MODERN COMPLEXITIES IN DISABILITY LAW:
DUAL ENROLLMENT IN HIGH SCHOOL AND COLLEGE, DOCTORS AND PLACEMENT DECISIONS, DISABILITY AND THE ARMED FORCES, AND THE SUPREME COURT'S CONFUSION ON IDEA & SECTION 504

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A note about these materials: These materials are not intended as a comprehensive review of all new case law, rules and regulations on Section 504, but as an introduction to some of the more complex current issues and trends confronted by schools as they seek to comply with Section 504 for their eligible students. These materials are not intended as legal advice, and should not be so construed. State law, local policy, and unique facts can make a dramatic difference in analyzing any situation or question. Please consult a licensed attorney for legal advice regarding a particular situation. References to the U.S. Department of Education will read "ED," references to the Equal Employment Opportunity Commission will read "EEOC," and references to the U.S. Department of Justice will read "DOJ." Some internal citations have been omitted from quotes to allow ease of reading.

In addition to the Section 504 regulations and OCR Letters of Finding, these materials will also cite guidance from two important OCR documents. First, a Revised Q&A document has been posted on the OCR website since March of 2009 addressing some of the ADAAA changes. This document, *Protecting Students with Disabilities: Frequently Asked Questions about Section 504 and the Education of Children with Disabilities,* (March 27, 2009, last modified October 16, 2015), is available on the OCR website at *www.ed.gov/about/offices/list/ocr/504faq.html* and is referenced herein as "Revised Q&A." In January 2012, OCR released a guidance document on the ADAAA and its impact on Section 504. The "Dear Colleague Letter" consisted of a short cover letter and a lengthy new question and answer document. *Dear Colleague Letter,* 112 LRP 3621 (OCR 2012)(hereinafter "2012 DCL").

I. Transition and Dual Enrollment in HS and College

A. Disability Law for Adults (after High School)

One of the more interesting areas of §504 involves students who are transitioning to post-secondary life, and thus face a different world of legal protections than what they experienced in the K-12 public schools. While Section 504 and the ADA protect students in colleges and universities and some employers, the rules are not as "friendly" as those for elementary and secondary students in public schools. The differences are important for K-12 school personnel to understand as they assist college- and career-bound §504 students. OCR noted the difference in Question 14 of the Revised Q&A.

> **"14. Does the nature of services to which a student is entitled under Section 504 differ by educational level?** Yes. Public elementary and secondary recipients are required to provide a free appropriate public education to qualified students with disabilities. Such an education consists of regular or special education and related aids and services designed to meet the individual educational needs of students with disabilities as adequately as the needs of students without disabilities are met.
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> At the postsecondary level, the recipient is required to provide students with appropriate academic adjustments and auxiliary aids and services that are necessary to afford an individual with a disability an equal opportunity to participate in a school's program. Recipients are not required to make adjustments or provide aids or services that would result in a fundamental alteration of a recipient's program or impose an undue burden."

Not only are the services themselves different, but the process of determining eligibility and accommodation changes as well.

1. Colleges and Universities operate in a different legal world from K-12 public schools. There are significant differences between the legal requirements applicable to K-12 schools and those of higher education. At the risk of over-simplification, here's a quick summary of the key differences.

No Duty to Child Find. Elementary and secondary schools have an affirmative duty to conduct a "child-find" at least annually, during which the school must make efforts to notify disabled students and their parents of the school district's obligations to provide a free appropriate public education. 34 C.F.R §104.32. The requirement places the burden of identifying potentially eligible students squarely on the shoulders of the school district. Postsecondary institutions have no child find requirement. Like employers, they have no duty to provide accommodations until a student presents evidence to the school of his eligibility and the need for services.

Eligibility is harder to establish. In addition to being "disabled," an individual must show that he or she is "qualified" in order to receive §504 protections. While the term "disabled" is no different after graduation, being "qualified" is a whole new ball game. For purposes of elementary and secondary education, "qualified" means the child has a legal right to education from the district (typically arising from state compulsory attendance laws) and is within the age range of students (both disabled and nondisabled) whom the school is legally obligated to serve. 34 C.F.R §104.3(k)(2). "With respect to postsecondary and vocational education services, a handicapped person who meets the academic and technical standards requisite to admission or participation in the recipient's education program or activity" is qualified. 34 C.F.R §104.3(k)(3). Clear from this regulation is that institutions of higher education can screen out students (whether disabled or not) who do not meet other eligibility requirements.

For example, a college refused to admit an applicant with a severe hearing problem to its nursing program. The college claimed that modifying the program to allow her participation would essentially prevent her from realizing the benefits of the program. The Supreme Court agreed. In the postsecondary world, Section 504 "does not compel educational institutions to disregard the disabilities of handicapped individuals or to make substantial modifications in their program to allow disabled persons to participate." *Southeastern Community College v. Davis,* 442 U.S. 397, 405 (1978). Even with a hearing aide, the student could not understand speech directed at her without lip-reading. Since in some cases, a nurse would have to instantly follow a doctor's directions for medication or instruments, and since masks in many settings would prevent lip-reading, her disability prevents her from safely performing the functions of a nurse in the both the training program and in the profession upon graduation. No accommodation solves that problem. She is simply not qualified.

No duty to evaluate. "A recipient that operates a public elementary or secondary education program shall conduct an evaluation in accordance with the requirements of paragraph (b) of this section of any person who, because of handicap, needs or is believed to need special education or related services before taking any action with respect to the initial placement of the person in a regular or special education program and any subsequent significant change in placement." 34 C.F.R §104.35(a). The burden is on the public school (at its expense) to investigate areas of suspected disability and determine whether the student is eligible. *Letter to Mentink,* 19 IDELR 1127 (OCR 1993); *Letter to Parker,* 18 IDELR 965 (OCR 1992). No corresponding regulation exists for postsecondary education. Instead, students can be required to provide their own evidence of disability (at their own expense). *Halasz v. University of New England,* 816 F.Supp. 37 (D.Me. 1993). While the institution is allowed to determine the types of evaluation instruments it will accept as evidence of impairment (and the credentials of evaluators) the requirements cannot be so burdensome that they "preclude or unnecessarily discourage individuals with disabilities from

establishing that they are entitled to reasonable accommodation." *Guckenberger v. Boston University,* 957 F.Supp. 306, 26 IDELR 573, 587 (D.Me. 1997).

Reasonable Accommodation is the higher ed standard. Many educators mistakenly believe that the accommodations they create for students in elementary and secondary programs are limited to "reasonable" accommodations. In response to a question on the subject, OCR concluded that reasonableness is not a factor in §504 on elementary and secondary campuses. "The key question in your letter is whether the OCR reads into the Section 504 regulatory requirement for a free appropriate public education (FAPE) a 'reasonable accommodation' standard, or other similar limitation. The clear and unequivocal answer to that is no." *Response to Zirkel,* 20 IDELR 134 (OCR 1993).

For employment situations and postsecondary students, the answer is different. In support of its conclusion, OCR notes that the §504 regulations on employment and postsecondary education include specific references to a reasonable accommodation standard while the elementary and secondary regulations do not. That omission was intentional because of the uniqueness of elementary and secondary education. **A critical factor identified by OCR is the voluntary nature of postsecondary study as opposed to the compulsory attendance rules that require students, both disabled and nondisabled, to attend elementary and secondary schools.** As a result of the higher education reasonable accommodation standard, "Academic requirements that the recipient can demonstrate are essential to the program of instruction being pursued by such student or to any directly related licensing requirement will not be regarded as discriminatory within the meaning of this section." 34 C.F.R. §104.44(a). The appendix to the regulation makes clear that this requirement "does not obligate an institution to waive course or other academic requirements.... It should be stressed that academic requirements that can be demonstrated by the recipient to be essential to its program of instruction or to particular degrees need not be changed." Appendix A, part 31.

2. No formal transition process under §504.

Unlike the IDEA, §504 has no formalized transition process to mark the path between the K-12 world and the adult working or post-secondary world beyond. That is not to say that §504 students have no need for help and the Accommodation Plan has no role in that journey. On the contrary, as a nondiscrimination statute, §504's expectation is that the transition needs of §504-eligible students are met as adequately as the transition needs of nondisabled peers. So, to the extent that the public school provides services to assist students in identifying career paths, finding and securing scholarships, applying for colleges and universities, etc., students eligible under §504 will have equal opportunity to access and benefit from those services. This requirement is highlighted by a regulation addressing career path counseling, prohibiting counselors from counseling disabled students to "more restrictive career objectives that nondisabled students with similar interests and abilities." §104.37(b).

