

Key Guidance in OCR's July 2016 Resource Guide on ADHD

by

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On July 26, 2016, the Office for Civil Rights (OCR) of the U.S. Department of Education issued a brief Dear Colleague Letter as a cover to a 35-page document entitled *Students with ADHD and Section 504: A Resource Guide* (noted below as “RG”). The resource guide is comprehensive of various positions taken by OCR in other Dear Colleague Letters, as well as in letters resulting from complaint investigations, together with some new positions on ADHD and Section 504. Although the document indicates it is “significant guidance,” it also states that it is “non-binding and does not create or impose new legal requirements.” Nevertheless, the substance of the document is likely to be used by OCR to determine if a school district has complied with §504 in complaint investigations and compliance reviews.

Summary of Section 504

The RG recites that §504 “prohibits discrimination on the basis of disability in programs or activities receiving Federal financial assistance, including school districts.” RG at p. 2. It restates the eligibility formulation of §504, which requires that a student have a physical or mental impairment that substantially limits a major life activity, have a record of an impairment, or be regarded as having such an impairment. A footnote clarifies that students that are “regarded as” being impaired are not entitled to FAPE under §504, but are protected by the nondiscrimination protections of the law.

Note— The footnote does not comment on students that have a *record* of an impairment, but do not currently have one. Prior guidance has generally indicated that such students are also not entitled to FAPE under §504, but are only protected by the nondiscrimination protections of the law. The likely reason for the omission is that under the ADAAA of 2008, students who had a condition that has now gone into remission must be treated, for eligibility purposes, as if the condition was in its full-blown active state.

But, one would think that such students would be only technically eligible, as their impairments are not present at this time, and would not be eligible for §504 services or FAPE.

Relevant Major Life Activities – The RG states that “some examples of a major life activity that could be substantially limited by ADHD include concentrating, reading, thinking, and functions of the brain.” RG at p. 2.

Note – The RG emphasizes that “it is important to remember that an impairment that substantially limits any major life activity, not just a major life activity related to learning or school, would be considered a disability under Section 504.” RG at p. 3. This correct position seeks to dispel the common misconception that students can only qualify under §504, or for §504 plans, if they have an impairment that impacts their academic function at school.

The RG recites that students with ADHD and a need for services are entitled to both a FAPE and the basic nondiscrimination protections of §504. As it has since the original promulgation of the §504 regulations, USDOE notes that providing an IEP developed and implemented in accordance with the IDEA is “one means of meeting the Section 504 FAPE standard.” RG at p. 3.

Note – Of course, it is not advisable to provide IDEA IEPs to students that qualify for §504 and not the IDEA, as IDEA eligibility would not be supported by the student’s evaluation data, and funding restrictions would prohibit non-IDEA students from accessing IDEA-funded services and settings. Moreover, the procedural safeguards and IEP process requirements of the IDEA far exceed those of §504.

Section 504’s “LRE” requirement – Although not using the terms least restrictive environment, the RG states that “Section 504 also requires that a student with a disability be educated with students without disabilities to the maximum extent appropriate to the needs of the student with the disability and that a student with a disability be educated in the regular education setting unless the district can demonstrate that the education of that student in the regular educational environment with the use of supplementary aids and services cannot be achieved satisfactorily.” RG at p. 4.

Note – Since §504 students may not access specialized classrooms that are funded through IDEA for special education students, the LRE issue does not present itself in many §504 FAPE situations. But, the requirement also applies in school-sponsored extracurricular activities, which must afford students with disabilities an equal opportunity to access the regular

extracurricular activities and non-academic services, instead of separate such activities for students with disabilities.

Section 504 Plans—Correctly, the RG states that the §504 regulations do not require elements of a student’s plan for FAPE under §504 to be reduced to a specific document. RG at p. 4. But, it notes that schools frequently do so, in documents commonly known as “Section 504 Plans.” The RG adds that “a Section 504 Plan often includes the regular or special education and related aids and services a student needs, and the appropriate setting in which the student should receive those services, also called the student’s ‘placement.’ A written plan is often a useful way to document that the school district engaged in a process to identify and address the needs of a student with disabilities and to communicate, to school personnel, the information needed for successful implementation. A Section 504 Plan for a student with ADHD, for example, could include behavioral interventions, assistance with organization, and additional time to complete assignments or tests.”

