THE AMERICANS WITH DISABILITIES ACT AND SECTION 504 UPDATE

James P. Drohan[*]

I. INTRODUCTION

On January 1, 2009, the Americans with Disabilities Amendments Act of 2008[1] ("ADAAA") became effective. The ADAAA broadens the definition of disability under the Americans with Disabilities Act ("ADA").[2] Additionally, it contains a conforming amendment to Section 504 of the Rehabilitation Act of 1973 ("Section 504")[3] that affects a similar change to the definition of disability under Section 504.

One of the main purposes for the enactment of the ADAAA was to overturn the Supreme Court's decisions in *Sutton v. United Airlines, Inc.*[4] and *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*.[5] In *Sutton*, the Court held that the existence of a disability under the ADA was to be determined after considering mitigating measures.[6] In *Williams*, the Court held that the ADA's definition of

[*] James P. Drohan has concentrated his practice on litigation and school law matters. He has extensive experience in grievance arbitration, special education litigation, and professional disciplinary matters. He has taught as an Adjunct Professor of Education Law at St. John's University, as well as at Mount St. Mary's College in Newburgh, and the State University of New York at New Paltz. Mr. Drohan regularly conducts seminars and in-service training for school board members, administrators, teachers, and attorneys on a variety of issues involving public education. Mr. Drohan is a graduate of Georgetown University and Fordham University School of Law. He has served on the Board of Advisors for the "No Child Left Behind Compliance Insider" and the "Special Education Law Insider." This Article is based on a presentation given at the Practising Law Institute's Tenth Annual School Law Institute in New York, New York.

[1] ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553.

[2] *Compare* 42 U.S.C.A. § 12102 (West 2010), *with* ADAAA, 122 Stat. 3553.

[3] ADAAA, 122 Stat. 3553.

[4] 527 U.S. 471 (1999).

[5] 534 U.S. 184 (2002).

[6] *Sutton*, 527 U.S. at 482-83 ("A 'disability' exists only where an impairment 'substantially limits' a major life activity, not where it 'might,' 'could,' or 'would' be substantially lim-

"substantial impairment" and "disability" should be strictly interpreted by requiring that one's impairment "prevent[] or severely restrict[] the individual from doing activities that are of central importance to most people's daily lives[,]" in order to qualify under the ADA.[7]

In addition, Congress expressed the expectation that the Equal Employment Opportunity Commission ("EEOC") would immediately revise those portions of its regulations that define the term "substantially limits" as "significantly restricts" to be consistent with the new amendments.[8] This article will address the recent legislative changes in the ADAAA and how school districts must plan to address these sweeping changes in order for their students to continue to qualify for benefits. Some of the changes in the ADAAA include the ameliorative effects of mitigating measures, the expansion of major life activities, coverage for impairments that are episodic or in remission, coverage for individuals "regarded as" having a disability, and guidance on what constitutes a "substantial limitation" of a major life activity.[9] Lastly, the EEOC's recent proposed regulations and how they compare to the ADAAA will be addressed.

II. THE ADAAA: A LEGISLATIVE RESPONSE TO RECENT SUPREME COURT DECISIONS

When Congress enacted the original ADA in 1990, about forty-three million Americans were believed to "have one or more physical or mental disabilities."[10] "[T]his number [was] increasing as the population as a whole . . . [grew] older . . . ."[11] However, in enacting the ADA, Congress considered individuals with disabilities to be a discrete and insular minority.[12]

The ADA was amended on January 1, 2009 and former Presi-

iting if mitigating measures were not taken.").

[7] *Williams*, 534 U.S. at 198.

[8] H.R. REP. NO. 101-558, at 2 (1990) (Conf. Rep.) (indicating that the purpose of the ADA is "to provide a clear and comprehensive national mandate for the elimination of discrimination").

[9] *Compare* 42 U.S.C.A. § 12102, *with* ADAAA, 122 Stat. at 3555-56 (clarifying, defining, and expanding on provisions contained in the ADA).

[10] H.R. REP. NO. 101-558, at 1.

[11] *Id.*

[12] *Id.* ("[H]istorically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem . . . .").

dent George W. Bush signed it into law on September 25, 2008.[13] The ADAAA is a short amendment that reflects Congress' displeasure with several Supreme Court decisions authored by Justice O'Connor that have become known as the "*Sutton* trilogy."[14] When the Supreme Court decided *Sutton* and its two companion cases, it had to determine what types of disabilities Congress intended to include in the ADA. The Court was concerned that if an individual who wore corrective lenses was considered to have a disability, the number of individuals with disabilities could double or triple to roughly 160 million.[15] Thus, in *Sutton*, the Court developed a functional definition of what constitutes a disability for the purpose of Section 504.[16] In providing a workable definition, the Court in *Sutton* held that courts should consider the ameliorating effects of mitigating measures in determining whether someone has a disability.[17]

Sutton involved two sisters with poor vision[18] who applied to be commercial pilots for United Airlines.[19] The sisters corrected their vision by wearing glasses, which brought their eyesight within the normal limits.[20] The Court ruled that the sisters did not have a disability that was protected under Section 504 or the ADA because the use of glasses was a mitigating measure that corrected their disability.[21] The Court in *Sutton* held that mitigating measures must be considered in determining whether an individual had a disability. In the view of the Court, determining whether an individual had a disability

---

[13] *President Bush Signs Americans with Disabilities Amendments Act*, THE WHITE HOUSE: GEORGE W. BUSH, http://georgewbush-whitehouse.archives.gov/news/releases/2008/09/images/20080925-1_p092508jb-0238-515h.html (last visited Sept. 1, 2010).

