

# Requirement and Options Under Section 504

Prepared by:  
James P. Evans  
*Barclay & Damon, LLP*



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## REQUIREMENT AND OPTIONS UNDER SECTION 504

### A. Students Protected Under Section 504

As noted above, a public school system offering a K-12 program must evaluate students who are suspected of having a disability to determine if such students are in fact disabled as Section 504 defines that term.

#### 1. Definition of Individual with Disabilities Under Section 504

Unlike IDEA, Section 504 is not limited to a discrete list of disabilities, but defines the term broadly. It defines an individual with disabilities as a person who (1) has a physical or mental condition that substantially limits a major life activity; (2) has a history of such a condition; or (3) is regarded as having such a condition.<sup>5</sup>

##### (a) *Physical or Mental Impairment*

A physical or mental impairment is any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs; respiratory; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine; or any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.<sup>6</sup> This is not an exhaustive list of physical or mental impairments, and 504 Committees must consider the possibility that other conditions also qualify as an impairment under Section 504.

##### (b) *Major Life Activities*

A major life activity is defined by a non-exhaustive list of functions, including caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.<sup>7</sup> However, other functions may also constitute major life activities under Section 504.

##### (c) *The ADA Amendment Act of 2008*

<sup>5</sup> 34 C.F.R. § 104.3(j)(1).

<sup>6</sup> 34 C.F.R. § 104.3(j)(2)(i).

<sup>7</sup> 34 C.F.R. § 104.3(j)(2)(ii).

In 2008, Congress passed the Americans with Disabilities Amendment Act (“ADAAA”), which amended the ADA and Section 504. The amendments were predicated on Congress’ belief that the federal courts had too narrowly defined the scope of individuals protected by these statutes. The ADAAA amended the definition of “disability” to include a statement that the term is to be construed “in favor of broad coverage of individuals . . . to the maximum extent permitted[.]”<sup>8</sup> The ADAAA also includes a non-exhaustive example of major life activities: caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, standing, lifting, bending, reading, concentrating, thinking, and communicating.<sup>9</sup> Further, it defines a major bodily function to “includ[e] . . . functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.”<sup>10</sup>

According to the OCR, although the Department’s regulatory definition of “major life activities” is not as comprehensive as the examples listed in the ADAAA, the definition remains valid because its list of conditions was never meant to be exclusive, and an activity or function that is not specifically listed in the regulation may still be considered a major life activity, if appropriate.<sup>11</sup>

The ADAAA also prohibits recipient schools from considering mitigating measures when deciding if an individual is disabled. For example, a hearing-impaired student cannot be evaluated while wearing a prescribed hearing aid in order to determine if the student has a hearing impairment. Instead, the student’s hearing must be evaluated without the mitigating measure (i.e., the hearing aid).<sup>12</sup> (See Section B(4), *infra*.)

(d) *Effect of a Student’s Classification Under IDEA on Evaluation Under Section 504*

<sup>8</sup> 42 U.S.C. § 12102(4)(A).

<sup>9</sup> 42 U.S.C. § 12102(2)(A).

<sup>10</sup> 42 U.S.C. § 12102(2)(B). This definition of major bodily function does not significantly expand the definition used by the Department in 34 C.F.R. § 104.3(j)(i).

<sup>11</sup> See *Protecting Students With Disabilities*, U.S. Dep’t of Educ., Office for Civil Rights, last modified, 10/16/2015, pp. 3-4, available at <https://www2.ed.gov/about/offices/list/ocr/504faq.html> (last accessed, Aug. 14, 2017).

<sup>12</sup> 42 U.S.C. § 12102(4)(E)(i).

The U.S. Appellate Court in New Mexico ruled that, although the existence of an IEP may strongly suggest that a student has an impairment that substantially limits a major life activity and, therefore, qualifies as an individual with disabilities under Section 504, but an IEP, by itself, does not establish such a condition. Nor does a conclusion that a student does not qualify for services under IDEA, by itself, demonstrate that a student does not have such a condition. School districts must evaluate students relative to Section 504 regardless of such prior determinations to determine if a student has a physical or mental condition that substantially limits a major life activity (e.g., learning).<sup>13</sup>

**Practice Tip:** Even if a student has been deemed qualified under IDEA, this does not necessarily mean the student has an impairment that significantly limits a major life activity – *i.e.*, that the student is protected under Section 504. Because Section 504 can support a claim for money damages – unlike IDEA – a school district should carefully consider whether to classify a student as qualified under Section 504.

