ACCOMMODATION OF DISABILITIES: UNDERSTANDING SEC. 504

The Office for Civil Rights (OCR) of the U.S. Department of Education is primarily responsible for enforcement of the requirements of Sec. 504 and the Americans with Disabilities Act (ADA) by recipients of federal financial assistance. Other terms that may appear below are:

ADA	Americans with Disabilities Act of 1990
ADD	Attention Deficit Disorder
ADHD	Attention Deficit Hyperactivity Disorder
BIP	Behavioral Intervention Plan/Program
CTR	Commitment To Resolve (Same as VRA)
EHLR	Education of the Handicapped Law Report (forerunner to IDELR)
ESY	Extended School Year
FAPE	Free Appropriate Public Education
FBA	Functional Behavioral Assessment/Analysis
FERPA	Family Educational Rights and Privacy Act
FPCO	Family Policy Compliance Office
IDEA	Individuals with Disabilities Education Act
IDEIA	Individuals with Disabilities Education Improvement Act of 2004
IDELR	Individuals with Disabilities Education Law Report (EHLR successor)
IEP	Individualized Education Plan/Program
LOF	Letter of Finding
LRE	Least Restrictive Environment
LEA	Local Educational Agency
OCR	Office for Civil Rights (USDOE)
OSERS	Office of Special Education and Rehabilitative Services (USDOE)
OSEP	Office of Special Education Programs (USDOE)
SEA	State Educational Agency
Sec. 504	Section 504 of the Rehabilitation Act of 1973
VRA	Voluntary Resolution Agreement (same as CTR)

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RELEVANT PROVISIONS OF SECTION 504 OF THE REHABILITATION ACT OF l973

(Nondiscrimination On The Basis of Disability In Programs and Activities Benefitting From Federal Financial Assistance)

34 CFR Part l04

Definitions

§ 104.3(f) Recipient means any state or its political subdivision, any instrumentality of a state or its political subdivision, any public or private agency, institution, organization, or other entity, or any person to which Federal financial assistance is extended directly or through another recipient, including any successor, assignee, or transferee of a recipient, but excluding the ultimate beneficiary of the assistance.

§ l04.3(j) "Handicapped person" (1) ...means any person who (i) has a physical or mental impairment, which substantially limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.

(2) (i) “Physical or mental impairment” means:
(A) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, disgestive, genito-urinary; hemic and lymphatic; skin; and endocrine; or
(B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(ii) "Major life activities" means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(iii) "Has a record of such an impairment" means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(iv) "Is regarded as having an impairment" means (A) has a physical or mental impairment that does not substantially limit major life activities but that is treated by a recipient as constituting such a limitation; (B) has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or (C) has none of the impairments defined [above] but is treated by a recipient as having such an impairment.

§ l04.3(k) "Qualified Handicapped Persons" mean:...
(1) With respect to employment, a handicapped person who, with reasonable accommodation, can perform the essential functions of the job in question;
(2) With respect to public preschool, elementary, secondary, or adult educational services,

a handicapped person (i) of an age during which nonhandicapped persons are provided such services, (ii) of an age during which it is mandatory under state law to provide such services to handicapped person, or (iii) to whom a state is required to provide a free appropriate public education under [the Individuals with Disabilities Education Act].

Discrimination Prohibited

§ l04.4(b) Discrimination actions prohibited. (1) A recipient, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of handicap: ...

(vii) Otherwise limit a qualified handicapped person in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving an aid, benefit, or service.

Designation of Responsible Employee and Adoption of Grievance Procedures

§ l04.7 (a) Designation of responsible employee. A recipient that employs fifteen or more persons shall designate at least one person to coordinate its efforts to comply with this part. (b) Adoption of grievance procedures. A recipient that employs fifteen or more persons shall adopt grievance procedures that incorporate appropriate due process standards and that provide for the prompt and equitable resolution of complaints alleging any action prohibited by this part....

* * *

Preschool, Elementary, and Secondary Education

§ 104.31 Application of this subpart.

Subpart D applies to preschool, elementary, secondary, and adult education programs or activities that receive Federal financial assistance and to recipients that operate, or that receive Federal financial assistance for the operation of, such programs or activities.

§ 104.32 Location and notification.

A recipient that operates a public elementary or secondary education program or activity shall annually:

(a) Undertake to identify and locate every qualified handicapped person residing in the recipient's jurisdiction who is not receiving a public education; and

(b) Take appropriate steps to notify handicapped persons and their parents or guardians of the recipient's duty under this subpart.

§ 104.33 Free appropriate public education.

(a) General. A recipient that operates a public elementary or secondary education program or activity shall provide a free appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction, regardless of the nature or severity of the person's handicap.

(b) Appropriate education.

(1) For the purpose of this subpart, the provision of an appropriate education is the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of §§ 104.34, 104.35, and 104.36.

(2) Implementation of an Individualized Education Program developed in accordance with the Education of the Handicapped Act [now IDEA] is one means of meeting the standard established in paragraph (b)(1)(i) of this section.

(3) A recipient may place a handicapped person or refer such a person for aid, benefits, or services other than those that it operates or provides as its means of carrying out the requirements of this subpart. If so, the recipient remains responsible for ensuring that the requirements of this subpart are met with respect to any handicapped person so placed or referred.

(c) Free education -- (1) General. For the purpose of this section, the provision of a free education is the provision of educational and related services without cost to the handicapped person or to his or her parents or guardian, except for those fees that are imposed on non-handicapped persons or their parents or guardian. It may consist either of the provision of free services or, if a recipient places a handicapped person or refers such person for aid, benefits, or services not operated or provided by the recipient as its means of carrying out the requirements of this subpart, of payment for the costs of the aid, benefits, or services. Funds available from any public or private agency may be used to meet the requirements of this subpart. Nothing in this section shall be construed to relieve an insurer or similar third party from an otherwise valid obligation to provide or pay for services provided to a handicapped person.

(2) Transportation. If a recipient places a handicapped person or refers such person for aid, benefits, or services not operated or provided by the recipient as its means of carrying out the requirements of this subpart, the recipient shall ensure that adequate transportation to and from the aid, benefits, or services is provided at no greater cost than would be incurred by the person or his or her parents or guardian if the person were placed in the aid, benefits, or services operated by the recipient.

(3) Residential placement. If a public or private residential placement is necessary to provide a free appropriate public education to a handicapped person because of his or her handicap, the placement, including non-medical care and room and board, shall be provided at no cost to the person or his or her parents or guardian.

(4) Placement of handicapped persons by parents. If a recipient has made available, in conformance with the requirements of this section and §104.34, a free appropriate public education to a handicapped person and the person's parents or guardian choose to place the person in a private school, the recipient is not required to pay for the person's education in the private school. Disagreements between a parent or guardian and a recipient regarding whether the recipient has made a free appropriate public education available or otherwise regarding the question of financial responsibility are subject to the due process procedures of §104.36.

(d) Compliance. A recipient may not exclude any qualified handicapped person from a public elementary or secondary education after the effective date of this part. A recipient that is not, on the effective date of this regulation, in full compliance with the other requirements of the preceding paragraphs of this section shall meet such requirements at the earliest practicable time and in no event later than September 1, 1978.

§ 104.34 Educational setting.

(a) Academic setting. A recipient to which this subpart applies shall educate, or shall provide for the education of, each qualified handicapped person in its jurisdiction with persons who are not handicapped to the maximum extent appropriate to the needs of the handicapped person. A recipient shall place a handicapped person in the regular educational environment operated by the recipient unless it is demonstrated by the recipient that the education of the person in the regular environment with the use of supplementary aids and services cannot be achieved satisfactorily. Whenever a recipient places a person in a setting other than the regular educational environment pursuant to this paragraph, it shall take into account the proximity of the alternate setting to the person's home.

(b) Nonacademic settings. In providing or arranging for the provision of nonacademic and extracurricular services and activities, including meals, recess periods, and the services and activities set forth in § 104.37(a)(2), a recipient shall ensure that handicapped persons participate with nonhandicapped persons in such activities and services to the maximum extent appropriate to the needs of the handicapped person in question.

(c) Comparable facilities. If a recipient, in compliance with paragraph (a) of this section, operates a facility that is identifiable as being for handicapped persons, the recipient shall ensure that the facility and the services and activities provided therein are comparable to the other facilities, services, and activities of the recipient.

§ 104.35 Evaluation and placement.

(a) Preplacement evaluation. A recipient that operates a public elementary or secondary education program or activity shall conduct an evaluation in accordance with the requirements of paragraph (b) of this section of any person who, because of handicap, needs or is believed to need special education or related services before taking any action with respect to the initial placement of the person in regular or special education and any subsequent significant change in placement.

(b) Evaluation procedures. A recipient to which this subpart applies shall establish standards and procedures for the evaluation and placement of persons who, because of handicap, need or are believed to need special education or related services which ensure that:

(1) Tests and other evaluation materials have been validated for the specific purpose for which they are used and are administered by trained personnel in conformance with the instructions provided by their producer;

(2) Tests and other evaluation materials include those tailored to assess specific areas of educational need and not merely those which are designed to provide a single general intelligence quotient; and

(3) Tests are selected and administered so as best to ensure that, when a test is administered to a student with impaired sensory, manual, or speaking skills, the test results accurately reflect the student's aptitude or achievement level or whatever other factor the test purports to measure, rather than reflecting the student's impaired sensory, manual, or speaking skills (except where those skills are the factors that the test purports to measure).

(c) Placement procedures. In interpreting evaluation data and in making placement decisions, a recipient shall (1) draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior, (2) establish procedures to ensure that information obtained

from all such sources is documented and carefully considered, (3) ensure that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options, and (4) ensure that the placement decision is made in conformity with §104.34.

(d) Reevaluation. A recipient to which this section applies shall establish procedures, in accordance with paragraph (b) of this section, for periodic reevaluation of students who have been provided special education and related services. A reevaluation procedure consistent with the Education for the Handicapped Act [now IDEA] is one means of meeting this requirement.

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§ 104.36 Procedural safeguards.

A recipient that operates a public elementary or secondary education program or activity shall establish and implement, with respect to actions regarding the identification, evaluation, or educational placement of persons who, because of handicap, need or are believed to need special instruction or related services, a system of procedural safeguards that includes notice, an opportunity for the parents or guardian of the person to examine relevant records, an impartial hearing with opportunity for participation by the person's parents or guardian and representation by counsel, and a review procedure. Compliance with the procedural safeguards of section 615 of the Education of the Handicapped Act [now IDEA] is one means of meeting this requirement.

§ 104.37 Nonacademic services.

(a) General. (1) A recipient to which this subpart applies shall provide nonacademic and extracurricular services and activities in such manner as is necessary to afford handicapped students an equal opportunity for participation in such services and activities.

(2) Nonacademic and extracurricular services and activities may include counseling services, physical recreational athletics, transportation, health services, recreational activities, special interest groups or clubs sponsored by the recipients, referrals to agencies which provide assistance to handicapped persons, and employment of students, including both employment by the recipient and assistance in making available outside employment.

(b) Counseling services. A recipient to which this subpart applies that provides personal, academic, or vocational counseling, guidance, or placement services to its students shall provide these services without discrimination on the basis of handicap. The recipient shall ensure that qualified handicapped students are not counseled toward more restrictive career objectives than are nonhandicapped students with similar interests and abilities.

(c) Physical education and athletics. (1) In providing physical education courses and athletics and similar aid, benefits, or services to any of its students, a recipient to which this subpart applies may not discriminate on the basis of handicap. A recipient that offers physical education courses or that operates or sponsors interscholastic, club, or intramural athletics shall provide to qualified handicapped students an equal opportunity for participation.

(2) A recipient may offer to handicapped students physical education and athletic activities that are separate or different from those offered to nonhandicapped students only if separation or differentiation is consistent with the requirements of §104.34 and only if no qualified handicapped student is denied the opportunity to compete for teams or to participate in courses that are not separate or different.

§ 104.38 Preschool and adult education.

A recipient to which this subpart applies that provides preschool education or day care or adult education may not, on the basis of handicap, exclude qualified handicapped persons and shall take into account the needs of such persons in determining the aid, benefits, or services to be provided.

§ 104.39 Private education.

