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Top Five Section 504 Errors Redux

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From: *ELA Notes*, the newsletter of the Education Law Association

www.educationlaw.org

In a 2003 issue of *ELA Notes*, I provided a brief set of practical tips, in the form of No-No’s, concerning eligibility under Section 504.¹ Jerry Hime, who conducts impartial hearings under Section 504, recently sent me a note in appreciation for, and reliance on, this information. I quickly responded that the information needed updating in light of the Americans with Disabilities Amendments Act (ADAAA),² which reversed various judicial interpretations of the definition of disability in Section 504 and its sister statute, the Americans with Disabilities Act (ADA) and which went into effect on January 1, 2009.

Although explained in detail in various other sources,³ the major changes of the ADAAA are to provide for more expansive interpretation of the eligibility standards under Section 504 and the ADAAA. These changes apply to the second and third parts of the disability definition: 1) physical or mental impairment that limits 2) one or more major life activities 3) to a substantial extent. More specifically, the amendments expand the illustrative list of major life activities, and they call for the determination of substantially without mitigating measures and, for impairments that are episodic or in remission, when they are active.

Thus, my prior “No-No’s” in determining eligibility of students, who are not covered by the IDEA, under Section 504 warrant repeating with updating revisions. Much more detailed and complete information, including eligibility and related forms, is available in my two-volume reference, which has annual supplements.⁴ Many school districts have not adjusted their eligibility determination procedures and practices to conform to the ADAAA or have

gone to the other extreme and not provided defensible limits in terms of administering Section 504, whether correctly characterized as a civil rights law or “unfunded mandate.”⁵ Here is my top-five list of such errors, which includes ongoing as well as new legal (mis)-understandings⁶:

1. Automatically offering—without a careful individualized evaluation according to current standards—a Section 504 plan as a consolation prize whenever a district determines that a student is not or is no longer eligible under the IDEA.

Although the ADAAA has considerably broadened the scope of eligibility under Section 504, much of the expansion is in terms of major life activities not specifically and directly in line with adverse effect on educational performance or the need for special education—e.g., sleeping, eating, and bowel functions. For the limited exceptions, only one—concentration—would appear to warrant special attention,⁷ particularly in relation to attention deficit hyperactivity disorder (ADHD); for the others—reading and thinking—it would be unlikely that the child would have a substantially limiting impairment that does not qualify under the IDEA classifications of other health impairment (OHI) or specific learning disabilities (SLD). In any event, careful individualized consideration is the key rather than a 504 plan as an automatic fallback.⁸

2. Requiring parents, at their own expense, to obtain medical diagnosis of ADHD as a prerequisite of a Section 504 evaluation or—just the opposite—accepting such a diagnosis, regardless of its lack of specificity or support, as establishing Section 504 eligibility.

The Office for Civil Rights (OCR) has made clear in various published policy interpretations that (1) a medical diagnosis is neither necessary nor controlling for determining whether a student has ADHD for purposes of Section 504 eligibility,⁹ and (2) if the district deems a medical diagnosis to be necessary, it must be at no cost to the parents.¹⁰ Rather, the district should invite, without requiring, such medical information from the parents, with the understanding that the eligibility team will give it due weight, much like the IDEA requirement to “consider” independent educational evaluations.¹¹

3. Using a relatively small subset of learning or reading, such as spelling, handwriting, reading fluency, or math calculation, as a major life activity.

Although the ADAAA’s expanded examples of major life activities add the related subset of reading, thus leaving as an open question whether the arguably comparable subsets of math and written expression are inferably intended, Congress did not opt for their components corresponding to the discrete enumerated areas in the IDEA’s regulatory definition of SLD—reading fluency skills, basic reading skills, reading comprehension, math calculation, and math problem solving.¹² Although the addition of concentration causes questions, depending on interpretation of its breadth, this major life activity appears to be aligned with OHI-type impairments (e.g., ADHD) rather than the SLD-type impairments (e.g., dyscalculia). Moreover, for issues such as spelling or handwriting, remember that the other two required elements (i.e., impairment and substantial) also apply, often helping to avoid over-identification under Section 504.¹³

4. Measuring “substantial” limitation—of the identified impairment on the identified major life activity—with, rather than without, the effects of a mitigating measure, such as but not at all limited to medication.