Note—With respect to §504 plans, the RG recommends that teachers and appropriate staff have access to the plans “so that the plan is implemented consistently.” “In OCR’s experience, the failure to ensure appropriate access to that plan or otherwise inform staff of their specific responsibilities under Section 504 for a particular student often results in a failure to provide FAPE and equal educational opportunity.”

Section 504 Committees or Teams—The RG recites the regulation, stating that “Section 504 also requires that any placement decisions about a student with a disability be made by a group that includes persons knowledgeable about the student, the meaning of the evaluation data, and placement options, and this group is often referred to as a ‘Section 504 team.’” RG at p. 4.

Note—A new wrinkle of the RG is OCR’s statement that it recommends that administrators attend §504 committee meetings. It states that “it is helpful if that group includes a school district or agency representative who can ensure the district provides, or is able to provide, all services that are identified as necessary. The absence of such a representative on the Section 504 team could result in a denial of FAPE if the Section 504 team determines certain services are necessary and the district is unable to provide them. Such a determination would depend on the particular facts and circumstances.” This guidance is in line with the IDEA regulation, which requires the attendance of an LEA representative in IEP team meetings, and that such person have knowledge of the resources available in the district and how to access resources. See 34 C.F.R. §300.321(a)(4).

Summary of ADA

The RG reminds readers that the ADAAA of 2008 expanded eligibility under the ADA and §504 by directing that the definition of disability “be construed broadly and that the determination of whether an individual has a disability not demand extensive analysis.” RG at p. 5.

OCR restates that the ADAAA expanded §504 and ADA eligibility by:

- expanding the list of examples of major life activities (adding concentrating, thinking, reading, and “functions of the brain”);
- requiring that mitigating measures (e.g., medications, coping strategies, “adaptive neurological modifications, etc.) not be considered in determining eligibility;

Note—The ADAAA also expands eligibility by its treatment of conditions that are episodic or in remission, since they must be considered, for purposes of eligibility, as if the condition were presently in its most full-blown active state. In addition, the ADAAA expressly indicates that its philosophy of eligibility is one of “maximum eligibility.” Also, the standard for substantial limitation is lowered, and is no longer akin to significant restriction.

Note—The RG cautions that determinations of eligibility of students with ADHD must be made without factoring in the beneficial impact of mitigating measures such as ADHD medications. “The impact, therefore, of a student’s ADHD on a given major life activity, such as concentrating or thinking, must be considered in the student’s unmitigated state to determine whether a substantial limitation exists. For example, if a student requires medication to address an impairment, the ameliorative effects of the medication cannot be considered when evaluating the student for a disability.” RG at p. 5.

Mitigating Measures under the ADAAA—Under the Amendments Act at §4(a) (at 42 U.S.C. § 12102), “the determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures such as—(I) medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies; (II) use of assistive technology; (III) reasonable accommodations

or auxiliary aids or services; or (IV) learned behavioral or adaptive neurological modifications.” *RG* at fn. 18.

ADHD under the IDEA

The *RG* reminds us that students with ADHD might qualify under the IDEA if they meet criteria applicable to one or more disability categories of IDEA and they need IDEA special education and related services because of their disability. *RG* at p. 7. It points out that students with ADHD might qualify under the Other Health Impairment (OHI) category, as it was specifically amended in 1999 to include ADHD as an example of a chronic health impairment that could form the basis for IDEA eligibility if all criteria are met. In addition, some students with ADHD could also be eligible under IDEA as LD or ED if they meet criteria for those categories under the federal regulations and state guidelines.

Note— The *RG* cautions that finding that a student with ADHD is not IDEA-eligible does not mean that the student is not obligated to evaluate the student under §504. “If a student is evaluated for the provision of services under the IDEA and is found ineligible because he or she does not need special education and related services because of the disability, the school district must still consider if the student could be covered by Section 504.” *RG* at p. 8. While OCR does not mandate that such a student be evaluated under §504 in all instances, it indicates that such a step would need to be considered. “This determination could require an evaluation under Section 504.”

Note on §504 evaluation after an IDEA evaluation— The *RG* clarifies that “in some circumstances, the IDEA evaluation process may provide the school district with the necessary information, required by Section 504, to determine whether or not a student has a disability, and whether that student needs related aids and services or supplementary aids and services in the regular education environment because of that disability.” *RG* at fn. 30.

