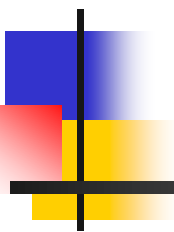


# Section 504 Issues and Answers



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# Purpose of IDEA

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- Individuals With Disabilities Education Act. (1997)
- Individuals With Disabilities Education Improvement Act of 2004.
- Purpose:
  - To ensure that all children with disabilities have available to them a free appropriate public education (“FAPE”) that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living.



# Eligibility Under IDEA

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- Must be between the ages of 3 and 21.
- Must qualify in at least 1 of 13 eligibility categories.
- Must require special education and related services as a result of his/her disability, in order to meet his/her unique needs.



# Not Eligible Under IDEA?

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- May still be eligible for special education and services under Section 504 of the Rehabilitation Act of 1973 or Title II of the Americans with Disabilities Act.
- If eligible under IDEA—always eligible for Section 504 and ADA.
- Reverse not true.



# Section 504 and Title II/ADA

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- Why do they apply to schools?
  - Schools are recipients of federal funds.  
(Section 504)
  - Schools are public entities.  
(Title II of the ADA)



# Section 504 of the Rehabilitation Act of 1973

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- “No otherwise qualified individual with a disability shall, solely by reason of the disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.”



# Section 504 of the Rehabilitation Act of 1973

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- To be eligible under Section 504, a student must be both “qualified” and “handicapped”. Pursuant to 34 CFR 104.3(j)(1):
- “Handicapped persons means any person who
  - (i) has a physical or mental impairment which substantially limits one or more major life activities; (ii) has a record of such an impairment; or (iii) is regarded as having such an impairment.”



# Highlights of Section 504

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- The purpose of the Act is to prohibit discrimination and to assure that handicapped students have educational opportunities and benefits equal to those provided to non-handicapped students.
- Schools must provide reasonable accommodations, adjustments, and modifications so children may participate equally in programs.





# Highlights of Section 504

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- Students who meet eligibility requirements for Section 504 may be placed in and receive services through regular education programs.
- Schools are not required to make fundamental alterations in the programs to serve disabled children.



# Individual with a Disability Under Section 504

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- Has a “physical or mental impairment.”
- The impairment must “substantially limit” one or more of the individual’s “major life activities.”
- The individual must have a “record of such impairment” or must be “regarded as having such an impairment.”



# Physical or Mental Impairment

- Defined as:
  - any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculo-skeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, 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. 34 CFR 104.3(j)(2)



# Physical or Mental Impairment

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- Disabling conditions include, but are not limited to, ADD/ADHD, asthma, diabetes, HIV infection, AIDS, allergies, obesity, epilepsy, Hepatitis, Hemophilia, or communicable diseases.
- Disabling conditions exclude, but are not limited to, homosexuality, bisexuality, gender-identity disorder, kleptomania, or current illegal drug users.



# Major Life Activities

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- Temporary or minor disabling conditions do not give rise to Section 504 protection unless the condition is severe.
- Environmental and cultural factors, and economic disadvantages, are not covered unless there is also a physical or mental impairment.



# “Having a Record of” or “Regarded as Being Disabled”

- The individual must have a "record of such impairment" or must be "regarded as having such an impairment."
- Protection extends to persons who "have a record" of a physical or mental impairment even if they no longer have the condition.
- Applies to persons "who have been incorrectly classified as having such a condition."
- Covers those with a history of mental illness, emotional illness, heart disease or cancer.
- Protects those who are "regarded," perceived, or treated as having an impairment, even if they don't have one.



# Drug Use

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- Persons currently using drugs are NOT considered individuals with disabilities who can enjoy the protections provided under Section 504.
- As long as there is no CURRENT drug use, Section 504 covers individuals who:
  - have successfully completed a supervised drug rehabilitation program or have been rehabilitated;
  - are participating in a supervised rehabilitation program; or
  - are erroneously regarded as engaging in the use of drugs;



# Requirements

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- The student must show:
  - he or she is a disabled person under the Act;
  - he or she is otherwise qualified for a program or activity (all of the operations of a local educational agency, system of vocational education, or other school system);
  - he or she is excluded solely because of his or her disability; and
  - the program or special service receives federal funding.





# The Important Question

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- Is the student afforded an equal opportunity to participate and/or benefit from education when compared to non-disabled, age-appropriate peers?



