. The school's duty to evaluate under Section 504 is triggered by the school's suspicion of the student's need. Section 104.35(a) on evaluation provides: "A recipient that operates a public elementary or secondary education program or activity shall conduct an

evaluation in accordance with the requirements of paragraph (b) of this section of any person who, because of handicap, needs or is believed to need special education or related services before taking any action with respect to the initial placement of the person in regular or special education and any subsequent significant change in placement." 34 CFR §104.35(a).

> **The result of the new rule is a "disconnect" between Section 504 eligibility criteria and the Section 504 duty to evaluate.** Where the disability is in remission, there will likely be no outward evidence of impairment or student need to trigger the school's evaluation. Nevertheless, as the impairment could well be substantially limiting when active, does the school have some new, non-regulation-based duty to evaluate under the ADAAA? Note that employers have no child find duty and no duty to evaluate. Consequently, rules crafted for employment would not address this concern. The plain language of the regulation should mean that the school has no duty to find and evaluate students with an impairment in remission, as long as no need for services arises from the dormant impairment.

2. Who gets Section 504 services and accommodations? To be eligible under Section 504, a student must be both "qualified" (basically the student is of an age during 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 activity;
> (ii) has a record of such an impairment; or
> (iii) is regarded as having such an impairment.

In a 1992 Senior Staff Memorandum, OCR clarified the FAPE duty and its application to students eligible under prong one, but not prongs two and three.

> "The reason for the inclusion of the second and third prongs of the definition is explained in the regulation at Section 104.3(j)(2)(iii) and (iv), and is further clarified in Appendix A at #3. **Those two prongs of the definition are legal fictions. They are meant to reach situations where individuals either never were or are not currently handicapped, but are treated by others as if they were.** For instance, a person with severe facial scarring may be denied a job because she is 'regarded as' handicapped. A person with a history of mental illness may be denied admission to college because of that 'record' of a handicap. The persons are not, in fact, handicapped, but have been treated by others as if they were. It is the negative action taken based on the perception or the record that entitles a person to protection against discrimination on the basis of the assumptions of others."
>
> The use of these prongs of the definition of handicapped person arises most often in the area of employment, and sometimes in the area of postsecondary education. **It is rare for these prongs to be used in elementary and secondary student cases. They *cannot* be the basis upon which the requirement for FAPE is triggered.** Logically, since the student is not, in fact, mentally or physically handicapped, there can be no need for special education or related aids and services. *OCR Senior Staff Memorandum*, 19 IDELR 894 (OCR 1992).

The ADAAA language seems to take what are essentially students eligible under prong two (record of impairment) and transform them into prong one students if they were substantially limited when the impairment was active. In traditional K-12 Section 504 thinking, that move from prong two eligibility to prong one eligibility would also result in the provision of a Section 504 plan.

The Section 504 FAPE (the Section 504 plan) is focused on leveling the playing field. "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) (emphasis added). The long-standing guidance from ED with respect to students who "have a record of such impairment" (discussed above) provides a logical response to the student with an impairment in remission — since this is not a student with a current impairment, he is not entitled to FAPE or a Section 504 plan. Unfortunately, in the Revised Q&A, the long-standing position on who gets a Section 504 plan is reinforced but not reconciled with the "in remission" change in the ADAAA. Two separate entries address the issue, with apparently different results.

> **"35. Is an impairment that is episodic or in remission a disability under Section 504?** Yes, under certain circumstances. In the Amendments Act (see FAQ 1), Congress clarified that an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active. *A student with such an impairment is entitled to a free appropriate public education under Section 504*" (emphasis added).
>
> **"37. Must a school district develop a Section 504 plan for a student who either "has a record of disability" or is "regarded as disabled"?** *No.* In public elementary and secondary schools, unless a student actually has an impairment that substantially limits a major life activity, the mere fact that a student has a "record of" or is "regarded as" disabled is insufficient, in itself, to trigger those Section 504 protections that require the provision of a free appropriate public education (FAPE)" (emphasis added).