(a) A recipient that provides private elementary or secondary education may not, on the basis of handicap, exclude a qualified handicapped person if the person can, with minor adjustments, be provided an appropriate education, as defined in §104.33(b)(1), within that recipient's program or activity.

(b) A recipient to which this section applies may not charge more for the provision of an appropriate education to handicapped persons than to nonhandicapped persons except to the extent that any additional charge is justified by a substantial increase in cost to the recipient.

(c) A recipient to which this section applies that provides special education shall do so in accordance with the provisions of §§ 104.35 and 104.36. Each recipient to which this section applies is subject to the provisions of §§ 104.34, 104.37, and 104.38.

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The following are selected court cases; policy constructions by OSEP; and Letters of Finding (LOFs), policy letters, and compliance reviews by OCR, applying provisions of Sec. 504 and Title II of the ADA.

104.3(f) ***Recipient***

Marshall v. Sisters of the Holy Family of Nazareth, 399 F.Supp.2d 597 (E.D. Pa. 2005). Assuming a first grade student had a disability, the private religious school did not discriminate against him under Sec. 504 when it denied him readmission. The school was not subject to the Rehabilitation Act because it did not receive federal funding. The private school does participate in the National School Lunch Program, but it benefits only one student. "The provision of a free lunch to a single student over the course of a year is *de minimis*–too little to alter my conclusion that the Academy does not receive federal financial assistance for the purposes of the Rehabilitation Act." Even if it were a recipient, the student did not have a disability as defined under the Rehabilitation Act. He had no history of a disability and no one regarded him as having one. There was not a condition present that would constitute a substantial limitation on a major life activity.

Our Lady of Assumption School, Archdiocese of Los Angeles (CA), 45 IDELR 64 (OCR 2005). Complainant asserted the private school discriminated against her daughter based on her disability when it refused to provide accommodations. The complainant further asserted the school and the Archdiocese were recipients of federal financial assistance through the U.S. Department of Agriculture. Even assuming this to be accurate, OCR noted that a "recipient" is one who receives Federal financial assistance from the federal Department of Education. See also 34 CFR § 104.3(d), defining "Department" as meaning "Department of Education. OCR determined it did not have jurisdiction and declined to investigate the complainant's allegations.

104.3(j) ***Handicapped Person***

Harris Co. (GA) Sch. Dist., 31 IDELR ¶145 (OCR 1999). There is no requirement under Sec. 504 or the ADA that a specific exceptionality area be delineated (in this case, dyslexia). It is important to identify the student's needs and provide appropriate services, which occurred in this instance.

104.3(j)(1) ***Substantially Limits***

Bibb Co. (GA) Sch. Dist., 30 IDELR 549 (OCR 1998). A public school district cannot limit its inquiry to a single "major life activity" (in this case "learning") when assessing what condition substantially limits a major life activity. The ability to learn is not the only factor that may require accommodation or modification of services, programs, and activities within the public school.

Union Beach (NJ) Public School District, EHLR 257:490 (OCR 1984). The school district did not discriminate against a seventh grade student with a chronic ear condition. School staff did not observe any hearing or learning difficulties throughout the student's elementary school years, her hearing tests were within normal limits, and her academic achievement was within normal

limits. Her declining school performance in the seventh grade was attributed to poor motivation and excessive absenteeism. Although OCR determined the student did not have a disability which "substantially limits" a major life activity and is, hence, not a "qualified handicapped person," the school nevertheless evaluated the student and found no disabling condition.

Graves County (KY) School District, 20 IDELR 384 (OCR 1993). The school district did not violate Sec. 504 or the A.D.A. when it did not identify the student as having a mobility impairment during his first grade year. In kindergarten, the school did identify him as having a disability of mobility impairment due to Perthes' disease in the right hip following surgery. The student attended kindergarten with a hip brace and required special transportation and a special aide to assist with toileting. However, the student's physician placed no limitations on the student's physical activities for the subsequent school year (first grade). The parent refused to provide any medical documentation indicating restrictions. The school considered the disability a temporary one and did not provide any special services during the student's first grade year. OCR found that the school district had properly evaluated the student's condition in determining that he no longer had a disability that substantially limited a major life activity.

104.3(j)(2)(iv) ***Regarded As Having An Impairment***

Nyack (NY) Unified School District, 43 IDELR 169 (OCR 2004). The principal sent a letter to a parent, advising the parent: "Due to [the student's] recent surgery, current instability of her diabetes, and the fact that there will be no medical staff or supplies on hand...your child WILL NOT attend the [field trip]." The school district was aware of the student's diabetes. However, the school district had never identified her as having a disability or developed an accommodation plan. "Although the District had not formally identified the Student as disabled, the District's actions indicate that the District regarded the Student as disabled." The school district failed to provide nonacademic services to a student it considered to have a disability.

104.3(k)(1) ***Employment and Reasonable Accommodation***

Weatherbee v. Indiana Civil Rights Commission, 665 N.E.2d 945 (Ind. App. 1996). Weatherbee was an unsuccessful bidder for a school bus route. Although her bid was the lowest one, it was rejected because her application indicated she had epilepsy and has had blackouts and seizures, although medication seemed to control the seizure activity. The Indiana Civil Rights Commission found the school corporation had discriminated against Weatherbee on the basis of her disability, but the trial court reversed. The Court of Appeals affirmed the trial court. The Court held that "the prohibition against discrimination in employment because of handicap does not apply to failure of an employer to employ a person who because of a handicap is physically or otherwise unable to perform the duties required in a job efficiently and safely, at the standards set by the employer." Id. at 948. The Court added at 949 that "the awarding of contracts to transport school children is not a purely ministerial act but requires the exercise of discretion or judgment in ascertainment of the lowest responsible bidder." In this matter, the school corporation was justified in refusing to accept her bid because there was "a reasonable probability of substantial harm to school bus passengers and others." Id. at 950. The Court clarified that it does not intend to have this decision applied beyond its facts. "In arriving at this decision, we do not mean and do not hold that all persons diagnosed with epilepsy are per se incapable of safely operating a school bus. An assessment of whether or not a particular disabled person can safely

perform a job involves a case-by-case analysis of the applicant's limitations in relation to the particular job requirements." The school corporation, the Court held, had a legitimate, nondiscriminatory motive for refusing Weatherbee's bid. Her application "failed to establish that her epileptic condition was under control and that, with medication, she was reliably asymptomatic."

Wood v. Omaha Sch. Dist., 25 F.3d 667 (8th Cir. 1994). Two Type II insulin-using diabetics were demoted from positions as school van drivers to aides when the state adopted Department of Transportation guidelines for over-the-road truck drivers. The regulations prohibit insulin-dependent diabetics from operating school buses or vans. The court, in finding them not to be "otherwise qualified" under Sec. 504, noted that Type II insulin-using diabetic persons are at an appreciable risk of developing hypoglycemia, the symptoms of hypoglycemia and complications from hyperglycemia, the onset of which may occur without warning. "[H]yperglycemia creates an increased risk of sudden and unexpected loss of vision or blurred vision and...hypoglycemia produces a danger of a sudden loss of consciousness." Id. at 669. No reasonable accommodation "could obviate the dangers inherent in insulin-using diabetics driving school buses or vans" Id.

l04.3(k)(2) ***School-Aged Children and Reasonable Accommodations***

Mesa (AZ) Unified School District No. 4, EHLR p.312:103 (OCR 1988). LEA violated Sec. 504 by refusing to evaluate and serve qualified disabled students covered by Sec. 504 but not IDEA when LEA denied students entitled supplementary services.

OCR Staff Memorandum, 16 EHLR 1086 (OCR 1990). A student with AIDS generally will be considered disabled under Sec. 504 due to a substantial limitation on a major life activity caused in part by perceived contagiousness of the disease.

School Dist. of River Falls (WI), 20 IDELR 1364 (OCR 1993). Student's mild allergy to cats did not substantially limit a major life activity. Presence of a cat on the premises of his school did not constitute discrimination.

Cruz v. Pennsylvania Interscholastic Athletic Association, Inc., 157 F.Supp.2d 485 (E.D. Pa. 2001). The student's IEP indicated his need to participate in extracurricular activities, including sports. The student was a member of the varsity football, wrestling, and track teams. However, the student was 19 years old. The association would not waive its Age Rule, resulting in the student and the school district initiating legal action under the A.D.A. for injunctive and permanent relief. The student's disabilities were such that he did not enter elementary school until 11 years of age. As a result, he has not had "comparable opportunities" as other students. He reads on a third-grade level. His participation on athletic teams had a direct impact on his academic achievement and interpersonal relations.[1] His coaches testified that the student has no competitive advantage, is not a safety risk, does not displace other athletes, and is a positive

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[1]The football coach related an incident during the student's freshman year when he actually scored a touchdown. He was so excited he "hugged the official as he was raising his arms."

influence. He was described as a marginal athlete as far as prowess. In addition, the student has not exhausted the eight semesters of participation allowed by the association's rules. Although the association presented itself as a private, not-for-profit organization, the court determined it was a "public entity" for the purpose of applying Title II of the ADA, which means the association cannot deny the benefits of the services, programs, or activities to the student if the student is a "qualified individual with a disability." This term is defined as follows:

> The term "qualified individual with a disability" 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 a public entity.[2]

The court noted there is a conflict among the federal courts as to whether age is an "essential requirement." The court relied heavily upon a number of cases from other jurisdictions, notably Michigan and Indiana. A "rule is essential to a program," the court observed, "unless it can be shown that the waiver of it would not fundamentally alter the nature of the program." In this case, the student "would not fundamentally alter the nature of the competition." A waiver of the Age Rule would be necessary for him to compete, even on the limited basis that he would. The central question, then, is whether such an accommodation–waiver of the Age Rule–is reasonable. The association stated that such a waiver would not be reasonable and would impose an "undue burden" on it to create a waiver procedure if the court ruled in the student's favor. The court was unpersuaded, especially as the association presently conducted investigations and granted waivers involving its eight-semester and transfer rules. In this case, the waiver process would require the student to have an IEP in place that requires participation in interscholastic sports, a very narrow consideration and certainly a very small population. Accordingly, the court found the student was entitled to benefits under the ADA, that he would suffer irreparable harm if he were not permitted to participate in football and track, the harm would be minimal to the association, and the public interest would benefit. The student was entitled to a permanent injunction against the association applying its Age Rule to him.

l04.4(a) ***Discrimination on Basis of Disability Prohibited***

McAllen (TX) Independent School District, 48 IDELR 142 (OCR 2006). School district had a policy that prevented students from enrolling in its after-school child care program if the students were not toilet trained or required one-to-one supervision. The school district initiated voluntary corrective action, removing these restrictions in its application process and advising parents of the revisions (in both English and Spanish), and encouraging parents to apply should they believe their children could benefit from the after-school child care program. OCR accepted the corrective action and closed its investigation.

Douglas (MA) Public Schools, 42 IDELR 209 (OCR 2004). Although the parent had requested

[2] 42 U.S.C. § 12131(2).

accommodations (an aide) for her child diagnosed with Tourette's Syndrome so that the child could participate in the school district's before- and after-school child care program, the school district removed the child from the program without considering any accommodations, based on the child's aggressive behavior. OCR found the district failed to provide the student with equal access to its programs and services. The program was held in the elementary school's gymnasium and included activities such as arts and crafts, sports, games, reading, studying, and films. When the parent requested accommodations, the school district should have considered whether the child could safely participate in the program with the assistance of an aide or some other reasonable accommodation.

New York City Board of Education, 16 EHLR 373 (OCR 1990). LEA violated Sec. 504 through failure to provide students with severe disabilities with equal opportunities to participate in after-school child care/latch key programs.

l04.4(b)

Talbot County (PA) Public Schools, 45 IDELR 45 (OCR 2005). The parent has a bilateral, very severe progressive hearing impairment. She primarily uses lip reading for receptive comprehension of verbal communications. Hearing aids have been unsuccessful, and she doesn't know sign language. She wished to participate in her son's IEP Team meeting and requested the school provide a Computer Assisted Real-time Translation (CART) system to enable her to do so. This system provides instant translation of the spoken word into English text using a stenotype machine, notebook computer, and real-time software. Instead, the school provided an alternative–someone typing on a laptop for the Complainant. Staff were also directed to make eye contact with the complainant when speaking, pace their speech, not engage in sidebar conversations, and use extra time. This did not prove to be effective. Notwithstanding, the school refused her repeated requests to use the CART system in future IEP Team meetings. The school district, OCR found, violated § 104.4(b)(1) (and the ADA as well) by failing to provide a qualified person with a disability effective access to the same aid, benefit, or service provided to others. Although the school district was not required to utilize the exact accommodation requested (the CART system), "it is required to offer an alternative means for ensuring that communications with the Complainant are as effective as communications with others. It did neither. The evidence clearly indicates that the laptop note-taker system previously provided failed to offer the Complainant an effective means of communication[.]"

