SECTION 504, THE ADA AND GIFTED STUDENTS: ELEVEN POINTS TO REMEMBER

PAEC Professional Development for Guidance Counselors
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Julie J. Weatherly
Resolutions in Special Education, Inc.
6420 Tokeneak Trail
Mobile, AL 26695
(251) 607-7377
JJWEsq@aol.com
Website: www.specialresolutions.com

Point #1: A student who is gifted might also be a student with a disability.

On occasion, a school may have a student who is gifted but is also disabled under IDEA or Section 504 and the ADA. It is important to be aware of the school's obligations to those who are found to be disabled.

Typically, the educational needs of a student who is IDEA-eligible and also gifted will be met through the provision of a comprehensive IEP. However, for students who are only disabled under the definition of Section 504, a 504 Education Plan may be needed. For all students with disabilities, they are protected against discrimination in school on the basis of disability, whether an educational plan (IEP or 504 Plan) is needed or not.

Point #2: The provisions of Section 504 are not complex.

Section 504 is a relatively straightforward antidiscrimination statute that provides in pertinent part, that:

> No otherwise qualified individual with a disability in the United States ... shall, solely by reason of his or her 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 .... 29 U.S.C. § 794(a).

Point #3: One of the difficulties with Section 504 is its broad definition of who is disabled.

The definition of "handicapped" (which is the term still used by the 504 educational regulations) is broader than the definition of a "student with a disability" under the IDEA. Therefore, there may be students with disabilities that are protected under Section 504 against discrimination or are entitled to 504 FAPE in the form of an Education Plan that do not meet the definition of disability under the IDEA.

1. Definition of "handicapped person"

A person is "handicapped" under Section 504 if he or she:

a. Has a physical or mental impairment which substantially limits one or more major life activities;

b. Has a record of such an impairment; or

c. Is regarded as having such an impairment.

2. "Physical or mental impairment"

a. 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, including speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine; or

b. Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

3. "Major life activities"

Under the 504 regulations, "major life activities" include functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working. The 2008 ADA Amendments expanded the list of functions that are major life activities to include activities such as eating, thinking, concentrating, communicating and reading.

Point #4: The hardest part of making the disability determination under 504/ADA is the "substantially limits" part.

For purposes of determining whether a student is an "individual with a disability," there is the requirement to determine whether an impairment "substantially limits" a major life activity. Unfortunately, there is no definition of "substantially limits" in Section 504 or its regulations. However, there is some available guidance from the Office for Civil Rights (OCR) and Section 504's "sister statute," the Americans with Disabilities Act (ADA), as to what constitutes a "substantial limitation."

1. Guidance from the Office for Civil Rights

On March 27, 2009, OCR issued a revised FAQ document for the primary purpose of addressing the effect of the ADA Amendments Act of 2008 (ADAAA) upon the provisions of Section 504. In its introductory statement, OCR notes that it "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." *FAQs about Section 504 and the Education of Children with Disabilities* (2009) [Note: This FAQ document can be accessed on the U.S. Department of Education's website, ED.gov, by searching for the document entitled "Protecting Students with Disabilities"].

When asked whether OCR endorses a single formula or scale that measures "substantial limitation," OCR responded that it does not and that "[t]he determination of substantial limitation must be made on a case-by-case basis with respect to each individual student." *FAQs about Section 504 and the Education of Children with Disabilities* (2009), Question 22. This is consistent with previous guidance issued by OCR. *See, e.g., Letter to McKethan*, 23 IDELR 504 (OCR 1995) (neither the regulations nor OCR have defined the word "substantially" and the decision as to whether a particular impairment "substantially limits" a major life activity for a child is a determination to be made by a school district, and not OCR); *Pinellas County Sch. Dist.,* 20 IDELR 561 (OCR 1993) (one of the purposes of Section 504 and Title II of the ADA is to improve opportunities for individuals with disabilities, who because of a generally acknowledged disabling condition, have been excluded from or experienced significant difficulty in obtaining the necessary education to be self-sufficient. The term "substantially limits" must be interpreted within that context); and *Saginaw City (MI) Sch. Dist.,* 352 IDELR 413 (OCR 1987) ("by definition, a person who is succeeding in regular education does not have a disability which substantially limits the ability to learn" but students with learning disabilities who pass from grade to grade while functioning further below norms for their age arguably are not succeeding in regular education).