# Child Find Concern

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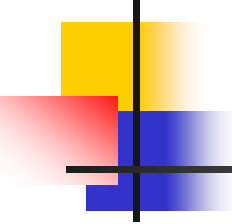
- If the student is identified under 504 as having an impairment that is among those protected by the IDEA, does the school district have a duty to offer an IDEA evaluation?



# District Obligations Under Section 504

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- A district must notify students and others that it does not discriminate on the basis of disability. A district must identify an employee responsible for grievance procedures that promptly and equitably resolve any complaints alleging discrimination on the basis of disability.
- A district must provide the necessary regular education supplementary aids and a continuum of special education services required by students with disabilities.
- A district must provide students with disabilities a school day comparable in length to the school day provided to all other students, unless a group of knowledgeable persons has compelling medical or educational reasons for recommending a shorter school day.
- A district must inform parents of students who may have a disability of their procedural rights, including the right to file a grievance, the right to request an impartial hearing, and the right to special safeguards for students with disabilities facing long-term suspension or expulsion.



# A Free Appropriate Public Education Under Section 504

- A FAPE for students eligible under Section 504 includes:
  - the establishment of nondiscriminatory evaluation and placement procedures to prevent misclassification or inappropriate placement of students and periodic reevaluation of students who have been provided special education or related services;
  - the provision of regular or special education and related services designed to meet the individual educational needs of students with disabilities as adequately as the needs of nondisabled students are met;
  - the participation of each student with a disability with nondisabled students in academic settings and in nonacademic services and activities to the maximum extent appropriate to the needs of the student with a disability; and
  - the establishment of due process procedures and procedural safeguards.



# Section 504 Assessments

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- Parental notification, not consent, is required. Advised: get parental consent anyway.
- Must have written parental consent if doing psychological assessment.

Consider:

- existing pupil records, including academic, social, attendance, and behavior records;
- comprehensive assessments by district's professional staff; and
- outside assessments/reports provided by parents.



# Other Considerations

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- The 504 team should consider the impact of the impairment on the student's learning and/or educational program, including, but not limited to:
  - grades,
  - accessibility to all aspects of the curriculum,
  - academic productivity and performance,
  - social/interpersonal relationships,
  - behavior/emotional status, and
  - extracurricular activities.



# Determining Impact of Disability without Mitigating Measures

- This may be a unique dilemma for schools. Example: child who takes medication.
  - Look at academic and behavior records before he/she started medication.
  - Obtain information from parents regarding behaviors/symptoms prior to beginning medication.
  - Contact physician about why he prescribed the medication. What behaviors were reported or observed?
  - Teachers may have information as to what behaviors/symptoms are observed when child fails to take his/her medication.



# Section 504 Plans

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- The team should include, at a minimum, the 504 coordinator, student's teacher, parent(s), the child, if appropriate, and other knowledgeable individuals.
- Identify specific problems requiring accommodations.
- Identify each accommodation to be made related to each problem.
- Identify a method of evaluating if accommodations are being implemented, are appropriate, and are successful.
- Get parent approval of the plan in writing and the signatures of all meeting participants.
- Give a copy to the parents.
- Inform all necessary staff members of the identified accommodations and give copies of the plan where appropriate. (Bus drivers? School office personnel? Yard duty personnel?)





# Examples of Section 504 Plan Components

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- Discipline = behavior intervention plan, evaluation, team meeting to determine any causal relationship.
- Academics = homework modifications, i.e., amount of homework, time spent on homework, test taking modifications.
- Related Services = interpreter, assistive technology, monitoring of medications or diet, medical resuscitation plan.
- Extracurricular activities = field trips, notice of student activities, athletics, band, clubs, outdoor science school.



# Nonacademic and Extracurricular Services

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- The regulations require that school districts provide "nonacademic and extracurricular services and activities ... to afford handicapped students an equal opportunity for participation in such services and activities."
- Such services may include counseling, physical recreational activities, transportation, health services, clubs, physical education and athletics.
- School districts cannot deny qualified handicapped students the opportunity to compete for teams and participate in courses that are not separate or different.



# Follow-Up

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- Section 504 plans continue from year to year.
- Make sure next year's classroom teacher(s) are informed that a 504 plan exists.
- Review the plan annually, at a minimum, to ensure that the handicapped student's needs are being met as adequately as the needs of non-handicapped students.
- Prior to subsequent significant change of placement, conduct a comprehensive reevaluation of student's needs and reconsider the 504 plan.



