Does Section 504 Require a Section 504 Plan for Each Eligible Non-IDEA Student?*

Perry A. Zirkel

Although overlapping with and extending well beyond the Individuals with Disabilities Education Act,[1] the two key questions under Section 504 for students in K-12 public schools who do not meet the IDEA definition of disability are: 1) who is eligible? and, for those who are eligible, 2) what is their entitlement?[2] The Americans with Disability Act Amendments Act (ADAAA),[3] which went into effect on January 1, 2009 and which expressly applies as well to Section 504, changed the answer to the first question and, without directly addressing it, reinforced the operational part of the second question, specifically, is every newly eligible student entitled to what is commonly called a "504 plan"?[4]

Eligibility

Unlike the IDEA definition of disability,[5] the broader Section 504 definition of disability has three alternate prongs, each based on three criteria.[6] The first prong is for an individual who has 1) a mental or physical impairment that 2) substantially limits 3) a major life activity. The second and third prongs are respectively for individuals who, although not currently meeting these three criteria, have either "a record of" or are "regarded as" meeting them.

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* 40 J.L. & EDUC. 407 (2011).

[1] See, e.g, Perry A. Zirkel, *An Updated Comparison of the IDEA and Section 504/ADA*, 216 EDUC. L. REP. 1 (2007). Although Section 504 and the ADA—unlike the IDEA—are civil rights acts, "entitlement" is used in this Article as a convenient and euphonious term, as the counterpart to "eligibility," to represent what is more accurately the obligation of the recipient institution of federal financial assistance.

[2] See, e.g., PERRY A. ZIRKEL, SECTION 504, THE ADA AND THE SCHOOLS One:5-One 6 (3d ed. 2011) (available from LRP Publications).

[3] Pub. L. No. 110-325, 122 Stat. 3553 (2008).

[4] Although some school district use varying terms, such as an "individual accommodation plan," and Pennsylvania regulations refer to a "service agreement" (22 PA. CODE Ch. 26), "504 plan" is used generically herein to refer to a document that specifies the accommodations and/or services that the district's team formulates for the individual student.

[5] 20 U.S.C. § 1402(3)(A) (2009).

[6] 29 U.S.C. § 705(20)(B) (2009) (cross referring to 42 U.S.C. § 12102, which is the ADA).

The Office for Civil Rights (OCR), which is the part of the U.S. Department of Education that administers and enforces Section 504 in the K-12 school context, has consistently adhered to a persuasive interpretation of the second and third prongs in relation to students. Specifically, OCR has clarified the "record of" and "regarded as" prongs only provide protection against exclusion, whereas the entitlement for a free and appropriate public education (FAPE) is solely for a student who is under the first prong.[7]

During the two decades previous to passage of the ADAAA, the courts restrictively interpreted the second and third criteria—substantial limitation and major life activity—of the first prong.[8] More specifically, led by the Supreme Court's trilogy of *Sutton v. United Air Lines, Inc.*,[9] *Albertson's, Inc. v. Kirkingburg*,[10] and *Murphy v. United Parcel Service, Inc.*,[11] the courts have interpreted substantial limitation restrictively against plaintiffs, such as applying this standards with mitigating measures. Similarly, exemplified by the Supreme Court's decision in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*,[12] the courts demandingly interpreted the statutory list of illustrative major life activities globally and centrally. Although the plaintiffs in the vast majority of cases were employees, the definition applies generically and, thus, the

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[7] Frequently Asked Questions about Section 504 and the Education of Children with Disabilities (OCR 2009), *available at* http://www.ed.gov/about/offices/list/ocr/504faq.html; OCR Senior Staff Memorandum, 19 IDELR 894 (1992). For the discussion of the FAPE entitlement, see *infra* notes 23-49 and accompanying text.

[8] See, e.g., Perry A. Zirkel, *Conducting Legally Defensible §504/ADA Eligibility Determinations*, 176 Ed.Law Rep. [1] (2003). For an updated version, including the initial effects of the ADAAA, see Perry A. Zirkel, *A Step-by-Step Process for §504/ADA Eligibility Determinations*, 239 EDUC. L. REP. 333 (2009).

[9] 527 U.S. 471 (1999).