Some common sense thoughts on transition. In the absence of specific requirements, and assuming that the school has satisfied the nondiscrimination duty as briefly articulated above, what else should a school be considering? The §504 rules change dramatically as the student moves to college (summarized above). The student moves from a somewhat sheltered environment where the adults have the duty to identify, assess and serve him to a harsher adult world where he must demonstrate to the satisfaction of the institution that he is disabled (the child "finds" himself and provides his own assessment), and must negotiate the services he needs (with or without help from the institution as disability services and support vary dramatically). That said, the efforts of K-12 schools to teach self-advocacy skills through the §504 process can be extremely helpful. For example, the §504 Committee must include a person with knowledge of the child. This requirement can certainly be met, as appropriate, with the attendance of the child. Not only will the student have the opportunity to speak on his or her own behalf to explain the impact of the impairment or preferences for a particular accommodation to assist current FAPE efforts, the skills learned through participation in the meeting

can assist the student's self-advocacy efforts later. The Committee might also consider having the student talk with one of his or her teachers following a §504 meeting to explain the disability and any changes to the required accommodations. Of course, the school's efforts to encourage and teach students self-advocacy cannot transfer the school's responsibility to provide FAPE to the student. The school remains responsible for the creation of an appropriate §504 plan and for its implementation.

What about the students going on to the workplace rather than college? While the materials have focused on the college-bound student, the nondiscrimination rules described (and transition steps urged above) apply with equal force to the student with vocational aspirations as well. To the extent that the school offers school-work programs, vocational classes, and other assistance to students to help them enter the work force after high school, 504 students should receive equal access to those activities. Similarly, efforts at self-advocacy will be beneficial to the student who must explain his disability to a boss, just as the skill is helpful when addressing a professor.

So, what happens when the student straddles the two sets of regulations? Dual Enrollment in High School and College: What's the duty to accommodate and *Who's* duty is it? The change in Section 504 protections from K-12 to college complicates an increasingly common dynamic: students in high school dually enrolled in college. These students have not yet graduated from K-12 but are working on credits for graduation while simultaneously taking classes at the college or university for credit there as well. The result is a student who seems to be working under both sets of regulations. If he has an IEP or a 504 Plan from the high school, what effect does that have on the college? If the college refuses to accommodate him, does the student have to self-advocate, or does the high school have a duty since he has not yet graduated and is taking the college class for high school credit AND college credit? OCR has now provided some answers.

In *Johnston County (NC) Schools,* 116 LRP 26085 (OCR 2016), a high school student with a disability (the impairment was not disclosed in the OCR letter) was dually enrolled in the school district and a local college through a district program. Despite receiving a 504 Plan addressing her needs in classes at the high school, the accommodations were not provided in her college classes. When she ran into trouble (hadn't turned in assignments since the semester began) her professor notified the school district. The district, via the 504 Coordinator, told the student to work with the instructors (the professor). "The Coordinator told the Student that 'the instructor emailing and providing support is a gift' because the College instructors are not obligated to work with students who are absent and not turning in assignments. She encouraged the Student to 'work with the instructor' since the instructor is working with her."

When OCR inquired as to the coordinator's interaction with college staff, the answer was rather unhelpful to the school's cause.

> "The Coordinator stated that she did not discuss the Student's performance with College staff because it was against College policy for her to discuss the Student with College instructors. She added that it was a privilege for the student to attend College courses, so it is her responsibility to contact College instructors for assistance with College courses. She provided that if the School's Section 504 team became aware of issues with College courses related to a student's disability, the student would be referred to the disability services coordinator at the College."

The problem was clearly confusion arising from the overlapping regulations, and the district's inability to see its overriding responsibility since it "owned" the dual enrollment program. Wrote OCR

> "The dual enrollment program in which the Student is enrolled is a program covered by Section 504. The School is run by the District, and all students are enrolled in the District. The District covers the tuition for the College courses, and the students receive high school credit for them. The College courses are therefore included within the District program, and the District has an

obligation to ensure that students with disabilities receive FAPE within their College courses. The District's policy of referring Students directly to the College for disability-related issues therefore violates Section 504 and Title II. The District must update its policy to treat these issues as they would any issues that arise within students' high school courses."

By way of resolution agreement, the school promised to "update its policy regarding how to address disability-related issues that arise in classes its students take at the College to comply with Section 504 and Title II." Further, "the District will convene a group or groups of persons knowledgeable about the Student, making all reasonable efforts to include the parent/guardian, to ensure that the Student's plan allows her to receive FAPE in all of her classes, including her classes at the College, and to determine whether the Student should receive compensatory and/or remedial services for the time period the Student may not have received appropriate regular and/or special education or related services."

A little commentary: Note that the easiest solution to this problem is available at the time the dual enrollment program is created. The school district must make clear that it has FAPE obligations that will extend into the classes provided by the college, and that FAPE obligation exceeds the 504/ADA obligation of the college or university due to the differences in regulations. If the college is unable or unwilling to implement the 504 plans (or IEPs for that matter) created by the district, the district will be unable to send its students on a dual enrollment basis. Since dual enrollment programs are a great way to get access to students early (and perhaps entice them to stay in the college or university after the student graduates from high school) there is a clear financial incentive for the college to make this work. The bottom line here is that the school district cannot contract away its duties to not discriminate, nor can it contract away the Section 504 FAPE obligation.

II. The role of doctor's diagnosis and medical data in eligibility and placement decisions

A. Determining the Weight of Data

The Section 504 Committee determines the weight to be given to outside evaluations including medical diagnoses, and all data that it reviews.

"Question 26. How should a recipient school district handle an outside independent evaluation? Do all data brought to a multi-disciplinary committee need to be considered and given equal weight? The results of an outside independent evaluation may be one of many sources to consider. Multi-disciplinary committees must draw from a variety of sources in the evaluation process so that the possibility of error is minimized. All significant factors related to the subject student's learning process must be considered. These sources and factors include aptitude and achievement tests, teacher recommendations, physical condition, social and cultural background, and adaptive behavior, among others. Information from all sources must be documented and considered by knowledgeable committee members. **The weight of the information is determined by the committee given the student's individual circumstances."** Revised Q&A (emphasis added).

Some things doctors say have more weight than others. *Marshall Joint School District #2 v. C.D.,* 54 IDELR 307, 616 F.3d 632 (7th Cir. 2010). A student with Ehlers-Danlos Syndrome, a genetic disorder that causes hypermobility, suffered from "poor upper body strength and poor postural and trunk stability." He had previously required adaptive P.E. due to these physical issues, but now only requires slight modifications for his medical and safety needs. As adaptive P.E. was the only special education required by the student, the school sought to dismiss him from special education since he no longer needed special education. The Administrative Law Judge (ALJ) ruled that the student could not be dismissed, relying in large part on evidence from the student's doctor that "the EDS causes him pain and fatigue and when he experiences that 'it can affect his educational performance.'" The 7th Circuit rejected the ALJ's finding with some excellent analysis.

> "Dr. Trapane was the main source of evidence cited for the proposition that the EDS adversely affects C.D.'s educational performance. And the sole basis of her information was C.D.'s mother. Dr. Trapane evaluated C.D. for 15 minutes; she did not do any testing or observation of C.D. and his educational performance. **In fact, 'Dr. Trapane admitted that she had no experience or training in special education and never observed C.D. in the classroom. Her only familiarity with the curriculum was with her own children.** Such a cursory and conclusory pronouncement does not constitute substantial evidence to support the ALJ's finding…. The cursory examination aside, Dr. Trapane is not a trained educational professional and had no knowledge of the subtle distinctions that affect classifications under the Act and warrant the designation of a child with a disability." (Emphasis added).

Further, the doctor's pronouncement indicated that the EDS *could* affect performance. Said the court, there was no substantial evidence that it actually *had* such an affect. **For evidence on the student's need for services, the court looked not to the doctor, but to the adaptive P.E. teacher who was "the one who could testify best concerning whether he needed special education to participate in the gym curriculum and meet the goal for children in his grade level."**

A little commentary: This case is best known for a couple of snippets of language you're likely to hear a lot at law conferences.

> "It was the team's position throughout these proceedings that physicians cannot simply prescribe special education for a student. Rather, that designation lies within the team's discretion, governed by applicable rules and regulations. We agree…. This brings us to a key point in this case: a physician's diagnosis and input on a child's medical condition is important and bears on the team's informed decision on a student's needs…. **But a physician cannot simply prescribe special education;** rather, the Act dictates a full review by an IEP team composed of parents, regular education teachers, special education teachers, and a representative of the local education agency[.]" (emphasis added).

B. Teams (IEP Teams or Section 504 Committees) Makes Placement Decisions.

While medical data can prove very helpful, the doctor does not order or prescribe educational placements. When the doctor makes a diagnosis or provides information to protect the student's health, the doctor is addressing issues within the doctor's knowledge and expertise. The school's obligation is to document and consider all sources of evaluation data. **Absent medical data to the contrary, the school cannot disregard the doctor's opinion, but that does not mean that everything the doctor orders is medical. For example, even in special education it's the IEP Team that places the student on homebound.** "It has long been the Department's position that when a child with a disability is classified as needing homebound instruction because of a medical problem, as ordered by a physician, and is home for an extended period of time (generally more than 10 consecutive school days), an individualized education program (IEP) meeting is necessary to change the child's placement and the contents of the child's IEP, **if warranted."** *Questions and Answers on Providing Services to Children with Disabilities During the H1N1 Outbreak,* 53 IDELR 269 (OSERS 2009)(emphasis added). Even if the doctor opines that homebound is required, the IEP Team has to make the educational placement decision that can differ from the doctor's preferred placement of the child (note the "if warranted" language from OSERS). A couple of cases emphasize the educational vs. medical distinction.