[14] *Sutton*, 527 U.S. 471; Albertson's, Inc. v. Kirkingburg, 527 U.S. 555 (1999); Murphy v. United Parcel Serv., Inc., 527 U.S. 516 (1999).

[15] *See, e.g.*, Ruth Colker, *The Mythic 43 Million Americans with Disabilities*, 49 WM. & MARY L. REV. 1, 38-39 (2007) (indicating that "Congress could not have intended to cover people when the limitations imposed by their disabilities could be reduced through the use of mitigating measures," especially since "100 million Americans use corrective lenses" alone).

[16] *Sutton*, 527 U.S. at 482.

[17] *Id.* at 482-83.

[18] *Id.* at 475.

[19] *Id.*

[20] *Id.* Despite being otherwise qualified for employment, the sisters were not offered positions with the airline "because [they] did not meet respondent's minimum vision requirement, which was uncorrected visual acuity of 20/100 or better." *Sutton*, 527 U.S. at 476.

[21] *Id.* at 488-89 ("[D]isability under the Act is to be determined with reference to corrective measures . . . .").

required a case-by-case analysis.[22]

One reason why mitigating measures were considered by the Court was simply grammatical. In the "*Sutton* trilogy," the Court noted that the relevant statutory language was written in the present tense.[23] Thus, the ADA does not consider whether someone used to have a disability.[24] Therefore, when determining whether an individual currently has a disability, mitigating measures must be considered.[25]

In two companion cases, the Court rendered similar holdings. The first case, *Albertson's, Inc. v. Kirkingburg*,[26] involved a plaintiff with monocular, one-eyed vision who, because of various self-correcting measures, was able to correct his vision for depth perception.[27] Due to the plaintiff's mitigating measures, the Court held that he did not have a protected disability under the ADA.[28] The second case, *Murphy v. United Parcel Service*,[29] involved a driver with high blood pressure who took medication for his condition.[30] The Court in *Murphy*, in determining whether a person has an ADA protected disability, focused on an individual's functionality, taking into account medication and other mitigating measures.[31] The Court ruled that because of the plaintiff's use of medication, his high blood pressure did not substantially limit any major life activity and, therefore, he did not have a protected disability under the ADA.[32]

The ADAAA also addresses a concern arising after the

---

[22] *Id.* at 482.

[23] *Id.* ("Because the phrase 'substantially limits' appears in the Act in the present indicative verb form, we think the language is properly read as requiring that a person be presently—not potentially or hypothetically—substantially limited in order to demonstrate a disability.").

[24] *Id.*

[25] *Sutton*, 527 U.S. at 482.

[26] 527 U.S. 555.

[27] *Id.* at 559.

[28] *Id.* at 565-66 (stating that although Kirkingburg's coping mechanisms were subconscious, there was "no principled basis for distinguishing between measures undertaken with artificial aids, like medications and devices, and measures undertaken, whether consciously or not, with the body's own systems").

[29] 527 U.S. 516.

[30] *Id.* at 519 (illustrating that the Petitioner was hired as a truck driver for United Parcel Service ("UPS") and was employed for three years prior to being terminated for failing the Department of Transportation ("DOT") minimum standards eye examination).

[31] *Id.* at 520-21.

[32] *Id.* at 521.

Court's decision in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, which held that the definition of a disability under the ADA must be strictly construed.[33] The Court in *Williams* stated "that to be substantially limited in performing manual tasks, an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives."[34]

In *Sutton* and its companion cases, the Court determined that Congress certainly could not have envisioned that a majority of Americans would be covered under the ADA.[35] However, the language of the ADAAA indicates that the legislative findings in the original ADA have been excised.[36] A reading of the congressional record discussion for the ADAAA provides proof that Congress simply did not want courts, including the Supreme Court, to be persuaded by the congressional findings in the original ADA.[37]

In response to these Supreme Court cases, Congress passed the ADAAA and legislatively overturned these prior court decisions. In doing so, it specifically changed the definition of what constitutes a "substantial impairment."[38] Under the current ADAAA regulations, an impairment is "substantially limiting" if it renders an individual "[u]nable to perform a major life activity that the average person in the general population can perform[,]" or "significantly restrict[s] . . . the condition, manner or duration under which an individual can perform a particular major life activity as compared to . . . the general population."[39] Moreover, under the ADAAA, Congress now provides that "the ameliorative effects of mitigating measures" cannot be considered in determining whether a substantial limitation of a major

---

[33] *Id.* at 198.

[34] *Id.* (noting that "[t]he impairment's impact must also be permanent or long term").

[35] *See Sutton*, 527 U.S. at 484 ("Finally, and critically, findings enacted as part of the ADA require the conclusion that Congress did not intend to bring under the statute's protection all those whose uncorrected conditions amount to disabilities.").

[36] 154 CONG. REC. S8342-01, 8342 (2008) (Statement of Sen. Tom Harkin) ("[W]hile Congress expected that the definition of disability under the ADA would be interpreted consistently with how courts had applied the definition of a handicapped individual under the Rehabilitation Act of 1973, that expectation has not been fulfilled . . . .").

[37] *Id.* at 8343.

[38] ADAAA, 122 Stat. at 3554.