A little commentary: Perhaps the two statements are not at all at odds. Perhaps the answer in Question #35 was confused because both episodic and in remission impairments were analyzed together despite the fact that they are quite different in the context of historical Section 504 analysis and good old fashioned logic. In that case, it would be clear that students with impairments in remission (which impairments are not active) do not receive FAPE. Should Question #35 be correct, one wonders why an accommodation plan would be developed or implemented for the student as there is no need for services since there is no current impairment. Should the plan be based on what he needed six years ago when the cancer was active, even though he has no needs now as the cancer is in remission? Such a reading makes little sense, and seems an onerous burden from an unfunded nondiscrimination statute.

3. Does a student have to need services in order to be Section 504-eligible?

Traditional pre-ADAAA Section 504 eligibility in most school districts was premised on the notion that the Section 504 prong-one eligibility requirements were met, and the student needed Section 504 accommodations or services in order for his needs to be met as adequately as his nondisabled peers. After all, why would we evaluate a student for Section 504 unless we thought that the student needed services? Consequently, if the student was found not to need services during the evaluation, he was likely determined ineligible for Section 504. The logic of nondiscrimination demanded that result: if the student did not need accommodations because of his impairment, how is he denied equal participation and benefit because of the impairment?

The ADAAA's provision on impairments in remission coincides with an interesting OCR criticism of traditional eligibility thinking. At least two OCR decisions in the last two years have highlighted a view of Section 504 eligibility not recognized by most public schools. In these decisions, OCR has separated eligibility questions from the question of whether the student needs a Section 504 plan. *See, e.g., Memphis (MI) Community Schools*, 54 IDELR 61 (OCR 2009) **("The procedures also state that a student is not eligible under Section 504 as a student with a disability if the student does not need Section 504 services in order for the student's educational needs to be met, which conflates the determination of disability with placement and services decisions, which should be separate").** This bit of language from OCR seems to support the position that a student can be

technically eligible for Section 504 under prong one, but not be eligible for services, for example, because the impairment is in remission and no services are necessary for the student to receive FAPE. *See also, Oxnard (CA) Union High School District*, 55 IDELR 21 (OCR 2009) (applying similar analysis to mitigating measures, OCR wrote: "Though the positive impact of accommodations is pertinent in evaluating the effectiveness of those accommodations, their impact should not be conflated with the issue of eligibility").

Put simply, a student does not have to demonstrate need for services in order to be Section 504-eligible. That position, of course, does not change the fact that the duty to evaluate is triggered, in part, by evidence of need for services. *See, for example, Revised Q&A #31, recognizing need for services to trigger evaluation after ADAAA.*

A technically eligible student? In the context of the student with an impairment in remission, the result is a student who is technically eligible (if the cancer or other impairment substantially limited a major life activity when it was active) but does not need a Section 504 plan (because the impairment is in remission and does not create a current need for services). So what does this student get from Section 504? **The technically eligible student with no current need for services would get no Section 504 plan, but would get the other procedural protections arising from prong-one eligibility.** Presumably, the student will 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 that in the past, no Section 504 committee action was necessary to create this protection (for example, if this child were to sue or complain of discrimination, the court or OCR would simply find the record of impairment and move on to look at the alleged discrimination). Under the ADAAA, although the duty to evaluate would not require a school to look for and refer students with impairments in remission, parents could certainly refer and the school would be required to respond to the referral.

IV. ADAAA Change 4: Determining Substantial Limitation under a New Mitigating Measures Rule

Congress rejected the mitigating measures rule imposed by the Supreme Court in the *Sutton* trilogy. In the ADAAA, Congress replaces *Sutton, et. al.*, with a rule prohibiting the consideration of the effects of remediation efforts when determining whether a disability substantially limits a major life activity (with the exception of ordinary eyeglasses 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. Thus, under the Supreme Court's reasoning in *Murphy*, the fact that the truck driver with high blood pressure was being effectively treated with medication had to be taken into account in determining whether he was a person with a disability

under Section 504. The Court found that, with treatment, the truck driver was not substantially limited in a major life activity and thus could not maintain a Section 504 lawsuit against his employer. In the third case of the *Sutton* trilogy, *Kirkingburg*, the Supreme Court determined that a compensatory skill developed and used by an individual with monocular vision was to be treated no differently for eligibility purposes than other mitigating measures. Congress here means to restore the employee's ability to press his claim for accommodation, rather than be dismissed at the "door" of the courthouse.