***Why* doctors don't make the placement decision….** For example, not knowing the educational options and resources available to the school, **the doctor may simply think that homebound is the only possible solution.** A case from Texas provides insight into the analysis that goes into educational placement decisions, and why these decisions are made by an IEP team.

> "Dr. [ ] is unfamiliar with the criteria for educational placements; educational programs, including special education; or state or federal criteria for determining the need for homebound placement. Dr. [ ] is unfamiliar with the term 'IEP' and does not know the difference between homeschooling and homebound placement. Dr. [ ] has never visited Student's home or school, or talked to anyone from Student's school. Dr. [ ] was unaware that Student's parent had refused to provide Student's school with her consent for the school to speak with Dr. [ ] about his treatment of Student. Dr. [ ] has provided no information to Student's school that could be confused as a medical and/or professional opinion in support of an eligibility determination of OHI, based on allergies or multi-chemical sensitivity…. The standards for homebound placement do not exist in a vacuum, nor is it left up to the generalized opinion of a physician who is unfamiliar with the written State standards." *Plano Indep. Sch. Dist.,* 62 IDELR 159 (SEA TX 2013).

See also, Brevard County Sch. Bd., 109 LRP 56512 (SEA FL 08/12/09)(With respect to a doctor's opinion on the issue of returning a medically fragile student with autism from homebound to a small classroom in his neighborhood school, the hearing officer wrote, "Petitioner's physicians are not experts on education generally or ESE in particular. Given the nature of their pediatric practices, their counsel on Petitioner's physical capacity to attend public school should be taken into consideration, but only in light of their very limited understanding of what the public school was offering in this instance.").

C. Is medical data or a diagnosis required for Section 504?

No medical diagnosis is required for §504 eligibility. "Section 504 does not require that a school district conduct a medical assessment of a student who has or is suspected of having ADHD unless the district determines it is necessary in order to determine if the student has a disability." *Williamson County (TN) School District,* 32 IDELR 261 (OCR 2000). **In fact, the regulations do not require medical evaluations for any disability to qualify under §504.**

So what's the rule? The §504 regulations require no medical diagnosis for eligibility. The school may conduct the §504 evaluation without a medical diagnosis if it believes it has other effective methods of determining the existence of a physical or mental impairment. **What are "other effective methods"?** Remember that the §504 Committee is not asked to "diagnose" impairments, but to identify impairments so that the Committee may meet the needs of the child arising from the impairment. Committees accomplish this by a combination of methods such as student observations, behavior checklists, screening instruments, test scores, grade reports, and review of other available data to (1) identify the impairment and (2) screen out nondisability causes for the student's struggles.

OCR's 2016 ADHD Resource Guide reaffirms this position.

> "Note, there is nothing in Section 504 that requires a medical assessment as a precondition to the school district's *determination* that the student has a disability and requires special education or related aids and services due to his or her disability. (In fact, as mentioned earlier, the *determination* of whether an individual has a disability need not demand extensive analysis.)" *Students with ADHD and Section 504: A Resource Guide,* 68 IDELR 52 (July 2016)(p. 23)(emphasis added).

A little commentary: A piece of very old 504 mythology is that the 504 Committee cannot identify an impairment without a doctor's help—that to do so means that the Committee is medically diagnosing the impairment. Note OCR's consistent use of the "determine/determination" to describe the 504 Committee's decision on the impairment. OCR recognizes that the Committee is authorized by federal law to make this decision, even in the absence of a medical diagnosis (if the Committee believes it has appropriate grounds to do so). That committee decision is not a diagnosis. It is an educational determination. On the other hand, should the school desire a medical diagnosis, it must secure one at no cost to parent.

What if the school thinks it needs medical data? Then it should get the medical data. *Bethlehem (NY) Central School District,* 52 IDELR 169 (OCR 2009). A student allergic to peanuts, dairy, egg, kiwi, and crab wanted to participate in the school's culinary arts program. The student's allergist opined that the student could safely participate as long as he wore gloves while handling the peanuts and did not ingest any of the foods to which he is allergic. **Despite that information, the school was concerned about the student's safety in the class, and staff "concluded that they required additional information about the extent and nature of the student's allergies."** To that end, they requested that the parents obtain a letter from the allergist with respect to the student's participation in the culinary class. A letter was provided, but did not allay the school's concerns with respect to "airborne allergens, accidental ingestion, food fights, etc." **The parent signed a release to allow the school to talk with the allergist who was on vacation when the district attempted contact.** "School staff acknowledged that they made no subsequent efforts to obtain the additional information." The student was denied enrollment in the class. OCR found a violation as the school did not convene a Section 504 Committee to make these determinations and did not identify the student as a student with a disability. Further, the school denied him enrollment because the school believed it did not have adequate medical information to determine if the student could participate safely. **"District staff members acknowledged that they could have sought additional information from the Student's allergist prior to excluding the Student from the Course for school year 2008-2009, but they did not do so."**

A little commentary: It's fairly simple: if the Committee thinks that it needs medical data in order to make an eligibility or placement decision, it has to get the data to make the decision. The school, not the parent, has the duty to evaluate.

If the school can't get the medical data it needs, what happens to the evaluation? The evaluation should still proceed to an eligibility determination on the basis of the data available to the Committee. OCR has found no violation where a district refused to base eligibility on the parents' assurances that a student suffered from multiple chemical sensitivity (MCS). *Montgomery County (MD) Pub. Schools,* 31 IDELR 84 (OCR 1999). The parent provided the district with medical documentation of the condition (we're not told what was provided), but the district was either skeptical or did not have enough information to make the eligibility determination. The district sought to get its own medical evaluation of the child, but the parent refused, arguing that the district's evaluation would not be administered by competent personnel. The district completed the evaluation by reviewing the data it had, but never formally identified the student as MCS. **OCR found no §504 violation** for the failure to identify the student as having MCS, since **"the student's parent refused to authorize the district to secure an independent evaluation** of the student concerning his suspected MCS" and the district "had insufficient evaluative materials to make an informed placement decision as required by Section 504." While not explicitly stated in the decision, at issue could be the requirement to not base eligibility upon a single source of evaluation data (here, the parent's assurances). §104.35(c)(1) & Appendix A, p. 430.

D. Why not just ask the parents to pay for a medical evaluation?

Because that's a violation. Note the additional concern raised by OCR in its 2016 AHDD Resource Guide with respect to a parent offer to secure evaluation data for the school. When the "parent volunteers to pay for a private assessment, the district must make it clear that the parent has a choice and can choose to accept a school-furnished assessment. Compliance problems could arise when school districts and parents do not communicate clearly on this requirement." *(ADHD Resource Guide, p. 23).* OCR's concern is that schools not delegate evaluation costs and burdens to parents. *See, for example, Santa Rosa County (FL) School District,* 110 LRP 48657 (OCR 2009). Despite evidence that the student had an impairment affecting his educational performance (teacher emails indicate that this student's was "the worst case of ADD" they had seen) and a Connor's rating scale showed the student's

inattention fell in the "very significant" range on all three scales, the school placed the burden on the student's parents to follow-up with their physician. "OCR still finds that the School's policy of requiring a parent to arrange and pay for a physician's evaluation for children with ADD and ADHD is inconsistent with Section 504." As part of the corrective action steps, the District agreed to revise its procedures "to ensure that *any medical evaluation or other assessment deemed necessary by the District for purposes of determining eligibility under Section 504 will be provided at no cost to parents." (Emphasis added).*

III. Disability, Medication, and Enlistment in the U.S. Armed Forces.

The following section is provided in response to frequent questions from parents and educators regarding the impact of disability, medication, Section 504 eligibility, and services on enlistment into the U.S. Armed Forces. While the author claims no particular expertise in matters of military procedure or regulation, the author has endeavored to at least provide a snapshot of the rules and guidelines applicable to the questions. For purposes of these materials, the phrase "armed forces" will apply collectively to the U.S. Army, Navy, Air Force, Marine Corp and Coast Guard.

While one might hope for simple, concrete answers, what exists is far more complex. Consider this quote from CHADD, the advocacy organization for individuals with ADD.

> **"Finding accurate information about whether or not individuals with ADHD can serve in the military is a challenge.** CHADD and the NRC often receive questions from parents or teenagers who want to know whether a diagnosis of ADHD or taking medication to treat ADHD disqualifies someone from entering the military service. This challenge is compounded by the fact that military recruiters who have monthly recruitment quotas they must meet, often give incomplete, contradictory, or inaccurate information. **So, the simple answer to this question is ... maybe."**

http://www.chadd.org/Understanding-ADHD/For-Adults/Workplace-Issues/ADHD-and-the-Military.aspx (emphasis added).