This reversal is one of the aforementioned major changes under the IDEA. The attendant considerations include (1) considering the wide breadth of the ADA’s specification of “mitigating measures”¹⁴; (2) recognizing that for all practical purposes this determination for a child who currently has such mitigating measures is in most cases going to be an educated estimate based on multiple sources of available evidence¹⁵; and (3) if the child is eligible, the consequent FAPE entitlement is with the child’s present mitigating measures.¹⁶

5. Measuring substantial limitation in reference to the child’s potential and/or the child’s immediate classmates rather than in reference to the performance of children at the same age or grade in the general population.

Neither the ADA nor the applicable agency interpretations to date have changed the frame of reference that the courts have used for substantial limitation in relation to students, not just employees, which is the average person, or at least most people, in the general population.¹⁷ Although the ADA would seem to suggest a non-demanding application of this standard,¹⁸ it still provides a useful and defensible way to determine this ultimate element of the eligibility definition without overdoing the limited available resources for implementing Section 504.¹⁹ In contrast, the natural inclination of parents—and educators—to focus on the potential and/or immediate classmates of the child merits reallocated attention to what schools could and should do in collaboration with parents for children not eligible under either IDEA or Section 504—providing individually effective accommodations and interventions via differentiated instruction, RTI, and common-sense “good” education that makes best use of local resources. ■

Endnotes

¹ Perry A. Zirkel, *Top-5 Section 504 Errors*, 38 ELA NOTES 13 (Third Quarter, 2003).
² 122 Stat. 3553, 3553-54 (codified at 42 U.S.C. §§ 12101-12110 (2006 & Supp. IV 2011), 29 U.S.C. § 705 (2006 & Supp. V 2011)).
³ See, e.g., Perry A. Zirkel, *The ADA and Its Effect on Section 504 Students*, 22 J. SPECIAL EDUC.

LEADERSHIP 3 (Mar. 2009); Perry A. Zirkel, *Legal Perspectives: New Section 504 Student Eligibility Standards*, 41 TEACHING EXCEPTIONAL CHILD. 68 (Mar./Apr. 2009). For more recent, specialized applications, see, e.g., Perry A. Zirkel, *Section 504 Eligibility and Students on Individual Health Plans*, 276 EDUC. L. REP. 577 (2012). For the wider scope of Section 504 for both general and special education students, see, e.g., Perry A. Zirkel, *Section 504 for Special Education Leaders: Persisting and Emerging Issues*, 25 J. SPECIAL EDUC. LEADERSHIP 99 (Sept. 2012).

⁴ PERRY A. ZIRKEL, SECTION 504, THE ADA AND THE SCHOOLS (2011) (available from www.lrp.com).

⁵ Although Section 504 applies to education institutions, including parochial and secular private schools that receive federal financial assistance, it does not provide any federal or state funding for its implementation. In this regard, it is like Title VI and Title IX and unlike the IDEA.

⁶ For a more comprehensive compilation of common misconceptions, with accompanying corrections, see Perry A. Zirkel, *The Common Lore of Section 504*, 54 IN CASE 4 (Summer 2012) (newsletter of the Council of Administrators of Special Education).

⁷ The case law interpreting concentration in this context has been largely limited to employment cases pre-ADA employment cases. See, e.g., Weidow v. Scranton Sch. Dist., 56 IDELR ¶ 11 (E.D. Pa. 2011) (student case citing *Gagliardo v. Connaught Labs., Inc.*, 311 F.3d 565, 569 (3d Cir. 2002)), *aff’d*, 460 F. App’x 181 (3d Cir. 2012). Concentration also appears occasionally in the context of the IDEA classification of OHI. See, e.g., *Mrs. H. v. Montgomery Cnty. Bd. of Educ.*, 56 IDELR ¶ 73 (M.D. Ala. 2011). In any event, its application to the issue of student eligibility under Section 504 in the post-ADA period is bound to be problematic in terms of workable measurement in relation to the requisite substantial limitation.