Child-Find, Evaluation, and Placement under §504

Child-Find— Any student who needs or is believed to need §504 services must be “identified” by the school district for referral to §504 committee for evaluation. This is known as the child-find requirement of §504. *RG* at p. 9. The term and concept derive from the IDEA requirements, but are also discussed in the §504 regulations. *See* 34 C.F.R. §104.32, 20 U.S.C. §1412(a)(3), 34 C.F.R. §300.111.

Note—With respect to ADHD, the RG states that “if district staff perceive or receive information to lead them to suspect that a student has a disability—for example, that a student has ADHD and needs or is believed to need special education or related aids and services in addition to regular education—the school district must evaluate to determine if the impairment substantially limits that student in a major life activity. In the context of students with ADHD, it is important that school districts consider conducting an evaluation when students demonstrate to teachers or parents signs of needing special education or related aids and services to meet their individual educational needs as adequately as the needs of their nondisabled peers are met.” RG at p. 10.

Signs raising suspicion of ADHD—considerable and atypical restlessness or inattention, trouble organizing tasks and activities, communication or social deficits, excessive daydreaming, over-socializing, failure to follow through on instructions, missing details, difficulty processing, losing things, interrupting conversations, and a disproportionately high number of disciplinary referrals. RG at p. 11, fn. 41 (citing CDC’s *Facts About ADHD*).

Evaluation—An individual evaluation comporting with the requirements of 34 C.F.R. §104.35 (i.e., careful consideration of various sources of relevant data) must be conducted before any action involving the student’s initial placement in §504, as well as prior to subsequent significant changes in placement (e.g., such as manifestation determination reviews prior to disciplinary changes in placement for violations of a student code of conduct).

Placement—Here, the RG clarifies what has been known for a long time to §504 practitioners: the term “placement” under §504 means whatever §504 services, aids, or accommodations the student needs, as well as “the appropriate setting in which the student is to receive those services.” RG at p. 9. Thus, for example, if part of the student’s §504 plan calls for dyslexia intervention services in a dyslexia classroom or lab, those services and that setting would be noted in the §504 plan.

ADHD-Specific Issues in Evaluation and Placement

Types of ADHD—(1) predominantly inattentive, (2) predominantly hyperactive-impulsive, and (3) combined type. RG at p. 10, citing *CDC Facts on ADHD*.

Impact of ADHD—“Every type of ADHD affects the functioning of the parts of the brain related to thinking, concentrating, and planning. A determination that a student has any type of ADHD, therefore, is a determination that a student has an

impairment for purposes of meeting one of the prongs of Section 504’s definition of disability.” RG at p. 10.

Note—The RG also notes that ADHD may manifest in a need for “behavioral and executive function supports to improve focus and organizational skills,” but also in depressive symptoms. RG at p. 12.

High-Functioning Students with ADHD—The document underscores that “someone with ADHD may achieve a high level of academic success but may nevertheless be substantially limited in a major life activity due to his or her impairment because of the additional time or effort he or she must spend to read, write, or learn compared to others. In OCR’s investigative experience, school districts sometimes rely on a student’s average, or better-than-average, grade point average (GPA) and make inappropriate decisions.” RG at p. 12. Indeed, in passing the ADA, members of Congress emphasized that “it is critical to reject the assumption that an individual who has performed well academically cannot be substantially limited in activities such as learning, reading, writing, thinking, or speaking.” *Id.* Thus, it is important for §504 committees conducting evaluations and eligibility determinations to inquire as to “how difficult it is or how much time it takes for a student with ADHD, in comparison to a student without ADHD, to plan, begin, complete, and turn in an essay, term paper, homework assignment, or exam.” *Id.*

Inattentive Type ADHD—“The failure to evaluate under Section 504 may be particularly acute for students with the inattentive-type ADHD; such students are less likely to come to the attention of school district personnel because they are less likely to engage in impulsive or disruptive behavior. Nonetheless, their substantial functional limitations, including those pertaining to starting a task or organizing and recalling information, can present them with overwhelming challenges to learning.” RG at p. 13 (citing Arcia, E., Frank, R., Sánchez-LaCay, A., Fernández, M.C., *Teacher Understanding of ADHD As Reflected in Attributions and Classroom Strategies*, 4 J. ATTENTION DISORDERS 91, 98 (2000)). The Guide asserts that schools’ failure to evaluate students with inattentive ADHD does a disservice to teachers who are frustrated at not reaching a quiet and cooperative student, and to parents who have to compensate for the child’s problems by struggling with homework and assignments. “The fact that these students do not show the same impulsivity or overactivity as some other students with or without ADHD does not in any way diminish the substantial limitations that may warrant a Section 504 individual evaluation to address specific areas of educational need and any need for special education or related aids and services. Similarly, the ability of a student to hyper-focus on a particular

activity, such as a computer-based assignment, may not be sufficient to confirm that the student does not have ADHD and does not have needs associated with the disorder.” *Id.*