A. Do either Section 504 or the Americans with Disabilities Act (ADA) apply to enlistment and service in the armed forces?

For ADA purposes, the federal government and its subsidiaries are not public entities subject to the ADA's general nondiscrimination requirements (42 U.S.C. 12131), nor is the federal government subject to the nondiscrimination provisions applicable to employment (42 U.S.C. 12111(5)(B)(i)). Section 504 *appears* to adopt a similar posture with respect to the armed forces. *See, 29 U.S.C. §791(f)*("The standards used to determine whether this section has been violated in a complaint alleging nonaffirmative action employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq.) and the provisions of sections 501 through 504, and 510,[1] of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201–12204 and 12210), as such sections relate to employment.") The lack of references to ADA/504 in the various regulations and instructions cited in these materials is consistent with this conclusion.

A little commentary: Even in the absence of exclusion from these statutes, the armed forces would seem to be able to apply screening criteria for enlistment to avoid conditions that would endanger the health or safety of the applicant or other soldiers *(see following discussion on rationale for medical standards).*

B. Why are medical standards required for military service?

In *DoD Instruction #6130.03, April 2010,* amended September 13, 2011, the Department of Defense provided the following explanation. The medical standards "ensure that individuals under consideration for appointment, enlistment, or induction into the Military Services are:

(1) Free of contagious diseases that probably will endanger the health of other personnel.
(2) Free of medical conditions or physical defects that may require excessive time lost from duty for necessary treatment or hospitalization, or probably will result in separation from the Service for medical unfitness.
(3) Medically capable of satisfactorily completing required training.
(4) Medically adaptable to the military environment without the necessity of geographical area limitations.
(5) Medically capable of performing duties without aggravation of existing physical defects or medical conditions."

To ensure appropriate physical condition for service, the armed forces will carefully review each applicant, pursuant to 10 U.S.C. §532, IMPROVEMENTS IN MEDICAL PRESCREENING OF APPLICANTS FOR MILITARY SERVICE."

"(a) In General.—The Secretary of Defense shall improve the medical prescreening of applicants for entrance into the Army, Navy, Air Force, or Marine Corps.
(b) Specific Steps.—As part of those improvements, the Secretary shall take the following steps
(1) Require that **each applicant for service in the Army, Navy, Air Force, or Marine Corps**
(A) provide to the Secretary the name of the applicant's medical insurer and the names of past medical providers, and
(B) sign a release allowing the Secretary to request and obtain medical records of the applicant.
(2) Require that the forms and procedures for medical prescreening of applicants that are used by recruiters and by Military Entrance Processing Commands be revised so as to ensure that medical questions are specific, unambiguous, and tied directly to the types of medical separations most common for recruits during basic training and follow-on training.
(3) **Add medical screening tests to the examinations of recruits carried out by Military Entrance Processing Stations, provide more thorough medical examinations to selected groups of applicants, or both, to the extent that the Secretary determines that to do so could be cost effective in reducing attrition at basic training.**
(4) Provide for an annual quality control assessment of the effectiveness of the Military Entrance Processing Commands in identifying medical conditions in recruits that existed before enlistment in the Armed Forces, each such assessment to be performed by an agency or contractor other than the Military Entrance Processing Commands." (Emphasis added).

C. The role of Military Entrance Processing Stations (MEPS). MEPS provide a variety of screening services for applicants to the armed services, including the Medical Qualification Program and administration of the Armed Forces Vocational Aptitude Battery (ASVAB) described below.

"The Medical Qualification Program consists of performing medical services including performing medical prescreening; performing medical examinations which consist of medical history interviews, physical screening examinations, medical tests, specimen collections, determining whether medical processing is warranted, determining additional medical information and consultative services required; and determining medical qualification. Medical qualification decisions include determining if an applicant does or does not meet Department of Defense (DoD) accession medical standards and when requested by the Services and approved by USMEPCOM, Service specific medical standards. USMEPCOM designated physicians are the DoD

medical authority for applicants processing with USMEPCOM for determining if an applicant medically meets the requirements of Title 10 to be qualified, effective, and able-bodied prior to enlistment." *USMEPCOM Regulation 40-1 (Medical Qualification Program), July 23, 2017, p. 1 (emphasis added).*

What physical or mental conditions exclude an individual from military service? "Unless otherwise stipulated, the conditions listed in this enclosure are those that do NOT meet the standard by virtue of current diagnosis, or for which the candidate has a verified past medical history." *DoD Instruction #6130.03 (September 13, 2011), enclosure 4, p. 10.* **What follows is a forty-plus page list of physical and mental impairments that cause an applicant to not meet the medical standard.** The list is quite comprehensive. The listing for ADHD is provided below by example. Note that an applicant with ADHD will NOT meet the medical standard unless the exceptions apply.

"29. LEARNING, PSYCHIATRIC, AND BEHAVIORAL

a. Attention Deficit Hyperactivity Disorder (ADHD) (314) UNLESS the following criteria are met:

(1) The applicant has not required an Individualized Education Program or work accommodations since the age of 14.

(2) There is no history of comorbid mental disorders.

(3) The applicant has never taken more than a single daily dosage of medication or has not been prescribed medication for this condition for more than 24 cumulative months after the age of 14.

(4) During periods off of medication after the age of 14, the applicant has been able to maintain at least a 2.0 grade point average without accommodations.

(5) Documentation from the applicant's prescribing provider that continued medication is not required for acceptable occupational or work performance.

(6) Applicant is required to enter service and pass Service-specific training periods with no prescribed medication for ADHD."

In other words, if all of the criteria are not met, the applicant with ADHD will not meet the standard. But it's not that simple, as explained by CHADDD above. In an online Air Force Q&A, the standard seems much more flexible.

"Is ADHD disqualifying to join the Air Force? If you have been diagnosed by a doctor as having ADD/ADHD, you must meet the following requirements in order to apply:

- Must have a current note from a primary care provider validating stable status of condition with summary of diagnosis, history of treatment and ruling out any residual of ADD/ADHD
- Must be off medication for a minimum of two years
- Show evidence of successful academic and work endeavors while off medication
- Show evidence that assignments or tests were not taken with classroom aids such as private study area, special tutors or additional time for completion"

https://www.airforce.com/frequently-asked-questions/medical/is-adhd-disqualifying-to-join-the-airforce?gclid=CjwKCAjwj8bPBRBiEiwASlFLFX8vuCRw0rWSF6iXMluLWIy7FO9GKwS0E4N6pZWnS6tPW8cPlrEdRoChtgQAvD_BwE&gclsrc=aw.ds&dclid=CJjnorPjj9cCFYvFwAodMsoIUw

What about ADHD and the other branches? When ADHD is entered into a search box on the **Marines recruiting website,** search responses are preceded by the following text in a bordered box: "Some medical waivers are possible. A Marine Corps Recruiter or Officer Selection Officer is the best person for you to talk to about your eligibility and opportunities with the Marine Corps." https://www.marines.com/search.html?q=adhd On the **Army recruitment site,** no results to the ADHD query were returned on the official site. However, in the "ask a soldier" feature, 1,270 ADHD enlistment questions and answers appeared. The **Navy** recruitment site returned 0 page results for "ADHD." The **Coast Guard** site offered no results, and suggested that ADHD was a misspelling.

ADHD was just an example. The list of disqualifying impairments is forty-plus pages long. By way of additional example, consider the following *summary* list of impairments that preclude attendance at one of the armed forces academies. The Coast Guard includes this list of common medical disqualifications on the DoDMERB (Department of Defense Medical Examination Review Board) Medical Exam.