1. What about students on medication? The students probably most affected by the new mitigating measures rule are students on medication. After the *Sutton* rule was created by the Supreme Court, schools fairly quickly adapted, recognizing that if medication used by the student decreased the impact of his impairment below substantial limitation, he would not be Section 504-eligible. As a result, students with ADD/ADHD, diabetes, allergies, asthma, and any number of other conditions stabilized by medication were found ineligible for Section 504. Of course, medication did not bar eligibility (even with medication, some students were still substantially limited), but it did reduce eligibility.

With the new ADAAA mitigating measures rule, the opposite result is likely. Schools are now required to screen-out or filter-out the positive impact of mitigating measures like medication. In essence, schools are asked to determine the impact of the student's impairment on the major life activity in the absence of medication. That can be difficult analysis, especially if the student has been following a medication regimen for some time, and doing so with fidelity. Where a student's medication use has been intermittent, the school likely will have data with respect to student behavior and performance in both a medicated and un-medicated state, in which case, the 504 committee can look to real data on the impact of the meds. In the absence of such data, the committee will likely have to look back to the time prior to medication (by accessing old medical and education records or getting anecdotal information from the parent or student as to the student's functioning). Upon review of the data, the 504 committee will need to be able to articulate the impact that medication has so as to determine whether the student is substantially limited in a major life activity without it. Note that this is the same basic process or analysis that a committee would use to properly evaluate a student receiving any mitigating measure.

2. What about health plans or emergency response plans? Health plans and emergency plans are mitigating measures. *North Royalton (OH) City School District*, 52 IDELR 203 (OCR 2009). Prior to the effective date of the ADAAA, North Royalton initially found the student with an anxiety disorder and tree-nut-allergy ineligible for Section 504 due to the effectiveness of his emergency allergy plan. OCR determined that at no point was the student denied appropriate services. Further, OCR did not dispute the school's claims that the student never had a reaction to nuts at school, and never visited the health services coordinator due to anxiety or allergy issues. Nevertheless, in November 2008, prior to the ADAAA going into effect, the school reconsidered the eligibility question, and found the student Section 504-eligible under the new rules, with his EAP becoming his 504 plan on Jan. 1, 2009. As the student's needs had been met throughout, OCR found no violation with respect to the child's services (so no compensatory education was required) but did conclude that his initial evaluation was inappropriate as it only considered limitations to the major life activity of learning (like the *Memphis* case, previously discussed).

With respect to health plans (or the EAPs here), OCR required the school to apply the ADAAA to future evaluations. **"In doing so, the district will also apply the new ADAAA standards and will not take into account mitigating measures, such as the use of medicine or the provision of related aids and services, such as those provided in EAPs, when determining students' disability status."**

A little commentary: "The district also stated, however, that no other student with a food allergy being served under an EAP — approximately 40 District students — has been identified as a student with a disability and provided a Section 504 plan since the ADAAA took effect on January 1, 2009." **Interestingly, the resolution agreement with OCR did not require the school to review the files of the other students on EAPs to determine whether referral to Section 504 should be made.** Instead,

OCR was satisfied with the following: "The district will issue a letter to the parents/guardians of all students in the District who are currently receiving services under Emergency Allergy Plans of the district's Section 504 procedures and of their right to request an evaluation under Section 504, at no cost to them, if they believe that their child may have a disability because the child's medical impairment substantially limits one or more major life activities." *But see also, Isle of Wight County (VA) Public Schools*, 111 LRP 1964 (OCR 07/14/10) (as part of a resolution agreement, the school agrees to review all students on medical/health plans and determine which students need to be referred to Section 504); *Memphis (MI) Community Schools*, 54 IDELR 61 (OCR 2009) (as part of a resolution agreement, the school agrees to reevaluate all students on medical management plans denied 504 eligibility or dismissed from Section 504 during the 2008-09 school year). Note that in both of these cases, the concern was not that students were on health plans but that school policy looked for eligibility only if the impairment impacted education.

