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ARE STUDENTS WITH CONCUSSIONS QUALIFIED FOR SECTION 504 PLANS?<sup>a1</sup>

Public awareness of the effects of concussions is on the rise, largely attributable to the controversies concerning NFL football players<sup>1</sup> and other professional athletes.<sup>2</sup> The results have included an expansion of state laws focusing on concussion management in youth sports,<sup>3</sup> with specific applications for K–12 student athletes.<sup>4</sup>

As the focus is extended from returning to play to returning to learn, questions have arisen as to whether students with concussions, whether attributable to athletics or other, more general activities, are eligible under federal disability laws.<sup>5</sup> Although one alternative is coverage under the Individuals with Disabilities Education Act (IDEA),<sup>6</sup> which requires meeting \*590 the criteria of an IDEA classification, such as traumatic brain injury or other health impairment and, by reason thereof, needing special education,<sup>7</sup> the more frequent concern is eligibility alone<sup>8</sup> under Section 504 of the Rehabilitation Act (§ 504).<sup>9</sup>

Eligibility for accommodations and services under § 504—more specifically, “appropriate education”<sup>10</sup>—requires three elements: (1) a physical or mental impairment that limits (2) one or more major life activities (3) to a substantial extent.<sup>11</sup> For a student with one or more concussions, the physical impairment is effectively a given. Under the expanded eligibility standards of the Americans with Disabilities Act Amendments Act (ADAAA),<sup>12</sup> which went into effect on January 1, 2009, the major life activities of thinking and concentration each likely come into play for the typical concussion, thus not requiring qualifying under the more stringent scope of learning.<sup>13</sup>

The key issue is the third essential element for two separable reasons. First, depending on the concussion(s), the effect on thinking, concentration, or any other affected major life activity may or may not be sufficiently severe to amount to a substantial limitation, even—per the ADAAA—without the ameliorating effects of medication or other applicable mitigating measure and, if the symptoms are episodic, at the time they are active.<sup>14</sup>

The second and more significant factor is whether the effect is of sufficient duration. In the cases arising pre-ADAAA with regard to temporary impairments of major life activities, the courts have required a relatively long requisite period in the general range of 1–2 or more years.<sup>15</sup> Although the cases under § 504 (or the ADA) arising after the 2008 amendments have \*591 followed the express Congressional intent not to be demanding, the newly adjusted range is not yet sufficiently settled. The post-ADAAA evolution is traceable to three phases thus far, with developments in not only the courts but also the administering agencies—the U.S. Department of Education's Office for Civil Rights (OCR) for student cases and the Equal Employment Opportunity Commission (EEOC) for employee cases. Moreover, these developments thus far have been limited to other temporary impairments, requiring application to the extent analogous.

First, OCR, while emphasizing a case-by-case approach that considered severity in combination with duration, appeared to use the six-month period that the ADAAA established as the minimum for the “regarded as” prong for disability,<sup>16</sup> as an approximate marker for the requisite range<sup>17</sup> for actual disability.<sup>18</sup>

Second, with an effective date of January 29, 2014, the EEOC issued revised employee-related regulations that—distinguishing the six-month period as being limited only to the regarded as prong—took the position that “the effects of an impairment lasting or expected to last fewer than six months can be substantially limiting” within the meaning of actual disability.<sup>19</sup> Moreover, the Appendix for these regulations, which provides interpretive commentary, list as an example of a qualifying substantial limitation a back impairment that results in a 20-pound lifting restriction “for several months,” citing the legislative history of the ADAAA as requiring a determination based on severity in combination with duration.<sup>20</sup>

Third, the post-ADAAA court decisions to date have been limited to other transitory impairments of employees.<sup>21</sup> More specifically, relying on the \*592 EEOC regulations,<sup>22</sup> most of the courts have required a relatively severe impairment to last at least a few months to qualify as substantially limiting. It is unclear whether the courts will import these employee-specific regulations as applicable in the corresponding student cases.<sup>23</sup>