[10] 527 U.S. 555 (1999).

[11] 527 U.S. 516 (1999).

[12] 534 U.S. 184 (2002).

lower courts applied these precedents to students.[13]

However, the ADAAA reversed this restrictive judicial trend, expressly rejecting the *Sutton* trilogy and *Toyota Motors*.[14] Although the ADAAA's provisions are rather extensive in terms of eligibility determinations, two pairs of examples are particularly significant. First, for substantial limitation, the ADAAA –provided that the determination be made 1) without—not with—mitigating measures,[15] and 2) for impairments that are episodic or in remission, at the time it is active.[16] For major life activities, the ADAAA expanded the illustrative list, including 1) less global functions for students than learning, such as reading and concentration, and 2) various health-related conditions, such as bowel and other major bodily functions.[17] The inevitable net effect is an expansion of eligibility. Under the previous interpretive standards, which the courts had developed, a national survey found that the estimated proportion of K-12 students covered

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[13] See Zirkel 2003, *supra* note 8, at 5 n.48. For more recent decisions, see, e.g., Weidow v. Scranton Sch. Dist., 56 IDELR ¶ 119 (M.D. Pa. 2011); Marshall Sisters of Holy Family of Nazareth, 44 IDELR ¶ 190 (E.D. Pa. 2005); D.P. v. Sch. Dist. of Poynette, 41 IDELR ¶ 6 (W.D. Wis. 2004); Montgomery Pub. Sch., 44 IDELR ¶ 24 (Md. SEA 2003).

[14] Pub. L. No. 110-325, 122 Stat. 3553, §2 (2008) (codified at 42 U.S.C § 12102 (2009)). For an overview of the implications in terms of student eligibility, see, e.g., Perry A. Zirkel, *The ADAA and Its Effect on Section 504 Students*, 22 J. SPECIAL EDUC. LEAD. 3 (2009). The amendments are now codified in the ADA at 42 U.S.C. § 12102, but the noted sections herein are based on the original form at 122 Stat. 3553.

[15] Couched as a rule of construction, this provision provided that the substantial-limitation determination be made "without regard to the ameliorative effects of mitigating measures." 122 Stat. 3553, §4(a)(4)(E). This provision also had a liberalizing effect by listing the mitigating measures, by way of example, as including:

> (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.

Id.

[16] The specific rule of construction is: "An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active." *Id*. §4(a)(4)(D).

[17] Elevating the list to statutory status, Congress added these major life activities to those listed in the Section 504 regulations (and in the ADA Title II regulations): standing, lifting, bending, reading, concentrating, thinking, communicating, and major bodily functions (e.g., digestive, bowel, bladder, neurological, brain, circulatory, endocrine, and four other specified examples). *Id*. §4(a)(2).

by Section 504 but not by the IDEA was approximately 1%.[18] The actual percentage in practice was, on average, slightly higher, the survey provided reason to suspect net over-identification; for example, at least one third of the survey respondents, who were Section 504 building coordinators, reported that the determination of substantial limitation was without mitigating measures.[19]

The specific extent of the revised and ultimately expanded proportion of students eligible under the new, ADAAA standards is unknown at this time. The reasons include the inevitable delays in awareness and implementation of the change at the local level and in empirical research, especially because—unlike the IDEA—the U.S. Department of Education does not collect this information. Another significant contributing factor is that the courts have rather consistently interpreted the effect of the ADAAA as being purely prospective, thus not applying it to alleged violations arising before its effective date.[20] As a result, it is not yet clear whether they will only adhere to the letter or rather extend their interpretations to the spirit of the

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[18] Rachel Holler & Perry A. Zirkel, *Section 504 and Public School Students: A National Survey Concerning "Section 504-Only" Students*, 92 NASSP BULL. 19 (2008). The most common impairment (80%) was ADHD. *Id*. at 27-28. At the time, the approximate proportion of IDEA-eligible students was 1%. *Id*. at 21.

[19] *Id*. at 29-30. Similarly, only approximately 7% of the respondents reported using the students in the general population—in contrast, for example, to the child's potential—as the frame of reference for the substantial-limitation determination. *Id*.