> "The following are some common medical disqualifications for the DoDMERB Medical Exam. THIS LIST IS NOT ALL INCLUSIVE. The only sure way to determine your medical fitness is to apply to the Academy and take a medical exam. We cannot make medical assessments over the phone or via email.
>
> **Color Vision:** Color perception deficiency, either complete or partial. Candidates who fail the American Optical Company PIP test shall be considered qualified if they pass the FALANT test.
>
> **Dental:** History of TMJ. Candidates must have sufficient teeth, natural or artificial, in functional occlusion to ensure satisfactory incision and mastication. Five or more teeth with multi-surface caries must be corrected prior to arrival. Current orthodontic appliances for continued treatment are disqualifying. Retainer appliances are permissible, provided all active orthodontic treatment has been satisfactorily completed.
>
> **Ears and Hearing:** Moderate hearing loss in the 500 to 4000Hz frequencies. History of middle ear surgery. Abnormalities of the external ear. Use of hearing aids. Perforated eardrum within 120 days of physical exam.
>
> **Endocrine System and Metabolism:** History of goiter (persistent) hyperthyroidism, thyroiditis, hyperparathyroidism, hypoparathyroidism, or diabetes mellitus.
>
> **Extremities:** All anomalies in the number, the form, the proportion and the movements of the extremities that produce noticeable deformity or interfere with function. Torn cartilage, unstable ACL or PCL, or surgical correction of any ligaments if unstable or symptomatic. Chronic knee pain syndrome. Flatfoot when accompanied by symptoms. Use of rigid, prescribed orthotics. Any surgical procedure on any joint during the past six months.
>
> **Eyes and Vision:** Uncorrected visual acuity worse than 20/400 in either eye. Vision not correctable to 20/20 in either eye. Refractive error exceeding plus or minus 8.00 diopters (spherical equivalent). Astigmatism exceeding 3.00 diopters and anisometropia exceeding 3.5 diopters. Refractive error corrected by orthokeratology, kerato-refractive, PRK, laser, or any other corneal enhancement.
>
> **Genitourinary System:** Horseshoe kidney or absence of one kidney. Atrophy or absence of both testicles. Undescended testicle. Active or difficult to treat genital herpes (even if asymptomatic). Bilateral kidney stones or single kidney stone with one year of the exam.
>
> **Head, Scalp, Face and Neck:** Abnormalities which interfere with wearing military equipment or are disfiguring.
>
> **Heart and Vascular System:** History of hypertension. Valvular, septal, congenital or other defects.
>
> **Lungs and Chest:** History of pneumothorax within the past year if due to simple trauma or surgery, or a history within the past three years if spontaneous. Asthma, including reactive airway disease, exercise-induced bronchospasm or asthmatic bronchitis, reliably diagnosed and symptomatic after the 13th birthday is disqualifying. Reliable diagnostic criteria may include any of the following elements: Substantiated history of cough, wheeze, chest tightness and/or shortness of breath, which persists or recurs over a prolonged period of time, generally more than 12 months.

Nervous System: Diagnosed seizure disorder since the age of five. Medications to control epilepsy within five years of the examination. Any chronic pain syndrome. Any history of recurrent headaches or frequent or severe headaches within the past three years.

Nose and Sinuses: Malformations or deformities that interfere with speech or breathing. Chronic rhinitis or sinusitis inadequately controlled, any history of anaphylaxis to stinging insects, or systemic allergic reactions to food or food additives.

Psychiatric and Personality Disorders: Psychotic episodes. Character and behavior disorders. History of depression requiring meds, outpatient treatment or hospitalization. Bedwetting/sleepwalking/eating disorders past the age of 12. Attention deficit, hyperactivity disorder or learning disability such as dyslexia, which interferes with perceptual or academic skills past the age of 12. Use of medications to reduce symptoms of ADD or ADHD within the previous 12 months.

Skin: Eczema or atopic dermatitis after the age of 8. Contact dermatitis or allergy to rubber. History of psoriasis. Current diseases of sebaceous glands to include severe acne, if extensive involvement of the neck, shoulders, chest or back is present or shall be aggravated by or interfere with the proper wearing of military equipment are disqualifying. Applicants under treatment with systemic retinoids, including, but not limited to isotretinoin (Accutane(r)), are disqualified until 8 weeks after completion.

Spine and other Musculoskeletal: Scoliosis, kyphosis, or lordosis likely to impair normal function. Herniated disc or history of operation for this condition. History of chronic or recurrent low back pain. Fusion of the spine. " http://www.cga.edu/admissions2.aspx?id=83

Any other requirements that could prevent enlistment of a disabled applicant?

(1) Enlistment typically requires a high school diploma, GED or other high school equivalency measure. If the rejection of 504 or IDEA services has resulted in the student's failure to graduate, he or she may be no better off for enlistment purposes. Further, note that age 14 appears to be a cut-off point after which continued medication or assistance/accommodations are problematic to the military. Services and medication prior to that time appear more easily waived.

(2) The Armed Forces Vocational Aptitude Battery (ASVAB)—appears to be normed, timed and not accommodated. "The ASVAB consists of ten short tests to complete during three hours…. [It covers] general science, arithmetic reasoning, word knowledge, paragraph comprehension, numerical operations, coding speed, auto and shop information, mathematics knowledge, mechanical comprehension and electronics information…. While there is no 'failing' the ASVAB, you will need to score at least a 31 on the exam to be considered for enlistment in the Army." https://www.goarmy.com/learn/understanding-the-asvab.html

A little commentary: Since the applicant is expected to take the test without accommodations, reading disorders, anxiety disorders and attentional disorders would seem likely to impact scores and the resulting types of careers for which the applicant might be eligible.

(3) Patterns of impulsive behavior. Part of the required interview at MEPS is used to verify medical and behavioral history. Where an applicant with ADHD has received passing grades and has graduated without medication or certain services since age 14, there is still a potential complication from habitual impulsive behavior. Consider this language from *USMEPCOM Regulation 40-1 (Medical Qualification Program), July 23, 2017, p. 54.*

> **"Minor legal issues do not need to be recorded unless there is a pattern of behavior that is deemed significant to the behavioral health screen.** Providers do not need to document medically innocuous traffic tickets, etc. **The tickets only become medically significant if there is a pattern of**

impulsive behavior that clinically would result in a conclusion that the applicant is not fit for service based on a behavioral health issue. MEPS medical providers will document arrest information only to the extent that there is medical applicability in determining whether or not an applicant does or does not meet accession standards and thus is or is not medically qualified to serve." (Emphasis added).

Medical Waiver Recommendations. Perhaps the most mysterious part of the process of gauging impact of disability on enlistment is the medical waiver. MEPS provides the necessary framework.

"(1) Factors to consider in making a medical waiver recommendation:
(a) Is the condition progressive?
(b) Is the condition subject to aggravation by military service?
(c) Will the condition preclude satisfactory completion of training and subsequent military duty?
(d) Will the condition constitute an undue hazard to the applicant or to others?
(2) If the MEPS physical is expired, all medical waivers are also expired.
(3) Medical waivers granted by one Service are not valid for another Service.
(4) MEPS providers do not have medical waiver authority for any condition." *Id., p. 68-69.*

A little commentary: The failure to meet standard does not end the eligibility inquiry. Each branch of the armed services has a mechanism whereby waivers can be requested—waivers are provided by the branches, not by MEPS. Note further that the waiver issued by one branch is not necessarily valid elsewhere. Based on the recruiting area and the needs of a particular branch of the services, waivers may be more readily available at one time or another. That's exactly the problem cited by CHADD: **the various branches may expand or contract their use of waivers depending on their recruitment needs without any notice to applicants. For the student with disability hoping to enlist, the prospect requires planning as well as a certain element of luck in one's timing.**

The Big Question: Since the armed forces are examining not only the applicant's medical records but examining the applicant himself, is the finding of eligibility by a 504 Committee exposing anything that won't be apparent through the service's application process? Put differently, if parents refuse 504 eligibility and services because of a disability, does the refusal have any apparent benefit in the enlistment process? Unfortunately, there is no way of knowing at the time that services for the K-12 student are contemplated whether there will be impact later should the student attempt to enlist. Since the military's medical rules are subject to waiver and change over time, parents are perhaps best advised to contemplate the impact of their eligibility and services decision in the short term where the impact is subject to analysis, as well as the long-term where some speculation is required. Will the loss of services or the absence of medication harm the student educationally, deny her skills and abilities, or contribute to a pattern of behaviors that will be problematic later? Since the future is unknown, this is clearly a decision that the parents must make. **Schools should encourage parents and students interested in the armed services to work closely with recruiters to get specific answers for their student's particular situation, recognizing that even the best laid plans may not result in the student's acceptance into the armed forces after high school.**

IV. The Supreme Court rules on *Fry v. Napoleon:* Exhaustion of IDEA Administrative Remedies & the Continuing Confusion over the IDEA-Section 504/ADA relationship.

Section 504/ADA protections extend to IDEA students because of the high hurdle for IDEA eligibility and the lower hurdle (relatively speaking) for Section 504/ADA. According to ED, students determined to be IDEA-eligible are also eligible under §504. "In order to be eligible for services under the IDEA, a child must be found to have one or more of the 13 disability categories specified *and* must also be found to need special education. OCR can not conceive of any situation in which these children would not also be entitled to the protections extended by Section 504." *Letter to Mentink,* 19 IDELR 1127 (OCR 1993).

A. IDEA rights and Section 504/ADA rights for the IDEA-eligible student.

By its own language, the IDEA provides that special education eligibility does not foreclose other rights the student may have under Section 504 or the ADA.

> "Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990, title V of the Rehabilitation Act of 1973, or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (f) and (g) shall be exhausted to the same extent as would be required had the action been brought under this subchapter." 20 U.S.C. §1415(l).

What rights (and limitations) do Section 504 and the ADA add to the mix? OCR provides a nice summary of the applicable rights as follows in response to a complaint in California. *Lodi (CA) Unified Sch. Dist.,* 116 LRP 21759 (OCR 2015) (emphasis added).