However, with or without importation of the case law relying on the employee-specific regulations, it seems highly likely that in student concussion cases arising after the January 1, 2009 effective date of the ADAAA that most courts will require rather severe effects on concentration, thinking, or another major life activity for at least a few months, whereas the typical concussion lasts 3–4 weeks.<sup>24</sup> For example, a leading statewide return-to-learn brain injury program recommends that school districts consider formal evaluation for IDEA or § 504 of students with concussions only in the relatively unusual cases where notable effects persist after a four-week period.<sup>25</sup>

Thus, subject to case law directly on point, the general answer to the overall question is that most students who experience a concussion alone<sup>26</sup> \*593 are unlikely to qualify under § 504.<sup>27</sup> Nevertheless, while an individual health plan (IHP) under state law or local policy should suffice in many such situations,<sup>28</sup> the child find obligations under § 504 require an eligibility evaluation,<sup>29</sup> along with the attendant procedural safeguards,<sup>30</sup> for those particular cases where there is reason to suspect that severe symptoms may last for more than a couple of months.

#### Footnotes

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<sup>1</sup> See, e.g., David S. Cerra, *Unringing the Bell: Former Players Sue the Helmet Makers over Concussions Risks in Maxwell v. NFL*, 16 MICH. ST. J. MED. & L. 265 (2012); Ken Belson, *Brain Trauma to Affect One in Three Players*, N.Y. TIMES, Sept. 12, 2014, [http://www.nytimes.com/2014/09/13/sports/football/actuarial-reports-in-nfl-concussion-deal-are-released.html?\\_r=0](http://www.nytimes.com/2014/09/13/sports/football/actuarial-reports-in-nfl-concussion-deal-are-released.html?_r=0); Associated Press, *Federal Judge Approves NFL Concussion Settlement*, July 7, 2014, <http://www.nfl.com/news/story/0ap2000000363672/article/federal-judge-approves-nfl-concussion-settlement>; Mark Fainaru-Wada & Steve Fainaru, *Seaus to Opt Out of Concussion Deal*, Sept. 3, 2014, [http://espn.go.com/espn/otl/story/\\_/id/11457306/junior-seau-relatives-reject-proposed-settlement-nfl-former-players](http://espn.go.com/espn/otl/story/_/id/11457306/junior-seau-relatives-reject-proposed-settlement-nfl-former-players)

