The “New” Section 504

Due to Section 504’s broader definition of “disability” than that in the Individuals with Disabilities Education Act (IDEA), school personnel often view Section 504 as a consolation prize for students not eligible under IDEA. They also often perceive Section 504 as “IDEA light” in terms of its requirements. Finally, they generally agree that it is a responsibility of general, rather than special, education.

During the past two decades, the courts have interpreted student eligibility under Section 504 rather narrowly. However, the Americans with Disabilities Act Amendments (ADAA) reversed this trend with new, broader eligibility standards that went into effect Jan. 1, 2009. Before and after these amendments, the courts have not been entirely clear or consistent regarding the substantive and procedural requirements of Section 504 for eligible students. The following case and the accompanying discussion illustrate these legal developments and their practical implications for principals.

The Case
Matthew was a student in the Centennial School District in eastern Pennsylvania. His parents provided the district with a medical diagnosis of attention-deficit hyperactivity disorder (ADHD), which also showed that he was regularly taking prescribed medication for this condition. Matthew, his family, and school personnel noted that the medication resulted in notable academic improvement.

In February 2006, the district conducted an evaluation of Matthew and determined that he was not eligible under IDEA. In May 2007, Matthew caused a bomb scare by writing a threatening message on a school bathroom wall. The principal immediately suspended him from school after providing the applicable procedural due process for regular education students. Soon thereafter, the principal met with Matthew and his parents, as required under state law, explaining that the school board would be holding an expulsion hearing for this serious violation of the student conduct code.

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At the meeting, the parents sought a manifestation determination (i.e., a meeting to determine whether Matthew’s bomb threat was a manifestation of his alleged disability) under IDEA or, alternatively, under Section 504.

Instead, the school district conducted a second evaluation, which confirmed the original IDEA noneligibility decision. Prior to the expulsion hearing, Matthew’s parents enrolled him in a private school and the school district issued the expulsion decision after providing the required hearing.

If the school had fulfilled the parents’ request for a manifestation determination, would Matthew have likely been found eligible under Section 504 at the time (2006-2007)?

Both Section 504 and the Americans with Disabilities Act define disability for the purposes of educational services and accommodations as having three essential elements: (a) a physical or mental impairment that (b) substantially limits (c) a major life activity.

If Matthew was not eligible under IDEA based on lack of the adverse effect of ADHD on his educational performance to the extent of needing special education, his pre-ADAA eligibility under Section 504 was unlikely. The reasons are that under the courts’ narrow interpretations that contributed to the passage of the amendments, any other learning-specific major life activity would have to be similarly global and central to daily living, and substantial limitation would be determined with mitigating measures such as medication. Thus, in short, if Matthew’s ADHD, with medication, did not impact his educational performance to require special education, how could it limit learning substantially?

Would Matthew have been eligible under Section 504 after the ADAA went into effect?

After the ADAA, Matthew’s odds of eligibility under Section 504 increased in two significant ways. First, the amendments require determining substantial limitation without medication or a whole host of other specified mitigating measures, including any “reasonable accommodations” the district had been providing in regular education. Second, the ADAA expanded the specified list of major life activities to include reading, thinking, communicating, eating, sleeping, bodily functions, and—most relevant for ADHD—concentrating.

If Matthew’s case had arisen after the ADAA, what claims would the parents have made for relief under Section 504?

Based on their much stronger odds of showing that the district had reason to suspect eligibility under Section 504, they presumably could have claimed a violation of “child find” because the district had not conducted an evaluation for Section 504 eligibility. On this basis, they could have sought not only compensatory education services (perhaps even tuition reimbursement), but also procedural protections from the expulsion. However, if Matthew was eligible under Section 504, the Office for Civil Rights has long required a manifestation determination (as well as an evaluation) upon a significant change in educational placement such
as an expulsion. Finally, they could have sought money damages under Section 504, a remedy not generally available under IDEA. In most jurisdictions, however, the courts require bad faith or deliberate indifference as a prerequisite for compensatory damages under Section 504.