[20] See, e.g., Nyrop v. Indep. Sch. Dist., 616 F.3d 728 (8th Cir. 2010); Ragusa v. Malverne Union Free Sch. Dist., 381 F. App'x 85 (2d Cir. 2010); Becerril v. Pima County Assessor's Office, 587 F.3d 1167 (9th Cir. 2009); Lytes v. DC Water & Sewer Auth., 572 F.3d 936 (D.C. Cir. 2009); Milholland v. Sumner County Bd. of Educ., 569 F.3d 562 (6th Cir. 2009); EEOC v. Agro Distrib., LLC, 555 F.3d 562 (5th Cir. 2009; Kiesewetter v. Caterpillar, Inc., 295 F. App'x 850 (7th Cir. 2008). The published court decisions that have applied the ADAAA eligibility standards to K-12 students have been limited in both number and guidance thus far. For example, a federal court issued an inconclusive decision in response to a student's challenge to an expulsion allegedly due to her eating disorder, more specifically denying a dismissal motion and, thus, preserving for further proceedings whether her disorder substantially limited the major life activity of eating. Franchi v. New Hampton Sch., 656 F. Supp. 2d 252 (D.N.H. 2009). Moreover, the suit was against a private school under the ADA rather than against a public school under Section 504.

ADAAA.[21] Perhaps more significantly in the long run, will the courts rule that all of the newly eligible students are entitled to 1) FAPE, and, if so, 2) a 504 plan?

Entitlement

Neither the original Section 504 legislation[22] nor the successive amendments of it via Section 504's sister statute, the ADA,[23] addressed students' entitlement, or, viewed in the obverse, K-12 school obligations, other than by more generally prohibiting and defining discrimination of individuals with disabilities. The Section 504 regulations, issued in 1978 in the wake of the IDEA regulations and not revised since then, provide—in comparison to the IDEA regulations—a rather limited answer. Specifically, the regulations require the school district, as a recipient of federal financial assistance, to provide the student with FAPE, defined as follows:

> regular or special education and related aids and services that (i) are designed to meet individual educational needs of [individuals with disabilities] as adequately as the needs of nondisabled persons are met and (ii) are based on adherence to procedures that satisfy the requirements of Secs. 104.34 [educational setting], 104.35 [evaluation

[21] For the spirit, the ADAAA provides for interpreting substantial limitation consistent with the stated findings and purposes of the Act and further directs that "the definition of disability … shall be construed in favor of broad coverage." 122 Stat. 3553, §4(a)(4)(A)-(B). For example, given the expanded list of major life activities, in student cases will courts consider the following functions to fit in the residual "other" category: written expression, mathematics, socialization, and behavior control?

[22] 29 U.S.C. § 794 (2009). For the related attorneys' fees provision, see *id*. § 794a. This legislation dates back to the Rehabilitation Act of 1973, thus preceding the original version of the IDEA, which was the Education of the Handicapped Act of 1975.

[23] Prior to the ADAAA, the original passage of the ADA in 1990 amended Section 504 in two respects that apply to K-12 students: 1) exclusions from eligibility for specified conditions, such as current illegal drug users and sexual behavior disorders, and 2) elimination of procedural protection for disciplinary changes in placement for use of illegal drugs or alcohol. 29 U.S.C. § 705(20)(C) (2009) (originally 104 Stat. 334 (1990)).

and placement], and 104.36 [procedural safeguards.[24]

Conspicuously missing—and fitting with a pattern of much more streamlined procedural safeguards of Section 504 than those of the IDEA[25]—is a 504 plan. In comparison, the IDEA legislation provides not only a definition but multiple pages of requirements for an individualized education program (IEP),[26] and the IDEA regulations provide further specifications as to its development, contents, and revisions.[27]

The extent of legal obligation for a 504 plan appears to be limited to policy interpretations of OCR, and most of them do not directly address the question of whether Section 504 procedurally requires such written documentation of FAPE, instead referring to a 504 plan in their interpretation or application of the express requirements of the regulations.[28] Moreover, although expressing the position that commensurate opportunity (i.e., "as adequately as")[29], rather than reasonable accommodation, is the applicable substantive standard for FAPE,[30] OCR

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[24] 34 C.F.R. § 104.33(b)(1) (2009). The first enumerated part provides the basis for the substantive standard referred to in short as "commensurate opportunity," whereas the second enumerated part provides similar support for OCR's emphasis on procedures. The companion subsection of this § 504 FAPE regulation provides that "implementation of an [IEP] developed in accordance with the [IDEA] is one means of meeting [this] standard." *Id*. § 104.33(b)(2).

