September 29, 2000

Sutton Investigative Guidance:
Consideration of "Mitigating Measures" in OCR Disability Cases

Introduction

This document provides an analysis of the Supreme Court decisions in Sutton v. United Air Lines, Inc., 527 U.S. 471, 119 S.Ct. 2139 (1999), Murphy v. United Parcel Service, Inc., 527 U.S. 516, 119 S.Ct. 2133 (1999), and Albertsons, Inc. v. Kirkingburg, 527 U.S. 555, 119 S.Ct. 2162 (1999). In these cases, the Supreme Court held that the determination of whether an individual has a disability under Title I of the Americans With Disabilities Act of 1990 (ADA) must take into account the effects, both positive and negative, of any mitigating measures used by that individual. Because Titles I and II of the ADA use the same definition of disability, and because this definition is essentially the same as the definition of disability under Section 504 of the Rehabilitation Act of 1973 (Section 504), these Supreme Court decisions apply to Title II and Section 504 as well.

The purpose of this document is to provide guidance to OCR enforcement offices on how these decisions might apply to OCR cases involving determinations of whether a student has a disability and to ensure a consistent OCR approach in this area.[i] This guidance is a living document, and will be modified as needed, in light of case experience. Importantly, the Sutton/Murphy/Albertsons decisions have not changed the process OCR follows in cases involving allegations of discrimination based on disability, but have changed the standard used in determining whether a student has a disability when that issue arises. For your convenience, case summaries of Sutton, Murphy and Albertsons are attached at Appendix A. Additional legal discussion and citations are contained in endnotes.

Under the ADA, there are three ways a student can have a disability. A student 1) can have a physical or mental impairment that substantially limits a major life activity; 2) can have a record of such an impairment; or 3) can be regarded as having such an impairment. The Sutton/Murphy/Albertsons decisions, and this document, focus on the first of these – whether a student has a physical or mental impairment that substantially limits a major life activity.

The Equal Employment Opportunity Commission (EEOC), the federal agency with the lead responsibility for interpreting Title I of the ADA and disability employment discrimination law, has issued instructions for EEOC investigators on how to incorporate Sutton, Murphy and Albertsons into their investigations. A copy of these EEOC instructions is attached at Appendix B.[ii] Since Section 504 was amended to incorporate Title I standards for employment discrimination, OCR should rely on this EEOC document, as well as other EEOC guidance documents, in investigating complaints of disability employment discrimination under Section 504 and Title II of the ADA.[iii]

Background

In the Sutton/Murphy/Albertsons cases, the Supreme Court decided that the determination of whether an individual has a disability under Title I of the ADA must take into account the effects, both positive and negative, of any mitigating measures used by that individual. Mitigating measures are devices or practices, conscious or not, that a person actually uses on his or her own to reduce or eliminate the effects of that person's physical or mental impairment, such as corrective eyeglasses or medications.

These Supreme Court decisions on mitigating measures constitute a change in how to identify a person with a disability. Before these decisions, the federal government's position (and the position of most appellate courts) was that the effect of mitigating measures should not be taken into account when determining whether a person had a disability. For example, prior to Sutton/Murphy/Albertsons, when determining whether a person with a psychiatric impairment who was taking medication was substantially limited in the major life activity of caring for himself or herself, you would consider how that person functioned **without** medication. After these Supreme Court decisions, you must consider how that person functions in caring for himself or herself **with** the medication that he or she is taking.

Application of Supreme Court decisions to Title II, Section 504, and IDEA

The decisions in Sutton, Murphy and Albertsons all involved Title I of the ADA, which OCR does not enforce. However, these Supreme Court decisions also apply to the other parts of the ADA, including Title II, which OCR does enforce, since all the titles of the ADA use the same definition of disability.[iv] These Supreme Court decisions should also be read to apply to Section 504, since the ADA definition of disability and the Section 504 definition of disability are essentially the same.[v] Note, though, that the Sutton/Murphy/Albertsons decisions are employment cases. OCR should keep in mind the differences between the employment and educational settings.[vi]

While the Sutton/Murphy/Albertsons decisions should be read to apply to Title II and Section 504, these decisions do not apply to the Individuals With Disabilities Education Act (IDEA). The IDEA statute contains a different standard for determining who is a student with a disability. The IDEA defines the term "child with a disability" as a child with one or more of several listed conditions who, by reason thereof, needs special education and related services. 20 U.S.C. 1401(3); 34 C.F.R. 300.7. Thus, the Sutton/Murphy/Albertsons decisions do not change the eligibility process under IDEA.