- 2 See, e.g., USA Today Sports, Concussion Policies by League, Oct. 11, 2012, <http://www.usatoday.com/story/sports/2012/10/11/concussions-nascar-nfl-mlb-nhl-nba/1628129/>; Elizabeth Eckhart, Looking at the Risk of Concussion in Sports Head On, <http://www.brainline.org/content/2014/07/looking-at-the-risk-of-concussion-in-sports-head-on.html>
- 3 See, e.g., Phoebe A. Amberg, *Protecting Kids' Melons: Potential Liability and Enforcement Issues with Youth Concussion Laws*, 23 MARQUETTE SPORTS L. REV. 171 (2012); Kevin Brandwein, *Goals and Obstacles in Legislating Concussion Management in Youth Sports*, 10 WILLAMETTE SPORTS L.J. 28 (2013).
- 4 Bryan Toporek, *Concussion Law Targeting Student-Athletes on Upswing*, EDUC. WK., Aug. 10, 2011, at 10. For recent state law examples, see ALA. CODE § 22-11E-2 (2012); CONN. GEN. STAT. § 10-149c and P.A. 14-66 (2014); N.Y. COMP. CODES R. & REGS. tit. 8, § 136.5 (2013).
- 5 See, e.g., Perry A. Zirkel & Brenda Eagan Brown, *K-12 Students with Concussions: A Legal Perspective*, J. SCH. NURSING (forthcoming 2015), available at <http://jsn.sagepub.com/content/early/2014/02/05/1059840514521465>
- 6 20 U.S.C. §§ 1401 *et seq.* (2013).
- 7 34 C.F.R. § 300.8 (2013).
- 8 For students who have an IEP before experiencing a concussion or who, as a result of one or more concussions, thereby qualify under the IDEA, § 504 eligibility is no longer the issue to the extent that complying with the IDEA eligibility and FAPE requirements fulfill the district's corresponding obligations under § 504 and the ADA.
- 9 29 U.S.C. §§ 705(20) and 794 (2013). The references to § 504 herein cover the concurrent coverage of the Americans with Disabilities Act (ADA) in the K-12 public school context. See generally PERRY A. ZIRKEL, SECTION 504, THE ADA AND THE SCHOOLS (2011).
- 10 34 C.F.R. § 104.33(b)(1) (2013).
- 11 *Id.* § 104.3(j). Herein, this definition, which is one of the alternative prongs for the meaning of disability under § 504 and the ADA, is referred to as “actual” disability. The alternative prongs of “record of” and “regarded as” are not applicable in terms of the affirmative obligations of appropriate education for students. See, e.g., Senior Staff Memorandum, 19 IDELR 894 (1992).
- 12 122 Stat. 3553, 3553-54 (codified at 42 U.S.C §§ 12101-12110 (2013), 29 U.S.C. § 705(9) (2013)). The various broadening Congressional clarifications of the ADAAA in reversing the narrowing interpretations of the courts culminating in *Toyota Motor Manufacturing, Inc. v. Williams*, 122 S.Ct. 681, 534 U.S. 184, 151 L.Ed.2d 615 (2002), included (1) expanding the illustrative list of major life activities, and (2) directing that “substantially limits” be determined without mitigating measures and, for episodic impairments, when active.
- 13 Moreover, if the particular student qualified for a substantial limitation on the major life activity of learning, s/he would very likely be eligible under the overlapping and generally deeper coverage of the IDEA.
- 14 See *supra* note 12.
- 15 See, e.g., *R.N. v. Cape Girardeau 63 Sch. Dist.*, 858 F.Supp.2d 1025, 284 Ed.Law Rep. 291 (E.D. Mo. 2012) (ruling that student with Perthes disease that healed within 2-3 years did not qualify under § 504, citing various employee cases arising before the effective date of the ADAAA).
- 16 42 U.S.C. § 12102(3)(B) (directing that the “regarded as” prong “shall not apply to impairments that are transitory and minor .... [defined as those] with an actual or expected duration of 6 months or less”).
- 17 See, e.g., Frequently Asked Questions about Section 504 and the Education of Students with Disabilities (OCR 2009), <http://www2.ed.gov/about/offices/list/ocr/504faq.html> (Q/A #34); *James A. Garfield (OH) Local Sch. Dist.*, 52 IDELR ¶ 142 (OCR 2009) (commenting, by way of dicta that inferably generalized the ADAAA's six-month standard for the “regarded as” prong for disability, that “any impairment the duration of which is less than six months would not constitute a disability”).