[25] *Compare id*. § 104.36, *with id*. §§ 300.300-300.305 and 300.501-300.516 (2009).

[26] 20 U.S.C. §§ 1402(14) and 1414(d) (2009).

[27] 34 C.F.R. §§ 300.320 - 300.324 (2009).

[28] In many of its letters of findings (LOFs), OCR merely refers to a 504 plan incidentally, in effect as an administrative convenience of both the district and agency for compliance purposes. For a wide sampling of such LOFs, see Zirkel, *supra* note 2, at Three:105-Three:154. For examples of the very few cases where OCR came closer to addressing the question directly, see *infra* note 36. Aside from its LOFs, OCR's more general policy interpretations have similarly avoided squarely addressing this issue. See, e.g., Letter to Williams, 21 IDELR 23 (OSEP/OCR 1994) (interpreting § 104.33(b) as requiring implementation of FAPE "by any appropriate means, including, but not limited to, an IEP" without defining the specific scope of "appropriate means").

[29] See *supra* note 24 and acccompanying text.

[30] See, e.g., Frequently Asked Questions about Section 504 and the Education of Children with Disabilities (OCR 2009), *available at* http://www.ed.gov/about/offices/list/ocr/504faq.html. For a recent example, see N. Royalton (OH) City Sch. Dist., 52 IDELR ¶ 203 (OCR 2009)"Under Section 504 and Title II [of the ADA], reasonableness is not the standard for the provision of services." *Id*. at 1000. It is not clear how OCR squares its position with the recognized defense of undue fiscal hardship.

generally declines to decide FAPE issues, deferring them for impartial hearings.[31] More specifically, OCR's longstanding policy is to focus on procedural compliance, not addressing substantive educational issues, such as eligibility or FAPE, with a limited exception for extraordinary circumstances.[32] In turn, courts have rarely addressed and certainly not settled the issue of the applicable substantive standard for FAPE,[33] and they have never addressed the question of whether public schools are required to provide a 504 plan for an eligible student. Given the previous, restrictive judicial standards for eligibility, it is not surprising that the parties did not raise this question in the past; the formality of a 504 plan was an administrative convenience for both the parents and the district as a way of formulating and implementing

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[31] See, e.g., *id*.

[32] *Id*.; 34 C.F.R. Part 104, Appendix A. For recent applications of this policy, wherein OCR defers to the impartial hearing process, see, e.g., Olathe (KS) Unified Sch. Dist. No. 233, 47 IDELR ¶ 78 (OCR 2006). Additionally, OCR often avoids definitive determinations of either procedural or substantive violations by resolving the complaint via a voluntary resolution agreement. See, e.g., Charlotte-Mecklenburg (NC) Pub. Sch., 54 IDELR ¶ 26 (OCR 2009). For one of the rare examples of the exception, based on a life-threatening impairment, see Gloucester County (VA) Pub. Sch., 49 IDELR ¶ 21 (OCR 2007); even in this case, after announcing the applicability of the exception, OCR did not definitively decide eligibility, instead expressing concerns and resolving the case in terms of a voluntary resolution agreement to reevaluate the student.