Jamestown Area (PA) School District, 37 IDELR 260 (OCR 2002). One of the areas of contention was that the company providing school bus services for the district would not let the student eat a snack on the bus. The student had diabetes. The parent and the LEA resolved disputes over snacks in the classroom, use of the bathroom when needed, and segregation in the lunchroom. The LEA agreed to develop an appropriate Sec. 504 plan for the student, designate and train a back-up person for the school nurse to administer glucagons to the student as needed, and inform the bus company that its drivers must permit the student to have snacks while riding the school bus as this was necessary to address his diabetic condition.

Maine Advocacy Services, 17 EHLR 226 (OCR 1990). LEA discriminated against student with disabilities by changing his diapers in front of his classmates while nondisabled students were provided private toileting facilities.

Letter to Veir, 20 IDELR 864 (OCR 1993). If an LEA provides food services to students generally, then it would also be required to provide appropriate food services to a student with a disability who has special dietary needs, on the same basis that food services are provided to students without disabilities. This will be a case-by-case analysis. Special dietary requirements are not subject to "medical service" exclusion.

104.7 *Grievance Procedures; Designated Individual*

Northshore (WA) School District No. 417, 48 IDELR 199 (OCR 2006). Student had a disability-related GPA that was lower than the minimum standard established by the high school for students interested in trying out for the cheerleading squad. When the parent was rebuffed in her attempts to seek a waiver to the GPA, one administrator told the parent the decision to make no exceptions was not appealable. The other administrator indicated the decision would not be overturned. Neither advised the parent of the grievance procedures available to address disability-related concerns of this nature. One of the administrators advised OCR that because the student had an IEP, she did not think Sec. 504 procedures would apply in this case. School district was out of compliance.

Jacksonville (AL) City Schools, 46 IDELR 139 (OCR 2006). The complainant alleged the school district violated Sec. 504 by not publishing its notice of procedural safeguards in the student handbook. OCR advised the school district is not required by Sec. 504 to publish its notice of procedural safeguards. However, although the student handbook did contain the school district's notice that it does not discriminate on the basis of disability, the school district did not provide the name or title of a person responsible for coordinating compliance with Sec. 504. The school district revised the handbook and identified a specific person, by name and title, who would be responsible for the coordination of compliance under this nondiscrimination law.

Whitnall (WI) School District, 44 IDELR 139 (OCR 2005). A Wisconsin school district did adopt and publish its grievance procedures for Sec. 504 and the ADA but failed to identify a specific employee or employees responsible for coordination of the school district's efforts to comply with Sec. 504 and the ADA. At least one employee must be designated to coordinate compliance efforts, including investigation of complaints. In addition to a designated employee, the notice must also provide the office address and phone number of the designated employee. See also Jacksonville (AL) City Schools, 46 IDELR 139 (OCR 2006) (student handbook failed to identify designated employee; inserts were included in the current handbook. Subsequent publications will include the designated employee, address, and phone number).

Delta/Greely (Alaska) School District, 40 IDELR 47 (OCR 2003). Parent complained the LEA did not provide her with adequate notice of the LEA's grievance procedures. OCR noted that such procedures must be "prompt and equitable." In determining whether grievance procedures meet these standards, OCR considers the following elements: notice of the procedures; application of the procedures; adequate, reliable, and impartial investigations; designated and reasonably prompt time frames; and notice to the complainant of the outcome of the complaint. Although the compliance coordinator's response was adequate, the superintendent's decision that the parent's appeal was not timely was not in concert with the LEA's written grievance

procedures, thus preventing the "equitable resolution of a disability discrimination complaint."

TOVAS Charter School (TX), 37 IDELR 290 (OCR 2002). The Charter School did not have a grievance procedure to address issues of disability discrimination; failed to notify individuals of its non-discrimination policies; did not have a system of procedural safeguards; lacked any "child find" procedures; and lacked any policies and procedures for evaluation and placement of students with disabilities under Sec. 504. The Charter School entered into a VRA with OCR that detailed the policies and procedures that needed to be implemented.

Palm Beach County (FL) Sch. Dist., 22 IDELR 893 (OCR 1995). School had prompt and equitable grievance procedures in place which provided informal and formal resolution of complaints. The procedures were included in the student handbook, which were given to students upon enrollment.

104.32 ***Child Find***

Crockett County (TX) Consolidated Common School District, 39 IDELR 39 (OCR 2003). A middle school student was referred for an evaluation under IDEA for a bipolar disorder. He was found not eligible for IDEA services. The LEA did not inform the parent of Sec. 504 or propose to evaluate him for eligibility under these provisions. However, the LEA did develop a behavior/intervention plan for the student after determining him ineligible under IDEA. Although subsequent evaluations were conducted, these were all related to possible IDEA eligibility. OCR reviewed a number of other files and found the LEA routinely did not consider Sec. 504 when a student was found ineligible under IDEA, even when the LEA would have had sufficient reason to suspect a student might require such consideration. (The principal at the middle school stated there were no students in his building with a Sec. 504 plan.) The LEA never advised parents of the availability of Sec. 504 and only provided information in this regard when a parent specifically requested it. The LEA's practices violated Sec. 504.

Hacienda (CA) Unified Sch. Dist., 30 IDELR 720 (OCR 1998). Student was chronically absent. The parents provided medical documentation to the school demonstrating that the absenteeism was attributable to the student's asthma. OCR cited the school for failure to have adequate "child find" procedures that identify, evaluate, and place any student with a disability for which it has a responsibility. The inadequate policies and procedures resulted in the a denial of FAPE to the student.

104.33(a) ***Free Appropriate Public Education***

Great Falls (MT) Public School District, 48 IDELR 200 (OCR 2006). The student had severe asthma and multiple allergies. In the eighth grade, he missed four months of school due to paint fumes at the school that exacerbated his asthma. He missed five months of school in the ninth grade. His Sec. 504 plan required the school district to notify the student's parents should there being any painting or construction projects at the school that may aggravate his asthma. Although the school assured the parents there were no such projects at the school prior to his tenth grade year, he suffered a severe reaction to fumes caused by tar being applied to the roof of the school. His Sec. 504 plan called for management of his asthma at school and homebound

educational services when he was not able to attend. Asthma triggers were identified. The Sec. 504 plan also provided that should the student's grades suffer due to illness, additional supportive services would be provided. The student missed significant time from school during the first semester, earning only .25 of a credit. He also missed significant amounts of homebound instruction due to a combination of problems. He fell significantly behind academically. The school and the parents agreed to place him in an alternative school for the second semester. He was absent a significant part of the time and did not earn any credits. Most of the absences were unexcused. Homebound was not offered or provided during the second semester. OCR determined the student was denied a FAPE because the school district did not provide additional supportive services, as the Sec. 504 plan required, nor did it attempt to determine whether absences were unexcused or related to illness. "Because the district did not implement aspects of the student's Section 504 plan designed to enable him to maintain progress in school and did not take appropriate steps to determine what services the student needed in light of his numerous disability-related absences from school, OCR concludes that the district denied the student a FAPE[.]"

Springfield (OR) School District 19, 48 IDELR 197 (OCR 2007). The student attended Springfield through the fifth grade. He had been identified as a student eligible for special education and related services. An IEP was developed for him. After fifth grade, he transferred to a Houston, Texas, school district. During sixth grade, he began to experience failing grades and peer problems. The parent obtained an independent psychological evaluation that identified certain psychosocial and academic problems. Medication and therapy were recommended. The Houston school district reviewed the evaluation results, conducted an FBA, and developed a BIP as a part of the student's IEP to address certain targeted behaviors (being off task, being tardy/truant, leaving assigned areas, failing to complete assignments, being unprepared for class, having emotional outbursts/tantrums, and engaging in negative verbalizations). He later moved back to Springfield, where his enrollment was inexplicably delayed. When his IEP Team met, they addressed only his academic needs and did not review the evaluation results or the BIP from the Houston school district. The student received failing grades in science and social studies and engaged in behaviors targeted by Houston but not Springfield. He had numerous disciplinary referrals and run-ins. OCR found that Springfield failed to address the student's identified behavioral needs when he re-enrolled even though Springfield had the Houston records, including the student's IEP/BIP. This failure to conduct a comprehensive evaluation of the student before implementing an educational placement resulted in a denial of FAPE.

Greensville County (VA) School Board, EHLR p.353:118 (OCR 1988). LEA incorrectly based number of instructional hours and content of curriculum for student with chronic asthma on administrative guidelines rather than on student's needs.

Tamalpais (CA) Union High School District, EHLR p.353:126 (OCR 1988). LEA may not comply with collective bargaining agreement restricting number of students with disabilities assigned to each general education class as this violates FAPE and LRE requirements of Sec. 504.

104.33(b)

Letter to Wilson, 43 IDELR 165 (OSEP 2004). A State had a rule that provided in relevant part:

"When a specific accommodation is necessary for a student to have access to his or her regular education, such an accommodation may be documented on a separate Section 504 accommodation plan and/or[3] the [IEP]." OSEP inquired of the State as to this meaning. The State replied that it had not intended to imply that services required by IDEA could be placed on a Sec. 504 plan. OSEP accepted the clarification.

Letter to Morse, 41 IDELR 65 (OSEP 2003). Development and implementation of an IEP under IDEA is one means of satisfying the FAPE requirement under Sec. 504. However, "[t]he IDEA regulations do not permit a Section 504 plan to substitute for an IEP. While this does not mean that an IEP cannot contain information or services that were previously a part of the student's Section 504 plan, a Section 504 plan that does not meet the specific IEP requirements of the IDEA may not be used to substitute for an IEP."

Maine Sch. Admin. Dist., 20 IDELR 1354 (OCR 1993). LEA did not discriminate against student with diabetes when it failed to provide him with soda and snacks for his diabetic condition. The student's health plan did not contain an agreement that these were necessary.

Renton (WA) Sch. Dist., 21 IDELR 859 (OCR 1994). Student had Down Syndrome, a speech impairment, and insulin-dependent diabetes. He required diabetes monitoring services through twice-daily snacks during school in order to participate in the school's education program. The school provided the diabetes monitoring services required by Sec. 504.

Letter to Anonymous, 24 IDELR 852 (OSEP 1996). A student with diabetes may qualify for special education under IDEA as "other health impaired" if the condition causes "limited strength, vitality, or alertness" that adversely affects the student's educational performance. In addition, Sec. 504 and Title II of the A.D.A. protect students with disabilities and provide similar rights to IDEA, including the right to a FAPE.