> **Prohibition on exclusion from participation and denial of benefit.** "Under the Section 504 regulations … no qualified individual with a disability shall, on the basis of disability, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives Federal financial assistance."
>
> **Equally effective aids, benefits and services.** "The Title II regulations … create the same prohibition against disability-based discrimination by public entities …. A recipient public school district may not, directly or through contractual, licensing, or other arrangements, on the basis of disability, provide a qualified disabled individual with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others.
>
> Under both the Section 504 regulations … and the Title II regulations … school districts, in providing any aid, benefit or service, may not deny a qualified person with a disability an opportunity to participate, afford a qualified person with a disability an opportunity to participate in or benefit from an aid, benefit or service that is not equal to that afforded to others, or provide a qualified person with a disability with an aid, benefit or service that is not as effective as that provided to others."
>
> **Reasonable modifications in policy, practice, and procedure.** "In addition, the Title II regulations … require public entities to make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability **unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity."** (Emphasis added).
>
> **Title II Fundamental Alteration & Undue Burden.** "Whether or not a particular modification or service would fundamentally alter the program or constitute an undue burden is determined on a case-by-case basis. **While cost may be considered, the fact that providing a service to a disabled individual would result in additional cost does not of itself constitute an undue burden on the program."** (Emphasis added).

B. An IDEA IEP AND a Section 504 plan for the IDEA-eligible student?

The fact that a student is eligible for Section 504 protections as well as IDEA protections does not mean that he can be served by a Section 504 plan, since that Section 504 plan is neither created nor maintained through the more stringent procedural protections of the IDEA. A school attempting to comply with its IDEA duties to a child by offering a §504 plan denies the IDEA-eligible student the procedural protections due under the IDEA. OCR's online Q&A addresses the issue quite simply.

"If a student is eligible for services under both the IDEA and Section 504, must a school district develop both an individualized education program (IEP) under the IDEA and a Section 504 plan under Section 504? No. If a student is eligible under IDEA, he or she must have an IEP. Under the Section 504 regulations, one way to meet Section 504 requirements for a free appropriate public education is to implement an IEP." Revised Q&A, Question 36.

In other words, a Section 504 plan will not satisfy the school's duty to serve an IDEA-eligible student due an IEP. The IDEA student receives an IEP and is also entitled to the nondiscrimination protections of Section 504 and the ADA.

C. What about additional aids and services under ADA/504 for the IDEA student?

When a student has a FAPE already developed by way of an IEP, what happens when the parent wants more services or aids and looks to 504/the ADA? The author will address the question first in the context of nondiscrimination generally, and then with respect to specific ADA/504 provisions.

1. Once IDEA FAPE is provided via IEP, is there anything left for §504 and the ADA to do? Given the substantial obligations placed on schools with respect to IDEA-eligible students, it's easy to think that there is nothing left for other laws to provide in terms of protections or services for a special education student's disability-related needs. An examination of the extent of the IDEA's IEP protections is required as the basis of this determination. The IDEA statute provides:

"(i) In general The term 'individualized education program' or 'IEP' means a written statement for each child with a disability that is developed, reviewed, and revised in accordance with this section and that includes—

(I) a statement of the child's present levels of academic achievement and functional performance, including—

(aa) how the child's disability affects the child's involvement and progress in the general education curriculum;

(bb) for preschool children, as appropriate, how the disability affects the child's participation in appropriate activities; and

(cc) for children with disabilities who take alternate assessments aligned to alternate achievement standards, a description of benchmarks or short-term objectives;

(II) a statement of measurable annual goals, including academic and functional goals, designed to—

(aa) meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; and

(bb) meet each of the child's other educational needs that result from the child's disability;

(III) a description of how the child's progress toward meeting the annual goals described in subclause (II) will be measured and when periodic reports on the progress the child is making toward meeting the annual goals (such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards) will be provided;

(IV) a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel **that will be provided for the child—**

(aa) to advance appropriately toward attaining the annual goals;

(bb) **to be involved in and make progress in the general education curriculum** in accordance with subclause (I) **and to participate in extracurricular and other nonacademic activities;** and

(cc) **to be educated and participate with other children with disabilities and nondisabled children in the activities described in this subparagraph;**

(V) an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and in the activities described in subclause (IV)(cc);"

20 U.S.C. §1414(d)(1)(A)(i) (Emphasis added). The section continues beyond the quoted language to address access and participation in the state assessment, logistical specifics for the services and accommodations provided, and transition services.

A little commentary: Note that the required IEP elements contain a number of nondiscrimination and equal access-like provisions (highlighted in bold), from curricular access to participation in extracurricular and nonacademic activities. If the IEP is appropriate, note that some non-discrimination and equal access has already been addressed by the IDEA. Note further that the meaningful benefit/educational benefit standard focuses on the student with disability and her potential rather than on a comparison to nondisabled peers.

2. The impact of IDEA FAPE on Section 504 obligations. Interestingly, unlike the IDEA FAPE with its focus on meaningful or educational benefit, the 504 FAPE is an expression of nondiscrimination — a comparison to how well the school meets the educational needs of the average nondisabled student. The Section 504 regulations provide the following "functional approach" to describing an appropriate Section 504 plan or the Section 504 FAPE.

> "For the purpose of this subpart, the provision of an appropriate education is the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of Sec. 104.34, 104.35, and 104.36." 34 CFR §104.33(b).

A little commentary: To most informed observers, a special education FAPE is far more valuable and results in far more intensive and individualized services (and a far more valuable set of procedural protections for those services) than what is provided to the average nondisabled student to meet his educational needs. In short, services provided via the IDEA FAPE surpass in quality and impact those necessary to meet the educational needs of nondisabled students and, thus, surpass that required by simple nondiscrimination protection under 504.

ED on the overlap of rights. In the context of a somewhat different problem, ED had the chance to explain once and for all how it sees the rights of kids to 504 services when an IEP has been offered but rejected. The question would look something like this: What happens when parents who revoke consent for special education services demand pieces or all of the student's now-rejected IEP delivered by way of a Section 504 plan? The answer is uncertain. When asked, ED said (in the commentary to the December 2008 regulations implementing the revocation of consent rules) **"these final regulations implement provisions of the IDEA only. They do not attempt to address any overlap between the protections and requirements of the IDEA, and those of Section 504 and the ADA."** 73 FEDERAL REGISTER, No. 231, December 1, 2008, p. 73,013. In the absence of a direct answer from ED, two schools of thought have developed on the issue.

> **If IDEA FAPE is rejected, 504 FAPE is required.** One school of thought is that a student leaving special education due to revocation of consent should be referred and evaluated under §504, since students with disabilities that are not IDEA-eligible may nevertheless have eligibility under §504. "In order to be eligible for services under the IDEA, a child must be found to have one or more of the 13 disability categories specified *and* must also be found to need special education. OCR can not conceive of any situation in which these children would not also be entitled to the protections extended by Section 504." *Letter to Mentink,* 19 IDELR 1127 (OCR 1993). This position is roughly that underlying the *Kimble* decision in Colorado, requiring the 504 committee to offer FAPE under 504 even when the parent had already rejected the offer of a FAPE under the IDEA via an IEP. *Kimble v. Douglas County Sch. Dist.,* 60 IDELR 221 (D. Colo. 2013). Another approach makes more sense, especially in light of the 504 regulations.

The much maligned but really logical *Letter to McKethan.* The other school of thought is that rejection of FAPE under the IDEA is tantamount to rejection of FAPE under §504 and, thus, schools would have no FAPE obligations under §504 to children whose parents revoked consent to IDEA services, but the student would continue to receive 504's nondiscrimination protection. *See, e.g., Letter to McKethan*, 25 IDELR 295, 296 (OCR 1996) (When parents reject the IEP developed under the IDEA, they "would essentially be rejecting what would be offered under Section 504. The parent could not compel the district to develop an IEP under Section 504 as that effectively happened when the school followed IDEA requirements."). For purposes of overlap discussion, that would seem to indicate that an IEP satisfies the school's Section 504 obligation to meet the educational needs of the student with disabilities as adequately as it meets the educational needs of nondisabled students. That position is plainly spelled out in the 504 regulations at 34 C.F.R. §104.33(b)(2): **"Implementation of an Individualized Education Program developed in accordance with the Education of the Handicapped Act is one means of meeting the standard established in paragraph (b)(1)(i) of this section [the Section 504 FAPE]."** (Bracketed material added by the author).

A little commentary: So what is left for 504/ADA to add to IDEA? The author's suggestion here is not that §504 and the ADA are completely satisfied when the IEP is appropriate, but that §504 and the ADA will have a very limited role in such a situation since all the student's educational needs are deemed to have been met by the offered IEP per the regulation. **Unless specific ADA or §504 regulations provide something beyond that available under the IDEA (think effective communication or service animal regulations under ADA), the range of services or accommodations available under 504/the ADA to a student with an appropriate IEP would seem rather narrow.**

D. A service animal and potential conflict with the IDEA IEP. *E.F. v. Napoleon Cmty. Schs.,* 62 IDELR 201 (E.D. Mich. 2014).