- 18 For the meaning herein of “actual” disability, see *supra* note 11.
- 19 29 C.F.R. § 1630.2(j)(1)(ix) (2013).
- 20 29 C.F.R. Pt. 1630 App. (2013) (citing ADAAA legislative history that “[t]he duration of an impairment is one factor that is relevant in determining whether the impairment substantially limits a major life activity. Impairments that last only for a short period of time are typically not covered, although they may be covered if sufficiently severe.”). The previous version of the Appendix had instead stated that “temporary, non-chronic impairments of short duration, with little or no long term or permanent impact are usually not disabilities....includ[ing]...concussions.” See, e.g., *Coale v. Metro-North R. Co.*, 2014 WL 975721 (D. Conn. Mar. 12, 2014) (observing that this interpretive guidance ended on May 23, 2011).
- 21 In the one limited exception, the court summarily rejected the ADA eligibility of an employee who had generically alleged “concussions, vision problems, [and] associated conditions” based on the “well established [conclusion] that temporary conditions generally are not considered disabilities”; however, the court mistakenly relied on pre-ADAAA law. *Baker v. Roman Catholic Archdiocese of San Diego*, 2014 WL 4244071 (S.D. Cal. Aug. 26, 2014). For the outdated nature of the regulatory appendix and court decision on which *Baker* relied, see *Poole v. Centennial Imports, Inc.*, 2014 WL 2090810 (D. Nev. May 19, 2014). Similarly, the limited authority at the hearing officer level is clearly questionable. See, e.g., *Warrior Run Sch. Dist.*, 112 LRP 41988 (Pa. SEA 2012) (concluding, in brief analysis that relied pre-ADAAA employee court decision and similarly mistaken IDEA conflation, that high school student who had sustained concussions along with other impairments was not eligible under § 504).
- 22 Compare *Summers v. Altarum Inst., Inc.*, 740 F.3d 325 (4th Cir. 2014) (ruling that employee with broken legs and injured tendons that rendered him completely immobile for more than seven months qualified), and *Young v. McCarthy-Bush Corp.*, 2012 WL1224459 (N.D. Ga. Mar. 12, 2014) (concluding that severe knee impairment that lasted several months qualified), and *Eastman v. Research Pharm., Inc.*, 2012 WL 3949236 (E.D. Pa. Aug. 1, 2013) (preserving for jury determination whether spinal problems that had week-long flare-ups a few times per year for 2–3 years substantially limited one or more identified major life activities), and *Wanamaker v. Westport Bd. of Educ.*, 899 F.Supp.2d 193, 211, 291 Ed.Law Rep. 285 (D. Conn. 2012) (dismissing employee's ADA claim in the absence of prima facie showing of more than “a short period of time”), with *Moore v. Jackson Cnty. Bd. of Educ.*, 979 F.Supp.2d 1251, 1261, 304 Ed.Law Rep. 356 (N.D. 2013) (concluding that “the fact that the limitation was temporary is irrelevant”).
- 23 In cases arising before the ADAAA, the courts often imported the “most-people” referent for substantial limitation in the employee regulations without careful consideration. See, e.g., *Weidow v. Scranton Sch. Dist.*, 460 Fed.Appx. 181, 185, 278 Ed.Law Rep. 879 (3d Cir. 2012); cf. *Millington v. Temple Univ. Sch. of Dentistry*, 261 Fed.Appx. 363, 366, 231 Ed.Law Rep. 691 (3d Cir. 2008) (citing without distinction the EOCC regulation re factors for substantial limitation, including duration); *Costello v. Mitchell Pub. Sch. Dist.*, 266 F.3d 916, 924, 157 Ed.Law Rep. 520 (8th Cir. 2001) (relying without distinction on the EEOC regulations for the “record of” and “regarded as” prongs). This trend would seem to continue, at least in the absence of specific assertions of a distinction between the employment regulations and the student applications. See, e.g., *Moore v. Chilton Cnty. Bd. of Educ.*, 1 F.Supp.3d 1281, 1296, 307 Ed.Law Rep. 949 (M.D. Ala. 2014).
- 24 See, e.g., Zirkel & Brown, *supra* note 5, at \_\_ (citing research that most concussion resolve within three weeks).
- 25 BrainSTEPS, Teachers' Desk Reference, [https://www.brainsteps.net/\\_orbs/about/6\\_TDR\\_BrainSTEPS.pdf](https://www.brainsteps.net/_orbs/about/6_TDR_BrainSTEPS.pdf) (explaining that although the effects may linger for a long time, the majority of concussions resolve within four weeks); BrainSTEPS, Returning to School After Concussion: Recommended Protocol, [https://www.brainsteps.net/\\_orbs/about/2\\_BrainSTEPS\\_Protocol.pdf](https://www.brainsteps.net/_orbs/about/2_BrainSTEPS_Protocol.pdf) (recommending a referral if symptoms persist for more than four weeks, with a 4–8 week transitional period for possible further formal steps).
- 26 For example, a series of concussions, a pre-existing physical condition that otherwise compounds the effects of a concussion, or already established eligibility under the IDEA or § 504 each would be distinguishable to this reference to “alone,” or without more.
- 27 Where the student does qualify, a 504 plan is administratively advisable. However, it is not necessarily legally required in terms of its name, contents, or even form. 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).

- 28 *See, e.g.,* Zirkel & Brown, *supra* note 5, at \_\_\_-\_\_\_. Thus, § 504 may be seen in this context as a relatively small circle overlapping with a similarly small circle for the IDEA on one side and a larger circle representing IHPs on the other side, but without bright-lines as the outer boundaries for each one.
- 29 34 C.F.R. § 104.35(a) (2013). For an example of a violation of child find in relation to a middle schooler who had sustained two concussions and, as a result, was excessively absent in grade 9 and treated for depression in grade 10, see *Acalanes (CA) Union High Sch. Dist.*, 64 IDELR ¶ 86 (OCR 2013).
- 30 34 C.F.R. § 104.36.

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