3. What's included in the phrase "reasonable accommodation"? Since the passage of the ADAAA, OCR has determined that the phrase recognizing "reasonable accommodations" as mitigating measures includes things such as accommodations and assistance provided to students through a student services team or early intervention team, *Oxnard (CA) Union High School District*, 55 IDELR 21 (OCR 2009); and informal help provided consistently by classroom teachers, *Virginia Beach (VA) City Public Schools*, 54 IDELR 202 (OCR 2009). The inclusion of those two activities would seem to logically include RTI as well. Of course, other activities will likely be added to the list.

4. How does this impact the line between regular education interventions and Section 504 eligibility for students who need support due to impairments? There no longer seems to be a line, at least in OCR's perspective. Consider these two portions of the Revised Q&A.

> **"31. What is a reasonable justification for referring a student for evaluation for services under Section 504?** School districts may always use regular education intervention strategies to assist students with difficulties in schools. Section 504 requires recipient school districts to refer a student for an evaluation for possible special education or modification of regular education if the student, because of disability, needs or is believed to need such services." Revised Q&A #31. *See also Revised Q&A #40* (**"40. What is the difference between a regular education intervention plan and a Section 504 plan?** A regular education intervention plan is appropriate for a student who does not have a disability or is not suspected of having a disability but may be facing challenges in school.").
>
> *A little commentary:* Interestingly, those two questions and answers are at odds with both the current RTI movement (emphasizing regular education intervention to ensure that students who get into special education are, in fact, disabled, and in need of special education) and older OCR thinking. For example, consider this 1999 case where OCR recognized that the school has the option of trying regular education interventions before Section 504 evaluation. "Under Section 504, prior to evaluating a student's need for special education or related services, the district must have reason to believe that the student is having academic, social or behavioral problems that substantially affect the student's overall performance at school. A district, however, has the option of attempting to address these types of problems through documented school-based intervention and/or modifications, prior to conducting an evaluation. Furthermore, if such interventions and/or modifications are successful, a district is not obligated to evaluate a student for special education or related services." *Karnes City (TX) Independent School District*, 31 IDELR 64 (OCR 1999).
>
> A final thought… Is Section 504 really a nondiscrimination statute if every student with an impairment who needs interventions must go through Section 504 to get the intervention, even if the help is available to *all students* through a regular education process *without* Section 504? Isn't there a flavor of discrimination in the notion that the regular education intervention process is not available for a student whose need may arise from a physical or mental impairment? Doesn't this thinking conflict with the IDEA push for regular education to do more and to get the right students into IDEA?

More plainly, isn't this type of thinking ominously similar to a "separate but equal" type of approach to intervention? ED can help school efforts to improve regular education interventions by providing consistent guidance here.

Some recent decisions involving mitigating measures
Update your forms!
Fox (MO) C-6 School District, 109 LRP 54751 (OCR 05/12/09).

The complaint arises from the school's alleged failure to properly evaluate a student with a peanut allergy for Section 504 eligibility. While not clear from the published decision, it appears that the district may have previously evaluated the student and denied eligibility due to the impact of a mitigating measure, such as an EpiPen. Part of the resolution agreement requires the school to evaluate the student for possible Section 504 eligibility. Included in the resolution language is the following: "Documentation considered by the multidisciplinary team in making its determinations will include, but not limited to, new and existing information regarding the Student and a copy of the complete text of the ADAAA."

> "While mitigating measures were addressed in the school's procedures manual, the references apparently were incorrect. OCR provides, as technical assistance, encouragement to either remove references to mitigating measures in the Section 504 eligibility form, or include language that addresses the ADAAA treatment of mitigating measures for eligibility purposes. Additionally, the school agrees to revise its Section 504 Procedures Manual "in the section under the heading 'Which students are covered,' to incorporate a definition of a person with a disability that is consistent with the ADAAA. Revisions will include, but may not be limited to, defining 'major life activities' as they are defined in the ADAAA and removing references to any court decisions that were specifically rejected by the ADAAA."

