**EXHIBIT A: SECTION 504/ADA ELIGIBILITY**

**DEFINITION OF A QUALIFIED PERSON WITH A DISABILITY**

A person with a disability under Section 504 of the Rehabilitation Act of 1973 (Section 504) and Title II of the Americans with Disabilities Act (ADA) means any person who (i) has a physical or mental impairment that substantially limits one or more major life activities, (ii) has a record of such impairment, or (iii) is regarded as having such impairment.1 For the purposes of the school setting, a “qualified person with a disability” is a person with a disability who is (i) of an age at which students without disabilities are provided elementary and secondary educational services, (ii) of an age at which it is mandatory under state law to provide such services to students with disabilities, or (iii) to whom a state is required to provide a free appropriate public education under [the IDEA].2

A “qualified individual with a disability [also] means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by” the school district.3

Section 504 requires that school districts provide a free appropriate public education (FAPE) to qualified students in their jurisdiction who have a physical or mental impairment that substantially limits one or more major life activities (the first eligibility category noted above).4

**ELIGIBILITY DETERMINATION**

The determination of whether a student is a qualified “person with a disability” under Section 504 must be made on the basis of an individualized inquiry. Congress intends that the definition of disability be construed in favor of broad coverage of individuals to the maximum extent permitted by the terms of the law and that the determination of whether an individual has a disability should not demand extensive analysis.

**Individual with** The term “disability,” with respect to a student, means:

**a disability** a physical or mental impairment that substantially limits one or more major

 life activities of such individual (34 C.F.R. § 104.3(j), 42 U.S.C. § 12102).

In conducting an evaluation of a student’s eligibility under Section 504, the Section 504 Team considers three elements as described below.

The first inquiry is: whether the student has a physical or mental impairment.

**physical or**  (A) any physiological disorder or condition, cosmetic disfigurement, or **mental**  anatomical loss affecting one or more of the following body systems: **impairment**  neurological; musculoskeletal; special sense organs, respiratory (including

speech organs); cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine; or

(B) any mental or psychological disorder, such as intellectual disability, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

If the student does not have a physical or mental impairment, the student is not eligible for Section 504 services and the evaluation is over.

In determining whether the student has a physical or mental impairment, the team may make a determination based on a physician’s statement and diagnosis of a qualifying condition provided by the parent without conducting a “formal” evaluation of the impairment by school staff. It is the school district team members’ discretion to determine whether a physician’s (or other health care provider’s) statement provided by a parent is sufficient to make a determination whether the student has a physical or mental impairment that substantially limits a major life activity. Further, a medical diagnosis of an illness does not automatically mean a student is eligible to receive services under a Section 504 Accommodation Plan. If the parent refuses to authorize members of the Section 504 team to confer directly with a health care provider (including a clinical psychologist) regarding his or her diagnosis and/or the affect of the impairment on a major life activity by providing written consent necessary for such disclosure of health-related information between the professionals, the team may either (a) conclude that it lacks necessary information to proceed with the evaluation and/or development of a Section 504 Accommodation Plan, and inform the parent that his or her failure to cooperate with the evaluation process prevents the team from either proceeding with the evaluation or completing the process of developing an accommodation plan; or (b) proceed with the evaluation and determine what weight to give to the parent’s health provider evaluation report.

That being said, impairments that will consistently meet the definition of disability broadly and without extensive eligibility analysis, as required under the 2008 ADA Amendments Act, include: deafness; blindness; intellectual disability; partially or completely missing limbs, and mobility impairments requiring the use of a wheelchair; autism (which substantially limits major life activities such as communicating, interacting with others, or learning); cancer (which substantially limits major life activities such as normal cell growth); cerebral palsy, which substantially limits major life activities such as walking, performing manual tasks, speaking, or functions of the brain); diabetes (which substantially limits major life activities such as functions of the endocrine system); epilepsy (which substantially limits major life activities such as functions of the brain, or during a seizure, seeing, hearing, speaking, walking, or thinking); HIV or AIDS (which substantially limit functions of the immune system); multiple sclerosis and multiple dystrophy (which substantially limit major life activities including neurological functions, walking, performing manual tasks, seeing, speaking, or thinking); and major depression, post-traumatic stress disorder, obsessive compulsive disorder, or schizophrenia (which substantially limit major life activities including functions of the brain, thinking, concentrating, interacting with others, sleeping, or caring for oneself).5