[39] EEOC Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, 29 C.F.R. § 1630.2(j)(1) (2010).

life activity exists.[40] In considering this, the ADAAA requires a school district to hypothesize how a student would perform if the student was not using his or her medicine, such as Ritalin for Attention Deficit Hyperactive Disorder ("ADHD").[41] In the wake of the passage of the ADAAA, the position of the United States Department of Education Office for Civil Rights ("OCR") is that "school districts, in determining whether a student has a physical or mental impairment that substantially limits that student in a major life activity, must *not* consider the ameliorating effects of any mitigating measures that [the] student is [taking]."[42]

III. THE ADAAA

A. Expanding Major Life Activities

In enacting the ADAAA, Congress expanded the list of major life activities.[43] Under the existing Section 504 regulations, major life activities included "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."[44] Under the ADAAA, other major life activities now include "eating, sleeping . . . standing, lifting, bending, . . . reading, concentrating, thinking, [and] communicating."[45] Furthermore, some other activities now considered "major bodily functions" include various functions of the body.[46] The "functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions" are now listed in the ADAAA as examples of "major bodily functions" that are deemed "major life activities."[47]

---

[40] 42 U.S.C.A. § 12102 (4)(E)(i) (West 2010). *See* H.R. Rep. No. 110-730(I), at 1 (2008).

[41] 42 U.S.C.A. § 12102 (4)(E)(i)(I).

[42] *Frequently Asked Questions About Section 504 and the Education of Children with Disabilities*, U.S. DEP'T OF EDUC., http://www2.ed.gov/print/about/offices/list/ocr/504faq .html (last modified Mar. 27, 2009).

[43] *See* Velez Del Valle v. Mobile Paints, 349 F. Supp. 2d. 219, 227 (D.P.R. 2004); *see also* Regulations to Implement the Equal Employment Provisions of the Americans With Disabilities Act, as Amended, 74 Fed. Reg. at 48432.

[44] DHHS Nondiscrimination on the Basis of Handicap in Programs or Activities Receiving Federal Financial Assistance, 45 C.F.R. § 84.3(j)(ii) (2010).

[45] 42 U.S.C.A. § 12102(2)(A).

[46] *Id.* § 12102(2)(B).

[47] *Id.*

Congress also included some activities that specifically apply to the school setting, including "reading, concentrating, thinking, [and] communicating."[48] This is quite an expansion from the existing Section 504 regulations, which merely mentioned "major life activities" and included functions such as "caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working."[49] With this new expansive list, psychologists, neuropsychologists, or neurologists will need to assist at Section 504 hearings involving a student having difficulties concentrating.

B. Episodic Disabilities and Disabilities in Remission

Assume that a student with Multiple Sclerosis ("MS") has a qualifying disability under Section 504. MS is a disease that has periods of remission and exacerbation.[50] Under the ADAAA, the student would have a disability even though the MS is in remission, and the student no longer requires a wheelchair or other services.

Should the school district then draft a Section 504 plan with proposed services available when, and if, the disability becomes active? Or, should the school district draft a Section 504 plan that acknowledges the disability, but provides no services? Is it proper for the school district to simply advise the parents of their rights under Section 504, but not prepare a Section 504 plan?

Congress found that an impairment may be covered under the ADAAA even if it is currently "episodic or in remission," if, when active, it would "substantially limit a major life activity."[51] Thus, even though the impairment is not presently active, the student is still covered under Section 504.[52] Similarly, the OCR suggests that if the student has a disability that is currently in remission, the disability qualifies under Section 504 if the disability "would substantially limit

[48] *Id*. § 12102(2)(A).

[49] *Compare* 42 U.S.C.A. § 12102(2)(A) (West 1991) (containing minimal detail explaining what would constitute a major life activity), *with* 42 U.S.C.A. § 12102(2)(A) (West 2010) (expanding on the definition of "major life activity").

[50] Wilcox v. Sullivan, 917 F.2d 272, 274 (6th Cir. 1990) ("Multiple sclerosis is characterized by periods of exacerbation and remission.").

[51] *See* 42 U.S.C.A. § 12102(4)(D).

[52] *See id.*

a major life activity when active."[53]

The district could, in most instances, draft a Section 504 plan while the condition is in remission to be readily accessed during a period of exacerbation. Depending on the nature of the disability, there may not, however, exist sufficient information to decide how the disability will manifest itself in the school setting.[54] If a disability existed when a student had a brain tumor, but the school never knew the condition of the student while in the state of remission, there may not be enough information to decide how to proceed with a Section 504 plan.[55] Therefore, to compensate for the lack of information in this situation, the school district can alert the teachers that if a student begins to exhibit the symptoms, a Section 504 team must convene and an immediate evaluation should be conducted.

C. "Regarded as" Having a Disability

The ADAAA also affects individuals "regarded as" having a disability.[56] Individuals "regarded as" having a disability are entitled to the nondiscrimination protections of Section 504 regardless of whether the impairment actually limits, or is perceived to limit, a major life activity.[57] However, the school district does not have to provide a Section 504 plan for a student who has a record of a disability or who is "regarded as" disabled.[58] According to OCR, unless a student actually has a qualifying impairment under Section 504, "the mere fact that a student has a 'record of' or is 'regarded as' disabled is insufficient, in itself, to trigger" the requirements for a Section 504

---

[53] *Frequently Asked Questions About Section 504 and the Education of Children with Disabilities*, *supra* note 42.

[54] Regulations to Implement the Equal Employment Provisions of the Americans With Disabilities Act, as Amended, 74 Fed. Reg. at 48446.

[55] *See* 34 C.F.R. § 104.35(c) (2010) (ensuring that "placement decisions . . . [are] draw[n] upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior . . . [and] that the placement decision is made by a group of persons, including persons knowledgeable about the child . . . .").

[56] 42 U.S.C.A. § 12102(3)(A) (stating that an individual is "regarded as" having a disability "if the individual establishes that he or she has been subjected to an action prohibited under this chapter because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity").