104.34(a) ***Educational Setting: Least Restrictive Environment***

Irvine (CA) Unified School District, 23 IDELR 1144 (OCR 1995). A ten-year-old fourth grade student with Juvenile Diabetes Mellitus was required to test his blood glucose levels outside the classroom. He injected insulin three times a day and usually tests his blood glucose level a

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[3]The use of "and/or" is fraught with peril. Highly disfavored by courts, the main problem is the ambiguity it creates. Is it "and" or "or"? In Employers' Mutual Life Ins. Co. v. Tollefsen, 219 Wisc. 434, 437 (1935), the court wrote: "... 'and/or,' that befuddling, nameless thing, that Janus-faced verbal monstrosity, neither word nor phrase, the child of a brain of someone too lazy or too dull to express his precise meaning, or too dull to know what he did mean, now commonly used by lawyers in drafting legal documents, through carelessness or ignorance or as a cunning device to conceal rather than express meaning with a view to furthering the interest of their clients." The North Carolina Supreme Court felt likewise in Brown v. Guaranty Estates Corp., 239 N.C. 595, 80 S.E.2d 645, 653 (1954): "The presiding judge murdered the King's, the Queen's, and everybody's English by using the monstrous linguistic abomination 'and/or' in this portion of the order. We are constrained to adjudge, however, that the judge's law is better than his grammar."

minimum of four times a day, depending upon symptoms. His placement was in a general education classroom with resource services to remediate lost academic time due to testing and to increase his skill levels. He has a health aide assigned to him who is required to be with him each time he tests and who keeps soda and other snacks at his desk. The student's parent alleged he was not being educated to the maximum extent appropriate with his peers because he was required to leave the classroom to test and was, as a result, missing considerable instruction. OCR determined the school district was not in compliance with Sec. 504 and Title II, A.D.A. because the school district failed to consider fully the individual needs of the student in determining the blood glucose testing would take place away from the classroom. OCR's investigation revealed that the district had thirty students with diabetes, all of whom were required to test outside of the classroom. The determination as to where a student with diabetes would test was based upon a district-wide practice and not upon individualized decision-making by a group of knowledgeable persons, using current information. See 104.35(c). OCR acknowledged that health and safety concerns, as well as disruption in the classroom, are important matters that may be considered when determining a student's educational placement. "However, the District's position on health and safety of all students and disruption in the classroom, was expressed using generalized expectations rather than based on an assessment and evaluation of the needs of the specific disabled student and the requirement to ensure that services are administered in the most integrated setting appropriate to the needs of the individual with disabilities." OCR concluded the school district did not adequately consider "the legal standards for deciding what constitutes a threat to health and safety nor demonstrated that such in-classroom testing could not be achieved satisfactorily with the use of supplementary aids and services or other modifications."

104.34(b) ***Educational Placement: Nonacademic and Extracurricular Activities***

Irvine (CA) Unified School District, 23 IDELR 1144 (OCR 1995). Another issue in the Irvine investigation (discussed immediately above) involved the integration of the student in classroom parties. Specifically, the parent alleged the school district did not give her prior notice of class parties at which food would be served so she could rearrange his diet so he could participate. The school district and the parent achieved resolution. Parents of children in the student's classroom were asked to notify the teacher at least two days prior to bringing food to the classroom. When this occurs, the teacher is to call the parent of the student. If the teacher cannot reach the parent or if the student's diet cannot be rearranged on the day of the class party, the student's treat is maintained in a refrigerator until the student can have it, usually the next day.

Wichita Falls (TX) Independent School District, 33 IDLER ¶ 167 (OCR 1999). The school district failed to provide a sign-language interpreter to a deaf student, thus preventing him from participating on the school's basketball team or participate in other extracurricular activities. The school district entered into a resolution agreement with OCR to remedy the school's failure to provide equal opportunities for deaf students to participate in the school's non-academic and extracurricular services and activities.

Lambert v. West Virginia Board of Education, 447 S.E.2d 901 (W. Va. 1994). This case involved a high school student who was deaf from birth. She had difficulty understanding the

coach's directions. Her parents requested a signer to assist her, but this request resulted in her dismissal from the team just before post-season tournament play. The court found the school responsible for providing the signing services. Under the Individuals with Disabilities Education Act (IDEA) and Sec. 504 of the Rehabilitation Act of 1973, students with disabilities are entitled to an equal opportunity to participate in extracurricular activities to the same extent as their peers without disabilities. In this case, the student already required the assistance of a signer in her academic pursuits. There was no need for the school to investigate further whether this service was necessary for her extracurricular endeavors.

Washoe County (NV) School District, 35 IDLER 15 (OCR 2000). OCR did not provide the facts underlying this case. From the lengthy resolution agreement, it appears that a student with a disability was prevented by the swim coach from participating in a district-sponsored swimming event. The parents complained to school officials, but their subsequent investigation was inadequate (grievance procedures are required under 34 CFR § 104.7). Although school staff were to receive training in Sec. 504 requirements, the swim coach was singled out to receive special attention "regarding disabled person's rights to access in the district's programs and activities, including extracurricular activities." Should the student express an interest in participating in the program in the future, "the district will allow the student to participate and ensure that any necessary aides, services, or accessibility accommodations are provided."

104.35 ***Evaluation and Placement***

Detroit (MI) Public Schools, 48 IDELR 286 (OCR 2006). The parent requested accommodations for her child. The school district took six months to complete the evaluation (delayed by the school's repeated requests to the parent to clarify what sort of evaluation she wanted–Sec. 504 or IDEA), and then took another six months to offer an appropriate educational placement. "Although the Section 504 regulation does not set forth specific timeframes by which districts must complete evaluations of students, OCR considers state-required timeframes for evaluations as well as district's own internal guidelines to determine whether the evaluation has been completed within a reasonable time." In Michigan, the time frame from parental consent to eligibility determination is 30 school days. The school district clearly exceeded this time frame. The district's own guidelines indicate that where a student is found not eligible for IDEA services, the team is to decide whether the student is eligible under Sec. 504. OCR also noted that should a medical evaluation be required for diagnostic purposes, this should be at no cost to the parent. "Although a district may request a medical statement from a parent or student, the district cannot require them to provide this information."

Garfield Heights (OH) City Schools, 42 IDELR 42 (OCR 2004). The student was enrolled as a third-grade student. He had multiple impairments. The school initially evaluated him and found him eligible for services under Sec. 504. However, the Sec. 504 plan developed for him did not address all (or most) of his impairments and was woefully thin on what was necessary for the student, especially in an emergency. As a result, services were uneven or nonexistent. The guardian sought a reevaluation and also initiated an evaluation under the IDEA. The district's policy requires evaluations to be completed within 30 days, but the district took three months to complete the reevaluation and staff the Sec. 504 team, at one point requesting the guardian sign a document "suspending" the timeline for evaluation and then delaying the process because the

guardian did not provide them with medical information. When the Sec. 504 team did convene, it consistently ignored the student's other needs and focused only on one major life activity ("learning"). As a result, the school district had to complete an adequate evaluation, including a medical evaluation at no cost to the guardian if such information is necessary for diagnostic reasons. If the student is eligible under Sec. 504, the team must address all major life activities that are posing a substantial limitation and not focus solely on "learning." The district had to agree also that it cannot hold hostage an eligibility determination until a parent/guardian supplies the school with documents the school requests. In-service training on all aspects of Sec. 504 was also required for staff and administration.

Gooding, 17 EHLR 1027 (OCR 1991). If an LEA denies the use of service dogs in classrooms, and this prevents disabled students from participating or benefitting from educational programs and other activities of the LEA, this would be a denial of FAPE and constitute a violation of Sec. 504.

San Diego City (CA) School District, EHLR p.353:296 (OCR 1989). Pre-screening process used by LEA was, in fact, an evaluation process under Sec. 504 and must conform to requirements for valid criteria, consistent standards, qualifications of assessors, and notice to and consent of the parent/guardian). Also see: Forest Park (MI) School District, EHLR p.352:182 (OCR, 1986) (Notice is not required prior to consultation between/among teachers or administration of general screening, but interviewing or assessing an individual student is an evaluation requiring notice to and consent of the parent/guardian.)

New York City Board of Education, 16 EHLR 455 (OCR 1990). LEA improperly excluded a student with diabetes from several field trips and secluded him in the library for examinations due to bladder control and flatulence problems, thus denying the student a FAPE in the LRE.

104.35(a) Pre-Placement Evaluation; Significant Change in Placement

Issaquah (WA) School District No. 411, 42 IDELR 273 (OCR 2004). The student was in high school. He had a Sec. 504 plan that addressed his deficits in social skills and fine/gross motor activities. The school counselor unilaterally removed him from his Sec. 504 plan after determining that the student wasn't utilizing the accommodations in his plan and had a 3.8 GPA. The counselor believed he had the discretion to decide whether students continued to need their Sec. 504 plans. The student's GPA fell to 1.4, although the counselor asserted this was not because of the lack of a Sec. 504 plan. "The removal of a student from a Section 504 plan is a significant change in placement. As such, the district is required to follow the procedural requirements of Section 504 in making these types of placement decisions." In this case, the district did not follow those procedures. Although it later placed him on a Sec. 504 plan at the parents' insistence, it failed to conduct an evaluation before doing so. There was new information from the student's psychologist regarding his disability, his personal and educational needs, and potential need for accommodations. These were not considered prior to the educational placement.

Rutland (VT) City Public Schools, 42 IDELR 180 (OCR 2004). High school student had Asperger's Syndrome and ADHD. He was removed in May from a computer course three weeks

prior to the end of the school year for "improper computer use," which was not otherwise specified. He was also prevented from continuing in a computer course the following school year. He had signed an agreement indicating that he would not engage in improper computer use, a problem he has exhibited since eighth grade. In an earlier incident, his Sec. 504 team had agreed he knew right from wrong, but also agreed this behavior was "partially a manifestation of his disability (Asperger's)." His behavior was motivated by a desire to impress other students because he has difficulty maintaining friendships. He tends to be impulsive and does not consider the consequences of his actions. The team did not discuss or evaluate the effect of his ADHD. After the May incident, his team noted his medications were not working, he was not sleeping well, and he "was making bad decisions." The team did not discuss manifestation determination before removing him from the course. OCR noted that Sec. 504 requires a manifestation determination meeting be held prior to a significant change of placement. There are four (4) issues the team needs to address during a manifestation determination: (1) whether the student understood the significance of his behavior; (2) whether the student could control his behavior; (3) whether his Sec. 504 Plan was appropriate to meet his needs; and (4) whether the Plan was fully implemented. The team did not consider all four issues when it decided to remove him from the computer course and prevent him from enrolling in a computer course the following year. This violated Sec. 104.35(a).

104.35(b)

Mequon-Thiensville (WI) Sch. District, 40 IDELR 22 (OCR 2003). LEA violated Sec. 504 and Title II of the ADA when it destroyed original teacher responses to a rating scale and provided the parents with only an interpretative summary prepared by the psychologist. The destruction of the test protocols denied the parents access to "relevant records."

104.35(c)

Ellenville (NY) Central School District, 43 IDELR 145 (OCR 2004). Sec. 504 requires that decisions regarding student needs be made by a group of persons, including those knowledgeable about the student, the student's needs, the meaning of the evaluation data, and placement options. The school district violated Sec. 504 by restricting options that could be considered to a pre-approved list of services. Any services recommended that were not on the list were refused. In addition, the former administrator would not allow any dissension or discussion of individual student needs that would exceed those listed. These procedures–which were driven by budgetary and logistical concerns–violated Sec. 504.

Clark County (NV) School District, 41 IDELR 216 (OCR 2003). As part of a VRA with OCR, the LEA agreed to insure that students transferring into the LEA with IEPs or Sec. 504 Plans be placed temporarily pursuant to such plans while the initial evaluation process is completed. If a plan called for ESY services during this temporary placement period, the ESY services would be provided. Initial placement decisions would be based upon information from a variety of sources, including prior IEPs and Sec. 504 Plans; information obtained from all sources would be documented and carefully considered; and placement decisions would be made by a group of persons, including persons knowledgeable about the student or the student's needs.

Culver City (CA) Unified School District, 16 EHLR 673 (OCR 1990). LEA failed to adequately assess degree of severity of student's asthmatic condition or plan staff development for proper administration of inhaler in emergencies.

Yuba City (CA) Unified School District, 22 IDELR 1148 (OCR 1995). The student had been diagnosed as having Juvenile Type I diabetes, and required monitoring of his blood sugar levels. His blood sugar levels were adjusted by insulin and diet, but he continued to experience frequent migraine headaches and had significant vision loss in both eyes. The student was originally placed on homebound instruction, but he was frequently too ill to attend, although the home instruction teacher related that frequently no one appeared to be home when she arrived. The following year, the student was reintroduced into the school population, but his attendance was poor. The parent related that she did not have a local primary care physician. The school developed a "Sec. 504 plan" for the student, which identified his needs (regular blood sugar testing, insulin injections) but offered no plan for addressing these in school. The student was incapacitated by his diabetes, and missed a considerable amount of school. Disciplinary procedures were begun because of his absenteeism. The school also referred the matter to the local Child Protective Services (CPS). The school district, in part, was found not in compliance with Sec. 504 and the A.D.A. The following are notable findings:
1. "If a medical assessment is necessary to make an appropriate evaluation, the District must ensure that the student is assessed at no cost to the parents. The District cannot pass this responsibility to the parents."
2. The school did not have sufficient knowledge to identify the extent of the student's disabilities. This prevented the formulation of a Sec. 504 plan which would have provided services that would have permitted him to attend school. "The district would not have had to resort to punitive measures if it had formulated the plan for services."
3. Neither Sec. 504 nor the A.D.A. permits a parent to refuse to allow a child to attend school.