Other types of impairments may be disabling for some individuals but not for others and, therefore, may require more analysis in order to determine whether or not they substantially limit an individual in performing a major life activity. For example, consider: (a) an individual with asthma who is substantially limited in respiratory functions and breathing compared to most people, as indicated by the effects experienced when exposed to substances such as cleaning products, perfumes, and cigarette smoke; (b) an individual with high blood pressure who is substantially limited in the functions of the circulatory system compared to most people, as indicated by the decrease in blood circulation caused by narrowing of the blood vessels; (c) an individual with a learning disability who is substantially limited in reading, learning, thinking, or concentrating compared to most people, as indicated by the speed or ease with which he can read, the time and effort required for him to learn, or the difficulty he experiences in concentrating or thinking (even if he has achieved a high level of academic success); (d) an individual with a back or leg impairment who is substantially limited compared to most people in the length of time she can stand, the distance she can walk, or the weight she can lift; (e) an individual with a psychiatric impairment (such as a panic disorder, anxiety disorder, or some forms of depression other than major depression), who is substantially limited compared to most people, as indicated by the time and effort required to think or concentrate, the diminished capacity to effectively interact with others, the length or quality of sleep the individual gets, the individual’s eating patterns or appetite, or the effect on other major life activities); (f) an individual with carpal tunnel syndrome who is substantially limited in performing manual tasks compared to most people, as indicated by the amount of pain experienced when writing or using a computer keyboard or the length of time for which such manual tasks can be performed; and (g) an individual with hyperthyroidism who is substantially limited in the functioning of the endocrine system compared to most people, as indicated by overproduction of a hormone that controls metabolism because the impairment causes the operation of the bodily function to over-produce or under-produce in some harmful fashion.

An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active. Examples may include, but not be limited to, epilepsy, hypertension, multiple sclerosis, asthma, cancer, or psychiatric disabilities such as depression, bipolar disorder, post-traumatic stress disorder, and severe food allergies.

The second inquiry is: whether a major life activity is affected by the impairment.

**a major life** A basic activity that most people in the general population can perform with

**activity**  little or no difficulty.

(A) In general, it includes, but is not limited to:

caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.

(B) It also includes the operation of a major bodily function, including, but not limited to:

functions of the immune system, special sense organs and skin, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, lymphatic, musculoskeletal, and reproductive functions.

For students, the Section 504 Team considers major life activities across the student’s entire day, not just his or her school day (as opposed to the IDEA, which, generally, considers the student’s school day education needs). Congress has added “major bodily functions” to the list of major life activities with the purpose of making it easier to find that individuals with certain types of impairments have a disability. The individual need only have one major life activity that is affected by the impairment to satisfy this element. It does not matter if the major life activity is from the first list (such as hearing or lifting) or the list of major bodily functions. Examples of major bodily functions (non-inclusive) are the following: kidney disease that affects bladder function; cancer that affects normal cell growth; diabetes that affects functions of the endocrine system (e.g., production of insulin), epilepsy that affects neurological functions or functions of the brain, and Human Immunodeficiency Virus (HIV) and AIDS that affect functions of the immune system and reproductive functions. Likewise, sickle cell disease affects functions of the hemic system, lymphedema affects lymphatic functions, and rheumatoid arthritis affects musculoskeletal functions.

The third inquiry is: whether the impairment substantially limits the affected major life activity.

**that is substantially** The term “substantially limits” shall be construed in favor of broad coverage **limited** of individuals to the maximum extent permitted by the terms of the law and

should not require extensive analysis.

An impairment is a disability if it “substantially limits” the ability of an individual to perform a major life activity as compared to most people in the general population, or, as appropriate, when compared to most students of a similar age. An impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability. In determining whether someone is “substantially limited,” the Section 504 Team should not evaluate what the individual is “able” to perform, rather, the focus should be solely on what the individual is “unable to perform.”6 An impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered “substantially limiting.” At a minimum, however, it is unlikely that a minor limit on an individual’s major life activity satisfies this element of the definition.

Rely on individualized evidence that a limitation is substantial in the context of the major life activity as a whole. Determination of whether an individual is experiencing a substantial limitation in performing a major life activity is often a common-sense assessment based on comparing an individual’s ability to perform a specific major life activity (which could be a major bodily function) with that of most people in the general population, without resorting to scientific or medical evidence.

Examples: An individual whose endocrine system is substantially limited due to diabetes need not also show that he is substantially limited in eating or any other major life activity. An individual whose normal cell growth is substantially limited due to cancer need not also show that he is substantially limited in learning or any other major life activity. An individual whose endocrine system is substantially limited due to diabetes need not also show that he is substantially limited in eating or any other major life activity. An individual with epilepsy will meet the definition of disability because he is substantially limited in major life activities such as functions of the brain or, during a seizure, functions such as seeing, hearing, speaking, walking, or thinking.

Nevertheless, not every impairment that affects an individual’s major life activities is a substantially limiting impairment. Therefore, eligibility under IDEA does not automatically determine Section 504/ADA eligibility. An IDEA disability may—and in the majority of cases probably will— substantially limit the major life activity of learning, but it need not. A student’s specific learning problem is considered in the context of the major life activity. So, the definitions under the IDEA and Section 504 overlap, but they are not entirely conflated.

**Exclusions**  The ADA excludes from the definition of a qualified individual with a

disability and, by incorporation by reference, from Section 504 protection, any person who is currently engaging in the illegal use of drugs when the school district acts on the basis of such use. Drug means a controlled substance, as defined in schedules I through V of section 202 of the Controlled Substance Act (21 U.S.C. § 812).

However, the following qualified individual with a disability shall not be excluded who (1) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use; (2) is participating in a supervised rehabilitation program and is no longer engaging in such use; or (3) is erroneously regarded as engaging in such use, but is not engaging in such use.