The fact that a school district has found a student to need special education and related services under IDEA because of a listed condition creates a strong, although rebuttable, presumption that the condition**,** with any mitigating measures used, is an impairment that substantially limits a major life activity such as learning or reading. In an IDEA evaluation, a school district uses a variety of assessment tools and strategies for the purpose of determining whether the child can participate in the general curriculum and what the child's Individual Education Program (IEP) should contain. IDEA regulations also require that the

child be assessed in all areas related to the suspected disability, including health, vision, hearing, and social and emotional status.[vii] In conducting this comprehensive evaluation, a district would generally consider the effects of any mitigating measures the student was using, in order to determine what more is needed to ensure that the student can access the educational program.

If the district determines that the student needs special education and related services, that is evidence suggesting that the student is substantially limited in a major life activity such as reading or learning.[viii] OCR must consider this evidence in cases which raise the issue of whether a particular student has a disability under the ADA and Section 504. OCR should presume that an IDEA-eligible student is substantially limited in a major life activity such as learning or reading, unless evidence indicates otherwise.[ix] Of course, students can still have a disability under Section 504 and Title II even if they are not eligible for special education under IDEA.

Application of Supreme Court decisions to OCR cases

The Sutton/Murphy/Albertsons decisions do not require OCR to change its investigatory approach or the process used in making a disability determination.[x] However, when the need to make a disability determination arises in OCR cases, OCR's analysis must now include appropriate consideration of mitigating measures. In analyzing whether a particular student's impairment substantially limits a major life activity, OCR must now take into account the effects, both positive and negative, of any mitigating measures that the student was actually using at the time of the alleged discrimination.

A. What is (and is not) a mitigating measure.

A mitigating measure is a device or practice that a student uses on his or her own to reduce or eliminate the effects of the student's impairment. A mitigating measure is something a student can use without any action or assistance by the school. The mitigating measures involved in the cases before the Supreme Court were corrective eyeglasses and contact lenses (Sutton); medications for high blood pressure (Murphy); and subconscious adjustments made by a person with monocular vision to cope with his visual impairment (Albertsons**)**.[xi]

Note that only mitigating measures that a student was actually using at the time of the alleged discrimination are relevant. The Supreme Court decisions in Sutton/Murphy/Albertsons do not require people with impairments to use mitigating measures to try to limit the effects of their impairments.[xii] If a student was using one or more mitigating measure at the time of the alleged discrimination, the effects of that mitigating measure (or measures) are relevant. If a student was not using a mitigating measure, then any effects a particular mitigating measure might have had, if that student had used it, are speculative and irrelevant.[xiii]

Mitigating measures should not be confused with reasonable modifications, academic adjustments, auxiliary aids and services, or related aids and services,[xiv] all of which are

provided by, or are under the control of**,** the educational institution.[xv] Examples of these are computers adapted for use by blind students, sign language interpreters, and permission to monitor diabetes or inject insulin. When some action or permission on the part of the school would be required before a student could use a measure, the effects of the measure will not be considered as "mitigating" because the measure is effectively unavailable to the student unless the school takes some action.[xvi] Therefore, OCR will not consider the impact of reasonable modifications, academic adjustments, auxiliary aids and services, or related aids and services when evaluating whether a student's impairment substantially limits a major life activity**.**

B. How to determine if a student's impairment, taking into account the effect of any mitigating measures, substantially limits a major life activity.

A student has a disability if his or her impairment substantially limits a major life activity. In making a disability determination, OCR should determine whether any limitations the student experiences related to his or her impairment, taking into account the effects, both positive and negative, of any mitigating measures used, are "substantial." OCR should also consider whether the limitations a student experiences affect any "major life activities." If the limitations are not substantial or do not affect a major life activity, a student does not have a disability.[xvii]

1. Substantially limits

The meaning of "substantially limits" has not changed. Rather, the "substantially limits" determination now includes a mitigating measures analysis. OCR should keep the following points in mind in determining whether the limitations the student experiences are substantial:

- The determination of disability must be made on the basis of an individualized inquiry.[xviii] Be careful about assuming that an impairment automatically equals a disability.[xix] That is, be careful about assuming that all people with "impairment x" have a disability. Rather, determine whether, for the particular student in question, that student's "impairment x" substantially limits him or her in any major life activity. For example, do not assume that all students with epilepsy have a disability. Rather, determine whether a particular student's epilepsy substantially limits him or her in a major life activity. For some impairments, the analysis may be simple. For instance, a person with total loss of vision is substantially limited in the major life activity of seeing.