2. <u>Guidance from the ADA's current regulations</u>

Because ADA and Section 504's antidiscrimination provisions generally mirror one another, the regulatory definitions applicable to Title I of the ADA (the employment provisions) have often been applied by analogy in the context of defining "substantially limits" in the area of education. *See, e.g., T.J.W. v. Dothan City Bd. of Educ.,* 26 IDELR 999 (M.D. Ala. 1997) (student's learning ability must be compared to the average student and fact that student made passing grades is a factor to consider; while receiving "D"s in spelling and deficiency reports may indicate that student's ability to perform academically was affected, it does not indicate that his ability to learn was limited so that he was not able to learn as well as the average student). Effective May 24, 2011, ADA's Title I regulations defining "substantially limits" were changed significantly to read, in part, as follows:

> (j) *Substantially limits* —(1) *Rules of Construction.* The following rules of construction apply when determining whether an impairment substantially limits an individual in a major life activity: (i) the term "substantially limits" shall be construed broadly in favor of expansive coverage, to the maximum extent permitted under the terms of the ADA. "Substantially limits" is not meant to be a demanding standard. (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)(1). Based upon this language, determining whether a student has a "substantial limitation" in a major life activity would be based upon a comparison of how the particular student performs a major life activity as compared to "most people" in the general population.

There is additional language in these new regulations within the section defining "substantially limits" that needs to be considered by schools. For instance, there is lengthy discussion regarding a consideration of the condition, manner or duration under which the individual performs a major life activity as follows:

> (4) *Condition, manner, or duration*—(i)…in determining whether an individual is substantially limited in a major life activity, it may be useful in appropriate cases to consider, as compared to most people in the general population, the condition under which the individual performs the major life activity; and/or the duration of time it takes the individual to perform the major life activity, or for which the individual can perform the major life activity. (ii) Consideration of facts such as condition, manner, or duration may include, among other things, consideration of the difficulty, effort, or time required to perform a major life activity; pain experienced when performing a major life activity; the length of time a major life activity can be performed; and/or the way an impairment affects the operation of a major bodily function….(iii) In determining whether an individual has a disability…the focus is on how a major life activity is substantially limited, and not on what outcomes an individual can achieve. For example, someone with a learning disability may achieve a high level of academic success, but may nevertheless be substantially limited in the major life activity of learning because of the additional time or effort he or she must spend to read, write, or learn compared to most people in the general population.

29 C.F.R. § 1630 (j)(4). Clearly, the definition of who might be an "individual with a disability" has been expanded. However, the team is still going to have to determine the need for a 504 Plan.

<u>Point #5:</u> When determining *whether a disability exists*, learning is not the only major life activity to consider.

The reason a gifted student might likely be disabled under Section 504/ADA is that major life activities, other than those that are learning oriented, must be considered. This could include eating, walking, breathing, writing, etc. Thus, a gifted student with a severe food allergy might have a disability because of a substantial limitation in the major life activity of eating, which has no impact on the major life activity of learning.

<u>Point #6:</u> When determining whether a substantial limitation in a major life activity exists (and, therefore, whether a disability exists), the ameliorative effects of mitigating measures cannot be considered.

One of the significant changes made by the 2008 ADA Amendments was to broaden the number of individuals who may be "disabled" by forbidding consideration of the ameliorative effects of mitigating measures when making the determination. In other words, the positive effects of things such as medication, assistive technology, accommodations, etc. cannot be considered when a determination is being made as to whether a disability exists.

Under this expansion of the disability determination, take the example of a gifted student with ADHD who is on medication and is making all A's. Under the old way of looking at the disability question under 504, that student would not be "disabled" because he is making A's. Under the new analysis required by the ADA, however, the student could be found disabled because the 504 team cannot consider the fact that medication is controlling the ADHD and, when the student is not on medication, his ADHD is substantially limiting. However, the team still must make the determination as to whether the student needs a Section 504 Education Plan.

<u>Point #7:</u> Although ameliorative effects of mitigating measures *cannot be considered* when determining whether a disability exists, the ameliorative effects of mitigating measures *can be considered* when determining whether a Section 504 Education Plan is needed.

Needless to say, the ADA Amendment's provisions related to "mitigating measures" have led to some interesting discussions about what 504 teams are to determine regarding "eligibility," making the term "eligibility" very confusing now. While the ameliorative effects of mitigating measures cannot be considered in making the disability determination, these ameliorative effects *can* be considered in determining whether a student is in need of services or accommodations (and an attendant 504 Education Plan) in order to meet his/her educational needs as adequately as the needs of his/her nondisabled peers. Therefore, while a student may be disabled, the 504 team could find that the student is not "eligible" or in need of a 504 Education Plan, because the student's needs are met as adequately as the needs of his/her nondisabled peers.