Section 504’s definition of a student with a disability does not exclude users of alcohol. However, Section 504 allows schools to take disciplinary action against students with disabilities using drugs or alcohol to the same extent as students without disabilities.7

The U.S. Department of Justice regulations under 28 C.F.R. Ch. 1, Part 35, state that the term “disability” does not include transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting in physical impairments, or other sexual behavior disorders; compulsive gambling, kleptomania, or pyromania; or psychoactive substance use disorders from current illegal use of drugs.8

**Mitigating Measures**

The determination of whether an individual’s impairment substantially limits a major life activity shall be made without regard to the remedial effects of mitigating measures. Mitigating measures are such remedial measures as (a) medication, medical supplies, equipment or appliances, (b) low- vision devices (which do not include ordinary eyeglasses or contact lenses), (c) prosthetics (including limbs and devices), hearing aids, cochlear implants or other implantable hearing devices, mobility devices, oxygen therapy equipment and supplies; (d) the use of assistive technology; (e) reasonable accommodations or auxiliary aids or services; and (f) learned behavioral or adaptive neurological modifications. It also includes, e.g., a student whose has controlled the effect of the impairment (mitigated it) by adhering to a careful regimen of eating only food products consistent with a special diet.

However, evaluators are allowed to consider the negative effects from the use of mitigating measures in determining if a disability exists. For example, the side effects that an individual experiences from use of medication for hypertension may be considered in determining whether the individual is substantially limited in a major life activity.

Congress created one exception to the mitigating measures analysis. The ameliorative effects of the mitigating measures of ordinary eyeglasses and contact lenses shall be considered in determining if an impairment substantially limits a major life activity. “Ordinary eyeglasses or contact lenses” are lenses that are intended to fully correct visual acuity or eliminate refractive error, whereas “low- vision devices” are devices that magnify, enhance, or otherwise augment a visual image. Ordinary eyeglasses and contact lenses are not mitigating measures that must be disregarded when determining whether an individual has an impairment that substantially limits a major life activity. An individual with severe myopia whose visual acuity is fully corrected, is not substantially limited in seeing, because the ameliorative effects of the lenses must be considered in determining whether the individual is substantially limited in seeing.9

If the only visual loss and individual experiences affects the ability to see well enough to read, and the individual’s ordinary reading glasses are intended to completely correct for this visual loss, the ameliorative effects of using the reading glasses must be considered in determining whether the individual is substantially limited in seeing.

1 34 C.F.R. § 104.3(j)(1); 42 U.S.C. § 12102. The Sec. 504 statute and regulations have not been revised to reflect “person first” language and, therefore, still contain the term “handicapped person.” This term has been substituted here with “person with a disability.”

2 34 C.F.R .§ 104.3(l)(2); see Ellenberg v. New Mexico Military Institute, 572 F.3d 815 (10th Cir. 2009): Both Section 504 and ADA standards require individualized evidence that a limitation is substantial in the context of the major life activity as a whole. Id. at 821. But eligibility under IDEA does not automatically determine Section 504 and ADA eligibility. Not every impairment that affects an individual’s major life activities is a substantially limiting impairment. Id. at 821, citing Knapp v. Northwestern Univ., 101 F.3d 473, 481 (7th Cir. 1996). “[A]n IDEA disability may—and in the majority of cases probably will—substantially limit a major life activity. But . . . it need not . . . .” Id. at 821. The “definitions may overlap,” but they are not entirely conflated. Id. at 822. “But the likelihood of overlap does not . . . mean that a student receiving special education services under the IDEA is per se handicapped under [Section 504],” Id. at 823, citing Bowers, 563 F. Supp. 2d at 533. Section 504 and ADA involve the same substantive standards and analysis of eligibility under a ADA claim and Section 504 is the same. Id. at 824.

3 42 U.S.C. § 12131(2).

4 Although the definition of a qualified person with a disability under Section 504 includes two additional categories of individuals, that is, those with (ii) a record of such impairment, or (iii) being regarded as having such an impairment, the mere fact that a student satisfies the definition of disability solely by virtue of having a “record of” or as being “regarded as” disabled does not trigger Section 504 protections that require the provision of a free appropriate public education. Therefore, the rights and obligations that arise out of a determination of whether an accommodation plan is required is only relevant when the individual actually has a disability. An individual "regarded as" disabled is still entitled to protection from discrimination including but not limited to protection from retaliation and harassment on the basis of disability.

5 See Equal Employment Opportunity Commission proposed rulemaking related to Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, as Amended, 74 Fed. Reg. 48431, 48441-42 (Sept. 23, 2009) [EEOC Regulations].

6 EEOC Regulations.

7 OCR Q & A, #17.

8 28 C.F.R. § 35.104 Disability(5) (U.S. Dept. of Justice, Nondiscrimination on the basis of disability in state and local government services). However, Wisconsin’s Pupil Nondiscrimination rules include sexual orientation as a protected category from prohibited discrimination with regard to admissions, participation in, or access to the benefits of school programs and activities. Wis. Admin. Code § PI 9.

9 EEOC Regulations.