- Consider only those mitigating measures the student was actually using at the time of the alleged discrimination. Do not speculate about what the student could have done if he or she had been using mitigating measures, or had been using different mitigating measures. For example, if a student with Attention Deficit Disorder is not taking Ritalin or any other medication, do not speculate as to how that child would act if she did take Ritalin. In addition, even if the student had medication but was not using it, do not consider what the student could have done if he or she had been taking his or her

medication. Note, though, that while a person's decision not to use mitigating measures does not affect the disability determination, it may be relevant elsewhere. For example, if a student has a disability and refuses to take medication that a doctor has prescribed, that information may be relevant in determining what the school district must do for that student with a disability.

- Mitigating measures are different from actions taken by the school. Mitigating measures should not be confused with reasonable modifications, academic adjustments, auxiliary aids and services, or related aids and services, all of which are provided by, or are under the control of, the educational institution.

- If there is a mitigating measure involved, determine if the student can use the mitigating measure independently in the school setting. Does the student need the school to take some action (such as provide a related aid or service, or modify a policy, including giving permission to use the mitigating measure during school hours, on school grounds) in order to use the mitigating measure? If the student needs the school to take some action, do not consider the effect of the measure (positive or negative) in determining if the student has an impairment that substantially limits him or her in any major life activity.

- If the individual was using a mitigating measure at the time of the alleged discrimination, determine the exact effects of the mitigating measure on this student. Did the mitigating measure fully control, partially control, or have little effect in controlling the symptoms and limitations of the impairment? Is the measure less effective under certain conditions? Find out as many specific facts as possible. Remember that this whole analysis is done on a case-by-case basis. Generalized assumptions, such as "hearing aids correct hearing impairments," or "a specific medication mitigates the effects of epilepsy," are not sufficient to show what hearing aids do for John Doe, who has a hearing impairment, or what a specific medication does for Jane Doe, who has epilepsy.

- Determine if the mitigating measure is effective all of the time for this student. If there is a risk of failure of the mitigating measure(s), or a risk that the effect of the mitigating measure(s) may not be consistent, then the student may still be substantially limited in a major life activity, despite the use of the measure(s). If that is the case, the school should be prepared to deal with emergency situations that might arise if the mitigating measure fails. For instance, a student with diabetes who injects insulin at home may still need an insulin injection, on an emergency basis, at school.

- Take both the positive and negative effects of mitigating measures into account.[xx] Are there any side effects of the mitigating measure the student used? Did the mitigating measure itself cause any limitations on what the student could do? For instance, assume a student with a psychiatric illness takes a certain medication to help with the effects of that illness, but the medication causes severe headaches and nausea. Consider whether these side effects substantially limit the student in any major life activities.

- Remember that a student who uses one or more mitigating measures can still have a disability.[xxi] A mitigating measure may not fully correct the effects of the student's impairment. For instance, a student with a hearing impairment who uses a hearing aid may be able to hear conversation because of hearing aid amplification, but may still not be able to adequately understand it because of sound distortion caused by a sensori-neural hearing loss. This student may still be substantially limited in her ability to hear, and therefore have a disability. Additionally, as noted above, side effects from the mitigating measure itself may substantially limit the student in a major life activity.