[57] 42 U.S.C.A. § 12102(3)(A).

[58] *Frequently Asked Questions About Section 504 and the Education of Children with Disabilities*, *supra* note 42.

plan.[59] OCR notes that the ADAAA provides that a person "who meets the definition of disability solely by virtue of being 'regarded as' disabled is not entitled to reasonable accommodations or the reasonable modification of policies, practices or procedures."[60] Instead, the school district simply has to observe the nondiscrimination provisions with regard to these students.[61] Moreover, under the ADAAA, an individual is not "regarded as" having a disability if the impairment is "transitory and minor."[62] "A transitory impairment is an impairment with an actual or expected duration of [six] months or less."[63]

D. The Ameliorative Effects of Mitigating Measures

Congress has attempted to provide examples of mitigating measures, but the list is not exhaustive.[64] A few examples include "assistive technology . . . reasonable accommodations or auxiliary aids or services."[65] Others include "medication, . . . low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics . . . , hearing aids . . . , mobility devices, . . . oxygen therapy equipment . . . [and] learned behavioral or adaptive neurological modifications."[66]

These examples raise questions about how to determine whether a student has a disability, and how to factor in the issue of performance with mitigating measures. For example, suppose a student with ADHD earned a "D" in a class before he or she received preferential seating as a mitigating measure, and after that accommodation, the grade becomes an "A." The parents' argument might be then that the student has an impairment that is affecting a major life activity, since that determination must be "made without regard to the ameliorative effect of mitigating measures."[67] However, suppose that

[59] *Id.*
[60] *Id.*
[61] *Id.*
[62] *Id.*
[63] *Frequently Asked Questions About Section 504 and the Education of Children with Disabilities*, *supra* note 42.
[64] *See* 42 U.S.C.A. § 12102(4)(E).
[65] *Id.*
[66] *Id.*
[67] *See id.* § 12102(2)(A), (4)(E)(i).

after the inception of preferential seating, the student's grades improved slightly to a "C." In this case, the preferential seating may have only had a partial affect on the student's ability; it did not completely eliminate the impairment. Thus, a Section 504 team might grapple with this issue in light of the new requirements regarding mitigating measures and substantial limitation.[68]

Furthermore, consider a student with a physical or mental impairment who is provided with an audiotape recording of his or her textbooks. Does this necessarily mean that the student is now disabled under the ADAAA? This example, as well as the preceding one, illustrates the issues associated with the relief Congress provided under the ADAAA. Although Congress provided that ordinary eyeglasses and contact lenses are to be considered in determining whether someone has an impairment, low vision devices, on the other hand, are not to be considered.[69] Paring out the effects of mitigating measures may become difficult and a recurring issue for school districts in the wake of the ADAAA's passage.

IV. THE EEOC'S PROPOSED REGULATIONS

A. Common Sense Approach to Substantial Limitation

Under the existing regulations of the ADAAA, if a limitation makes it impossible to perform an activity that an average person in the population can perform, or if it significantly restricts the condition, manner, or the duration under which an individual can perform such an activity compared to the general population, then a disability exists.[70] This may lead to issues in Section 504 hearings such as examination of academic test scores and comparing a student's performance with how his or her peers are performing.[71] The Equal Employment Opportunity Commission ("EEOC") has proposed an amendment to the ADAAA that provides:

[68] *See id.* § 12102(4)(E)(i) (stating that "[t]he determination of whether an impairment substantially limits a major life activity shall be made *without* regard to the ameliorative effects of mitigating measures") (emphasis added).

[69] *See id.* § 12102(4)(E).

[70] 29 C.F.R. § 1630.2(j)(1).

[71] *See Frequently Asked Questions About Section 504 and the Education of Children with Disabilities*, *supra* note 42.

> An impairment is a disability within the meaning of this section if it "substantially limits" the ability of an individual to perform a major life activity as compared to *most people* in the general population. An impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered a disability.[72]

This language explicitly overturns the Court's finding in *Williams* that an impairment qualifies as a disability under the ADA if it "prevents or severely restricts the individual from doing activities . . . of central importance to most people's daily lives."[73] This proposed change from the average person to " 'most people in the general population' " was made to allow for a more "common-sense approach" in determining whether an existing impairment is substantially limiting.[74] The EEOC's proposed regulations provide that this new common-sense approach requires a comparison of the individual with the impairment to "most people in the general population[,]" which is meant to avoid the use of "scientific or medical evidence" when determining whether a substantial limitation exists.[75] For example, teachers, in considering the major life activity of learning and whether it is substantially limited, can evaluate report cards, test results, and grades.

One commentator of the proposed regulation argues that it "suggests that courts should not consider hard evidence that may be directly relevant to whether a condition is indeed limiting, let alone substantially limiting."[76] Conversely, another commentator on the proposed regulations argues that logically speaking, "conclusions about how a child should be performing or is capable of performing

---

[72] Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, 74 Fed. Reg. 48431-01, 48440 (proposed Sept. 23, 2009) (to be codified at 29 C.F.R. pt. 1630) (emphasis added).

[73] *Williams*, 534 U.S. at 198.

[74] Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, 74 Fed. Reg. at 48446.

[75] *Id.* at 48440.