E.F. is an 8-year-old IDEA-eligible student, born with spastic quadriplegic cerebral palsy. Her pediatrician wrote a prescription for a service animal, as she requires physical assistance in daily activities. Her service animal is named "Wonder." **Wonder is a Goldendoodle, trained to retrieve dropped items, help her balance when using a walker, open/close doors, turn on/off lights, transfer to and from toilet, etc. Wonder also "enables [EF] to develop independence and confidence and helps her bridge social barriers."** Parents allege that Wonder is specially trained and certified, although Department of Justice service animal regulations do not require formal training or certification for service animals. Both before and after a trial period during which Wonder performed without any apparent problem, the school refused to allow Wonder to attend school with the student.

What is exhaustion and why does it matter? The parents sued, alleging violations of Section 504, the ADA, and a Michigan civil rights law protecting people with disabilities. They sought a declaratory judgment, monetary damages, and attorneys' fees. Defendants argued that the parents failed to exhaust their administrative remedies by not first filing for IDEA due process with the Michigan ED. **"States are given the power to place themselves in compliance with the law, and the incentive to develop a regular system for fairly resolving conflicts under the [IDEA]. Federal courts — generalists with no experience in the educational needs of handicapped students — are given the benefit of expert fact-finding by a state agency devoted to this very purpose."**

But the parents didn't argue that the school failed to provide FAPE under the IDEA. Instead, they argued that the school failed to meets its ADA/Section 504 burden to accommodate a student

with a disability in a place of public accommodation (the school). The court looked past the parent's legal position, to the implications of the parents' demand on the student's IEP.

> "The Court concludes that IDEA's exhaustion requirement was triggered here. **Despite the light in which Plaintiffs cast their position, the Court fails to see how Wonder's presence would not — at least partially — implicate issues relating to EF's IEP ….** It appears conceivable that E.F.'s IEP would undergo some modification, for example, to accommodate the 'concerns of allergic students and teachers and to diminish the distractions [Wonder's] presence would engender.' Moreover, having Wonder accompany EF to recess, lunch, the computer lab and the library would likewise require changes to the IEP. Again, by way of example, the IEP would need to include plans for handling Wonder on the playground or in the lunchroom. Defendants (i.e., the school and school district) would also have to make certain practical arrangements — such as developing a plan for Wonder's care, including supervision, feeding, and toileting — so that the school continued to maintain functionality. All of these things undoubtedly implicate EF's IEP and would be best dealt with through the administrative process." (Emphasis added).

The school's motion to dismiss for failure to exhaust administrative remedies was granted.

A little commentary: While the court understands the potential for conflict with the IEP, the examples cited seem extremely generic — applicable to any student with an IEP. **The author wonders what goals and objectives were in place for the student with respect to independent living, mobility, self-care etc., and how Wonder's service to the child would interfere with the student making progress on those goals.** It does not appear that the district raised the issue or argued any such conflict, leaving the court to speculate. A similar dynamic is sometimes created where the student is not allowed to use skills learned at school. *See, for example, Montgomery County Pub. Schs.,* 23 IDELR 852 (SEA MD 1996) ("The evidence is strongly suggestive that the young adult-soon-to-be in this case may be engaging (not unexpectedly) in a form of 'learned helplessness' while in the home. Skills or behaviors that he independently performs at school or in the work setting are apparently being provided by [ ] in the home. Such actions on the part of the mother or other family members only serve to exacerbate dependencies and prolong the road to independence.").

The 6th Circuit affirmed the *Napoleon* decision. *Fry v. Napoleon Cmty. Schs.,* 65 IDELR 221 (6th Cir. 2015), *cert. granted*, 116 LRP 27666, 136 S. Ct. 2540 (2016). The 6th Circuit agreed with the District Court approach on exhaustion. The rationale embraced by the court is that regardless of the parents' argument that IDEA FAPE was not at issue, their insistence that the service animal be allowed at school evidences their belief that the school's services are inadequate and, thus, an inference of denial of FAPE is inherent in the demand.

> "The exhaustion requirement applies to the Frys' suit because the suit turns on the same questions that would have determined the outcome of IDEA procedures, had they been used to resolve the dispute. **The Frys allege in effect that E.F.'s school's decision regarding whether her service animal would be permitted at school denied her a free appropriate public education.** In particular, they allege explicitly that the school hindered E.F. from learning how to work independently with Wonder, and implicitly that Wonder's absence hurt her sense of independence and social confidence at school. The suit depends on factual questions that the IDEA requires IEP team members and other participants in IDEA procedures to consider. This is thus the sort of dispute Congress, in enacting the IDEA, decided was best addressed at the first instance by local experts, educators, and parents …
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> **The primary harms of not permitting Wonder to attend school with E.F. — inhibiting the development of E.F.'s bond with the dog and, perhaps, hurting her confidence and social experience at school — fall under the scope of factors considered under IDEA procedures.** Developing a bond with Wonder that allows E.F. to function more independently outside the classroom is an educational goal, just as learning to read braille or learning to operate an automated

wheelchair would be. The goal falls squarely under the IDEA's purpose of 'ensur[ing] that children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living.' 20 U.S.C. § 1400(d)(1)(A). **Thus developing a working relationship with a service dog should have been one of the 'educational needs that result from the child's disability' used to set goals in E.F.'s IEP.** *Id.* § 1414(d)(1)(A)(i)(II). 'Educational needs' is not limited to learning within a standard curriculum; the statute instructs the IEP team to take into account E.F.'s 'academic, developmental, and functional needs,' which means that the IEP should include what a student actually needs to learn in order to function effectively. *Id.* § 1414(d)(3)(A). 'A request for a service dog to be permitted to escort a disabled student at school as an "independent life tool" is hence not entirely beyond the bounds of the IDEA's educational scheme.' *Cave v. E. Meadow Union Free Sch. Dist.,* 514 F.3d 240, 248 (2d Cir. 2008). The Frys' stated argument for why E.F. needed Wonder at school would have provided justification under the IDEA for allowing Wonder to accompany E.F."

A little commentary: The dissent took aim at the speculative nature of the court's concerns. How could the court determine, for example, that the IEP was implicated? "The Frys' complaint was dismissed on the pleadings before any discovery could occur. Moreover, in terms of a school-age child, virtually any aspect of growth and development could be said to 'partially implicate' issues relating to education. If flimsy, however, the district court's 'implication' analysis was at least a test. On appeal, the majority offers no useful yardstick at all." In the author's opinion, the majority's recognition of the potential for conflict with the IEP is appropriate (see previous commentary), but so is the dissent's concern with the overbroad result. In the author's mind, the question to be asked here should be "does this service animal interfere with the provision of FAPE for this student?" — a fact question that should be answered in the first instance by the student's IEP team.

The Supreme Court reversed and remanded *Fry v. Napoleon.* *Fry v. Napoleon Community Schools,* 137 S.Ct. 743, 69 IDELR 116 (2017). At the Supreme Court, the focus was on the rights of IDEA students under Section 504/ADA and whether those rights can be pursued without first going through IDEA due process. The case focuses on the impact of the language added to IDEA in 2004 (previously provided on the bottom of page 1). The IDEA language does two things.

"The first half… reaffirm[s] the viability of federal statutes like the ADA or Rehabilitation Act 'as separate vehicles,' no less integral than the IDEA, 'for ensuring the rights of handicapped children.' According to that opening phrase, the IDEA does not prevent a plaintiff from asserting claims under such laws even if, as in *Smith* itself, those claims allege the denial of an appropriate public education (much as an IDEA claim would). But the second half of § 1415(l) …imposes a limit on that 'anything goes' regime, in the form of an exhaustion provision. **According to that closing phrase, a plaintiff bringing suit under the ADA, the Rehabilitation Act, or similar laws must in certain circumstances–that is, when 'seeking relief that is also available under' the IDEA–first exhaust the IDEA's administrative procedures. The reach of that requirement is the issue in this case." (Emphasis added).**

Both the district court and court of appeals struggled with the connection between the parents' concerns over access and socialization that were addressed by the service animal and the student's right to FAPE as an IDEA-eligible student. "Because the harms to E.F. were generally 'educational'—most notably, the court reasoned, because 'Wonder's absence hurt her sense of independence and social confidence at school'—the Frys had to exhaust the IDEA's procedures. Daughtrey dissented, emphasizing that in bringing their Title II and § 504 claims, the Frys 'did not allege the denial of a FAPE' or 'seek to modify [E.F.'s] IEP in any way.'"