Although OCR did not address this question in its updated FAQ document, the Equal Employment Opportunity Commission has addressed it in proposing the new Title I ADA employment regulations. With respect to any argument that "mitigating measures" (such as medication, private tutoring) cannot be considered by a school district, the EEOC made it clear that:

> The ADAAA's prohibition on assessing the positive effects of mitigating measures **applies only to the determination of whether an individual meets the definition of "disability." All other determinations—including the need for a reasonable accommodation…—can take into account the positive and negative effects of a mitigating measure.** For example, if an individual with a disability uses a mitigating measure which eliminates the need for a reasonable accommodation, then an employer will have no obligation to provide one.

See, Questions and Answers on the Notice of Proposed Rulemaking for the ADA Amendments Act of 2008, Question 11. [Note: This document, as well as the proposed Title I regulations and summary, can be found on the EEOC website at www.eeoc.gov/laws/statutes/adaaa_info.cfm].

Based upon this guidance, it can be argued that while any positive effects of mitigating measures used by a student cannot be considered in answering the initial question as to whether the student **has a disability**, those effects *can* be considered when determining **whether reasonable accommodations/services via a 504 Education Plan are needed**. For example, Johnny's ADHD may rise to the level of being a disability (for which he cannot be discriminated against), but his medication may negate the need for actual 504 services if he does not need services to ensure that his educational needs are being met as adequately as those of his nondisabled peers. However, if Johnny's mother decides not to medicate him and his grades plummet or he violates the code of conduct, the district must ensure that any subsequent disciplinary action taken is not discriminatory on the basis of disability (i.e, conducting a manifestation determination, etc.) and consider whether Johnny's need for a 504 Education Plan should be re-visited.

Point #8: A Section 504 Education Plan should be developed if it is needed to provide FAPE to the student with a disability.

Under the Section 504 regulations, "Free Appropriate Public Education" (FAPE) is required. 504 FAPE is defined as follows:

> "Appropriate education" is the provision of regular or special education and related services that
>
> i. are designed to meet the individual *educational needs* of handicapped persons as adequately as the needs of non-handicapped persons are met and
>
> ii. are based upon adherence to procedures that satisfy the requirements of 104.34, 104.35. 34 C.F.R. § 104.33(b).

Although an actual written Plan is not required under the regulations, the regulations note that developing such a document would satisfy the requirements of the 504 regulations. 34 C.F.R. § 104.33(c)(2). As a matter of best practice, schools develop 504 Education Plans to clearly set out the services that are needed to meet the individual educational needs of the disabled student as adequately as the needs of non-disabled students are met.

Point #9: The fact that a student is found to be disabled always means that the student cannot be discriminated against on the basis of disability.

The importance of determining whether a student has a disability is to ensure that the student is not discriminated against on the basis of that disability, whether the student has a 504 Plan or not. For example, the gifted and medicated ADHD student who is making all A's could not be excluded from participation in the honor club based upon the fact that he has ADHD or some other physical or mental impairment.

<u>Point #10:</u> The bottom line is that 504 teams now have two tasks: 1) to determine whether a student has a disability and 2) if so, whether the disabled student needs a Section 504 Education Plan.

Because the ameliorative effects of mitigating measures cannot be considered when determining whether a student has a "disability," school teams will need to make a two-step analysis under 504. First, the determination must be made as to whether a student is disabled, without regard to the ameliorative effects of mitigating measures. If the student is disabled, the second step will include determining whether the student is in need of a "Section 504 Education Plan" in order to have his/her educational needs met as adequately as those of nondisabled students. Teams *can* take into consideration the ameliorative effects of mitigating measures when determining the need for an actual Plan. Thus, all students with a disability under Section 504's definition are entitled to be free from discrimination but will not necessarily qualify for a 504 Plan.

<u>Point #11:</u> An impairment that is episodic or in remission may also be a disability if it is substantially limiting when active.

Everything we have discussed above is also applicable to students who have a condition that is episodic or in remission. For example, a gifted student may have cancer that is a disability but is in remission. The task of the 504 team in his case would be to identify whether the cancer is a disability when it is active (which it more than likely is) and whether, if it returns, the student may need a 504 Education Plan. It may be that the team decides that the student has a disability (so that there is no discrimination on the basis of the cancer), but that a 504 Education Plan is not needed at this time and the team will re-visit the issue if the cancer returns.