2. Major life activities

If a student's impairment substantially limits him or her in doing something, that student has a disability only if the "something" in which he or she is substantially limited is a major life activity. While the Sutton/Murphy/Albertsons decisions did not focus directly on this element of the disability determination, one indirect effect of these decisions is that the "major life activity" component becomes more important. Mitigating measures used by a student may reduce or eliminate a substantial limitation on one major life activity, but may have a different effect on another major life activity. For instance, a particular student who uses a wheelchair may not be substantially limited in the major life activity of caring for himself, but may still be substantially limited in the major life activity of walking.[xxii]

While there is no statutory definition of "major life activity" in either the ADA or the Rehabilitation Act, the regulations implementing Section 504, Title II, and Title I all state that " '[m]ajor life activities' means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."[xxiii] This regulatory list is not exhaustive. An activity need not be on the list to be considered a major life activity. In Bragdon v. Abbott, 524 U.S. 624, 118 S.Ct. 2196 (1998), the Supreme Court, in ruling that reproduction is a major life activity, rejected the argument that major life activities had to be limited to activities that are public, economic, or daily in nature.[xxiv]

The following activities have been recognized as major life activities: reading;[xxv] thinking;[xxvi] concentrating;[xxvii] reproduction;[xxviii] sleeping, engaging in sexual relations, and interacting with others;[xxix] eating and walking;[xxx] and standing, lifting and reaching.[xxxi] Lower courts have concluded that the following are not major life activities: having a fully functioning cardiovascular system, shoveling snow, gardening, mowing the lawn, playing tennis, fishing and hiking;[xxxii] and awareness.[xxxiii] While some activities in and of themselves may not be major life activities, problems in performing numerous tasks could create a pattern that suggests that a major life activity**,** such as caring for oneself, is substantially limited.[xxxiv]

In the "major life activity" analysis, keep the following points in mind:

- Be clear on which major life activity (or activities) the student is substantially limited in performing. The major life activity may be one of the ones discussed above, or it may

be something else. An activity need not have a public, economic, or daily aspect in order to be a "major life activity."

- For a student, the major life activity does not have to be learning.[xxxv]

- For students with learning disabilities, be sure to consider other major life activities in addition to learning, such as reading. For example, suppose you are trying to determine if a particular honors student with dyslexia, who is not receiving any special education or related aids and services, has a disability. Determining whether this student is substantially limited in learning may be complicated, given her good academic record. However, if that student's dyslexia substantially limits her ability to read, then she has a disability.

- A person with an impairment has to be substantially limited in only one major life activity to have a disability, although he or she certainly might be substantially limited in more than one major life activity.

C. "Record of" a disability and "regarded as having" a disability

In the Sutton/Murphy/Albertsons decisions, the Supreme Court did not analyze the "record of" prong of the definition of disability. However, in Sutton the Supreme Court did discuss the meaning of the "regarded as" prong. The Court stated that there are two ways in which an individual may be regarded as having a disability.

> ". . . (1) a covered entity mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities, or (2) a covered entity mistakenly believes that an actual, nonlimiting impairment substantially limits one or more major life activities. In both cases, it is necessary that a covered entity entertain misperceptions about the individual – it must believe either that one has a substantially limiting impairment that one does not have or that one has a substantially limiting impairment when, in fact, the impairment is not so limiting."

Sutton, 119 S.Ct. at 2149-2150. OCR should keep this analysis in mind when determining if a particular individual has a disability under the "regarded as" prong.

Conclusion

The Sutton/Murphy/Albertsons decisions do not require OCR to change its investigatory approach for cases under Section 504 and the ADA. However, the Supreme Court decisions have set a new standard that must inform OCR's analysis when the need to make a disability determination arises in OCR cases. OCR's analysis must now include appropriate consideration of mitigating measures. That is, in determining whether a particular student's impairment substantially limits a major life activity, OCR must now take into account the effects, both positive and negative, of any mitigating measures that the student was actually using at the time of the alleged discrimination.

This guidance should be considered when the issue of whether a student has a disability comes up in OCR cases. If you have questions about this guidance document, please contact Anne Hoogstraten, in OCR's Program Legal Group. As you encounter cases implicating Sutton issues not fully addressed in this document, please "call home" for further discussion.

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[i] This guidance document often uses the term "student" to describe the individual about whom OCR is making the disability determination. Note that where relevant, this guidance applies to other individuals as well, such as applicants to college.

[ii] The EEOC instructions, entitled "Instructions for Field Offices: Analyzing ADA Charges After Supreme Court Decisions Addressing 'Disability' and 'Qualified'" (EEOC Field Instructions) and found at Appendix B, are copied from the EEOC website, at http://www.eeoc.gov/docs/field-ada.html. A link to the EEOC website can be found on the Program Legal Group's website, at http://connectediis/ocr/plg/CR_Agencies.