Cardinal (OH) Local School District, 31 IDELR ¶ 13 (OCR 1998). Ten-year-old student wanted to participate in recreational basketball program operated as a joint venture by the school district with a local community. The student has a rare medical disability (dysautonomia), which involves an abnormal functioning of the autonomic nervous system, making it difficult to regulate response to outside ambient temperature. The student's application contained a letter from his physician, indicating the student could develop a life-threatening elevation of temperature in ordinary situations, such as when participating in sports. The basketball program sought more information from the physician, but were rebuffed by the parents, who insisted sufficient information had been presented. The basketball program did not run afoul of Sec. 504. The student's participation was contingent upon additional medical information regarding how the student could safely participate in the program. The program's request for additional medical information was "reasonable and rational" and displayed "an effort...to accommodate the student's disability rather than deny or exclude him from participating in the sports program."

Mishawaka (IN) School Corporation, 39 IDELR 10 (OCR 2002). The LEA violated Sec. 504 when it relied upon an independent evaluation by a psychologist that the student had ADHD to provide services without independently reviewing such evaluative data to determine the student's need for services under Sec. 504.

104.35(d) *Re-evaluation*

Copperas Cove (TX) Independent School District, 41 IDELR 73 (OCR 2003). Complainant alleged retaliation when the LEA's Sec. 504 committee determined her son's ADHD no longer posed a "substantial limitation on a major life activity" and declined to provide him services for the remainder of the school year. The Sec. 504 committee made its decision based upon review of past educational and medical assessments and reports, standardized test scores, and the student's behavior/action plan. The committee followed Sec. 504 procedures both in the staffing of the committee and in the consideration of information from a variety of documented sources. The committee's determinations were not discriminatory. Should the complainant dispute the committee's declassification determination, the due process procedures under Sec. 504 would be the appropriate forum, not the complaint investigation process.

Worcester (MA) Public Schools, 35 IDELR 133 (OCR 2001). Students exhibited serious behavior problems, exacerbated by language barriers, but the school failed to evaluate the students' behaviors in light of their disabilities or placements before applying sanctions. As a part of its resolution agreement with OCR, the school agreed to address more comprehensively serious behaviors of students that have resulted in suspensions of more than five school days in a school year, irrespective of whether such students are presently known to have disabilities.

Mt. Diablo (CA) United Sch. Dist., 30 IDELR 994 (OCR 1999). The school initiated a requirement that students participating in extracurricular activities must maintain a 2.0 grade point average (GPA). A student with a learning disability, as well as visual and auditory deficits, was placed on academic probation when his GPA fell below 2.0. The school declined to evaluate the effects of the students disability on the GPA, which ran afoul of Sec. 504 requirements. The school agreed to establish a process whereby the effects of a disability would be assessed prior to the institution of any sanction.

104.36 *Procedural Safeguards*

California Department of Education, 47 IDELR 45 (OCR 2006). This document addresses a number of questions regarding report cards, progress reports, and transcripts. One of the questions posed was: "Can a student's transcript indicate that the student has been enrolled in a special education program, has received special education or related services, or has a disability." OCR's succinct answer was "No." It elaborated. A transcript is generally intended for post-secondary purposes, including employment. Notations about modified or alternate education curriculum are permissible so long as these notations do not disclose that a student has a disability.

Lake Villa (IL) School District #41, 46 IDELR 292 (OCR 2006). The mother alleged the school district violated Sec. 504 when it would not provide her access to records concerning the administration of asthma medication to her son. However, during the time period in question, the student's father was his sole, legal custodian. A state court had issued a protection order that prevented the mother from having access to the student or his records. In addition, the student was not considered to have a substantial limitation on a major life activity and did not have either

an IEP or a Sec. 504 accommodation plan. The school was aware of the protection order. When the mother came to the school, she represented that the protection order had been rescinded but did not provide a copy of such an order to the school to support this representation. OCR noted that under Sec. 504, a non-custodial parent has a "general right to access to the child's educational record," but this "right may be limited if the school district has evidence that a state law or valid court order limits the non-custodial parent's right of access." The school district was "acting pursuant to a valid court order when it denied the Complainant access to the records." As a consequence, the school district did not violate § 104.36 when it denied the mother access to the student's records.

Frederick County (MD) Public Schools, 46 IDELR 230 (OCR 2006). Parents sought access to certain records that were referenced during a Sec. 504 committee meeting (the education records of the student) or generated in response to the parents' grievance. The school district provided the education records but destroyed the records of interviews conducted in the investigation of the grievance. The destruction of the records prevented the parents from having access to relevant records. This constituted a violation of § 104.36.

Williamson County (TN) School District, 47 IDELR 20 (OCR 2006). A third-grade student had a significant hearing loss. The school district had considered audiologist evaluations and had implemented an FM (frequency modulation) system in the student's classroom, along with training for the teachers. However, the parent believed the student was eligible for IDEA services. An IEP Team met but determined the student was not eligible because her hearing loss did not constitute an "adverse impact upon educational performance." OCR noted the school district complied with procedures for reaching its eligibility determination. "Due process is the proper forum for addressing disagreements with the placement decision. The evidence reveals that all tests and evaluations were considered in making the placement decision and that the Complainant was notified of her due process rights."

Marion County (WV) Schools, 45 IDELR 289 (OCR 2005). Parent complained the school district failed to provide her with a copy of the notice of procedural safeguards or explain these to her. The principal had asked her if she understood her rights, to which she stated she did. As a result, procedural safeguards were not discussed any further. OCR noted that "[t]he Section 504 regulations do not specify the method for providing notice of procedural safeguards to parents and guardians, and leaves this decision to the discretion of the District." Although "verbal notice may under certain circumstances be sufficient notice to comply with 34 C.F.R. § 104.36, it was not adequate in this case" because the procedural safeguards were not discussed verbally.

Griffith (IN) Public Schools, 40 IDELR 105 (OCR 2003). Complainant requested a hearing to challenge the Sec. 504 Plan proposed by the LEA. The LEA appointed a hearing officer, who conducted a pre-hearing conference and framed the issues but later recused herself. The LEA appointed a second hearing officer. The second hearing officer conducted a pre-hearing conference and eventually added another issue for hearing. Later, the complainant requested the second hearing officer to recuse himself because he worked for a law firm that represents public school districts and attends professional meetings where the local superintendent was also in attendance. The complainant also disagreed with the hearing officer's interim orders concerning the issuance of subpoenas. The hearing officer denied the recusal request. OCR noted that LEAs

may not use their own employees as hearing officers or use employees of school districts with which the LEA has a contractual relationship (e.g., cooperative agreement, interlocal arrangement). School board members may not serve in this capacity. The second hearing officer was not an employee of the LEA, was not a local school board member, and had no contractual arrangement with the LEA. OCR found the hearing officer could serve in this capacity. OCR also noted that any challenges the complainant has to the hearing officer's orders could not be pursued through OCR's complaint investigation process.

Griffith (IN) Public Schools, 41 IDELR 157 (OCR 2003). This complaint arises from the same operative facts in the companion LOF at 40 IDELR 105, *supra*. The complainant alleged the hearing was not conducted in a timely fashion. The hearing was requested on October 22, 2002, but not conducted until April of 2003. Although the hearing was initially scheduled for December 18, 2002, it was the complainant who requested a 30-day extension of time. Later, the complainant requested a second extension of time in order to respond to the LEA's requests for certain information. By mutual agreement of the parties, the April dates for hearing were vacated. No delays were occasioned by the LEA; rather, it was the complainant who caused the delays. The LEA was in compliance with Sec. 504 procedural safeguards.

Plainfield (CT) Public Schools, 40 IDELR 18 (OCR 2003). The LEA violated Sec. 504 by distributing to parents brochures developed by the SEA, which addressed IDEA but not Sec. 504. A brochure explaining IDEA procedural safeguards is inadequate in explainaing to parents their rights and procedural safeguards under Sec. 504.

Forest Hills (OH) Public School District, 42 IDELR 210 (OCR 2004). The student was a middle school student with a Sec. 504 plan. She brought alcohol to school for which she was initially suspended pending expulsion. At a Sec. 504 manifestation determination meeting, the team determined this behavior was not a manifestation. When the parent asked if she could appeal this determination, she was informed by the assistant principal there was no appeal. The student was expelled. OCR noted that recipients must have a system of procedural safeguards. "Manifestation determinations are educational placement decisions that are subject to the requirements of this section of the regulation [§ 104.36]." The school acknowledged the assistant principal erred. Although the Sec. 504 coordinator did correct the misrepresentation, the district again confused IDEA with Sec. 504 (as did the complainant by this time), such that an IDEA hearing officer became assigned but then dismissed the action because the school argued there were no due process procedures available for a Sec. 504 student. Corrective action was warranted.

Moreno Valley (CA) Unified Sch. Dist., 22 IDELR 902 (OCR 1995). School did not violate Sec. 504 and Title II of A.D.A. by suspending student with diabetes, hearing loss, and a learning disability when he refused to turn over an unauthorized beeper to school security. The beeper was not needed for medical reasons but for family convenience in reaching student. Also see Huntington Beach (CA) Union High Sch. Dist., 21 IDELR 806 (OCR 1994), where school had designated a Sec. 504 coordinator, and had his name published in two publications distributed to parents.

Mequon-Thiensville (WI) Sch. District, 40 IDELR 22 (OCR 2003). LEA violated Sec. 504 and

Title II of the ADA when it destroyed original teacher responses to a rating scale and provided the parents with only an interpretative summary prepared by the psychologist. The destruction of the test protocols denied the parents access to "relevant records."

104.37 *Nonacademic Services*

Quaker Valley (PA) School District, EHLR p.352:235 (OCR 1986). LEA violated Sec. 504 when it denied student with disabilities equal opportunity for participation in field trips and swimming program out of concern for her safety even though she could have participated if offered accommodations.

East Windsor (CT) Board of Education, 18 IDELR 1310 (OCR 1992). LEA violated Sec. 504 when it resurfaced playground with pea gravel, thus preventing students with mobility impairments, including wheelchair users, from equal opportunity to participate.

Elk Grove (CA) Unified Sch. Dist., 21 IDELR 941 (OCR 1994). School violated Sec. 504 and Title II, A.D.A. when it denied transportation to a field trip for a student with Legg Calves Perthes Disease who used a wheelchair. The School had adequate notice of the student's need for accommodation and failed to provide a legitimate reason for preventing student from boarding the bus.

104.37(a)

Northshore (WA) School District No. 417, 48 IDELR 199 (OCR 2006). High school student had an IEP for her learning disabilities. Although she was eligible for placement and use of a modified grading scale, her IEP team placed her in a general education class with academic support in order to increase social interaction with her peers without disabilities. At the time of cheerleading try-outs, her cumulative GPA was 2.364. The school district required prospective candidates to have a minimum GPA of 2.8. School officials acknowledged her low GPA was the result of her disability and placement. Her IEP included a notation to this effect. Notwithstanding, the high school's co-principal indicated to the parent that the student could not try-out for cheerleading, that no exceptions to the GPA requirement had been made in the past, and that none would be considered in this case either. The parent was also advised that there was no mechanism to appeal this decision. The district has three high schools. All have different GPA requirements and different approaches to considering exceptions to the cheerleading GPA requirement. The other two high schools have more accommodating approaches that do not automatically exclude a student but consider each case individually. The student's school–which will not make any exceptions–acknowledged that had the student been on the modified grading scale, she would have had much higher grades and likely would have met the GPA requirement. Even though the co-principal told the parent there were no avenues for appeal, there apparently were potential avenues, but none was in writing and the parent was not so advised. OCR found the high school was out of compliance through its no-exceptions application. In this case, the student's lower GPA was disability related. An exception to the GPA requirement would not be a fundamental alteration of the program. OCR noted that the 2.8 GPA for cheerleaders was significantly higher than other programs, including the athletic programs, yet the district could not provide evidence supporting the necessity to use a higher GPA requirement for cheerleading.