⁸ Indeed, equating § 504 eligibility with a 504 plan is clearly questionable. See, e.g., Perry A. Zirkel, *Does Section 504 Require a Section 504 Plan for Each Eligible Non-IDEA Student?* 40 J.L. & EDUC. 407 (2011).

⁹ See, e.g., Letter to Williams, 21 IDELR 73 (OSEP/OCR 1994).

¹⁰ See, e.g., Letter to Veir, 20 IDELR 63 (OCR 1993).

¹¹ Cf. *K.E. v. Indep. Sch. Dist. No. 15*, 647 F.3d 795 (8th Cir. 2011); *T.S. v. Bd. of Educ.*, 10 F.3d 87 (2d Cir. 1993); *G.D. v. Westmoreland Sch. Dist.*, 930 F.2d 942 (1st Cir. 1991) (interpreting what is currently 34 C.F.R. § 300.502(c)(1)).

¹² 34 C.F.R. § 300.309(a)(1) (2102).

¹³ The same lesson is applicable to motor issues, such as fine motor skills, or speech issues, such as articulation; the respective ADA major life activities—manual tasks and speaking/communicating—are broader in scope, and if the child met not only this broader scope but also the elements of impairment and substantial limitation, the IDEA classifications of OHI, orthopedic impairment, and speech or language impairment would be called into question.

¹⁴ 42 U.S.C. § 12102(4)(E)(i):

(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.

¹⁵ For many of these mitigating measures, such as medication, the removal in some sort of controlled experiment is obviously infeasible and/or unethical.

¹⁶ Office for Civil Rights, Questions and Answers on the ADA Amendments Act of 2008 for Students with Disabilities Attending Public Elementary and Secondary Schools—Q11, <http://www2.ed.gov/about/offices/list/ocr/docs/dcl-504faq-201109.html> (last visited Feb. 14, 2013). This interpretation assumes the understanding that for the mitigating measure of medication, the starting and stopping choices are entirely within the parent’s discretion without any coercion from district personnel.

¹⁷ See, e.g., *Weidow v. Scranton Sch. Dist.*, 460 F. App’x 181, 185 (3d Cir. 2012); *Rhodes v. Langston Univ.*, 462 F. App’x 773, 778 (10th Cir. 2011); *Schnelting v. St. Clair R-XIII Sch. Dist.*, 2011 WL 5913483 (E.D. Mo. Nov. 28, 2011) (pre-ADA); *Peters v. Cincinnati Coll. of Med.*, 2012 WL 3878601 (S.D. Ohio Sept. 6, 2012); *Rademaker v. Blair*, 55 IDELR ¶ 286 (C.D. Ill.2010) (post-ADA). The EEOC revised its regulation, which the courts have imported to student cases in determining substantial limitation, in light of the ADA as follows:

(ii) An impairment is a disability within the meaning of this section if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population. An impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting. Nonetheless, not every impairment will constitute a disability within the meaning of this section.
29 C.F.R. § 1630.2(j)(2) (2012).

¹⁸ See, e.g., *Peters v. Cincinnati Coll. of Med.*, 2012 WL 3878601 (S.D. Ohio Sept. 6, 2012).

¹⁹ The decision to evaluate (or, absent the requisite reasonable suspicion, not to evaluate) the child for eligibility, the decision upon completing this knowledgeable-team determination, and—if the child is eligible—any significant changes in educational placement should all be accompanied by the requisite procedural safeguards notice. However, upon a substantively and procedurally defensible determination that the child is not eligible, the transaction costs of Section 504 can be reallocated to the primary focus of systemically effective education.