[76] E-mail from Joshua Ulman, Chief Gov't Relations Officer, Coll. and Univ. Prof'l Assoc. for Human Res., & Ada Meloy, Gen. Counsel, Am. Council on Educ., to Stephen Llewellyn, Exec. Officer, Exec. Secretariat, EEOC (Nov. 23, 2009), *available at* http://www.acenet.edu/AM/Template.cfm?Section=Legal_Issues_and_Policy_Briefs2&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=34946.

are not common sense determinations and would require some kind of expert support."[77]

In most cases, teachers will testify that notwithstanding the diagnosis, a student's academics are satisfactory. Furthermore, a student's report cards and Section 504 team reports may demonstrate that a student is succeeding academically despite having a learning disability. The teacher, despite lacking the knowledge a medical professional may have of a student's learning disability, will find that the student's disability does not affect the major life activity of learning.[78] In these types of cases, it may be necessary for an expert to testify as to what would occur if the mitigating measures were removed. To be sure, there are numerous factors that contribute to a student's performance in school, and it may be difficult for hearing officers to isolate one factor as the cause of a student's progression or regression.

B. Per Se Impairments

The EEOC's proposed regulations also provide that some impairments should be considered "per se" disabilities in determining whether an individual has an impairment that substantially limits a major life activity.[79] The proposed rule provides that certain impairments, such as autism, cancer, cerebral palsy, diabetes, epilepsy, HIV, AIDS, MS, muscular dystrophy, major depression, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder and schizophrenia will consistently meet the definition of disability and, therefore, are "per se" disabilities.[80]

However, an impairment that may be disabling to some will not be for others, and determining this distinction may require further analysis. Accordingly, one commentator has stated, "[w]e are partic-

[77] Letter from Sara J. Brummel to the EEOC, *Recommendations for the Proposed Rules for the 2008 Amendments of the Americans with Disabilities Act* (2009) (on file with author).

[78] *See* 42 U.S.C.A. § 12102(3)(A).

[79] *See* Ulman & Meloy, *supra* note 76 (arguing that "per se" disabilities are not supported by the ADAAA).

[80] *See* Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, 74 Fed. Reg. at 48441 (stating that "[e]xamples of [i]mpairments that [w]ill [c]onsistently [m]eet the [d]efinition of [d]isability [are] . . . [a]utism . . . [c]ancer . . . [c]erebral palsy . . . [d]iabetes . . . [e]pilepsy . . . HIV or AIDS . . . [m]ultiple sclerosis and muscular dystrophy . . . [m]ajor depression, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, or schizophrenia").

ularly concerned that in many instances the proposed rule eliminates any meaningful distinction between an impairment and a disability and disregards the Act's requirement that disability determinations be made on a case-by-case basis."[81] Commentators also note that designating certain disabilities as "per se," however, is not supported by the ADAAA because "[n]o matter what the impairment" is, the ADAAA still mandates that the impairment be analyzed to determine "whether it substantially limits . . . [a] major life activit[y].[82] Incorporating "per se" disabilities, therefore, will alter the necessity of making a determination on a case-by-case basis.[83]

OCR does not take the position that there are any "per se" disabilities.[84] Instead, it finds that an "impairment must substantially limit one or more major life activities in order to be considered a disability under Section 504."[85] OCR's guidance, in this regard, appears to be at odds with the EEOC regulations categorizing certain impairments as "per se" disabilities and appears to abolish (at least in some cases) the necessity of making case-by-case determinations of whether an impairment substantially limits a major life function.[86]

V. OCR GUIDANCE REGARDING SECTION 504

In March 2009, OCR issued a revised version of its "Frequently Asked Questions about Section 504 and the Education of Children with Disabilities."[87] OCR does not endorse a single formula or scale for measuring substantial limitation for the purposes of qualifying under Section 504. Even with the advent of the ADAAA, OCR's position remained that "[t]he determination of substantial limitation must be made on a case-by-case basis with respect to each in-

---

[81] *See* Ulman & Meloy, *supra* note 76.

[82] *Id.*

[83] *Id.*

[84] *Frequently Asked Questions About Section 504 and the Education of Children with Disabilities*, *supra* note 42 ("Are there any impairments which automatically mean that a student has a disability under Section 504? No. An impairment in and of itself is not a disability. The impairment must substantially limit one or more major life activities in order to be considered a disability under Section 504.").

[85] *Id.*

[86] *Compare id.*, *with* Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, 74 Fed. Reg. at 48441.

[87] *See Frequently Asked Questions About Section 504 and the Education of Children with Disabilities*, *supra* note 42.

dividual student."[88] As stated in 34 C.F.R. § 104.35(c), a group of knowledgeable persons "must draw upon information from a variety of sources" in making this determination.[89]

Furthermore, OCR takes the position that a medical diagnosis of an illness will not automatically mean that a student can receive services under Section 504.[90] The illness must substantially limit the student's ability to learn or another major life activity.[91] Often, a student will provide a prescription pad from a doctor indicating that the student has ADHD and, therefore, requires home instruction or a tutor. Merely because a doctor indicates that the student has an impairment does not necessarily mean a disability exists.[92] The OCR's position on this issue does not seem to align with the EEOC's proposed regulations in finding "per se" impairments.[93] Instead, the OCR strives for an individualized determination.[94]

Lastly, the OCR reiterates that Section 504 protections are generally not available to students that are currently users of illegal drugs.[95] A student using illegal drugs would not have to obtain a determination to ascertain whether the conduct is related to the disability.[96] On the other hand, the nondiscrimination provisions of Section 504 protect a student who is in rehabilitation and is not an active user of drugs.[97]

---

[88] *Id.*

[89] 34 C.F.R. § 104.35(c) (2010).

[90] *See Frequently Asked Questions About Section 504 and the Education of Children with Disabilities*, *supra* note 42.

[91] *Id.* (stating that an individual will only receive protections under Section 504 if there has been a "determin[ation] that the student's mental or physical impairment no longer substantially limits his/her ability to learn or any other major life activity").

