TOUGH ELIGIBILITY DECISIONS

(1) Drug and Alcohol Dependency

Current drug abusers are excluded from the definition of an individual with a disability under Section 504. *OCR Staff Memo, 16 EHLR 609*

Local educational agencies may take disciplinary action pertaining to the use or possession of illegal drugs or alcohol against any student with a disability who is currently engaging in the illegal use of drugs to the same extent that such disciplinary action is taken against non-disabled students.
Letter to Zirkel, 22 IDELR 609

In 1990 Congress amended Section 504 and gave directions on drug and alcohol addiction and eligibility for Section 504 accommodations.

* A person who is currently using illegal drugs does not qualify under Section 504.
* General consensus is that a student who has been diagnosed as an addict, is currently using alcohol but is not violating the school code regarding drugs and alcohol, may be eligible for Section 504 protection.
* It is generally accepted that nicotine addiction does not qualify a person for Section 504 protection.

(2) ADD/ADHD

The Office for Civil Rights has made it clear that Attention Deficit Disorder and Attention Deficit Hyperactivity Disorder are disabilities to be considered under both IDEA and Section 504. *Joint Policy Memorandum, 18 IDELR 116.* Even so, that condition must cause either an adverse affect upon educational performance under IDEA, or a substantial limitation upon a major life activity under Section 504, in order for the particular student to be eligible for any services under either law. The decision regarding adverse affect is made by the ARC; the decision regarding substantial limitation is made by the school 504 team. (Reference the discussion in (5) below.)

(3) Other Health Needs

A number of health needs that may not "adversely affect educational performance" (IDEA) may be found to meet eligibility criteria ("substantially limits a major life activity, health issues, e.g., breathing") under Section 504. Examples are:

(a) insulin-dependent diabetic whose blood sugar level had to be monitored
(b) chronic asthma
(c) severe allergies requiring prescription medication
(d) temporary disability which caused absences beyond district health policy
(e) arthritis; epilepsy
(f) HIV/ AIDS

TOUGH ELIGIBILITY DECISIONS - continued

An evaluation is required in order to determine whether the condition "substantially limits a major life activity."

Many courts have held that students with communicable diseases are eligible for protection under Section 504, and the law bars any blanket school board policy limiting the attendance of such students. Eligible students with AIDS, for example, are entitled to a FAPE which may include placement in a general education setting unless the student presents a significant risk of contagion. (EHLR 441:114, 1988)

Suggested considerations of eligibility status in the area of health concerns:

(a) What is the appropriate educational setting for the child without regard for the disease?
(b) Is there a "significant risk level" for transmission of the disease so that the child would not be "otherwise qualified" to be in that setting? This determination is to be made by medical, not educational, personnel. If the answer is no, then the child is to be served in the appropriate educational setting for the child without regard for the disease.
(c) If there is significant risk of transmission, is there an accommodation that would make that setting appropriate for the child?
(d) If an accommodation is being considered, the "probable effect" on the child's "psychological and educational" development must be assessed.

(4) Socially Maladjusted

"The term (emotional disturbance) does not apply to children who are socially maladjusted, unless it is determined that they have an emotional disturbance as defined in this section. [*IDEA Regulations Section 300.8©(4)(2)*]. However, the court has found that socially maladjusted is a mental impairment that triggers consideration for eligibility under Section 504. To be 504 eligible, the student had only to establish that his social maladjustment was a mental impairment that substantially limited a major life activity, such as his ability to attend school or to learn. *Irvine (CA) United School District, 353 IDELR 192 (OCR 1989).* Thus a student could be covered under Section 504 if he has a disability, as opposed to engaging in volitional conduct out of perversity, rebelliousness, problems at home, etc., notwithstanding his possible ineligibility under IDEA. Poor behavior alone doesn't mean that a physical or mental impairment exists.

(5) Learning Disability and Not Eligible for IDEA Services

Is there the possibility of the existence of a current learning disability that creates a substantial limitation in the major life activity area of learning, that would not qualify a child under IDEA? Several issues must be weighed and considered by the 504 Team.
(a) The impact of the changing face of LD eligibility determination under

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IDEA'04 will cause new interpretations, for example: a severe discrepancy between ability and performance must not be required by the SEA; the advent of response to intervention efforts that must be implemented presumably by general education.

(b) Section 504 interpretations from court cases and legal opinions currently present somewhat conflicting decisions between the circuits. If there is a disability that substantially limits the major life activity area of learning, most decisions indicate the disability must so limit all learning, and not just math, or study skills, or reading. In addition, the team must consider how adverse affect upon learning actually differs, if in fact it does, from a substantial limitation upon the major life activity area of learning.

(c) These issues would have to be considered and reconciled on a case-by-case basis by the school 504 Team.

(6) Regarded as Having an Impairment—Example: Communicable Diseases

The eligibility under Section 504 includes not only the actual presence of a physical or mental impairment but also the student who is regarded as having an impairment. Therefore it may be only the attitude of others toward such an impairment that causes the limitation. In the case of communicable disease, such as testing positive for HIV, the actual symptoms may not have advanced to the point that there is a current physical condition substantially limiting a major activity (thus triggering the requirement for a 504 Plan). But there are clearly attitudes that may lead, through attempts to exclude the individual from school, to a substantial limitation of the major life activity of learning. Such students are entitled to passive nondisrcrimination, but not affirmative special treatment, such as a 504 Plan. The District must avoid discrimination against them due to attitudes or perceptions, but they are not entitled to a 504 Plan because they do not have a current disability that substantially limits a major life activity area.

(7) Record of a Disability - Example: Student is Released from Special Education (IDEA)

The Section 504 eligibility definition also includes students who have a record of a disability. In such a situation, the attitude of individuals may present the problem, and not the presence of a current disability. Thus the student who is released from IDEA may or may not have eligibility under Section 504 due to another disability that substantially limits a major life activity area. (This issue may have been addressed appropriately under the previous IEP.) Or there may be no current disability, and therefore only the avoidance of discrimination due to attitude or perception is at issue; no 504 Plan is required. The ARC should make this determination of 504 eligibility at the time of transition to full services in regular education.