[33] See, e.g., *Mark H. v. LeMahieu*, 513 F.3d 922 (9th Cir. 2008), *further proceedings sub nom. Mark H. v. Hamamoto*, 620 F.3d 1090 (9th Cir. 2010). For an early analysis of this still unsettled issue, see Perry A. Zirkel, *The Substantive Standard for FAPE: Does Section 504 Require Less Than the IDEA*?, 106 EDUC. L. REP. 471 (1996). The ADA's Title II standard of "reasonable modification" does not necessarily change the answer because, according to the accompanying rule of construction, the ADA shall not provide a lesser standard than § 504. 28 C.F.R. §§ 35.103 and 35.130(b)(7) (2009). One respected commentator asserted that commensurate opportunity is the applicable standard. Mark C. Weber, *A New Look at Section 504 and the ADA in Special Education Cases*, 16 TEX. J. C.L. & C.R. 1 (2010). However, the Ninth Circuit seemed to straddle the fence, using both in its latest remand. *Mark H. v. Hamamoto*, 620 F.3d at 1102; *cf. Brown v. Dist. 299-Chicago Pub. Sch.*, __ F. Supp. 2d __ (N.D. Ill. 2010) (citing *Mark H.* to use both but defeating the parent's claim based on causation analysis). Moreover, other courts have failed to embrace this standard, using instead reasonable accommodation in student cases under Section 504 in tandem with the ADA. See, e.g., R.K. v. Bd. of Educ. of Scott County, __F. Supp. 2d __ (E.D. Ky. 2010); *cf*. J.D. v. Pawlet Sch. Dist., 224 F.3d 60, 71 (2d Cir. 2000) ("only reasonable accommodations that give those students the same access to the benefits of a public education as all other students"). In an early analysis, Lindgren concluded "OCR's maneuver to remove the reasonable accommodation standard from the public school context in favor of an unlimited FAPE guarantee is unsound." Kristine L. Lindgren, Comment, *The Demise of Reasonable Accommodation under Section 504: Special Education, The Public Schools, and an Unfunded Mandate*, 1996 WIS. L. REV. 633, 657.

FAPE.

However, the ADAAA's notable extension of major life activities to include health conditions related not just to breathing (e.g., asthma) and eating (e.g., diabetes and eating disorders) but a whole host of other major bodily functions, such as bowel functions (e.g., colitis, Crone's disease, and irritable bowel syndrome) raises the question of whether an individual health plan, which has become a staple of school nurses' practice in many public schools, suffices for the purpose of FAPE without switching to a 504 plan.[34] For example, is a 504 plan required for a student whose impairment is substantially limiting without the mitigating measure of medication but who, with parent consent and medical prescription, regularly takes medication under the supervision of the school nurse[35] and, as a result, is not substantially limited in any major life activity? Even more stark in its difference, what if the prescription called for administration of medication at home before and after school? Similarly, if the health condition substantially limited a major life activity and was currently in remission, regardless of whether a mitigating measure would have been available at the time it was active, is a 504 plan required and, if so, what would it necessarily provide in terms of reasonable accommodation or commensurate opportunity? Thus, far OCR has declined to address these issues in terms of policy guidance,[36] and it has not arisen in a published court case.

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[34] A related but separable question is whether a procedural safeguards notice must accompany the health plan, per 34 C.F.R. § 104.36.

[35] In such circumstances, the individual health plan would typically include administration of medication, which is a related service under Section 504. See, e.g., Berlin Brothersvalley (PA) Sch. Dist., EHLR 353:124 (OCR 1988). For subsequent federal appellate case law applying a reasonableness test to this obligation, see, e.g., DeBord v. Board of Education, 126 F.3d 1102 (8th Cir. 1997).

[36] In re Americans with Disabilities Act of 2008, 51 IDELR ¶ 80 (OCR 2008). However, in a cluster of recent letters of findings that addressed such issues indirectly by focusing instead on evaluation, OCR seemed to suggest that an individual health plan would not suffice without a procedural safeguards notice and a 504 plan. Isle of Wight County (VA) Pub. Sch., 56 IDELR ¶ 111 (OCR 2010); Memphis (MI) Cmty. Sch., 54 IDELR ¶ 61 (OCR 2009); N. Royalton (OH) City Sch. Dist., 52 IDELR ¶ 203 (OCR 2009); *cf*. Oxnard (CA) Union High Sch. Dist., 55 IDELR ¶ 21 (OCR 2009) (student on medical homebound). The following dicta in a related letter of findings expresses OCR's position: "In relying on