[92] Demetropoulus v. Derynda Foods, Inc., No. 08-C-0420, 2010 WL 2900342, at *5 (E.D. Wis. July 20, 2010) (stating that "[i]mpairments that interfere in only a minor way with the performance of the major life activities . . . are not enough to establish disability").

[93] *See Frequently Asked Questions About Section 504 and the Education of Children with Disabilities*, *supra* note 42.

[94] *See id.* (explaining that a "determination of substantial limitation must be made on a case-by-case basis with respect to each individual student"); *see also* 34 C.F.R. § 104.35(c).

[95] *See Frequently Asked Questions About Section 504 and the Education of Children with Disabilities*, *supra* note 42 ("Are current illegal users of drugs excluded from protection under Section 504? Generally, yes. Section 504 excludes from the definition of a student with a disability, and from Section 504 protection, any student who is currently engaging in the illegal use of drugs when a covered entity acts on the basis of such use.").

[96] *Id.*

[97] *Id.* ("There are exceptions for persons in rehabilitation programs who are no longer engaging in the illegal use of drugs.").

VI. THE INDIVIDUALS WITH DISABILITIES ACT AND SECTION 504

The Individuals with Disabilities Act ("IDEA") is similar to Section 504 in many respects.[98] It is possible that a student will qualify under both Section 504 and the IDEA if he or she has a disability that substantially impairs a major life activity.[99] However, if a student is eligible under both statutes, it appears that the school district does not have to develop an Individualized Education Program ("IEP") and a Section 504 plan.[100] "If a student is eligible under IDEA, he or she must have an IEP."[101]

According to many commentators, the IEP plan should be developed to address learning disabilities, and perhaps will contain accommodations or even a medical or nursing protocol for the medical needs.[102] "Under the Section 504 regulations, one way to meet [the] requirements for a free appropriate public education is to implement an IEP."[103] In *Muller v. Committee on Special Education of the East Islip Union Free School District*,[104] the Second Circuit stated that if the student qualifies under both Section 504 and IDEA, the school district could not relegate the student to the statute with fewer protections, in this case, Section 504.[105] Rather, the school district must inform the student that he or she is eligible for services under IDEA as

---

[98] *Id.* (discussing the interrelationship between the IDEA and Section 504).

[99] *See Frequently Asked Questions About Section 504 and the Education of Children with Disabilities*, *supra* note 42 (stating that "[t]o be protected under Section 504, a student must be determined to . . . have a physical or mental impairment that substantially limits one or more major life activities"). *Contra* Alina Das, *The Asthma Crisis in Low-Income Communities of Color: Using the Law as a Tool for Promoting Public Health*, 31 N.Y.U. REV. L. & SOC. CHANGE 273, 312 (2007) ("IDEA . . . do[es] not require a showing of substantial limitation on a major life activity . . . .").

[100] *See Frequently Asked Questions About Section 504 and the Education of Children with Disabilities*, *supra* note 42 ("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.").

[101] *Id.*

[102] *See, e.g.*, Mahone v. Ben Hill Cnty. Sch. Sys., No. 09-15562, 2010 WL 1780246, at *1 (11th Cir. May 5, 2010); C.N. *ex rel.* Newman v. L.A. Unified Sch. Dist., No. CV 07-03642 MMM (SSx), 2008 WL 4552951, at *2 (C.D. Cal. Oct. 9, 2008).

[103] *Frequently Asked Questions About Section 504 and the Education of Children with Disabilities*, *supra* note 42.

[104] 145 F.3d 95 (2d Cir. 1998).

[105] *See id.* at 105.

well.[106]

The New York State Education Department states that an IEP can provide a student with any reasonable accommodation.[107] Although the OCR does not recognize the term "reasonable accommodations," services could include anything from test to classroom modifications.[108] Most students with Section 504 plans should effectively receive the services they require through the types of classroom or test modifications offered by the school districts. However, under Section 504, a student can receive other types of accommodations including access to resource rooms.[109] Individualized tutoring and behavior plans are also available under Section 504 and IDEA.[110]

However, a problem may arise when a student requires related services, such as speech therapy. This service might be offered under Section 504, but if the student also qualifies as "speech-impaired" under IDEA—meaning that he or she has a delay in receptive language, expressive language, or articulation—then the school district is depriving the student of the benefits under IDEA, which is the

---

[106] Yankton Sch. Dist. v. Schramm, 93 F.3d 1369, 1376 (8th Cir. 1996) (noting that "[u]nder the statutory scheme, the school district is not free to choose which statute it prefers").

[107] *See* NEW YORK STATE EDUC. DEP'T, GUIDE TO QUALITY INDIVIDUALIZED EDUCATION PROGRAM (IEP) DEVELOPMENT AND IMPLEMENTATION 2 (2010), *available at* http://www.emsc.nysed.gov/specialed/publications/iepguidance/IEPguideFeb2010.pdf (explaining that in order to provide accommodations for a student, committees "will need to know the expectations of the general education classroom for the corresponding age of the student both in terms of *what* learning is . . . as well as *how* the students are expected to access/demonstrate that learning").

[108] *See Frequently Asked Questions About Section 504 and the Education of Children with Disabilities*, *supra* note 42 ("An appropriate education for a student with a disability under the Section 504 regulations could consist of education in regular classrooms, education in regular classes with supplementary services, and/or special education and related services."); *see also* Betts v. The Rector and Visitors of the Univ. of Va., No. 97-1850, 1999 WL 739415, at *4 (4th Cir. 1999) (explaining that both parties agreed that receiving double time on an examination is a reasonable accommodation); Zukle v. The Regents of the Univ. of Cal., 166 F.3d 1041, 1048 (9th Cir. 1999) (finding that receiving double time to take exams, "notetaking services and textbooks on audio cassettes" as well as being "allowed to retake courses," and utilize a decelerated schedule were reasonable accommodations).