# Behavior Management Plans

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- District must develop an individualized behavior management plan ("BMP") for Section 504 student if student's behavioral difficulties interfere with his/her ability to benefit from his/her education.
- Purpose of BMP is maintenance of placement in the least restrictive environment.
- The BMP may supplant the use of the regular school discipline code. Be careful how the BMP is worded.
- The district is required to make sure that all district employees discipline the student according to his BMP, including bus drivers, yard duty personnel, coaches, etc.



# Disciplining Students with Section 504 Plans

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- Discipline procedures must be designed to meet the individual educational needs of 504 students as adequately as the needs of nondisabled students are met.
- OCR has stated that the same protections available to students classified as disabled under the IDEA are available to Section 504 students.
- Disciplinary removal of less than 10 schooldays is not a change in placement, and thus does not trigger the change of placement procedural safeguards and requirements.
- Serial suspensions may or may not constitute a significant change in placement, depending on whether or not they create a "pattern of suspensions," thus triggering the reevaluation requirement.
- Factors to consider are the length of each suspension, the proximity of the suspensions to one another, and the total amount of time the student is excluded from school.



# Manifestation Determinations

- A district must complete a manifestation determination if suspension or expulsion exceeds the 10-day limit.
- The manifestation determination is conducted in a manner similar to that which would be conducted for a student eligible under the IDEA.
- An evaluation must be completed before taking any action which would result in a significant change in placement.
- The group of people considering the manifestation determination must consider current evaluation data related to behavior, and determine if the student's current educational placement is appropriate.



# Manifestation Determinations

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- If the student's misconduct is determined to be related to his disability, then long-term suspension or expulsion is not an option. A determination should be made regarding whether the student's current placement is appropriate.
- If the manifestation determination results in the decision that the student's misconduct was not related to his disability, then the district may impose the same suspension or expulsion it would impose on a similarly situated nondisabled student.



# Funding for Section 504 Services

- States are prohibited from using IDEA funds to provide services to students who do not meet the IDEA's definition of children with disabilities.
- Section 504 does not receive any federal funding.





# The ADA Amendments Act of 2008

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- Signed into law by President Bush on September 25, 2008.
- Became effective January 1, 2009.
- Through the ADA Amendments Act of 2008 (“ADAAA”), Congress rejected a number of Supreme Court decisions that narrowed ADA coverage and excluded individuals originally meant to fall within the protections of the ADA.
- This may/will have a significant effect on disability determinations, and, by extension, on Section 504 eligibility determinations.



# Findings and Purposes of the ADA Amendments Act of 2008

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- Congress intended that the Americans with Disabilities Act of 1990 “provide a clear and comprehensive mandate for the elimination of discrimination against individuals with disabilities.”
- Congress recognized that physical and mental disabilities in no way diminish a person’s right to fully participate in all aspects of society, but that people with physical or mental disabilities are frequently precluded from doing so because of prejudice, antiquated attitudes, or the failure to remove societal and institutional barriers.



# The ADA Amendments Act

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- “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.”



# Disability Defined (ADAAA)

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- The term disability means, with respect to an individual—
  - “a physical or mental impairment that substantially limits one or more major life activities of such individual;
  - a record of such an impairment; or
  - being regarded as having such an disability.”



# Key Points (ADAAA)

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- An impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability.
- An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.
- Current ADA regulations which define the term “substantially limits” as “significantly restricted” express too high a standard.
- “Substantially limits” is now defined as “materially restricts.”



# Major Life Activities (ADAAA)

- Includes, but is not limited to: caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.



# Major Life Activities (ADAAA)

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- 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.”



# Mitigating Measures (ADAAA)

- 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:
  - medication, medical supplies, equipment, or appliances, low-vision devices, prosthetics, hearing aids and implantable hearing devices, mobility devices, use of assistive technology, reasonable accommodations, auxiliary aids, or services (interpreters, readers, taped text), or learned behavioral modifications.





# Mitigating Measures (ADAAA)

- The ameliorative effect of only two mitigating measures shall be considered in determining whether an impairment substantially limits a major life activity:
  - ordinary eyeglasses, and
  - contact lenses



# Regarded as Disabled (ADAAA)

- An individual meets the requirement of “being regarded as having such an impairment” if the individual can establish that he/she has been subjected to an action prohibited under the Act because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.
- The “regarded as” definition does not apply to impairments that are transitory (with an actual or expected duration of 6 months or less) and minor.
- There is no need to provide a reasonable accommodation or reasonable modification to these individuals.



# Substantially Limits

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- This now means, under ADAAA, “materially restricts.”
- The 504 Team needs to consider:
  - the nature and severity of the impairment,
  - the duration or expected duration of the impairment, and
  - the permanent, long-term impact or expected impact of the impairment.