There was also evidence that the high school did not adhere to a strict "no exception" policy in applying the 2.8 GPA. This was particularly true in the other two high schools in the district. "Because OCR found that the GPA criterion was not shown to be necessary to the program and that the modification of the criterion would not fundamentally alter the program, OCR concludes that the district discriminated against the student...when it refused to consider whether the GPA rule should be modified due to her disability."

Nyack (NY) Unified School District, 43 IDELR 169 (OCR 2004). The principal sent a letter to a parent, advising the parent: "Due to [the student's] recent surgery, current instability of her diabetes, and the fact that there will be no medical staff or supplies on hand...your child WILL NOT attend the [field trip]." The school district was aware of the student's diabetes. However, the school district had never identified her as having a disability or developed an accommodation plan. "Although the District had not formally identified the Student as disabled, the District's actions indicate that the District regarded the Student as disabled." The school district failed to provide nonacademic services to a student it considered to have a disability.

Mobile County (AL) Public School System, 38 IDELR 15 (OCR 2002). Complainant claimed the LEA denied opportunities to students with disabilities to participate in cheerleading, on volleyball and softball teams, or at school dances by not providing adequate notice. The complainant also alleged the LEA did not provide recognition of achievements of students with disabilities at Honors' Day events. OCR found the LEA's policies for participation in nonacademic and extracurricular activities to be "facially neutral" and did not pose any disability-based obstacles. Although the LEA does have academic eligibility rules, LEA policy requires eligibility decisions to be made by a student's Sec. 504 team. The LEA acknowledged it failed to recognize one student's achievements at Honors' Day, but this was due to her participation in a vocational education program at another school. The LEA undertook voluntary corrective action to ensure that, in the future, all such achievements are reported and recognized. OCR found the LEA provided ample notice of all of its events, including try-outs for teams, through intercom announcements, posters, and newspaper accounts. OCR also found students with disabilities were participating in all nonacademic and extracurricular activities, including athletics.

Perry (OH) Public School District, 41 IDELR 72 (OCR 2003). The student had juvenile diabetes. She was denied acceptance into the LEA's chapter of the National Honor Society (NHS). For induction into the NHS, a student must demonstrate scholarship, leadership, service, and character. Students must have, *inter alia*, a 3.5 grade point average and be involved in at least two "co-curricular activities." Applications were reviewed by the Faculty Council, which turned down the student's application because she was not an active member of the Spanish Club as she had represented. The student had never taken a Spanish class, which is a prerequisite to being in the club. The student had not demonstrated "continued and active participation" in the club. The Spanish Club sponsor didn't even know who the student was when approached by a member of the Faculty Council. The Faculty Council had in the past denied other applications for failure to demonstrate active participation in co-curricular activities. OCR concluded the student's exclusion from the NHS was not based on her disability.

Aldine (TX) Independent School District, 16 EHLR 1411 (OCR 1990). LEA could not demonstrate educational necessity for separate graduation ceremony for students with severe

disabilities.
104.37(c)

Alpena (AR) Public School District, EHLR p.257:565 (OCR 1984). LEA violated Sec. 504 when it refused student with epilepsy participation on its basketball team even though he was qualified to play; also, one individual cannot make placement determinations.

DeKalb County (GA) School District, 32 IDELR ¶ 8 (OCR 1999). The student has an accommodation plan. However, the accommodation plan did not address support services for extracurricular activities. The accommodation plan was designed solely for academic pursuits. The student attended try-outs for the basketball team but was cut. The basketball coach indicated the student lacked the skills necessary to make the team. The reason for the student's exclusion from the basketball team was not based on the student's disability and did not violate Sec. 504.

Salem (NH) School District, 35 IDELR 260 (OCR 2001). Student transferred to the public school with an IEP. The school provided services but recommended he pursue a GED rather than a diploma because of his age and lack of credits. The student wanted to participate on the hockey team but his age prevented his eligibility. The student's school attendance was spotty, with many unexcused absences and disciplinary referrals. Under the by-laws of the New Hampshire Interscholastic Athletic Association, to be eligible to play hockey, a student must: (1) be age-eligible; (2) be in good scholastic standing, which includes academic grades and school attendance; and (3) not have played for more than eight consecutive semesters beyond the eighth grade. When the student enrolled in this school, he was one month short of his 19th birthday. He had also exhausted the eight-semester requirement. Although the principal is authorized to grant student-specific waivers–and has done so in the past, including students with disabilities–the student in this dispute was ineligible because of age, the eight-semester rule, and his poor attendance, his grades, and his behaviors at school.

Dennin v. Connecticut Interscholastic Athletic Conference, 913 F.Supp. 663 (D.Conn. 1996). A 19-year-old student with Down Syndrome sought to enjoin the enforcement of an age-limitation rule which would have prevented him from participating on his school's swim team. Because of his special needs, he spent an additional year in middle school. Participation on the swim team was specified in his individualized education program (IEP). Anyone can try out for the swim team; no one is cut. The athletic conference by-laws render ineligible a high school student who turns age 19 before September 1. The primary purposes for the rule is to prevent competitive advantages; to protect younger students; and to discourage the delaying of one's education for athletic purposes ("red shirting"). Dennin turned 19 on September 1. His times were not particularly competitive and swimming is not a contact sport. He sought a waiver of the rule, but the conference refused. In granting the injunction, the court found that under IDEA, Sec. 504, and the Americans with Disabilities Act (ADA), Dennin was entitled to "reasonable accommodations" (waiver of the age rule) because the waiver would not fundamentally alter the athletic program or impose an undue burden. Although the age eligibility rule is neutral on its face, individual circumstances may cause its application to be discriminatory. In this case, the sole reason the student is 19 and still in school is the existence of his disability. Application of the age rule under these circumstances would violate Sec. 504 and the ADA. The Second Circuit Court of Appeals declined to review the decision because the swim season was over and the issue

was moot. 94 F.3d 96 (2d Cir. 1996).

Pottgen v. Missouri High Sch. Athletic Assoc., 857 F.Supp. 654 (E. D. Mo. 1994), rev'd on other grounds, 40 F.3d 926 (8th Cir. 1994), applying a similar age eligibility rule, but in this case to prevent a 19-year-old disabled student from playing baseball.

Johnson v. Florida High School Activities Association, Inc., 899 F.Supp. 579 (M.D. Fla. 1995), applying a case-by-case analysis to an age eligibility situation in permitting a disabled student to participate in wrestling and football because, given the student's relative lack of athletic prowess and the reasons for his continuing in school till age 19, he posed no threat to other students and was not the result of an attempt to gain a competitive edge. The purpose of the rule was satisfied, and waiver would be a "reasonable accommodation."

Hoot v. Milan Area Schools, 853 F.Supp. 243 (E.D. Mich. 1994). Student with ADHD had been denied participation in athletics because he lacked sufficient credits required by non-recipient athletic association. The school district requested the association waive its rule, but the association refused. The student was subsequently identified as eligible for special education services, eventually having his credits restored and his athletic eligibility restored. In denying the association's Motion for Summary Judgment based on mootness, the court said questions remained as to the application of Sec. 504 and the A.D.A. to a nonrecipient of federal financial assistance (the Association) and whether a recipient member can avoid its responsibilities by relying upon the actions of a nonrecipient.

Sandison v. Michigan High School Athletic Association, 863 F. Supp. 483 (E.D. Mich. 1994). Later in the year, the federal court (different judge) granted an injunction to students with disabilities, enjoining the association from enforcing its age limitation to the students for participating in athletics (in this case, track and cross country). In granting the injunction, the court decided an issue the Hoot court did not. The court decided that the Association is subject to the requirements of Sec. 504 and the A.D.A. because it is an indirect recipient of federal financial assistance, is a private entity operating a public accommodation, and is a public entity. *Id.,* at 486, 489-90. However, the Sixth Circuit Court of Appeals reversed, finding that the issue of participation was moot because the respective athletic seasons had ended. The Court of Appeals also questioned whether the students could have succeeded on their A.D.A. claims against the nonrecipient athletic association. Sandison v. Michigan High School Athletic Association, 64 F.3d 1026 (6th Cir. 1995).

Kling *et al.* v. Mentor Public School District *et al.*, 136 F.Supp.2d 744 (N.D. Ohio 2001). The school district was ordered by an Impartial Hearing Officer (IHO) and State Review Officer (SRO), conducted pursuant to 20 U.S.C. § 1415 of the IDEA, to develop a program placing the student on the track and cross-country teams. The school refused to do so, asserting it would face sanctions from the State athletic association for violating a by-law that prohibited 19-year-old students from participating in interscholastic athletic competition.[4] The student was born

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[4]The school district's position could have resulted in a more severe penalty. A State, as a condition for receipt of IDEA funds, must have a complaint investigation process, which includes issues such as the purported failure to implement a hearing officer's decision. Refusal to comply

with a hearing impairment and cerebral palsy. These disabilities prevented him from starting second grade until he was approximately ten (10) years old. The late start of second grade has resulted in the student remaining in high school at age 19. During his freshman year, the physical education teacher required his class to complete a one-mile run. It took the student the entire class period to do so. He was later encouraged to try out for the cross country and track teams. He spent the summer training with his father for cross country. During his sophomore year, he participated on these teams, which resulted in "notable improvements in both his academic work and his sense of personal well-being." Prior to his junior year, he was informed that the State athletic association rules prohibited him from further participation because of his age. The "Age Rule" is designed to prevent an unfair advantage to one team, to help ensure the safety of all players, and to give every school a "level playing field." The court did not dispute the "Age Rule" serves a valid and important purpose. However, the student typically finishes last in every race, such that his participation–at any age–will not provide an "unfair advantage." During the IEP Team meeting to review and revise the student's IEP for his junior year, the student's parents proposed goals that addressed his participation on the athletic teams, but the school declined to consider these goals. The parents exercised their right under IDEA to an impartial due process hearing. The IHO found that participation in interscholastic athletics (track and cross country) is a necessary component of the student's IEP "without which he cannot attain educational benefit or FAPE." The SRO affirmed the IHO's decision. Despite being ordered to incorporate the student's athletic participation into his IEP, the school refused. The court found the student had "suffered irreparable harm insofar as he has been excluded from competition and relegated to merely suiting up and practicing. [The student] was encouraged by school officials to prepare, join, and participate fully in the teams. His participation resulted in academic, physical, and personal progress. [He] has run afoul of the Age 19 Rule only because of his disabilities." However, IDEA takes precedence over an athletic association's by-laws. The court entered an injunction on the student's behalf, entitling him to participate and restricting the athletic association from leveling sanctions against the public schools because of his participation.[5]

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with such an order can result in the withholding of all federal funds to the school district, a considerably greater penalty than any athletic association could impose.

[5]Because the student and his parents were likely to be the "prevailing parties" in this matter, the school district faced the payment of attorney fees under the IDEA. See 20 U.S.C. § 1415(i).

MEDICATION ADMINISTRATION IN PUBLIC AND PRIVATE SCHOOLS

Administration of medications to students while at school has been the core issue in a number of administrative and judicial proceedings. The following are representative.

Student Medications

1. Hamilton Heights (IN) School Corporation, 37 IDELR 130 (OCR 2002). The student was a middle school student with diabetes. He used an infusion pump that automatically injects insulin into his system after he sets the correct amount to be injected. The "correct amount" is determined based on the number of carbohydrates he has consumed. The school nurse and staff were trained in noticing signs indicating the student's blood sugar levels were too low or too high. His intake of carbohydrates was monitored. The school nurse had open and frequent communications with the student's physician and his parents. The school nurse also received specific training on insulin pump therapy from a local hospital. OCR found no merit to the complainant's allegation the school nurse failed to make daily entries regarding the student's blood-sugar levels, the number of carbohydrates he consumed, and the calculations of the amount of insulin he should inject, as well as the amount of juice or other items (soda pop, glycogen, gel/tablets or cake icing) he is to be given if his blood sugar level is too low. There were occasional entry mishaps, but these were all addressed and the parents were informed. The school nurse followed the Diabetes Management Protocol for the student. Other pertinent OCR determinations:
   - Although teachers of the student had received instruction in the use of the glucose gel/tablets for the students, some teachers were uncertain where in the student's mouth this should be placed. Some other teachers had not received the training. The LEA resolved the matter by clarifying where in the mouth the gel tablet should be placed and training the remaining teachers.
   - The student's Sec. 504 plan required notification to the parents of the carbohydrate counts on all food items to be served in the cafeteria the following week. The LEA acknowledged that on one occasion, the information provided was five days–and not seven days–in advance. Also, there were some discrepancies in the carbohydrate counts as there was no distinguishing between food in a dry state and food in a prepared state. The discrepancies were discovered and corrected four weeks into the school year.