Squaring the child-find trigger with OCR’s guidance – An area of tension exists between the trigger for child-find, as stated in the Guide, and the guidance with respect to high-functioning students and those with difficult-to-identify inattentive type ADHD. A district’s child-find duty is triggered when there is suspicion of disability and need for §504 services. But for these students, neither the disability nor the need may be apparent. Certainly, for a child that is performing well at school, there would be no reason to suspect a need for services unless the parents report that the student is spending an atypical amount of time, and exerting unusual degrees of effort, on schoolwork. Similarly, for a reserved child that has inattentive type ADHD, their disability will not be apparent, particularly if their academic performance is acceptable. Aside from noting that these students exist, and may require evaluation and services, the Guide does not provide assistance with respect to how teachers should go about identifying their condition.

Role of ADHD Diagnosis – Here, the RG goes further than stating that a diagnosis of ADHD is evidence that the student may have an impairment. The RG then states that “OCR will presume, unless there is evidence to the contrary, that a student with a diagnosis of ADHD is substantially limited in one or more major life activities.” RG at p. 10. Thus, OCR presumes §504 eligibility once a diagnosis of ADHD exists – in essence, presuming that the diagnosis means the student in fact has the impairment, and if the impairment exists, that it will substantially limit either learning, thinking, concentrating, or functions of the brain, if not more. In a footnote, the RG points out that under the ADAAA, once an impairment is determined to exist, whether it rises to the level of a substantial limitation “should not demand extensive analysis as the law requires broad coverage.” RG at fn. 38.

Note – Crucially, on this point, OCR cites the National Institutes of Mental Health (NIMH), which has concluded that “Diagnosis of ADHD requires a comprehensive evaluation by a licensed clinician, such as a pediatrician, psychologist, or psychiatrist with expertise in ADHD.” NIMH publication, *Attention Deficit Hyperactivity Disorder* (Rev’d March 2016). Thus, the presumption is based on the existence of a diagnosis in turn based on a comprehensive evaluation, which one can assume means an evaluation considering various sources of information, across settings, and including ADHD rating scale assessments. The NIMH booklet on ADHD states to parents that “your child’s doctor may make a diagnosis. Or sometimes the doctor may refer you to a mental health specialist who is more experienced

with ADHD to make a diagnosis. There is no single test that can tell if your child has ADHD. To make a diagnosis, the doctor or specialist will examine your child and use several rating scales to track ADHD symptoms. The specialist will also collect information from you, your family, and your child's teachers." Thus, NIMH appears to require comprehensive and valid ADHD evaluations to include various sources of data, administration of ADHD rating scales, an in-person examination, and collection of input from parents, family, and teachers.

What if a private ADHD diagnosis does not meet the NIMH criteria?— Presumably, then the diagnosis would not be extended the presumption to which OCR refers in the RG, and the diagnosis could be questioned by a §504 committee evaluating the student for potential eligibility, if the committee's data from various sources does not corroborate the existence of ADHD.

Parent Requests for §504 Evaluation— The Guide reiterates that parents can request an evaluation of their child with respect to existing or suspected ADHD. If such a request is made, then the district must either conduct the evaluation "or explain its refusal to evaluate the student to the requesting parent and notify parents of their right to dispute that decision through the due process procedures that must be made available under Section 504's implementing regulation." RG at p. 14.

Note— Significantly, OCR here is engrafting a requirement akin to IDEA's requirement for prior written notice, as applied to denials of parent requests for §504 evaluation. See 34 C.F.R. §300.503 (IDEA prior written notice requirement regulation). In addition, OCR takes the position that in denial-of-evaluation situations, parents must be provided notice of procedural safeguards, which is a common-sense implication. The new aspect of this guidance is OCR's mandate to provide an explanation of the refusal to evaluate, as this is nowhere found in the §504 regulations, although it has been accepted as a best practice in the past. Schools should be aware that OCR now considers this step a requirement under §504 (although the Guide states it is not imposing new legal requirements in the preamble to the document).