[iii] Section 504 employment claims remain valid, but because the Ninth Circuit Court of Appeals has ruled that the employment provisions of Title II of the ADA are invalid, OCR should not include allegations of employment discrimination under Title II in the following states: Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington. Zimmerman v. Oregon Department of Justice, 170 F.3d 1169 (9th Cir. 1999), rehearing en banc denied, 183 F.3d 1161 (9th Cir. 1999), petition for cert. filed, Aug. 8, 1999. However, the Title I statute and regulations continue to provide the compliance standard.

[iv] In the ADA statute, the definition of disability is contained in a section, 42 U.S.C. 12102, which appears near the beginning of the statute, before Title I. This definition applies to all the titles of the ADA.

[v] The ADA defines "disability" as follows.

> (2) Disability. The term 'disability' means, with respect to an individual
> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
> (B) a record of such an impairment; or
> (C) being regarded as having such an impairment.

42 U.S.C. 12102(2). See also Title II regulation, at 28 C.F.R. 35.104. The relevant Rehabilitation Act definition of disability is that an "individual with a disability" means "any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities; (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment." 29 U.S.C. 706(8). See also Section 504

regulation, at 34 C.F.R. 104.3(j)(1) (differs slightly from statutory definition – uses "handicapped person," and omits "of such person's" when discussing major life activities). The Department of Justice has said that the ADA definition of disability is comparable to the Rehabilitation Act definition, and that legislative history makes clear that the analysis of the Rehabilitation Act definition should apply fully to the ADA term "disability." Section-by-section analysis of Title II regulation 28 C.F.R. 35.104. OCR has always interpreted the ADA definition of disability and the Section 504 definition of disability as being the same.

[vi] State compulsory attendance laws require students of a certain age to attend school at the elementary and secondary level. The school must provide students with disabilities the assistance they need to function while in school. The obligation to provide a free appropriate public education (FAPE) is different from the obligation of an employer to provide reasonable accommodations. Employers need not provide a reasonable accommodation if doing so would be an undue burden. Since students are generally younger than employees, students with disabilities are less likely than employees to have fully developed effective self-compensating measures to deal with their disabilities. They are more likely to need assistance in the use of measures that adults may use independently. At the postsecondary level, students have the obligation to inform the school of their disability and their need for academic adjustments, auxiliary aids, and reasonable modifications, and to provide documentation where needed. Nonetheless, schools must provide academic adjustments, auxiliary aids, and reasonable modifications as needed to ensure that students with disabilities are not subject to discrimination.

[vii] See IDEA regulations at 34 C.F.R. 300.530 – 300.536.

[viii] In addition, a determination that a student needs special education and related services under IDEA also may be evidence suggesting that the student has a record of a physical or mental impairment that substantially limits a major life activity, or that the student is regarded as having such an impairment.

[ix] This analysis is consistent with the guidance set forth in an October 24, 1988 memorandum issued by Assistant Secretary LeGree S. Daniels, entitled "Distinctions Between Section 504 and the Education of the Handicapped Act," codified as Policy Codification System (PCS) Doc. 166. That memorandum, at page 3, states that "[W]hile eligibility for special education virtually always is an indication that a child is handicapped or believed to be handicapped, the converse is not always true." The memorandum notes that while coverage under Section 504 and the Education of the Handicapped Act (now known as the IDEA) may be similar, the analytical approach is different, and OCR must follow the approach of the Section 504 regulation.

[x] This guidance document does not change the guidance set forth in a May 13, 1992 memorandum entitled "Jurisdiction over Elementary and Secondary Education Free Appropriate Public Education Complaints in which a Child's Status as a Handicapped Person Is at Issue - - Recision of October 14, 1987 Memorandum," and codified as Policy Codification System (PCS) Doc. 243. As stated in that guidance, in general, OCR makes a determination of a person's disability status early in the investigation. However, in

elementary and secondary education free appropriate public education (FAPE) complaints in which a child's disability status is a disputed issue, OCR should not make a determination as to whether the child has a disability. Rather, OCR should investigate whether the recipient conducted an evaluation in accordance with applicable Section 504 requirements that was sufficient to determine the child's disability status.