2. Springsboro (OH) Community School District, 39 IDELR 41 (OCR 2003). The student was a second grader with Type I diabetes. His parents withdrew him from the public school and enrolled him in a private school when the LEA would not consider permitting the student to self-test in the classroom. OCR noted that whether a student with diabetes can self-test in the classroom is a related services issue to be determined by the student's Sec. 504 team. The LEA also provided the parents with a copy of the monthly menu at the elementary school with the size and carbohydrate count for meals so the parents could calculate the student's insulin dosage.

3. Wayne-Westland (MI) Community Schools, 35 IDELR 14 (OCR 2000). The eight-year-old student had an individualized Health Care Plan (HCP) regarding the administration of insulin or glucagon during the school day for her diabetes. The parents and the school began to disagree as to the extent to which the student should self-administer such medications and emergency procedures to be employed. The school and parents resolved their differences when the school agreed to reconvene the Sec. 504 committee to review the HCP of the student upon receipt of a completed Medical Authorization Form and Physician's Order, which would include detailed instructions as to the student's need for insulin or glucagon during the school day. Insulin would be administered by a school nurse or trained staff member, in accordance with the physician's written order; the school will administer the insulin until such time as the student is determined by the Sec. 504 team, the student's parents, and the student's physician to have the skill and comfort level to self-administer her insulin medication; and the glucagon will be administered to the student by the school nurse, as needed in emergency situations, in accordance with the physician's written order.

4. Murfreesboro (Tenn.) City School District, 34 IDELR ¶299 (OCR 2000). The parent kept her daughter, who had asthma, out of school until the school assigned a nurse to the school. OCR found the school's policies were compliant with Sec. 504 and the ADA. The school and the student's physician maintained contact. The physician stated the student did not have an acute medical condition and that non-medical personnel could be trained in the appropriate administration of the student's medications, including the use of the student's nebulizer and the monitoring of the student's airflow readings.

5. Henderson Co. (NC) Pub. Schs., 34 IDELR ¶43 (OCR 2000). The student had juvenile diabetes (Type I) and was enrolled in the elementary school. The school did not develop and implement a health management plan that would have provided the student diabetes-related assistance, including administration of insulin and glucagon injections. The school acknowledged it failed to accommodate the student's condition and agreed to provide training to staff from a registered nurse and other professionals, as appropriate. Staff would also be trained how to observe hypoglycemia (low blood-glucose level) and hyperglycemia (elevated blood-glucose level). The school also agreed to ensure that there would be three full-time staff members at the school trained in the use of an insulin pump, and that there would be at least one person trained in this aspect who would accompany the student to school-sponsored events off-campus.

6. North Kitsap (WA) Sch. Dist. No. 400, 33 IDELR ¶109 (OCR 1999). The student attended the local junior high school. He has Insulin-dependent Diabetes Mellitus and experiences episodes of hypoglycemia, where he may be unresponsive and require injections of glucagon. The school developed an accommodation plan and obtained a "Physician's Order for Medicine at School" from the student's physician, requiring a licensed registered nurse or medical response team member administer injections of glucagon, when necessary. The accommodation plan also required that physical education be scheduled during a time best suited to his condition; altered the lunch schedule as needed; monitored the student's food intake and blood-glucose levels through the school day; provided the student with fast-acting sugars at all times; provided health updates and a copy of the accommodation plan to his teachers and other staff; and provided annual training regarding the emergency management of diabetics. There were

also "emergency kits" maintained in several areas of the school, including the student's backpack. These kits contained fast-acting sugars and glucose gel. The physical education teacher also had a two-way radio for use when the class went outside. These procedures, OCR determined, complied with the requirements of Sec. 504 and the ADA.

7. Southwest Vermont Supervisory Union #S, 33 IDLER ¶10 (OCR 1999). The student had asthma. The district developed an "Asthma Action Plan" for her.[6] The school's local policy for the administration of medication requires a written order from a physician detailing the name of the student, the drug dosage, the reason for the administration of medication, and the time the medication is to be administered; medications are to be dispensed by the school nurse or someone trained by the school nurse; and administrations of medication are to be recorded (by time and dosage) and initialed by the school personnel administering same. The student in this case required medication on an "as needed" basis as she was asymptomatic for most of the school year. The student's teacher was to provide verbal and visual cues to the student to prompt her to take her medications. A note with the word "nurse" was taped to the student's desk. This method for making the student more independent was devised by the school nurse and the teacher, and explained to the student's parents, who did not object. (This use of single-word cues was used by the teacher with all of her students as a means of enhancing independence in a variety of areas and not just medication-related.) OCR determined the student was not being treated differently from her peers, and found the school's policies and procedures compliant with federal law.

8. Maine Sch. Administration Dist. #40, 29 IDELR 624 (OCR 1998). Among a host of allegations, the complainant alleged the district failed to notify the student's teachers, substitute teachers, and track coach that the student had a life-threatening allergic reaction to bee and hornet stings, and to develop an alternative plan for administering an EpiPen shot should the student not be able to self-administer the EpiPen himself.[7] Pursuant to school policy and procedure, the school nurse had placed the student's name on the Confidential Health Alert form that she distributed to all teachers. Included in this form are guidelines for the dispensing of medications to those students known to have allergic reactions to insect bites or bee and hornet stings. The school nurse also provided in-

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[6]Unlike IDEA where the educational program is fairly standardized under an Individualized Education Program (IEP), there is no standard nomenclature for an accommodation plan under Sec. 504 or the ADA. For this reason, the accommodation plan may have many different names, including "Sec. 504 Plan," "Health Care Plan," "Accommodation Plan," or, as in this case, "Asthma Action Plan."

[7]Insect stings from bees, wasps, hornets, ants and other "biting" arthropods are capable of causing allergic reactions in hypersensitive individuals. An insect sting may cause allergic reactions ranging from relatively trivial symptoms (itchy skin, flushing) to anaphylaxis, a life-threatening reaction where the airway may become swollen, interrupting respiration and sometimes resulting in cardiac arrest. Emergency treatment may mean the difference between life and death. One of the more common emergency self-help treatment kits is the EpiPen, where a dosage of epinephrine, a form of adrenaline, can be injected into the thigh muscle.

service training to designated school personnel on the use of injectable medications. It was noted the student had an EpiPen with him at all times. The school nurse also maintained an EpiPen in her office in case of an emergency. OCR found these policies and procedures appropriately informed staff of the student's needs and ensured an appropriate contingency plan should there be an emergency.

9. San Juan (Ca) Unified School District, 20 IDELR 549 (OCR 1993). The school district properly evaluated the student's educational needs in light of diagnosed Attention Deficit Hyperactivity Disorder (ADHD), including the identification of dispensing of medication (Ritalin) as a related service. The student, a 13-year-old with a long history of attentional problems and impulse control deficits, was made responsible for ensuring she took her medication as prescribed. There was no plan or process to ensure that the student did so. This constituted a denial of a related service and, hence, a denial of a "free appropriate public education" (FAPE).

10. Pearl (MS) Public School District, 17 EHLR 1004 (OCR 1991). The school district's policy of prohibiting school personnel from administering Ritalin during school hours to students identified as having ADHD violated Sec. 504 of the Rehabilitation Act of 1973.

11. Huntsville City (AL) School District, 25 IDELR 70 (OCR 1996). The school district's medication policy required generally that students with diabetes who needed to use a glucometer to monitor the level of glucose in their blood to come to the office. The school district's medication policy did permit a case-by-case analysis and exceptions where indicated. One student, for example, was medically required to carry her glucometer with her at all times. The Office for Civil Rights (OCR) determined that the school district has not violated Sec. 504 or Title II, Americans with Disabilities Act (A.D.A.).

12. Valerie J. et al. v. Derry Cooperative School District, 771 F.Supp. 483 (D. N.H. 1991). A student's right to a FAPE cannot be premised upon the condition that the student be medicated (Ritalin) without the parents' consent. The parents previously had the student on Ritalin, but while the drug "took the edge off" the student's behavior, it left the student spacey, drugged or lethargic with a diminished attention span. The parents became opposed to the use of Ritalin, but the school insisted upon its use as a prerequisite to the student receiving educational services. A hearing officer upheld the school, but the district court found such a prerequisite inconsistent with federal disability laws.

13. Nieuwendorp v. American Family Insurance Co., 529 N.W.2d 594 (Wisc. 1995). The parents of a student with ADHD who was impulsive and aggressive were liable to a teacher for personal injuries when the parents unilaterally removed the student from the medication that was controlling the student's impulsive and aggressive behaviors. The student injured the teacher's neck when he pulled her hair, causing her to fall to the floor. The teacher had been called to the classroom to help control the student's behavior. The parents had not informed the school that they had removed him from his medication nor had the parents informed themselves about the possible behavioral consequences from doing so. Had the school known of the parents' actions, it could have responded by developing a plan to manage the student's behavior. The parents' failure to exercise reasonable care was the proximate cause of the teacher's injuries.

14. In Lubbock (Tex.) Independent School District, 27 IDELR 509 (OCR 1997), the Office for Civil Rights found that the school district's procedures and policies for administering medications did not discriminate against a student with multiple disabilities. School policy required signed parental consent; the provision of medication in the original, labeled container; and, for any changes in dosages, a written order from a physician to the school nurse. The school's individual medication log indicated medication was dispensed to the student when he was in school and that a current, signed consent form was on file. The school nurse and the classroom teacher sent home a letter to the parent requesting clarification regarding a dosage increase. Thereafter, the school nurse contacted the student's physician and pharmacy, and obtained a faxed order from the physician regarding dosage and administration of medication for the student. There was no interruption of service.

Manifestation Determination; Child Find

1. Hacienda La Puente (CA) Unfied Sch. Dist., 30 IDELR 720 (OCR 1998). The student was in the fourth grade but was absent excessively (87 days). The school referred him to the truancy program conducted in conjunction with local law enforcement and social services. In a meeting with school officials and a prosecutor, the parents stated the student had severe asthma and offered copies of doctor office visits, which the prosecutor refused, adding that he needed doctor statements about the student's medical condition and how this affected his school attendance. The parents were provided with a medical release form, but the father did not execute the release so the school could have the medical records. No one suggested the student be evaluated to determine whether he had a disability under Sec. 504 or Title II of the ADA. OCR cited the school for failing "to adequately assess whether [the student's] asthma was a disability under Section 504/Title II. OCR finds that the complainants attributed [the student's] chronic absences to his asthma and offered documents to support their claim. OCR finds that this information was sufficient under 34 C.F.R. §104.35(a) to require the District to assess whether [the student] had a disability under Section 504. However, the District did not conduct such an assessment." 30 IDELR at 722. "Further, the District acknowledged to OCR that it did not have adequate policies and procedures for the identification, evaluation and placement of students with disabilities under Section 504/Title II." Id. The school district agreed to adopt and implement policies and procedures for the identification, evaluation, and placement of students with disabilities, and further agreed to provide for the assessment of this student's health and conduct other assessments as necessary to determine whether the student has a disability and, if so, whether the disability affected his school attendance.

Liability

1. Nance v. Matthews, 622 So.2d 297 (Ala. 1993). An elementary school student with spina bifida needed to be catheterized at school following bladder surgery. An aide who was trained to catheterize the student failed to do so on one day, allegedly resulting in physical injuries to the student, who sued the aide and school officials for negligence. The court sustained the dismissals from the suit of the school nurse, the principal, and the special education supervisor, finding that they had qualified immunity from charges they negligently supervised and retained the aide. The court stated no qualified immunity

would apply where bad faith or fraud is involved, but there was no evidence that such was the case in this dispute. The court did not dismiss the aide from the suit.