[109] *See Frequently Asked Questions About Section 504 and the Education of Children with Disabilities*, *supra* note 42.

[110] *See, e.g.*, Laura Rothstein, *Disability Law and Higher Education: A Road Map for Where We've Been and Where We May Be Heading*, 63 MD. L. REV. 122, 131 (2004) (explaining that tutoring may be required of public schools under the IDEA); *see also* Mark C. Weber, *The IDEA Eligibility Mess*, 57 BUFF. L. REV. 83, 107 (2009) ("The school deemed the child eligible under section 504 and provided her a plan that furnished tutoring and social pragmatics instruction.").

more protective of the two statutes.[111] This danger is analogous to the scenario in *Muller* because if the student qualifies under both statutes, then IDEA services are supposed to be offered and procedural safeguards, including pendency, which is not offered under Section 504, should be applied.[112]

VII. STATUTORY CONSTRUCTION AND RETROACTIVITY

Courts that have addressed issues of statutory construction regarding the new ADAAA have concluded that they are to be construed prospectively, not retroactively.[113] Although there has not been a Second Circuit Court of Appeals decision directly on point, the Fifth, Sixth, Seventh, and District of Columbia Circuit Courts of Appeals each have held that the ADAAA does not apply retroactively.[114] Similarly, lower courts in the Second Circuit have reached the same conclusion.[115] The one exception is if the plaintiff is seeking injunctive relief prospectively and he or she wants accommoda-

---

[111] *Compare* 20 U.S.C.A. § 1401 (West 2010) (explaining that a " 'child with a disability' means a child . . . who, by reason thereof, needs special education and related services" including "transportation, and such developmental, corrective, and other supportive services (including speech-language pathology and audiology services[)]"), *with* 29 U.S.C.A. § 794 (West 2010) ("No otherwise qualified individual with a disability . . . shall . . . be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . .").

[112] *See generally* 20 U.S.C.A. § 1415 (West 2010) (setting out the procedural safeguards required of "[a]ny State educational agency, State agency, or local educational agency that receives assistance under" IDEA).

[113] *See, e.g.*, Equal Emp't Opportunity Comm'n v. Agro Distrib., LLC, 555 F.3d 462, 469 n.8 (5th Cir. 2009) (explaining that "Congress recently enacted the ADA Amendments Act of 2008, but these changes do not apply retroactively").

[114] *See id.*; Milholland v. Sumner Cnty. Bd. of Educ., 569 F.3d 562, 565 (6th Cir. 2009) (stating that "[t]he recently-enacted ADA Amendments Act of 2008 does not govern this case because its application would have the type of impermissibly retroactive effect that requires a clearly-stated congressional intent"); Lytes v. D.C. Water and Sewer Auth., 572 F.3d 936, 940 (D.C. Cir. 2009) (agreeing with the Authority's argument that "Congress, by delaying the effective date of the statute, mandated purely prospective application of the ADAA[A]"); Kiesewetter v. Caterpillar Inc., 295 F. App'x 850, 851 (7th Cir. 2008) (holding that the ADA Amendments Act of 2008 does not apply retroactively).

[115] *See, e.g.*, Smith v. Saint Luke's Roosevelt Hosp., No. 08 Civ. 4710(GBD)(AJP), 2009 WL 2447754, at *13 (S.D.N.Y. Aug. 11, 2009) (holding that "the [c]ourt will not apply the 2008 ADA Amendments retroactively to this case"); Young v. Precision Metal Prods., Inc., 599 F. Supp. 2d 216, 224 (D. Conn. 2009) (stating that "[t]he [c]ourt therefore applies the prevailing presumption against retroactivity and finds 2008 amendments to the ADA to be inapplicable to this case").

tions.[116] In this case, the ADAAA may be applied retroactively, even though the injury actually happened before the effective date of the statute.[117]

VIII. JURISDICTIONAL QUESTIONS IN NEW YORK

In New York, a new issue regarding disability is whether the New York State Division of Human Rights has jurisdiction over school districts when there is a complaint that they have not properly accommodated a student.[118] There is an apparent split in the appellate divisions over this issue.[119] In *East Meadow Union Free School District v. New York State Division of Human Rights*,[120] the student wanted to take a service dog to school.[121] The dog was a Labrador Retriever named Simba who helped with the student's socialization.[122] The Division of Human Rights ruled in favor of the student, stating that the student had a right to bring the dog to school.[123] If there was an issue with other students being allergic to the dog, then the school district would have to remedy that issue, rather than preventing the student from bringing the dog to school.[124] The Second

[116] *See, e.g.*, Jenkins v. Nat'l Bd. of Med. Exam'rs, No. 08-5371, 2009 WL 331638, at *1 (6th Cir. Feb. 11, 2009) (holding that the ADA Amendments Act of 2008 do apply because the plaintiff's "suit for injunctive relief was pending on appeal when the amendments became effective").

[117] *See id.* (noting that the suit involved "prospective relief and [that the case] was pending when the amendments became effective").

[118] *See* East Meadow Union Free Sch. Dist. v. N.Y. Div. of Human Rights, 886 N.Y.S.2d 211, 212 (App. Div. 2009).