A little commentary: In a related case, *St. Clair County (MI) Regional Educational Service Agency*, 53 IDELR 238 (OCR 2009), OCR made similar findings with respect to the service agency providing the manuals. *See also, Rim of the World (CA) Unified School District*, 109 LRP 27323 (OCR 02/02/09) ("The District's Section 504 plan form contains a definition of 'substantially limits a major life activity,' which is inconsistent with current law because it instructs staff to consider mitigating circumstances in determining whether a student has a disability under Section 504").

V. ADAAA Change 5: A Lower Standard for "Substantial Limitation"

In the ADAAA, Congress expresses its "expectation" that the 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. Given that Congress appears intent on broadening access to the courts for employees with impairments claiming their employers have failed to provide reasonable accommodations in the workplace, it is not surprising that they would want the EEOC to relax its regulation defining "substantial limitation." Congress wants to move the focus from the threshold eligibility determination to employers' provision of reasonable accommodations to persons with impairments. The EEOC's now-defunct definition is 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 CFR §1630.2(j)(1)(i)&(ii).

It is interesting to note, however, that the ADAAA makes no mention of the ED's Section 504 regulations, or of any need to effect change to its substantive requirements. The ED did not create a definition of substantial limitation in the regulations. Instead, the commentary to the ED's regulations provides 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, the 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. **For those school districts utilizing the EEOC's definition, a change in the substantial limitation definition is required.** The more interesting question, of course, is what definition to use? In response to Congress' "expectation," EEOC produced a final regulation which transforms what was a fairly simple two paragraph definition into nine paragraphs. As a practical matter, the EEOC's new definition is likely too unwieldy for use by Section 504 Committees, and need only be adopted for K-12 student evaluations should a school desire to do so. Unless ED creates a definition or endorses a definition, LEAs will have to adopt a definition of their own. All that is certain from the ADAAA is that the "significant restriction" identified in the now-defunct EEOC definition is too high a requirement. A less demanding definition is required.

A little commentary: Until guidance is issued by ED, consider with your school attorney the following approach. In your Section 504 evaluations forms and procedures, ask your Section 504 Committees to determine whether there is a substantial limitation, with the note that (1) substantial limitation does not mean "significant restriction" as ordered by Congress, and (2) the appropriate standard is less demanding than "significant restriction." The Committee is then free to apply its own, less demanding definition, and knows not to use the definition that was rejected by Congress.

An update on temporary impairments and the ADAAA's six-month rule
James A. Garfield (OH) Local School District, 52 IDELR 142 (OCR 2009).

Addressing a complaint based on a student's ability to participate at school following a broken foot and injured knee, OCR determined he was not Section 504-eligible as the disability did not last six months. Citing ADA's Title II regulations, OCR wrote:

> "At the time of the alleged discrimination, the Title II implementing regulation, at 28 CFR § 35.104, stated that the question of whether a temporary impairment rises to the level of a disability must be addressed on a case-by-case basis and noted that: 'temporary impairments, such as a broken leg, are not commonly regarded as disabilities, and only in rare circumstances would the degree of the limitation and its expected duration be substantial.' OCR typically has found that temporary impairments affecting mobility for a few months or less are not considered significant enough to qualify as a disability pursuant to Section 504 or Title II. It should be noted that OCR applied the standards in effect at the time of the alleged discrimination and not the amendments to the Americans with Disabilities Act that became effective in January 2009. Under those amended standards, any impairment, the duration of which is less than six months, would not constitute a disability."

A little commentary: This decision seems strange as it not only misstates the ADAAA change (it applies the six-month rule only to the "regarded as disabled" prong of eligibility) but it also seems at odds with historical and current OCR policy. In various policy letters over the years, OCR has reiterated that a temporary disability can constitute a physical impairment that substantially limits a major life activity such that Section 504 services might be required. *See, for example, Ventura (CA) Unified School District,* 17 IDELR 854 (OCR 1991); *Temple (TX) Independent School District,* 25 IDELR 232 (OCR 1996). That position seemed completely entrenched in March of 2009 when OCR posted the "Revised Q&A." Question 34 of the document includes no bright-line rule.