Implications of Response-to-Intervention (RtI) Strategies and Programs

A significant concern of OCR, as reflected in various complaint investigations, is that RtI programs can be implemented in a way that denies or delays evaluations of students that are suspected of having disabilities that may qualify them under §504. See, e.g., *Polk County (FL) Pub Schs.*, 56 IDELR 179 (OCR 2010); *Broward Co. (FL) Sch. Dist.*, 59 IDELR 143 (OCR 2012); *Indian River County*

(FL) Sch. Dist., 11 LRP 70055 (OCR 2011); *Forest Hills (OH) Local Sch. Dist.*, 111 LRP 70117 (OCR 2011); *Bristol-Warren (RI) Regional Sch. Dist.*, 56 IDELR 303 (OCR 2010); *Harrison (CO) Sch. Dist. Two*, 57 IDELR 295 (OCR 2011). Thus, the Resource Guide spends three pages on this issue, alerting schools that while RtI programs can be beneficial, they should not be applied in a way that unduly denies or delays evaluations when the suspicion of disability and need for services exists.

When RtI goes awry—Thus, with respect to child-find requirements, OCR states that “school districts violate this Section 504 obligation when they deny or delay conducting an evaluation of a student when a disability, and the resulting need for special education or related services, is suspected.” *RG* at p. 15. But, possibly contrary to this duty, OCR reports that “as a first response to address the needs of any student experiencing challenges at school or in the classroom and prior to conducting an evaluation, many school districts choose to implement different intervention strategies, regardless of whether or not the student is suspected of having a disability.” *Id.* While OCR agrees that “interventions can be very effective and beneficial,” rigidity in implementing RtI can lead to problems with §504 child-find compliance. “If the district suspects that a student has a disability and because of the disability needs special education or related aids and services, it would be a violation of Section 504 to delay the evaluation in order to first implement an intervention that is unrelated to the evaluation, or to determining the need for special education or related aids and services.”

Note—The key point is that RtI interventions should not be applied or viewed as a “prerequisite” to §504 evaluations, or as a required step prior to deciding to evaluate a student under §504. OCR thus states that districts tend to run afoul of §504 child-find and evaluation requirements when they “rigidly insist” on implementing RtI before conducting §504 evaluations, when they inflexibly apply tiered intervention strategies sequentially before considering evaluation, and when they “categorically require that data from an intervention strategy must be collected and incorporated as a necessary element of an evaluation.” *RG* at p. 17.

The Relationship Between RtI and §504 Evaluations—Initially, OCR points out that RtI strategies *and* a §504 evaluation can occur simultaneously. “Implementing an intervention strategy and evaluating for a disability do not have to occur sequentially, but could be implemented at the same time, as parallel responses in an attempt to identify and address a student’s needs. Interventions could be implemented while a student is being evaluated, and information gathered during the intervention protocol could be useful in the evaluation process.” *RG* at p. 16. In fact, the intervention data could be part of the evaluation data reviewed by the §504 team. Thus, a footnote states that “the interventions also can be implemented as part of the school district’s overall preplacement evaluation of the student, so long as the interventions yield data that satisfy the Section 504 regulation concerning evaluation materials, and

do not delay the completion of the evaluation.” *RG* at fn. 55. If the child is determined to be eligible, and “if the Section 504 team believes an intervention strategy would be effective in addressing the student’s needs, then the district could consider including those interventions as part of the student’s Section 504 Plan.” *Id.*

Applying RtI Thinking—Using traditional RtI analysis, OCR states that “If a student continues to experience academic or behavioral problems, even after the implementation of intervention strategies, this may indicate that the student has a disability (substantial limitation of a major life activity) and that because of the disability he or she needs special education or related aids and services.” *RG* at p. 16. It also notes that time is of the essence on this point. “School districts are in a better position to comply with their Section 504 obligations if they consider this evidence within a reasonable period of time in determining whether a Section 504 evaluation could be necessary.” *Id.*

Intervention Strategies as Mitigating Measures—The RtI strategies and assistance provided to a student who is struggling is in fact a mitigating measure that has a beneficial impact that must be “subtracted” when determining if the child’s ADHD (or other condition) poses a substantial limitation on a major life activity. “This means, for example, that the school district cannot consider the ameliorative effects of any mitigating measures, for instance the ameliorative effects of the school district’s intervention strategies, such as improved grades resulting from peer-tutoring in math, in determining whether the student has a disability but could consider them in determining the individual educational needs.” *RG* at p. 17.