Would Matthew’s parents have a claim against the private school if it subsequently failed to provide him with educational accommodations? If the private school participated in any federally funded activities, such as the E-Rate Program or the National School Lunch Program, or if more than a negligible number of its students received Title I or IDEA services, Section 504 would apply. But the obligation would be for “minor adjustments,” not reasonable accommodations. However, if the private school is not religiously controlled, the Americans with Disabilities Act would apply, and the standard would be reasonable modifications. Thus, the parents might have a claim against the private school.

For public schools, what are other major implications of the ADAA for students not eligible under IDEA? First, regarding eligibility, the major consideration would be for students with various health issues that do not impact learning to the extent of requiring special education services. The leading examples are students with diabetes and food allergies, in light of eating being a major life activity and substantial limitation determined without the mitigation of medication. However, a variety of other health conditions, including but not limited to asthma, Crohn’s disease, colitis, sleep disorders, and eating disorders, now merit more frequent and careful consideration as a result of the expanded list of major life activities and the new, more liberal standards for determining substantial limitation. The school nurse, thus, becomes a key member of the Section 504 team.

Second, for the consequent entitlement of these newly eligible students, the issues of whether 504 plans are required in every case and what the substantive scope and standard are for the contents of these plans—particularly in light of the economically tight times and the lack of federal or state funding under Section 504—are open issues that the ADAA indirectly raises and does not in any way settle. Courts largely but not uniformly use “reasonable accommodation” as the measuring stick for the substance of a school district’s obligation to Section 504 students. Although the Office for Civil Rights asserts that the substantive standard is meeting the eligible student’s needs as adequately as the district meets the needs of nondisabled students (i.e., commensurate opportunity), the agency’s enforcement efforts focus on procedural compliance.

For example, in R.K. v. Board of Education of Scott County (2010), the court upheld, as a reasonable accommodation, the district’s offer to provide insulin pump monitoring in another school to a kindergarten child with Type I diabetes, rejecting the parent’s Section 504 claim that the neighborhood school must provide nursing services to the child. Yet, in a cluster of recent rulings after complaint investigations after the ADAA (e.g., Tyler Independent School District, 2010), the Office for Civil Rights has found districts in violation of Section 504 for failing to provide an evaluation for possible eligibility under the Section 504 definition of disability and a notice of the procedural safeguards, such as the right to an impartial hearing, to students under individual health plans. For example, in Tyler a fourth grader with diabetes had an individual health plan that the school nurse had developed. The parent requested a 504 plan instead. After conducting an investigation, the Office for Civil Rights found insufficient evidence for the parent’s complaint that the district’s evaluation, which found the student eligible under Section 504, was not timely. However, the Office for Civil Rights found that the district’s practice of not providing a Section 504 eligibility evaluation for any of the various other children on individual health plans “circumvent[ed] the procedural safeguards set forth in Section 504.”

Conclusion
School principals need to take a leadership role in the building-level implementation of Section 504 for students not eligible under IDEA. Leaving such matters to the district special education director or an unsuspecting staff member, such as the new guidance counselor, is not generally the way to go, especially given the new ballgame as a result of the ADAA. Here are four key suggestions:

Make sure that you have readily available (a) a grievance procedure for disability-related complaints from parents, students, employees, and others; (b) a procedural safeguards notice that includes provision for an impartial hearing; and (c) a designated coordinator for Section 504/Americans with Disabilities Act who has the authority and training to implement the student-specific as well as other requirements of Section 504 and the Americans with Disabilities Act.

Revise your student eligibility form and process under Section 504 to be in accordance with the new standards of the ADAA.

Arrange for professional development training for your staff, including close coordination with the central administration and school nurse, including not only the eligibility standards, but also the requirements for 504 plans, discipline, services/accommodations, and accessibility.

Provide special consideration, in collaboration with the district’s special education director, for emerging issues of litigation under Section 504 (e.g., retaliation, peer harassment, and service animals) as well as coordinated compliance in relation to the Office for Civil Rights.

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