"34. How should a recipient school district view a temporary impairment? A temporary impairment does not constitute a disability for purposes of Section 504 unless its severity is such that it results in a substantial limitation of one or more major life activities for an extended period of time. **The issue of whether a temporary impairment is substantial enough to be a disability must be resolved on a case-by-case basis, taking into consideration both the duration (or expected duration) of the impairment and the extent to which it actually limits a major life activity of the affected individual.** In the Amendments Act (see FAQ 1), Congress clarified that an individual is not 'regarded as' an individual with a disability if the impairment is transitory and minor. A transitory impairment is an impairment with an actual or expected duration of 6 months or less" (emphasis added).

This result is a perfect illustration of why schools are confused and in need of substantial, comprehensive guidance to square the ADA Amendments with the Section 504 FAPE and long-standing OCR policy positions. Presumably, as this complaint (dated Feb. 19, 2009) was resolved prior to the Revised Q&A (March 27, 2009), it is no longer OCR's position.

VI. Something to Watch: The EEOC's List of Impairments with "Predictable Assessments."

Perhaps the biggest shift in thinking arising from the ADAAA is manifest in a new position taken in the EEOC's regulations granting near-automatic eligibility for certain types of impairments.

"(3) *Predictable assessments—*
(ii) …Given their inherent nature, these types of impairments will, as a factual matter, virtually always be found to impose a substantial limitation on a major life activity. Therefore, with respect to these types of impairments, the necessary individualized assessment should be particularly simple and straightforward.
(iii) For example, applying the principles set forth in paragraphs (j)(1)(i) through (ix) of this section, it should easily be concluded that the following types of impairments will, at a minimum, substantially limit the major life activities indicated: Deafness substantially limits hearing; blindness substantially limits seeing; **an intellectual disability (formerly termed mental retardation) substantially limits brain function;** partially or completely missing limbs or mobility impairments requiring the use of a wheelchair substantially limit musculoskeletal function; autism substantially limits brain function; cancer substantially limits normal cell growth; cerebral palsy substantially limits brain function; **diabetes substantially limits endocrine function;** epilepsy substantially limits neurological function; **Human Immunodeficiency Virus (HIV) infection substantially limits immune function;** multiple sclerosis substantially limits neurological function; muscular dystrophy substantially limits neurological function; and major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, and schizophrenia substantially limit brain function. The types of impairments described in this section may substantially limit additional major life activities not explicitly listed above." 29 C.F.R. §1630.2(j)(3)(emphasis added).

Although these are final EEOC regulations, they do not have legal authority with respect to K-12 Section 504 students, as the ED retains jurisdiction to issue K-12 rules. (These regs do apply to issues involving school districts and *their employees*). They are provided here so that school personnel understand the position taken by EEOC should parents or advocates argue that the school take a similar tact with respect to K-12 eligibility. **Note, however, that in the Revised Q&A the ED has already taken a position on ADAAA contrary to that in the EEOC rule** (*see, for example, Revised Q&A Question #23):*

"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."

Of course, the ED took this position prior to the EEOC releasing regulations, and can always reconsider. For now, however, Section 504 eligibility is determined individually and not merely because the student has a particular impairment.

VII. Some Thoughts on How to Meld the Section 504 FAPE with the ADAAA

• **Watch for clarifying guidance from the ED on the impact of the ADA amendments to the functions and duties of public schools under Section 504.** In October 2008, OCR issued a letter response indicating that "OCR is evaluating the impact of the ADA Amendments on OCR's enforcement responsibilities made under Section 504 and Title II, including whether any changes in regulations, guidance, or other publications are appropriate." *In re: Americans with Disabilities Act Amendments of 2008*, 51 IDELR 80 (OCR 2008). In light of the fact that the purpose of the amendments seems limited to the employment context, and that a strict technical application of the changes would lead to clearly unworkable results in the educational context, it is our hope that the ED will at some point provide written guidance on the amendments in order to clarify the act's implications on public schools' K-12 duty to provide FAPE. The Section 504 FAPE, child find and the duty to evaluate are creatures of the regulations, and are the key differences between the employment world where Congress was focused in the ADAAA and the K-12 world where the changes simply don't work as written.