# Substantially Limits

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- OCR has not provided a definition of “substantial limitation”
- Congress did not provide a definition in the ADAAA, but did provide some instruction to EEOC on changing its definition.



# Substantially Limits

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- Schools must not apply a substantial limitation standard requiring
  - a significant or severe restriction on the performance of a major life activity, nor
  - the student to be substantially limited in a part of the major life activity that is important to, or central to the lives of most people.



# Substantially Limits

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- Apply the ADAAA's mitigating measures rule, and determine students Section 504-eligible when the 504 committee is "on the fence" and cannot decide whether or not the student is substantially limited.



# Substantially Limits

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- OCR will not, except in extraordinary circumstances, second-guess eligibility and placement decisions when the school district follows the procedural requirements of 504.



# Automatic eligibility?

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- There are no impairments that automatically mean that a student has a disability under Section 504.
  - An impairment is not a disability unless it substantially limits one or more major life activities.
  - However, the nature of many impairments is such that, in virtually every case, a determination in favor of disability will be made.





# Automatic eligibility?

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- “...a school district should not need or require extensive documentation or analysis to determine that a child with diabetes, epilepsy, bipolar disorder, or autism has a disability under Section 504 and Title II”

2012 DCL, p.5, Question 4



# Automatic eligibility?

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- ADHD

- "...a diagnosis of ADHD is evidence that a student may have a disability. OCR will presume, unless there is evidence to the contrary, that a student with a diagnosis of ADHD is substantially limited in one or more major life activities."



# Automatic eligibility?

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- “Diagnosis of ADHD requires a comprehensive evaluation by a licensed clinician such as a pediatrician, psychologist, or psychiatrist with expertise in ADHD.”

National Institutes of Mental Health (NIMH publication),  
Attention Deficit Hyperactivity Disorder (Revised March  
2016)



# Students with ADHD and Section 504: A Resource Guide

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- Three types of ADHD recognized:
  - Predominantly inattentive type;
  - Predominantly hyperactive-impulsive type;
  - Combined type – symptoms of the first two types are equally present.

The sub-type of ADHD is not a determinative factor in whether the student is impaired.



# Expansion of Physical or Mental Impairment?

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- Environmental Factors, Trauma and the Physical or Mental Impairment under Section 504/ADA
  - Assertion that the witnessing or experiencing of traumatic events creates “neurobiological effects” that impair a number of major life activities.



# Expansion of Physical or Mental Impairment?

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- Transgender, Gender Dysphoria and the ADA's Gender Identity Disorder Exclusion
  - Discrimination and harassment claims are being brought under various legal theories, primarily under Title IX.
  - Department of Education Guidance Letter is currently being challenged by nearly half of the 50 states.



# Expansion of Physical or Mental Impairment?

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- Transgender, Gender Dysphoria and the ADA's Gender Identity Disorder Exclusion
  - Under the ADA, "the term 'disability' shall not include (1) transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders."



# Expansion of Physical or Mental Impairment?

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- May or may not be disabilities under Section 504:
  - Pedophilia, exhibitionism, voyeurism, gender identity disorder not resulting from physical impairments, or other sexual behavior disorders;
  - Compulsive gambling;
  - Kleptomania;
  - Pyromania





# Legal Recourse for Violations

- Possible relief available from school districts for students/individuals include:
  - reasonable modifications to an educational program,
  - compensatory relief - making up for lost services,
  - monetary damages awarded to the family,
  - punitive damages for an intentional violation of Section 504, and/or
  - award of attorneys' fees.



# Legal Recourse for Violations

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- Possible consequences to the school district include:
  - termination of federal funding.



# Legal Recourse for Violations

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- Possible consequences to individual school district personnel include:
  - personal liability for compensatory damages *Doe v. Withers* (West Virginia, 1993) 20 IDELR 422,
  - personal liability for punitive damages *Doe v. Withers* (West Virginia, 1993) 20 IDELR 422,
    - In *Doe v. Withers* the jury awarded the student \$5,000.00 in compensatory damages and \$10,000.00 in punitive damages against a history teacher who refused to comply with an IEP provision allowing for oral testing by the special education teacher. The student failed the course and subsequently was not allowed to participate in extracurricular activities. Student brought suit for violation of his civil rights under 42 U.S.C. Section 1983.



# Automatic eligibility?

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- New Guidance, July 2016
  - U.S. Department of Education, Office for Civil Rights, Students with ADHD and Section 504: A Resource Guide, 68 IDELR 52 (July 2016).