When Congress passed the Americans with Disabilities Act Amendments Act (ADAAA) in 2008, it had intended to make significant changes to employees’ rights under both the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act of 1973 (Section 504). However, although Congress may not have realized or intended it, these same changes automatically also applied to student eligibility under Section 504 in school settings. As a result, school staff must be extremely careful to apply the new Section 504 rules, particularly in the area of eligibility, at least until the U.S. Department of Education’s Office for Civil Rights (OCR) issues clarifying guidance to the contrary. Such guidance has been anticipated for quite some time. But the question remains: Will Section 504-eligible students actually get more services under the new law?

It is undisputed that the ADAAA resulted in a relaxed standard for student eligibility under Section 504. This is due to two changes in particular. First, the ADAAA states that an impairment that is episodic or in remission must be considered as if it were active. Second, the ADAAA now prohibits consideration of mitigating measures such as medication, medical supplies, or low-vision devices (not including ordinary eyeglasses or contact lenses). In both cases, Section 504 teams face an unusual dilemma: Although the impairment may be in remission or a mitigating measure might be completely effective, Section 504 teams still must evaluate a problem that may not even be present. But must they develop a Section 504 plan with services and accommodations if the student does not appear to actually need one?

The law now clarifies that “an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active. A student with such impairment is entitled to a free, appropriate public education under Section 504” (Question #35 of the Frequently Asked Questions from OCR dated March 27, 2009). Section 504 teams have some experience with episodic conditions that do, in fact, come and go and have developed Section 504 plans to reflect these expected fluctuations. But in cases where the disability is in full remission and, thus, there is no outward evidence of the impairment, the school now must evaluate the student for Section 504 eligibility nonetheless if the impairment could be substantial when in an active state.

The inability to consider mitigating measures also presents challenges for 504 teams. Prior to the enactment of the ADAAA, if medication or another measure mitigated the effects of the disability in some way, the student would be found ineligible for Section 504 protection. Now, however, Section 504 teams are required to completely ignore any beneficial results of medication or any other remediation result. This can make an evaluation extremely challenging in cases where the mitigating measure has been successful because teams need to essentially see an impact that does not presently exist. For example, a student whose asthma was completely controlled by an inhaler previously may have been found ineligible for Section 504 protection since his/her asthma did not substantially limit his/her breathing (in large part due to the inhaler); thus he/she was not disabled. Yet, that same student now may be considered Section 504 eligible once the use of the inhaler is factored out of consideration. Similarly, a student with an allergy may have previously been ineligible under Section 504 due to the use of an Emergency Allergy Plan (EAP) that effectively controlled the student’s exposure and reaction to any allergic elements. Now, because it is a mitigating measure, the EAP cannot be considered and...
this student must be evaluated as if no EAP were in place. The practical result may simply be that the EAP will become the Section 504 plan since it essentially outlines all of the steps necessary to ensure that the student’s health is not compromised and that he/she can access school programs.

What about all of the students who had previously been found ineligible for Section 504 due to the effective implementation of EAPs or health plans? Must they all be found eligible now? The answer appears to be “not necessarily.” A post-ADAAA case, North Royalton (OH) City School District (OCR 2009), involved a student with a tree-nut allergy who had previously been found ineligible under Section 504 because his EAP was completely effective. The school was required to reconsider and apply the new ADAAA rules, which led to a finding of eligibility. Notably, in its Resolution Agreement, OCR did not require the district to review the files of all the other students who similarly had been found ineligible due to the existence of EAPs or health plans. Rather, OCR stated that “[T]he district will issue a letter to the parents/guardians of all students in the District who are currently receiving services under Emergency Allergy Plans of the district’s Section 504 procedures and of their right to request an evaluation under Section 504, at no cost to them, if they believe that their child may have a disability because the child’s medical impairment substantially limits one or more major life activities.” In the absence of any other guidance at this time, this would appear to be the present expectation of school districts with respect to previously ineligible students with EAPs or health plans.

Again, it is anticipated that OCR may issue a clarification on the impact of mitigating measures on students since the original intent of the changes was to provide greater protection to individuals in the employment, not school, setting. But in the meantime, while it is clear that Section 504 eligibility has been broadened substantially, nothing in the ADAAA speaks to the provision of accommodations in Section 504 plans. As a result, the practical effect of the new Section 504 changes may be to increase the number of eligible students. But this does not mean that these newly covered students would necessarily be entitled to additional accommodations. Some have termed this “technical eligibility” because although deemed Section 504 eligible, these students may not need a Section 504 plan. For example, if a student’s AD(H)D is fully controlled by medication that the student diligently takes, there would be no need to draft a Section 504 plan since no accommodations are required. For previously ineligible students who had EAPs or health plans, those plans would simply become the Section 504 plans, thus requiring no new services. This distinction is especially important to educators (and classroom teachers in particular) because the accommodations that they are required to make to implement a Section 504 plan impact them the most. Therefore, the central question for Section 504 teams is:

Even factoring out mitigating measures or considering an impairment that may be episodic or in remission, does the student need accommodations to ensure that his/her educational needs are met as adequately as those of his nondisabled peers?

If the answer is “Yes,” the Section 504 team would develop a Section 504 plan that is appropriate, given those needs. If the answer is “No,” the school would still ensure that the student is provided access to extracurricular and nonacademic services, would be protected from discrimination on the basis of the disability, would have a right to a Section 504 due process hearing or to file an OCR complaint, and would be covered by certain disciplinary protections provided to Section 504-eligible students.

Whether the result of unintended consequences or not, the ADAAA has caused an increase in the number of students found to be eligible for Section 504. Yet it can be a challenge (and somewhat defies logic) to consider students’ needs in “what if” situations that do not presently apply because the students are functioning perfectly well due to successful mitigating measures or an impairment that is in full remission. But, until the guidance emerges from OCR, school staff would be well advised to err on the side of broad coverage under Section 504 but to remain very diligent when considering the need for a Section 504 plan, or what to include in one, since it was never the intent to provide accommodations that are not necessary or appropriate. Rather, Section 504 plans should continue to provide only those accommodations that the Section 504 team believes are directly related to the student’s impairment and will provide him/her with equal access to school programs and services. Accommodations that are not necessary but would allow the student to “maximize his/her potential” have always been and continue to be beyond the scope of requirements of Section 504.