Note—At times, it has been proposed that one method to determine the student’s limitation without mitigating measures would be to withdraw the measures for a period of time to examine the student’s unmitigated condition. OCR disagrees, stating that “it should not be necessary to suspend mitigating measures (including any ameliorative intervention strategies) in order to evaluate what the condition of the student would be in his or her unmitigated state.” *RG* at fn. 57.

More on Evaluation and Placement under §504

At page 19, the Guide recites that the process for placement under §504 requires a two-step determination:

1. Does the student have a disability under §504 (i.e., physical or mental impairment that substantially limits one or more major life activities)?

2. If so, does the student need regular or special education under Section 504, related aids and services, or supplementary aids and services because of the disability, and in what setting should the student receive them?

Thus, the fact that a student qualifies under §504 does not mean that the student needs services under §504.

Range of Evaluation Data—The Guide states the various standard sources of data, including achievement tests, teacher recommendations, social background, adaptive behavior, and physical condition that are listed in 34 C.F.R. §104.35(c). In addition, “school districts could discover necessary and helpful information from the student, the student’s parents and caregivers, teachers, and other professionals, such as psychologists and physicians.” *RG* at p. 19. OCR cautions, however, that schools cannot demand that the parents provide anything to assist in the evaluation. “Although the district could request relevant information from parents, the district cannot require the parent to provide certain data or information before conducting an evaluation. It is the district’s obligation to evaluate; it cannot shift the burden of that cost or obligation onto the parent.” *Id.*

First Step: Determination of Disability—OCR reminds schools that, with respect to students with ADHD, major life activities such as thinking, reading, concentrating, or neurological or brain functions could be affected. *RG* at p. 20. “A student’s ability to learn may certainly be substantially limited by ADHD, but that is not the only way a student could be considered to have a disability and be eligible for services under Section 504. For example, one student with ADHD may be substantially limited in the ability to learn, but another student with ADHD may be substantially limited in the ability to concentrate.” *Id.*

Stereotypes and Generalizations—OCR reminds schools to not act on the basis of preconceptions about the nature of ADHD. Although ADHD occurs more often in boys, for example, schools should not disregard valid signs of ADHD in girls. Similarly, race-based preconceptions of prevalence of ADHD should not play a part in evaluation decision-making. “More importantly, in acting upon such assumptions, school districts put such students at risk of delayed referral for evaluation, which would violate Section 504.” *Id.*

“Subtracting” the Effect of Mitigating Measures—“When a school district suspects a student has ADHD and conducts an evaluation to determine disability, it must consider the student, in an unmitigated state, both in and out of school. A student might not exhibit serious academic or behavioral challenges at school—perhaps due to self-management skills, or medication of which the school district may or may not be aware, or the nature of the impairment—but, in other settings, or later in the day, the limitations

become more apparent and substantial.” *RG* at p. 21. Thus, the fact that a child can function at school when ADHD medication is administered does not mean they will not qualify under §504. To ascertain the condition’s impact on major life activities, the Guide indicates that schools could look at how the child functioned prior to medication being initiated, “or evidence concerning the expected course of a particular disorder absent mitigating measures. This is why it is also beneficial to involve the parent in the evaluation process, as parents would be an excellent resource to provide such evidence.” *Id.* Moreover, OCR notes that the fact that a child takes advantage of mitigating measures, such as breaking down study questions and segmenting research, actually could be an indication that the student may have a disability.

Non-beneficial effects of mitigating measures—Mitigating measures can come with negative attributes, such as medication side effects. OCR takes the position that the non-beneficial effects of mitigating measures can be considered in determining eligibility. *RG* at p. 21.

