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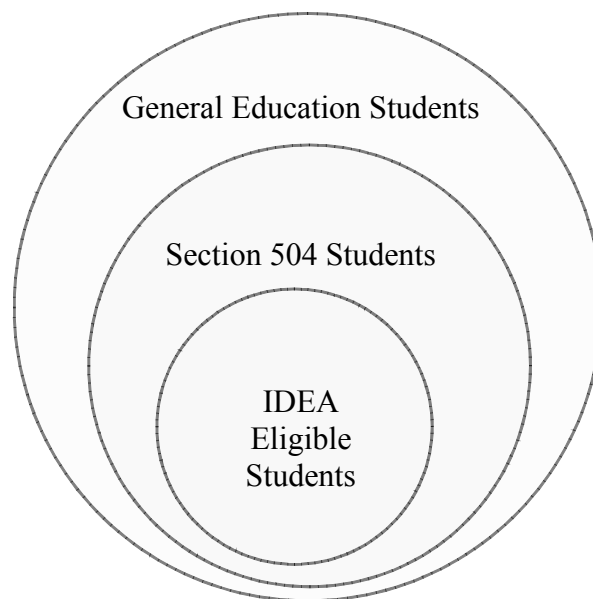
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## **Section 504 Legal Update Midwest Principals' Center Legal Breakfast December 5, 2011**

Section 504 of the Rehabilitation Act of 1973 ("Section 504"), 29 U.S.C. § 794, prohibits discrimination, on the basis of disability, by any program or activity which receives or benefits from federal financial assistance. Section 504 requires that disabled students be provided with a free appropriate public education ("FAPE") and sets forth requirements concerning identification, evaluation, appropriate services, and procedural safeguards.

The ADA Amendments Act of 2008, effective January 1, 2009, broadened who qualifies for protection under the Americans with Disabilities Act (ADA) and Section 504. Since these changes, the Office of Civil Rights in the Department of Education ("OCR") has clarified how the changes affect school district's obligations to provide services to students under Section 504 (see: <http://ed.gov/about/offices/list/ocr/504faq.html>).

### **Relationship Between Section 504 and the Individuals with Disabilities Education Improvement Act ("IDEA")**

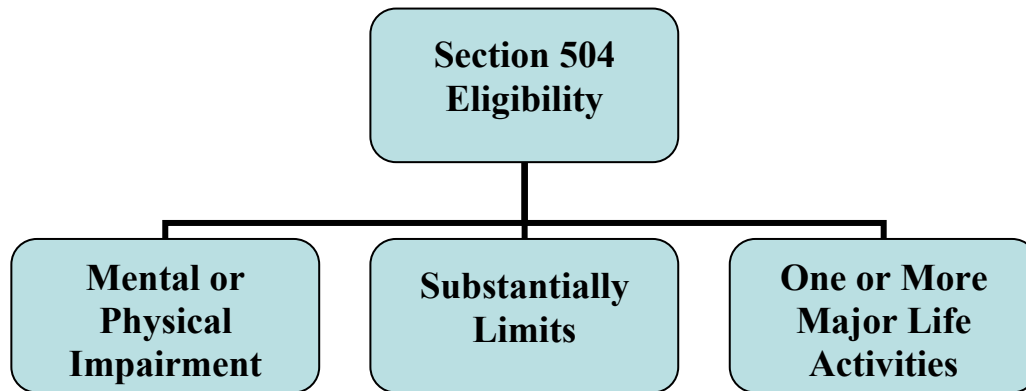


- Section 504 is not a funding statute, *i.e.*, school districts do not receive state or federal money for serving Section 504 students.
- Section 504 is broader in scope, *e.g.*, it requires that schools and other public entities be physically accessible to persons with disabilities. Section 504 applies to both students and school district employees.
- Section 504 prohibits discrimination on the basis of disability, while IDEA mandates appropriate educational placements and related services, regardless of discriminatory intent.
- IDEA and Section 504 apply to different categories of individuals and define disability in different ways:

<b>IDEA — 20 U.S.C. §1401(3)(A)</b>	<b>SECTION 504 — 29 U.S.C. §794</b>
Applies only to students ages 3 – 21 in public elementary and secondary schools	Schools that receive federal funds are prohibited from discriminating against individuals on the basis of disability
“Child with a disability” means a child with mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities	A person has a disability under Section 504 if he or she has a mental or physical impairment, defined as 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, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine; or any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities
<b>AND</b>	Which substantially limits
Who, by reason thereof, needs special education and related services ( <i>i.e.</i> , specially designed instruction in response to a specific “adverse effect”)	One or more major life activities, which includes but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, <b>eating, sleeping, walking, standing, lifting, bending</b> , speaking, breathing, learning, <b>reading, concentrating, thinking, communicating</b> , and working  *ADA Amendments Act changes in bold

## I. The Effect of the ADA Amendments Act of 2008 on Section 504

The ADA Amendments Act of 2008 did *not* change the three criteria for eligibility under Section 504; however, the definitions of “substantially limits” and “major life activities” were broadened.