Given the "unfunded mandate" status of Section 504 in combination with the current climate of economic stringency and political conservatism, it would not be a surprise if one of the "new 504" issues arose, particularly in one of the litigious areas of the country where Section 504 is often used as a consolation prize in the wake of a determination of non-eligibility for an IEP under the IDEA.[37] If a parent chose to resort to the OCR complaint process,[38] it is likely that OCR would analyze the case from a procedural perspective and find a violation of the FAPE regulation.[39] Although a district might challenge OCR's interpretation, invoking the due process procedures and judicial review of the agency's enforcement decisions,[40] it is much more likely that the issue would crystallize in the courts via a parent's filing a court action either after or without resorting to their right to an impartial hearing.[41]

In the judicial forum, the odds are likely but not certain that the court would rule in favor of the defendant school district that does not provide a 504 plan, and even procedural safeguards notice,[42] to the newly eligible students within the circumscribed circumstances in question.[43]

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an [IHP] and not conducting an evaluation pursuant to Section 504, the [district] circumvents the procedural safeguards set forth in Section 504." Tyler (TX) Indep. Sch. Dist., 56 IDELR ¶ 24 (OCR 2010). The "504 plan" reference in the letters of findings, however, typically is not part of the legal conclusions but rather the appended voluntary resolution agreement.

[37] The suburbs of New York City, particularly Long Island and metropolitan New Jersey, and of Philadelphia are, in the author's experience, examples of such 504-active areas.

[38] For an overview of the available legal avenues, see Perry A. Zirkel & Brooke L. McGuire, *A Roadmap to Legal Dispute Resolution for Parents of Students with Disabilities*, 23 J. SPECIAL EDUC. LEADERSHIP 100 (2010).

[39] For example, depending on whether the district provided the parents with a procedural safeguards notice (*supra* note 34), OCR would likely invoke that related regulation. See *supra* note 36.

[40] See, e.g., Freeman v. Cavazos, 923 F.3d 1434 (11th Cir. 1991).

[41] It is not entirely clear whether exhaustion applies in such cases, because the exhaustion language is within the IDEA and arguably only applies to students double-covered by the IDEA and Section 504. 20 U.S.C. § 1415(l) (2009).

[42] For example, in one of the few court decisions that addressed FAPE of a child eligible under only § 504 not also the IDEA, the court examined the substantive reasonableness of the district's proposed accommodations and services without addressing whether the parent received procedural safeguards and whether the child had a 504 plan. J.D. v. Pawlet Sch. Dist., 224 F.3d 60 (2d Cir. 2000). However, the court oddly characterized the district's proposal as an IEP, although the facts did not

The reasons are several. First, as a threshold matter, some courts have rejected a private right of action predicated on the § 504 regulations.[44] Second, even if the plaintiff hurdles this threshold problem, the following arguments appear to fit with the rather longstanding trend of judicial interpretation of Section 504 cases and, more generally, K-12 student litigation. More specifically, the defendant district would argue that this functional approach (a) fits, by analogy, with OCR's consistent policy that students without present substantial limitation are not entitled to FAPE[45]; (b) is also consistent with the reasonable interpretation[46] that even though eligibility is determined during the active or non-ameliorated condition, the district's obligation—whether the substantive standard is reasonable accommodation or commensurate opportunity—is based on the individual's disability-based needs at the time[47]; and (c) conforms to the general harmless-

include any particular form, much less one that met the extensive elements that the IDEA requires. *Id*. at 63-64 and 72.

[43] See *supra* text accompanying notes 34-36.

[44] See, e.g., *Power v. Sch. Bd*., 276 F. Supp. 2d 515 (E.D. Va. 2003); *A.W. v. Marlboro Co.*, 25 F. Supp. 2d 27 (D. Conn. 1998); *cf. Wiles v. Dep't of Educ., State of Hawaii*, 555 F. Supp. 2d 1143 (D. Hawaii 2008) (rejecting implied right of action under the regulation where not tightly linked to the statute, which in this case concerned implementation, not design, of FAPE). *But cf*. Mark H. v. LeMahieu, 513 F.3d 922 (9th Cir. 2008) (FAPE design regulation is within the implied right of action).

[45] See *supra* note 7 and accompanying text. Under this analogy to the "record of" and "regarded as" prongs, the student would be eligible only to protection from exclusionary action based on their disability, which would be part of the district's general obligation to avoid disability-based harassment under Section 504 and the ADA as well under state anti-bullying laws.