Mitigating Measures and Good Performance—Students who employ mitigating measures, such as taking advantage of informal accommodations or using an extraordinary amount of time and effort on work, might perform well academically as a result. But, OCR cautions that this does not mean the student does not qualify under §504. “School districts should not assume that a student’s academic success necessarily means that the student is not substantially limited in a major life activity and, therefore, is not a person with a disability. A student may receive good grades, but only as a result of having extra time on exams, or receiving help at home in completing assignments, or studying for extraordinarily long periods of time.” *RG* at p. 22.

Note—The Guide indicates that this concept is borrowed from the EEOC’s guidance with respect to persons with learning disabilities, but which applied with equal force to students with ADHD. *RG* at fn. 68, citing EEOC Interpretive Guidance and H.R. Rep. No. 110-730, p. 1, at 15 (2008).

Eligibility or Services?—It is clear that high-performing students who exert an unusual degree of extra effort may be substantially limited by their ADHD and thus qualify for §504 status. What is not so clear from this portion of the Guide is whether this type of student is expected to need §504 services, and not just the nondiscrimination protections of the law.

Technically-Eligible Students—Students who have ADHD that substantially

limits a major life activity, but who perform well with medication or another mitigating measure, will not need §504 services, and the school is not required to provide any. *RG* at p. 22. “But, the student is still a person with a disability (that is, still has an impairment that substantially limits a major life activity), and so is protected by Section 504’s general nondiscrimination prohibitions and Title II’s statutory and regulatory requirements.” *Id.* While these students may not need a §504 plan of services, accommodations, or aids, they are nevertheless entitled to the nondiscrimination protections of §504 and Title II of the ADA.

The Role of Medical Assessments—In some cases, OCR indicates that schools might consider paying for a medical assessment of the child’s suspected ADHD. The Guide states that “if a school district determines, based on the facts and circumstances of the individual case, that a medical assessment is necessary to conduct a Section 504 individual evaluation in order to determine whether a child suspected of having ADHD has a disability under Section 504 and, therefore, needs special education or related services, the school district must ensure that the student receives this assessment at no cost to the student’s parent.” *RG* at p. 23. Of course, parents can volunteer to pay for a private assessment, but schools must make clear that this is their choice and not a requirement, since “compliance problems could arise when school districts and parents do not communicate clearly on this requirement.” *Id.* The Guide also notes that Medicaid might pay for such assessments under its “Early Periodic Screening, Diagnostic and Treatment” (EPSDT) benefit. *RG* at fn. 73.

Note—OCR clarifies, however, that “there is nothing in Section 504 that requires a medical assessment as a precondition to the school’s determination that the student has a disability and requires special education or related aids and services due to his or her disability.” *RG* at p. 23. “A specific diagnosis is not actually necessary if the school determines a student is substantially limited in a major life activity and that limitation is caused by a mental or physical impairment.” *RG* at fn. 70.

Second Step: Determination of Need for Services—OCR notes that many of the same steps and tools used to determine if the student is §504-eligible also assist in determining whether they need §504 services. The decision, of course, is made by the §504 committee/team, and the services to be provided, if any, must be “tailored to the individual needs of the student.” *RG* at p. 25. “Not every student with ADHD needs the same set of services, or any services at all.” *Id.* On this point, OCR cautions that “School districts cannot simply group together a few aids and services and provide them in a blanket fashion to any student with ADHD.” *RG*

at p. 26. Whether the student uses mitigating measures can also help schools determine if the student needs services. “Furthermore, parents can be an important source of information to the school district about what techniques, interventions, services and supports would be most effective in meeting that student’s needs.” RG at p. 27.

Back to Technical Eligibility—OCR states that “if, as a result of a properly conducted evaluation, the school district determines that the student does not need special education or related services, the district is not required to provide them. Section 504 does not obligate a school district to provide special education or related aids or services that the student does not need. But the school district must still conduct an evaluation before making that determination. Further, that student is still a person with a disability, because the student has an impairment that substantially limits a major life activity, and so is protected by Section 504’s general nondiscrimination prohibitions (e.g., no retaliation, harassment, unlawful different treatment, etc.)” RG at p. 25.

Note—The listed nondiscrimination protections that residually remain for technically-eligible students are those against retaliation, harassment, unlawful different treatment. In addition, a footnote reminds schools of the obligation to make “reasonable modifications” to district policies and practices as necessary to avoid discrimination on the basis of disability. RG at fn. 76. It bears noting, however, that there is no mention of the manifestation determination protection for disciplinary changes in placement, or of reevaluations prior to changes in placement.