[xi] The Supreme Court did not clearly define the term "mitigating measures." Rather, the Court used the term to describe certain devices and actions used by the individual employees and applicants in the cases. In Sutton, the Court described eyeglasses and contact lenses as "measures that mitigate the individual's impairment." Sutton, 119 S.Ct. at 2143. In Murphy, the Court indicated that blood pressure medication is a mitigating measure. Murphy, 119 S.Ct. at 2137. The Court also indicated that "measures undertaken, whether consciously or not, with the body's own systems" should be considered mitigating measures. Albertsons, 119 S.Ct. at 2169.

[xii] The Supreme Court said that "if a person is taking measures to correct for, or mitigate, a physical or mental impairment, the effects of those measures – both positive and negative – must be taken into account when judging whether that person is 'substantially limited' in a major life activity and thus 'disabled' under the [ADA]." Sutton, 119 S.Ct. at 2146. Nothing in Sutton, Murphy or Albertsons implies that an employer, a recipient, or anyone else can require individuals with impairments to use mitigating measures. But see Tangires v. Johns Hopkins Hospital, 79 F.Supp.2d 587 (D.Md. 2000), aff'd per curiam, 2000 U.S.App.LEXIS 23555 (4th Cir. 9-20-00) (unpublished opinion) (district court ruled that since plaintiff's asthma is correctable by medication, and plaintiff refused to take the medication, plaintiff's asthma did not substantially limit her in any major life activity; Fourth Circuit did not address merits).

[xiii] The Supreme Court noted that the approach of not taking mitigating measures into account "would often require courts and employers to speculate about a person's condition and would, in many cases, force them to make a disability determination based on general information about how an uncorrected impairment usually affects individuals, rather than on the individual's actual condition." Sutton, 119 S.Ct. at 2147. By the same token, one cannot speculate about how a mitigating measure that a person was not using might affect that individual. See Finical v. Collections Unlimited, Inc., 65 F.Supp.2d 1032 (D.Ariz. 1999) (testimony of expert witness that plaintiff would benefit from hearing aids is not evidence that plaintiff does not have a disability when mitigating measures are considered, since plaintiff does not in fact use hearing aids).

[xiv] The term "reasonable accommodations" is sometimes used to describe reasonable modifications, academic adjustments, auxiliary aids and services, or related aids and services. "Reasonable accommodations" is a concept from the employment context. The analysis used with "reasonable accommodations" is significantly different from the analysis used with "related aids and services" in the elementary and secondary student context. This document does not use the term "reasonable accommodations."

[xv] This documents uses the term "educational institution" to refer to the recipient or public entity that is subject to Section 504 and/or Title II of the ADA. Where relevant, this guidance applies to recipients and public entities other than educational institutions as well.

[xvi] See Finical v. Collections Unlimited, Inc., 65 F.Supp.2d 1032, 1038 (D.Ariz. 1999) (footnote omitted) ("the mitigating measures or devices that must be considered are those employed by the individual claimant, such as hearing aids or blood pressure medication, not those provided by, and within the control of, the employer").

[xvii] See Spades v. City of Walnut Ridge, 186 F.3d 897 (8th Cir. 1999) (police officer's depression does not substantially limit him in any major life activities, since medication and counseling "allow him to function without limitation"); Todd v. Academy Corp., 57 F.Supp 2nd 448 (S.D.Tex 1999) (stock clerk's epilepsy does not substantially limit him in any major life activities, since with medication he suffers only light seizures, lasting from five to fifteen seconds, about once a week, and has some reduction in "thinking capacity" and "intellectual functioning"); McGuinness v. University of New Mexico School of Medicine, 170 F.3d 974 (10th Cir. 1998), cert denied 526 U.S. 1051 (1999) (pre-Sutton case) (medical student with test anxiety did not have disability because adjusted study regimen mitigated the effects of the text anxiety).

[xviii] "[W]hether a person has a disability under the ADA is an individualized inquiry." Sutton, 119 S.Ct. at 2147.

[xix] "While some impairments may invariably cause a substantial limitation of a major life activity, cf. [Bragdon v. Abbot, 524 U.S. 624, 642] (declining to address whether HIV infection is a per se disability), we cannot say that monocularity does." Albertsons, 119 S.Ct. at 2169.

[xx] Sutton, 119 S.Ct. at 2147.