[119] *Compare id.* (holding that "the statutory provision upon which the [New York State Division of Human Rights] finding is based does not apply to [the School District]" and thus, it did not have jurisdiction), *with* Newfield Cent. Sch. Dist. v. N.Y. Div. of Human Rights, 888 N.Y.S.2d 244, 245 (App. Div. 2009) (finding that the New York State Division of Human Rights had "jurisdiction to hear discrimination claims involving conduct that occurred within the [s]chool [d]istrict").

[120] 866 N.Y.S.2d 211 (App. Div. 2009).

[121] *Id.* at 212. New York Executive Law section 296 addresses discrimination against the hearing impaired for use of a service dog. N.Y. EXEC. LAW § 296(14) (McKinney 2010).

[122] *See* Cave v. East Meadow Union Free Sch. Dist., 480 F. Supp. 2d 610, 615 (E.D.N.Y. 2007).

[123] N.Y. Div. of Human Rights v. East Meadow Union Free Sch. Dist., Case No. 10115533, 2 (Mar. 10, 2008), http://www.dhr.state.ny.us/pdf/Commissioner's%20Orders/nysdhr_v_east_meadow_union_free_school_district.pdf.

[124] *See id.* at 17 (explaining that schools must "reasonably accommodate [the allergic] individuals, not . . . abrogate the right of students with disabilities to use their guide, hearing, and/or service dogs in school, which is absolute").

Department, however, reversed this decision, holding that the New York State Division of Human Rights does not have jurisdiction over school districts.[125] This issue has not yet been conclusively addressed by the New York Court of Appeals.

IX. CONCLUSION

With the new amendments to the ADA, Congress has significantly changed how the ADA and Section 504 will be applied to school districts.[126] It is clear that these new changes will have major impacts on determining whether a student qualifies for disability benefits in the classroom. In enacting these changes, Congress indicated a desire that a more "common-sense" approach be applied to the determination of whether an individual qualifies under the statute.[127] When considering the "ameliorative effects of mitigating measures,"[128] Section 504 accommodation teams and school districts may be required to evaluate fairly complex medical evidence about a student's medication or other mitigating measures under some circumstances.[129] It could prove difficult for "laypersons" on a Section 504 team to evaluate how effective medication is on a student's performance in school. In any event, under the new practical and common-sense approach, a person with day-to-day knowledge of a student's performance—in many cases a teacher—is required to employ exam grades, report cards, and observe a student in the classroom to evaluate the student's performance.[130] This approach might make it

[125] *East Meadow Union Free Sch. Dist.*, 886 N.Y.S.2d at 212-13 (holding that N.Y. EXEC. LAW § 296 does not apply to the East Meadow Union Free School District; therefore, the determination made by the New York State Division of Human Rights does not apply to the East Meadow Union Free School District).

[126] *See* ADAAA, 122 Stat. at 3554 ("[T]he question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis . . . .").

[127] Regulations to Implement the Equal Employment provisions of the Americans with Disabilities Act, 74 Fed. Reg. at 48440 (explaining that "an individual's limitation [may be compared] to the ability of most people in the general population often may be made using a common-sense standard, without resorting to scientific or medical evidence").

[128] ADAAA, 122 Stat. at 3554 ("The purposes of this Act are . . . to reject the requirement enunciated by the Supreme Court in [*Sutton*] and its companion cases that whether an impairment substantially limits a major life activity is to be determined with reference to the ameliorative effects of mitigating measures . . . .").

[129] *Id.* at 3556.

[130] *See* Regulations to Implement the Equal Employment provisions of the Americans with Disabilities Act, 74 Fed. Reg. at 48440.

much easier for a Section 504 team to determine whether a disability is affecting the major life activity of learning.

On the other hand, this "common-sense" approach could conceivably result in the disability analysis becoming more complicated, rather than less. As commentators have suggested, determining how a student would be performing, absent any mitigating measure, is purely speculative.[131] Only qualified experts may be able to render opinions about how a student could perform absent mitigating measures taken to remedy a disability.[132] Experts can prove extremely useful when they assist the average layperson by educating him or her on issues that are beyond common knowledge. Why would Congress want to remove the need for experts in determining whether a student qualifies for benefits? A decision whether a student qualifies under the ADA or Section 504 may not always be susceptible to resolution without outside expert advice. It is an extremely important decision that could significantly impacts a student's education, which in turn affects a person over the course of his or her lifetime.

Whether Congress' new approach will prove to be a more effective method for determining if a person qualified for benefits because of a disability under the ADA is unknown at this point. However, with the expansive list of major life activities, and a common-sense approach, Congress has opened the door to allowing an expanding list of people to qualify for educational benefits because of a disability, whereas Congress has previously designated those persons as a "discrete and insular minority."[133]

Lastly, with respect to school districts, many of the current administrators or employees on Section 504 teams are not necessarily special education experts or evaluators. Instead, they are often assistant principals, nurses, or teachers. Thus, they are not necessarily educated or trained on what might constitute a disability under Section 504. Those in a position of advising school districts, private schools, or charter schools, should provide training to Section 504 teams, and such training should include discussing the new definitions of disability, demonstrating how to address the ameliorative effects of mitigat-

[131] Brummel, *supra* note 77 (indicating that "conclusions about how a child should be performing or is capable of performing are not common sense determinations and would require some kind of expert support").

[132] *Id.*

[133] *See Sutton*, 527 U.S. at 494 (Ginsburg, J., concurring).

ing measures, and creating awareness of other changes noted by the Supreme Court.[134] In addition to training, existing policies of school districts should be evaluated to determine whether updates are necessary in light of the changes to Section 504 since the ADAAA went into effect.

[134] *See id.* at 483 (majority opinion).