Medication Administration—“If, as a result of a properly conducted evaluation, the school district determines that the student needs a related aid or service, the school district must provide it.” RG at p. 26. Specifically, OCR mentions administration of ADHD medication as a potentially needed §504 service. That need alone could require a §504 services plan and consideration of parental input. “If medication prescribed by a doctor needs to be taken during the school day, and a student cannot self-administer the medication, the school district must provide medication administration assistance to the student, as a part of FAPE.” *Id.*

School Staff’s Misconceptions on Services—OCR points out that in its complaint investigations, it often finds that staff believed that service options for §504 students are limited to free or low-cost services. To the contrary, the Guide clarifies that “in making Section 504 FAPE determinations, the Section 504 team cannot limit its placement

recommendations to those related aids or services that are free or low-cost, and cannot exclude them just because of their expense (although, of course, if there are equally effective related aids and services, nothing in Section 504 precludes a school district from choosing the less costly alternative).” *RG* at p. 27. An eligible student is entitled to *any* services that the §504 committee/team decides are necessary for FAPE, regardless of cost and administrative burden, “and especially where such services have been provided to IDEA-eligible students in the past.”

Note—Certainly, however, the services required by §504 students who do not need IDEA special education and related services will not normally be as extensive as those needed by special education students eligible under the IDEA. Otherwise, they would be eligible under the IDEA. The example of a high-cost service—the provision of a full-time one-on-one nurse in the case of *Cedar Rapids Cmty. Sch. Dist. v. Garret F.*—involved an IDEA-eligible student, not a §504-only student. See *RG* at fn. 82. This section touches on a point that has simmered underneath the legal surface for some time: the Section 504 statutory provision does not expressly require any affirmative acts on the part of federal fund recipients. The FAPE requirement on schools to provide services under §504 is entirely a creation of the Department of Education’s implementing regulations. Whether those regulations go beyond the passive nondiscrimination requirement of the statute passed by Congress in 1973 is a legal issue not yet entertained by the federal courts.

Implementation of §504 Plans—OCR rightfully acknowledges the problem of failures to implement existing §504 plans, noting that many complaints it investigates are based on that problem. “OCR cannot overemphasize the importance of making sure that school district personnel understand their obligations to implement appropriate plans for students with disabilities once the plans have been developed.” *RG* at p. 28. The main problems appear to be that teachers are either unaware the plans even exist, or the plans are so vaguely worded that neither parents nor staff know precisely what the plan requires. At times, OCR finds that staff incorrectly believe that the accommodations and services in a plan are optional, unnecessary because the child is academically capable, or that students must request the services.

Procedural Safeguards

The Guide reminds schools that §504 requires a system of procedural safeguards that includes:

- Local grievance procedures
- Opportunity for an impartial due process hearing
- Notice of actions/refusals
- Notice of procedural safeguards
- Right to review their child's records
- Review procedure for hearing decisions

OCR clarifies that schools cannot satisfy the due process hearing requirement only with its grievance process, and cannot require parents to exhaust the grievance process prior to requesting a due process hearing. *RG* at p. 30. And, districts must ensure that they have properly identified a §504 Coordinator.

Notice of Refusal to Evaluate—In this section, OCR repeats its earlier position that “a school district that denies a parent’s request for a Section 504 evaluation of a student, regardless of the grounds for the denial, must inform the student’s parent of its decision and of the parent’s procedural safeguard rights, as set forth in the Section 504 regulations.” *RG* at p. 31.

Notice of Procedural Safeguards—The Guide states that notice issues come up in complaint investigations when districts publish notice of availability of due process procedures in handbooks and on websites, but do not specifically provide notice to parents “when an event occurs for which parents may wish to avail themselves of the due process procedure.” *RG* at p. 31. “For example, if a parent requests that a school district evaluate her son for disability because she suspects he has ADHD, and the school district refuses to evaluate, the school district must ensure that the parent is aware of her due process right to appeal that district’s refusal.” *Id.*

Due Process Hearings—The assigned hearing officer must be impartial, and cannot be an employee of the district. *RG* at 31. The school can use the state’s IDEA hearing procedure if the state allows IDEA hearing officers to hear complaints from §504-only students based on §504 requirements. “Regardless of the system used, it is the responsibility of each school district to ensure that an impartial due process hearing is promptly available when requested by a parent.” *Id.*