[xxi] In Sutton, the Supreme Court stated the following. "The use of a corrective device does not, by itself, relieve one's disability. Rather, one has a disability under subsection A if, notwithstanding the use of a corrective device, that individual is substantially limited in a major life activity." Sutton, 119 S.Ct. at 2149. See Taylor v. Phoenixville School District, 184 F.3d 296 (3rd Cir. 1999) (genuine issue of material fact exists over whether school employee with bipolar disorder is substantially limited in thinking while taking lithium)(on remand, district court denied defendant's motion for summary judgment on actual disability and "regarded as", but granted motion on "record of" disability, 2000 U.S. Dist. LEXIS 13407 (E.D.Pa. 9-19-2000)); McAlindin v. County of San Diego, 192 F.3d 1226 (9th Cir. 1999), amended by, rehearing en banc denied by, 201 F.3d 1211 (9th Cir. 2000), cert. denied, 120 S.Ct. 2689 (2000) (genuine issue of material fact exists over whether county employee with anxiety disorders is substantially limited while taking medications, which cause dizziness, narrowed vision, sleep problems, and impotence).

[xxii] In discussing that individuals who use mitigating measures can still have disabilities, the Supreme Court stated that "individuals who use prosthetic limbs or wheelchairs may be

mobile and capable of functioning in society but still be disabled because of a substantial limitation on their ability to walk or run." Sutton, 119 S.Ct. at 2149.

[xxiii] 34 C.F.R. 104.3(j)(2)(ii); 28 C.F.R. 35.104; 29 C.F.R. 1630.2(i).

[xxiv] Although Bragdon was a Title III (ADA) case, the Court looked to Section 504 to interpret Title III. The Court stated that the list of major life activities in the Section 504 regulation "is illustrative, not exhaustive." 118 S.Ct. at 2205. The Court rejected the argument that major life activities had to be limited to public activities. "The inclusion of activities such as caring for one's self and performing manual tasks belies the suggestion that a task must have a public or economic character in order to be a major life activity for purposes of the ADA. On the contrary, the Rehabilitation Act regulations support the inclusion of reproduction as a major life activity, since reproduction could not be regarded as any less important than working and learning. Petitioner advances no credible basis for confining major life activities to those with a public, economic, or daily aspect." 118 S.Ct. at 2205.

[xxv] Bartlett v. New York State Board of Law Examiners, 2000 U.S.App.LEXIS 22212 (2d Cir. 8-30-00), on remand from Supreme Court, 527 U.S. 1031 (1999).

[xxvi] Taylor v. Phoenixville School District, 184 F.3d 296 (3rd Cir. 1999).

[xxvii] EEOC Field Instructions at 7. But see Pack v. KMART, 166 F.3d 1300 (10th Cir. 1999), cert. denied, 120 S.Ct. 45 (1999) (rejecting concentration as a major life activity).

[xxviii] Bragdon v. Abbot, 524 U.S. 624, 118 S.Ct. 2196 (1998).

[xxix] McAlindin v. County of San Diego, 192 F.3d 1226 (9th Cir. 1999), amended by, rehearing en banc denied by, 201 F.3d 1211 (9th Cir. 2000), cert. denied, 120 S.Ct. 2689 (2000).

[xxx] Weber v. Strippit, Inc., 186 F.3d 907 (8th Cir. 7-29-99), cert. denied, 120 S. Ct. 794 (2000).

[xxxi] Davoll v. Webb, 194 F.3d 1116 (10th Cir. 10-25-99).

[xxxii] Weber v. Strippit, Inc., 186 F.3d 907 (8th Cir. 7-29-99), cert. denied, 120 S. Ct. 794 (2000).

[xxxiii] Deas v. River West, L.P., 152 F.3d 471, 479, n.18 (5th Cir. 1998), cert. denied, 527 U.S. 1035 (1999), motion granted by, cert.denied, 527 U.S. 1044 (1999).

[xxxiv] EEOC Field Instructions at 9-10.

[xxxv] In Pacella v. Tufts University School of Dental Medicine, 66 F.Supp.2d 234 (D.Mass. 1999), the district court considered whether a dental student with vision problems was

substantially limited in seeing, and whether the student was substantially limited in learning. The court found that the student, who used glasses, contact lenses, and visual cues, was not substantially limited in either major life activity.