Refusal to Administer

1. Prince George's (MD) County Schools, 39 IDELR 103 (OCR 2003). This would have been a "refusal to administer" situation had LEA personnel followed the LEA's policy, which OCR found to contravene Sec. 504. In this matter, the elementary school student had diabetes. Her Sec. 504 Plan called for, *inter alia*, orientation for staff and the school nurse for diabetes management. The parent authorized the LEA to provide injectable glucagon and insulin, snacks, and oral glucose to the student, and to test her urine for high blood sugar. At the beginning of the 2002-03 school year, the LEA did not have a certified nurse at the elementary school. It did have a Certified Nursing Assistant (CNA), who was not qualified to administer insulin. For the two months before a nurse was hired, the parent came to the school to administer the injections. The LEA hired a nurse who, in contravention of LEA policy (which prevented Health Services staff from administering insulin), gave the student her necessary injections. OCR found the LEA's policy violated Sec. 504 by (1) not having a qualified person to provide injectable medications for the student and requiring the parent to do so, and (2) by having a policy that prevents Health Services staff from giving injectable medications to diabetic students, even in emergency situations. This policy has the effect of denying needed services to students with disabilities. The LEA had to revise its policy.

2. Rock Hill (OH) Local Schools, 37 IDELR 222 (OCR 2002). The student had juvenile diabetes and attended the elementary school. The complainant alleged the LEA failed to provide related aids and services when it refused to provide the student with humalog (fast-acting insulin for use when the student's blood sugar was too high) and glucagon (when blood sugar levels were too low). OCR noted that students with diabetes often have a substantial limitation on the major life activity of breathing (as well as other areas) even though this may not pose a limitation on learning. In such cases, the Sec. 504 plan "may consist solely of a medical plan that addresses the related services, such as insulin, humalog, or glucagon" that must be administered during the school day in order for the student to have "an equal opportunity to participate in the school's programs and activities." The complainant later requested assessment under IDEA, which the LEA conducted but eventually found the student ineligible. OCR noted the LEA was far too limited in its IDEA procedures because it only looked at whether the student had a learning disability and did not consider when the student's diabetic condition constituted an "Other Health Impairment" under the IDEA or a substantial limitation on learning under Sec. 504. (By this time, the student was missing a great deal of school due to a worsening of his diabetic condition.) The complainant had submitted "Administration of Medication" forms to the LEA but she was apparently not comfortable with the LEA personnel administering injections so she came to school and performed this function herself. Later, the complainant requested to LEA staff to assume this responsibility. The LEA was willing to do so but the complainant would not provide a prescription or other written instructions from the student's physician on how and when to administer humalog and glucagon. Also, the complainant prevented the LEA and the physician from communicating regarding the student's needs. OCR found the LEA did not fail to

provide related aids and services because the complainant failed to provide the requisite medical authorization and information.

3. Ian E. v. Bd. of Education, Unified Sch. Dist. No. 501, Shawnee County, Kansas, 21 IDELR 980 (D. Ks. 1994). The school district refused to administer Clonidine to a student based upon alleged safety concerns, requiring instead that the parents come to school to do so. The parents hired an attorney and requested a hearing. The school reversed itself and agreed to administer the medication. The court found the school liable for the attorney fees the parents incurred in challenging the school's refusal to administer the medication.

4. Davis v. Francis Howell Sch. Dist., 104 F.3d 204 (8th Cir. 1997). The 8th Circuit Court of Appeals determined that a school district in Missouri did not violate the Americans with Disabilities Act when it declined to provide Ritalin in excess of the recommended maximum daily dosage. The student's physician had prescribed 360 milligrams a day of Ritalin to address the student's ADHD. The school nurse administered the medication in school for two years before she noticed the prescription exceeded the maximum daily dosage recommended by the *Physician's Desk Reference.* The school nurse asked the parent to obtain a second physician's opinion regarding the Ritalin dosage. The second doctor wrote that the dosage was safe. Nevertheless, the school nurse declined to provide Ritalin to the student at the dosage prescribed because of concern for the student's health. The school permitted the parent to come to school and provide the medication to her son. The 8th Circuit panel ruled that the family had not suffered "irreparable harm" by the school's actions.

5. In DeBord v. Bd. of Education of the Ferguson-Florissant Sch. Dist., 126 F.3d 1102 (8th Cir. 1997), the 8th Circuit revisited its decision in Davis v. Francis Howell, *supra.* In this case, the school district's nurse refused to administer an afternoon dosage of Ritalin to an eight-year-old student identified as having Attention Deficit Hyperactivity Disorder (ADHD) because the student's daily intake of Ritalin exceeded by 60 mg the recommended dosage in the PDR. The school declined to accept a waiver of liability from the parents. The court found the school's policy regarding dosages to be neutral and nondiscriminatory. The court also found that the waiver of liability would "impose an undue administrative burden on the school district to verify the safety of an excess dosage in each individual case... At this time, no one knows what the long-term effects of high doses of Ritalin might be. A waiver of liability might not be effective, and statutory immunity might not apply." The school did offer to alter the student's class schedule so the parents could administer the medication. The U.S. Supreme Court has denied certiorari. See *DeBord v. Bd. of Education, Ferguson-Florissant Sch. Dist.*, 523 U.S. 1073, 118 S. Ct. 1514 (1998).

6. Pueblo (CO) Sch. District No. 60, 20 IDELR 1066 (OCR 1993). The school district did not violate Sec. 504 and Title II, A.D.A., when it discontinued the administration of prescription eye drops to a student when the parent failed to produce an updated prescription from the physician. However, OCR noted that the school had continued to provide the eye drops every thirty (30) minutes even though the last prescription was over two (2) years old. The school discontinued the eye drops after the complaint was

initiated. This constituted retaliation for engaging in a protected activity (advocating for someone's civil rights), thus violating Sec. 504.

7. East Helena (MT) Elementary School District #9, 29 IDELR 796 (OCR 1998). The school district did not discriminate against a student with asthma when the school nurse refused to administer "medications" prescribed by a Naturopathic Physician & Acupuncturist (ND) or to observe the student while he "self-administered" the medications. "Naturopathy" and its practitioners believe in natural therapeutic substances and are not authorized to prescribe legend drugs, such as those dispensed by pharmacies. An ND creates the concoctions in the ND's office. Under Montana law and directions from the Montana State Department of Nursing, a school nurse is not allowed to take orders from ND's, nor are school nurses to dispense medications unless filled by a pharmacist. The school district did offer to permit family members of the student to come to the school and administer the Naturopathic medications. OCR found the school was abiding by state law, and that its policy was uniformly applied to all students, whether or not there was a disability. OCR also recognized the school's liability and safety concerns with the use of unregulated alternative medicines.

8. Evergreen (WA) School Dist. No. 114, 29 IDELR 983 (OCR 1998). When the school district received conflicting information regarding the administration of medications during school hours of a seven-year-old child with ADHD, the school district requested permission to speak with the student's physician. The parent filed a complaint. OCR found the school was motivated by safety concerns and was not retaliating against the parent or the student.

PRIVATE SCHOOL STUDENTS

Sec. 504 does include within its purview private schools that receive federal education funds, although the standards that must be met are not the same as those for public schools. The applicable regulation is as follows.

34 CFR §104.39 Private Education Program

(a) A recipient that operates a private elementary or secondary education program may not, on the basis of handicap, exclude a qualified handicapped person from such program if the person can, with minor adjustments, be provided an appropriate education, as defined in §104.33(b)(1), within the recipient's program.

(b) A recipient to which this section applies may not charge more for the provision of an appropriate education to handicapped persons than to non-handicapped persons except to the extent that any additional charge is justified by a substantial increase in cost to the recipient.

(c) A recipient to which this section applies that operates special education programs shall operate such programs in accordance with the provisions of §§104.35 [evaluation and placement] and 104.36 [procedural safeguards]. Each recipient to which this section applies is subject to the provisions of §§104.34 [least restrictive environment], 104.37 [non-academic, extracurricular activities], and 104.38 [preschool and adult education programs].

Under Sec. 504 and the Americans with Disabilities Act, a non-special education private school that is a recipient of federal financial assistance: (1) may not exclude qualified individuals with disabilities if such individuals can be provided an appropriate education with minor adjustments; (2) may not charge more for that education unless such charges are justified by a substantial increase in cost to the recipient private school; and (3) must operate the private school program in accordance with the provisions of Sec. 504 regulations, which deal with educational setting, evaluation and placement, procedural safeguards, non-academic services, and preschool and adult education programs. Letter to Zirkel, 24 IDELR 733 (OCR 1996).

A private school that receives federal financial assistance is required to provide "minor adjustments" to students with disabilities. This would include accommodations for the administration of medication, albeit not to the same degree as a public school would be required. Although there is little policy development or case law in this area, Hunt v. St. Peter School, 963 F.Supp. 843 (W.D. Mo. 1997) does provide a specific application of non-discrimination laws to a private school. The student had a severe form of asthma that required her to take a number of medications and resulted in hospitalizations. She also had allergic reactions to certain scents (perfumes, colognes, strong odors, and diesel fumes) as well as some animals. Oddly enough, the parent resisted providing medical information to the private school. The private school undertook voluntary measures, including a scent-free classroom routine, requiring the teacher not to wear perfume and encouraging the students not to wear perfume or cologne. The parent also conducted in-service training for the student's teachers. The parent demanded a scent-free environment at the school itself, but again refused to share medical information with the school.

The student's doctor did tell the school that the student's asthmatic condition could be life-threatening without a scent-free environment. The school could not guarantee a scent-free environment and suggested the parent enroll the student elsewhere. The parent filed suit. The court found the private school was a recipient of federal financial assistance and thus required to abide by §104.39 of Sec. 504. The student has a substantial limitation on a major life activity due to her severe asthma and would be considered a qualified student with a disability under Sec. 504. However, whether or not a student's disability can be reasonably accommodated depends upon the nature of the disability and the ability of the recipient to accommodate such a condition. "By her own doctor's admission, [the student] is at risk of death unless she has a scent-free environment. Absent accommodation, she is not qualified to attend St. Peter. The school has no obligation to continue to provide services to a student who is exposed to an unreasonable risk of danger in the school environment." The court added that private schools, unlike public schools, are required to make "minor adjustments" and not "reasonable accommodations." The school met its "minor adjustment" requirement under Sec. 504 when it instituted its voluntary scent-free policy in the classroom and permitted the student's parent to provide in-service training to school staff.

Fond du Lac (WI) School District, 36 IDELR 12 (OCR 2001). The complainant alleged the LEA violated Sec. 504 by providing assistance to a private school that would not admit her daughter. The daughter had a learning disability. She previously attended a private middle school and received some IDEA services from the LEA pursuant to an individualized service plan. When she applied to the private high school, the private school rejected her application because of her need for specialized math instruction and the school's belief that the student would never satisfy the school's math requirements for graduation. OCR determined that it did not have jurisdiction over the private school because it did not receive federal education funding. Also, the proffered reasons for rejecting her application was because the school did not have an appropriate math programs for her. This did not implicate the LEA.

Marshall v. Sisters of the Holy Family of Nazareth, 399 F.Supp.2d 597 (E.D. Pa. 2005). Assuming a first grade student had a disability, the private religious school did not discriminate against him under Sec. 504 when it denied him readmission. The school was not subject to the Rehabilitation Act because it did not receive federal funding. The private school does participate in the National School Lunch Program, but it benefits only one student. "The provision of a free lunch to a single student over the course of a year is *de* minimis–too little to alter my conclusion that the Academy does not receive federal financial assistance for the purposes of the Rehabilitation Act." Even if it were a recipient, the student did not have a disability as defined under the Rehabilitation Act. He had no history of a disability and no one regarded him as having one. There was not a condition present that would constitute a substantial limitation on a major life activity.

Our Lady of Assumption School, Archdiocese of Los Angeles (CA), 45 IDELR 64 (OCR 2005). Complainant asserted the private school discriminated against her daughter based on her disability when it refused to provide accommodations. The complainant further asserted the school and the Archdiocese were recipients of federal financial assistance through the U.S. Department of Agriculture. Even assuming this to be accurate, OCR noted that a "recipient" is one who receives Federal financial assistance from the federal Department of Education. See also 34 CFR § 104.3(d), defining "Department" as meaning "Department of Education. OCR determined it did not have jurisdiction and declined to investigate the complainant's allegations.