For example, in a recent case, the OCR found a district non-compliant with Section 504 because, after finding a student ineligible for services under IDEA, it failed to evaluate the student to determine if she had an impairment that substantially limited a major life activity, although there was evidence the student did have such an impairment.<sup>14</sup>

<sup>13</sup> See, e.g., *Ellenberg v. New Mexico Military Inst.*, Case No. 08-2112, 39 NDLR 160 (10th Cir. July 10, 2009) (the plaintiff student's failure to show that oppositional defiant disorder substantially impaired her ability to learn was fatal to the student's lawsuit, alleging illegal discrimination, in violation of Section 504); *Widefield (CO) School Dist. No. 3*, 45 IDELR 130 (OCR 2005) (OCR finds for district after parent alleges the district denied her daughter a FAPE. The OCR found that although the student received homebound services at the request of her doctor due to fibromyalgia, the parent failed to provide evidence that the student's condition substantially limited a major life activity. Further, the staff did not consider her to have such an impairment).

<sup>14</sup> *Vance (NC) Schools*, 40 NDLR 124 (OCR XI, D.C. (NC) 2009). In this case, the OCR noted that the school district did not even attempt to address the student's educational needs in light of his impairment, although the parent made a number of inquiries about its obligation to do so. Undoubtedly, these circumstances heightened the OCR's concern.

**Practiced Tip:** School districts are well advised to convene a 504 Committee to determine whether the evaluations done under IDEA are adequate, whether additional evaluations are necessary, and, ultimately, whether the student is disabled under Section 504. It should also clearly record its determination in this regard in writing. To ensure it is plain that the committee considered the student's eligibility specifically under Section 504, it may be advisable to conduct a second and separate meeting for this purpose.

## 2. *Students with a History of Disability or Regarded as Disabled*

As noted above, students may qualify as disabled individuals under Section 504 because they have a history of having a particular impairment in the past or are regarded by others as having an impairment – even though they presently do not have the impairment. In such cases, a student falls within the class of persons protected by Section 504 even though the student is not actually a student with disabilities and will not actually need special education or related services. It would be superfluous for a school district to provide an education plan to such a student, and, therefore, a school district need not do so. In such a case, a district must, however, ensure that such a student is not subjected to discrimination or harassment based on the perceived – but non-existent – impairment.<sup>15</sup>

The OCR explained its rationale for this position in a 1992 field memorandum to senior staff :

Logically, since the student [qualifying under prong two or three] is not, in fact, mentally or physically handicapped, there can be no need for special education and related aids and services . . . . 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.<sup>16</sup>

<sup>15</sup> Protecting Students With Disabilities, *supra*, 37.

<sup>16</sup> OCR Senior Staff Memorandum, 19 IDELR 894 (OCR 1992).

### 3. *Temporary and Intermittent Disabilities*

As for intermittent disabilities, the ADAAA specifies that “[a]n impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.”<sup>17</sup> So, for example, an intermittent condition, such as asthma, can be an impairment that substantially limits a major life activity when aggravated, although it is not always such an impairment. Likewise, a student with cancer undergoing chemotherapy, which causes the student to have episodic or intermittent, but substantial, limitations of major life activities, is a student with disabilities during such periods.

Likewise, conditions that are in remission, but which substantially limit a major life activity when active, constitute a disability under Section 504. So, for example, a student afflicted with cancer that is in remission will remain protected under Section 504 because when the cancer is active it substantially limits a major life activity.<sup>18</sup> Schools must assess whether conditions that are intermittent or in remission constitute disabilities under Section 504 on a case-by-case basis. In doing so, they should consider the impairment’s duration (or anticipated duration) and the extent to which it limits a major life activity when active.<sup>19</sup>

A temporary disability will comprise a disability under Section 504 if it results in a substantial limitation of one or more major life activities for an extended period of time. Relying on the ADAAA, the OCR considers an extended period of time to be at least six months. A condition that has an actual or expected duration of less than six months is considered “transitory and minor” and, therefore, not a disability as defined by Section 504 (or the ADA).<sup>20</sup>

<sup>17</sup> 42 U.S.C. § 12102(4)(D).

<sup>18</sup> Protecting Students With Disabilities, *supra*, 35.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*, 35. The OCR cites to the ADAAA for this position, which provides that an individual is not disabled – not even as an individual regarded as having a condition that substantially limits a major life activity – if the impairment is “transitory and minor. A transitory impairment is an impairment with an actual or expected duration of 6 months or less.” 42 U.S.C. § 12102(3)(B).

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