• **Add language to Section 504 eligibility forms, manuals and procedures to show your school's understanding of the ADAAA's emphasis on broad eligibility.**

• **Change Section 504 eligibility forms, manuals and procedures to reflect the newly recognized major life activities, including reading, and the inclusion of major bodily functions.** Pay special attention to the recent cases (*North Royalton* and *Memphis*, discussed previously) where schools were found in violation for only looking at impact on the major life activity of learning. While the ADAAA did not change the rule, it seems to have exposed an inappropriate practice in some schools.

• **Remove references to the EEOC's definition of substantial limitation from Section 504 eligibility forms, manuals and procedures.** Keep an eye on the federal courts and the EEOC for emerging definitions. *See, for example, Rim of the World (CA) Unified School District*, 109 LRP 27323 (OCR 02/02/09) (while investigating a variety of parent complaints, OCR identified problems with the district Section 504 paperwork, including the district's use of a definition of "substantial limitation" rejected by the ADAAA). Consider with your attorney the approach outlined on p. 14.

• **Recognize the limited options available to the school when a parent requests a Section 504 evaluation.** *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").

• **Child find and evaluate under Section 504 only students suspected of having a *current* disability-related need for services.** If regular education students with impairments that are successfully addressed by mitigating measures or are in remission must be treated as if they were presently disabled, without taking into account their remission or effective treatment, child find would be rendered nearly impossible. Identification of potentially eligible students has always hinged on whether there are *reasonable grounds to suspect* an impairment that substantially limits a major life activity. How then, does a school child find

for students that show no outward signs of impairment due to effective treatment or the fact the impairment is in remission?

Consequently, discuss the following approach with your school attorney. Focus the limited time, personnel and intervention resources of the school on students who are struggling. If the student's needs are already met as adequately as his peers, there is no need to trigger a Section 504 evaluation (even though, if mitigating measures were ignored, the student might be eligible). As he has no current need, the school does not have to evaluate him. *See, the previous discussion of 34 CFR §104.35(a).* Of course, if the parents of a student choose to refer to Section 504, the school must either follow through with referral, applying the eligibility standard as required by the ADAAA, followed by a determination of whether a Section 504 plan is required, or refuse to evaluate and provide the parents their notice of rights. *See previous discussion of Bryan County.*

• **Be careful determining eligibility for students whose conditions, although episodic, can reach the point of substantial limitation when active.** Understand that the plain language of the changes may create a duty to evaluate based on an impairment that is in remission and gives rise to no current need for services. Make appropriate changes in Section 504 eligibility forms, manuals and procedures to reflect the new requirement.

• **Understand that the plain language of the changes requires Section 504 eligibility to be determined without regard to the ameliorative or beneficial impact of mitigating measures.** Those measures likely include regular education interventions, accommodations (like differentiated instruction) and other assistance (like health plans and emergency response plans). Understand that OCR could conclude that regular education intervention provided outside of a Section 504 process or plan is not appropriate for students who have a physical or mental impairment and are in need of interventions or accommodation (the Q&A #31 approach discussed above), even though such a conclusion is inconsistent with IDEA's emphasis on regular education as a first tier for all students.

• **Recognize the possibility of "technical Section 504 eligibility" but no need for a Section 504 plan.** Since Section 504 eligibility and need for a Section 504 plan are separate questions, and since both the "in remission" and the mitigating measures rule can result in students being found eligible but not in need of a Section 504 plan, this new hybrid type of student must be recognized. Since this student is Section 504-eligible, he is reevaluated periodically and he has nondiscrimination protection. He has the Section 504 procedural safeguards including manifestation determination available to him. Further, should he need accommodations or services at a later time, the Section 504 committee must address those needs as they arise. Schools will need to create a mechanism to document, track and provide the protections arising from technical eligibility.

• **Continue to develop strong systems of early intervention for all struggling students**, with the knowledge that the need for services arising from disability may be considered a trigger of the duty to evaluate under Section 504.

• **Work closely with your school attorney** to ensure Section 504 compliance as you consider appropriate changes to your Section 504 process and ongoing efforts to serve students under Section 504.