A little commentary: While the court of appeals dissent indicates that the parents did not seek to modify the IEP in any way, there is no serious discussion of what the IEP included or the impact of the service animal on goals and objectives or overlapping services. Interestingly, the Supreme Court

includes this snippet. "Under E.F.'s existing IEP, a human aide provided E.F. with one-on-one support throughout the day; that two-legged assistance, the school officials thought, rendered Wonder superfluous. In the words of one administrator, Wonder should be barred from Ezra Eby because all of E.F.'s 'physical and academic needs [were] being met through the services/programs/accommodations' that the school had already agreed to." Put differently, if the equal access service animal goes to school, some IEP-required services are no longer required. More on this below.

The Supreme Court explains how exhaustion should work. Looking at the relief available under the IDEA, the Court noted "the primacy of a FAPE in the statutory scheme." That is, FAPE is central.

> **"The IDEA's administrative procedures test whether a school has met that obligation—and so center on the Act's FAPE requirement.** As noted earlier, any decision by a hearing officer on a request for substantive relief 'shall' be based on a determination of whether the child received a free appropriate public education…. **For that reason, § 1415(l)'s exhaustion rule hinges on whether a lawsuit seeks relief for the denial of a free appropriate public education.** If a lawsuit charges such a denial, the plaintiff cannot escape § 1415(l) merely by bringing her suit under a statute other than the IDEA—as when, for example, the plaintiffs in *Smith* claimed that a school's failure to provide a FAPE also violated the Rehabilitation Act." (Emphasis added).

The focus should not be on the words of the complaint (since artful pleading could simply omit references to FAPE or the IEP). Instead, the court would be looking at the crux or the gravamen of the complaint. The IDEA "requires exhaustion when the gravamen of a complaint seeks redress for a school's failure to provide a FAPE, even if not phrased or framed in precisely that way." **So how does one determine the gravamen of the complaint?** The Supreme Court provided the following test.

> "One clue to whether the gravamen of a complaint against a school concerns the denial of a FAPE, or instead addresses disability-based discrimination, can come from asking **a pair of hypothetical questions. First, could the plaintiff have brought essentially the same claim if the alleged conduct had occurred at a public facility that was not a school— say, a public theater or library? And second, could an adult at the school— say, an employee or visitor— have pressed essentially the same grievance?** When the answer to those questions is yes, a complaint that does not expressly allege the denial of a FAPE is also unlikely to be truly about that subject; after all, in those other situations there is no FAPE obligation and yet the same basic suit could go forward. But when the answer is no, then the complaint probably does concern a FAPE, even if it does not explicitly say so; for the FAPE requirement is all that explains why only a child in the school setting (not an adult in that setting or a child in some other) has a viable claim.
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> Take two contrasting examples. **Suppose first that a wheelchair-bound child sues his school for discrimination under Title II (again, without mentioning the denial of a FAPE) because the building lacks access ramps.** In some sense, that architectural feature has educational consequences, and a different lawsuit might have alleged that it violates the IDEA: After all, if the child cannot get inside the school, he cannot receive instruction there; and if he must be carried inside, he may not achieve the sense of independence conducive to academic (or later to real-world) success. But is the denial of a FAPE really the gravamen of the plaintiff's Title II complaint? Consider that the child could file the same basic complaint if a municipal library or theater had no ramps. And similarly, an employee or visitor could bring a mostly identical complaint against the school. That the claim can stay the same in those alternative scenarios suggests that its essence is equality of access to public facilities, not adequacy of special education. (describing OCR's use of a similar example). And so § 1415(l) does not require exhaustion.
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> **But suppose next that a student with a learning disability sues his school under Title II for failing to provide remedial tutoring in mathematics.** That suit, too, might be cast as one for disability-based discrimination, grounded on the school's refusal to make a reasonable

accommodation; the complaint might make no reference at all to a FAPE or an IEP. **But can anyone imagine the student making the same claim against a public theater or library? Or, similarly, imagine an adult visitor or employee suing the school to obtain a math tutorial?** The difficulty of transplanting the complaint to those other contexts suggests that its essence— even though not its wording— is the provision of a FAPE, thus bringing § 1415(l) into play.

A further sign that the gravamen of a suit is the denial of a FAPE can emerge from the history of the proceedings. **In particular, a court may consider that a plaintiff has previously invoked the IDEA's formal procedures to handle the dispute— thus starting to exhaust the Act's remedies before switching midstream.** Recall that a parent dissatisfied with her child's education initiates those administrative procedures by filing a complaint, which triggers a preliminary meeting (or possibly mediation) and then a due process hearing. A plaintiff's initial choice to pursue that process may suggest that she is indeed seeking relief for the denial of a FAPE— with the shift to judicial proceedings prior to full exhaustion reflecting only strategic calculations about how to maximize the prospects of such a remedy. Whether that is so depends on the facts; a court may conclude, for example, that the move to a courtroom came from a late-acquired awareness that the school had fulfilled its FAPE obligation and that the grievance involves something else entirely. **But prior pursuit of the IDEA's administrative remedies will often provide strong evidence that the substance of a plaintiff's claim concerns the denial of a FAPE, even if the complaint never explicitly uses that term." (Emphasis added).**

The judgment of the Court of Appeals is vacated and the case is remanded to apply the appropriate test for exhaustion.

A little commentary: While the Supreme Court focused on the central role of FAPE, it neglected the fact that it is the IEP that documents and implements that FAPE. The IEP is the delivery device for FAPE. That IEP includes not only FAPE but the nondiscrimination features of the IDEA with respect to supplementary aides and services to provide equal opportunity to participate in extracurricular and nonacademic activities, as well as the manifestation determination requirement (also arising from 504's nondiscrimination focus. Said the court: "A school's conduct toward such a child—say, some refusal to make an accommodation—might injure her in ways unrelated to a FAPE, which are addressed in statutes other than the IDEA. A complaint seeking redress for those other harms, independent of any FAPE denial, is not subject to § 1415(l)'s exhaustion rule because, once again, the only 'relief' the IDEA makes 'available' is relief for the denial of a FAPE."

Describing again the idea of the crux or gravamen of the complaint driving the exhaustion requirement, the Supreme Court seeks to distinguish the laws at issue.

"In addressing whether a complaint fits that description, a court should attend to the diverse means and ends of the statutes covering persons with disabilities—the IDEA on the one hand, the ADA and Rehabilitation Act (most notably) on the other. **The IDEA, of course, protects only 'children' (well, really, adolescents too) and concerns only their schooling.** And as earlier noted, the statute's goal is to provide each child with meaningful access to education by offering individualized instruction and related services appropriate to her 'unique needs.'

By contrast, Title II of the ADA and § 504 of the Rehabilitation Act cover people with disabilities of all ages, and do so both inside and outside schools. And those statutes aim to root out disability-based discrimination, enabling each covered person (sometimes by means of reasonable accommodations) to participate equally to all others in public facilities and federally funded programs.

In short, the IDEA guarantees individually tailored educational services, while Title II and § 504 promise nondiscriminatory access to public institutions. That is not to deny some overlap in coverage: The same conduct might violate all three statutes—which is why, as in *Smith,* a plaintiff

might seek relief for the denial of a FAPE under Title II and § 504 as well as the IDEA. But still, the statutory differences just discussed mean that a complaint brought under Title II and § 504 might instead seek relief for simple discrimination, irrespective of the IDEA's FAPE obligation." (Paragraph breaks added by the author for clarity, emphasis added).

Unfortunately, while accepting that the laws may overlap, the Supreme Court did not address the issue of a potential conflict between equal access rights and IDEA FAPE. Even on the scant facts of *Napoleon,* it was clear that the service animal would perform functions previously provided by the aide. If the service animal or equal access choice replaces an IEP service, doesn't that mean that the crux of the complaint is the parents' desire that FAPE needs to be provided in a different way, and that exhaustion should be required? Doesn't that mean that the IEP (the vehicle for implementation of the FAPE) is being re-written by the ADA/504 rights of the parents without the rest of the IEP Team?

An interesting concurrence by Justices Alito and Thomas points to the problems with the two-part test. First, the test only works if there is no overlap between the relief available under the IDEA and 504/ADA. Justice Alito writes that once the Court indicates that the same conduct might violate all three laws "And since these clues work only in the absence of overlap, I would not suggest them." Continued Justice Alito:

"The Court provides another false clue by suggesting that lower courts take into account whether parents, before filing suit under the ADA or the Rehabilitation Act, began to pursue but then abandoned the IDEA's formal procedures. This clue also seems to me to be ill-advised. It is easy to imagine circumstances under which parents might start down the IDEA road and then change course and file an action under the ADA or the Rehabilitation Act that seeks relief that the IDEA cannot provide. The parents might be advised by their attorney that the relief they were seeking under the IDEA is not available under that law but is available under another. Or the parents might change their minds about the relief that they want, give up on the relief that the IDEA can provide, and turn to another statute.

Although the Court provides these clues for the purpose of assisting the lower courts, I am afraid that they may have the opposite effect. They are likely to confuse and lead courts astray." The author agrees. Stay tuned….