[46] OCR has not addressed this issue, but the EEOC recently issued this interpretation under what may be analogous under Title I (the employment part) of the ADA. See *infra* note 47. Moreover, if the child's needs are considered in this mitigated state, neither the reasonable accommodation or commensurate opportunity standard for FAPE would appear to be equally unproblematic for the district. Finally, OCR arguably implicitly recognized the possibility of "technically eligible" students as the obverse for this conclusion: "The [district's] procedures also state that a student is not eligible under Section 504 as a student with a disability if the student does not need 504 services in order for the student's educational needs to be met, which conflatesthe determination of disability with placement and services decisions, which should be separate." *Memphis (MI) Cmty. Sch.,* 54 IDELR ¶ 61 (OCR 2009).

[47] EEOC, Questions and Answers on the Final Rule Implementing the Americans with Disabilities Amendments Act of 2008 (http://www.eeoc.gov/laws/regulations/ada_qa_final_rule.cfm). Specifically, item #16 provides this interpretation:

> 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

error treatment of procedural violations, which the courts developed[48] and Congress codified under the IDEA,[49] for FAPE cases. Finally, if courts take this predicted course, OCR will adjust their policies accordingly, as they did—albeit belatedly and with obvious resistance—in relation to the mitigation case law.[50]

Thus, the results of the ADAAA will be not only major changes in school district policies and procedures but also major challenges in legal enforcement and interpretation. Although the immediate issues concern eligibility, the thicker and thornier ultimate issues concern districts' obligations under Section 504 to the newly eligible students, particularly those under individual health plans and those who do not have disability-based needs for FAPE. For these particular students and those eligible more generally, the unsettling and unsettled question[51] looms large—is a 504 plan a *sine qua non*?

> into account the positive and negative effects of a mitigating measure. . . . [I]f an individual with a disability uses a mitigating measure that results in no negative effects and eliminates the need for a reasonable accommodation, a covered entity will have no obligation to provide one.

In general the courts have borrowed standards from the employment context, such as the "average person in the general population" frame of reference for determining substantial limitation, to K-12 students. See, e.g., Costello v. Mitchell Pub. Sch. Dist. 79, 266 F.3d 916 (8th Cir. 2001); D.P. v. Sch. Dist. of Poynette, 41 IDELR ¶ 6 (W.D. Wis. 2004); T.J.W. v. Dothan City Bd. of Educ., 26 IDELR 999 (M.D. Ala. 1997); *cf*. Bercovitch v. Baldwin Sch., Inc., 133 F.3d 141 (1st Cir. 1998); Marshall v. Sisters of Holy Family of Nazareth, 44 IDELR ¶ 190 (E.D. Pa. 2005); Ballard v. Kinkaid Sch., 147 F. Supp. 2d 603 (S.D. Tex. 2000) (applying same to K-12 students in private schools).

[48] The FAPE section of the successive annual updates of IDEA cases law provide an ample sampling of this consistent judicial trend in the *Rowley* progeny. See, e.g., Perry A. Zirkel & Tessie Rose, *Special Education Law Update X*, 240 EDUC. L. REP. 503 (2009); Perry A. Zirkel & Tessie Rose, *Special Education Law Update IX*, 206 EDUC. L. REP. 501 (2006); Perry A. Zirkel, *Special Education Law Update VIII*, 183 EDUC. L. REP. 35 (2004); Perry A. Zirkel, *Special Education Law Update VII*, 160 Ed.Law Rep. [1] (2002).

[49] 20 U.S.C. § 1415(f)(3)(E) (2009). It is not uncommon for courts to use, sometimes even confuse, IDEA standards for those under Section 504. See, e.g., Molly L. v. Lower Merion Sch. Dist., 194 F. Supp. 2d 422 (E.D. Pa. 2002).

[50] *Sutton* Investigative Guidance: Consideration of "Mitigating Measures" in OCR Disability Cases, U.S. Department of Education Office for Civil Rights (September 29, 2000) (available at http://www.diabetes.org/assets/pdfs/know-your-rights/for-lawyers/education/atty-sutton-investigative-guidance.pdf).

[51] This procedurally oriented question necessarily implicates the substantive question as to the extent of the FAPE obligation to these students.