### A. Definition of “mental or physical impairment” remained the same

The definition of “mental or physical impairment” is still defined as 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, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine; or any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

### B. Definition of “substantially limits” was relaxed

1. **Episodic impairments:** The 2008 amendments provide that “[a]n impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.” For example, a student with Crohn’s Disease who may have periodic flare-ups that require hospitalization must be evaluated based on how the disease affects him or her during those flare-ups, and not when the disease is inactive.
2. **Mitigation:** The 2008 Amendments clarified that a student may be eligible under Section 504 even if the student’s disability or condition is controlled or mitigated, *e.g.*, by medication, cochlear implants, hearing aids, etc. The definition of mitigating measures also includes “reasonable accommodations” and other steps that a school district can take to address learning issues. Mitigating measures include, but are not limited to:
  - Medication

- Medical supplies, equipment, or appliances
- Low-vision devices (excluding eyeglasses and contact lenses)
- Prosthetics (including limbs and devices)
- Hearing aids, cochlear implants or other implantable hearing devices
- Mobility devices
- Oxygen therapy equipment and supplies
- Assistive technology devices
- Reasonable accommodations or auxiliary aids or services
- Learned behavioral or adaptive neurological modifications.

The only exception is that a school district may consider the ameliorative effects of ordinary eyeglasses and contact lenses. “Ordinary eyeglasses or contact lenses” are lenses that are intended to correct visual acuity or eliminate refractive error. “Low vision devices,” on the other hand, are devices that magnify, enhance, or otherwise augment a visual image.

### C. The definition of “major life activity” was expanded

1. The definition of “major life activity” was expanded (in fact, it was doubled) by the 2008 Amendments (new language in bold): “major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, **eating, sleeping**, walking, **standing, lifting, bending**, speaking, breathing, learning, **reading, concentrating, thinking, communicating**, and working
2. A major life activity also includes the “operation of a major bodily function,” including but not limited to functions of the immune system, normal cell growth, digestive bowel bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

## II. Section 504 Plans in General

### A. Do the new changes mean that virtually all students will now be eligible for a Section 504 Plan?

1. No. An impairment in and of itself is not a disability under Section 504. A student’s impairment must *substantially limit* one or more major life activities in order to be considered a disability under Section 504.
2. For example, a student who has a physical or mental impairment would not be considered a student eligible for services under Section 504 if the impairment only results in some minor or moderate limitation, rather than a substantial limitation. *See Knapp v. Northwestern Univ.*, 101 F.3d 473, 481 (7th Cir. 1996) (“not every impairment that affects an individual’s major life activities is a substantially limiting impairment”).

**B. Does a school district still have to provide services to a student whose learning is not substantially limited by her impairment?**

1. Yes. Learning is not the only major life activity for which a student may be found eligible. Under Section 504, a student may qualify as disabled even if his or her disability does not substantially limit learning.
2. Learning is only one of 18 major life activities, such as breathing, walking, caring for oneself, etc., that districts should consider during the evaluation process to determine whether a student has a disability under Section 504.

**C. Is there a test that districts should use to determine “substantial limitations”?**

No, there is no litmus test for determining whether an impairment substantially limits a major life activity. Rather, the determination of substantial limitation must be made on a case-by-case basis with respect to each individual student. Consider the following when deciding the question of substantially limits:

1. The nature and severity of the impairment;
2. The duration or expected duration of the impairment; and
3. The permanent, long-term impact or expected impact of the impairment. *Snowflake (AZ) Unified School District*, 102 LRP 38676 (OCR 1998).

Indicate the degree to which the student’s physical or mental impairment limits a major life activity compared to the average student in the general population:		
Mildly	Moderately	Substantially

**D. What questions can the Section 504 team members ask?**

1. What is the nature and severity of the impairment?
2. What is the duration or expected duration of the impairment?
3. Does the student consistently need substantial changes to complete assignments?
4. Does the student consistently exhibit difficulties with planning and organization?
5. Has the student shown a consistent downward slope in academic progress?
6. Has the student shown a consistent pattern of negative behaviors?
7. Does the student need assistance to participate fully in any portion of the school day, including those where academics are not at issue?

Remember — the determination of whether an impairment substantially limits a major life activity must be made on a **case-by-case basis**.

### **III. Medical Diagnoses**

#### **A. Can school districts determine Section 504 eligibility on the basis of a medical diagnosis alone?**

1. No. A medical diagnosis of an illness does not automatically mean a student can receive Section 504 services. The illness must cause a substantial limitation on the student's ability to learn or another major life activity. *OCR FAQ Question #24*. OCR has consistently held that a medical diagnosis can and should be considered among other sources in evaluating a student for Section 504 eligibility. Other sources to be considered include:
  - a. Aptitude and achievement tests
  - b. Teacher recommendations
  - c. Physical condition of student
  - d. Social and cultural background
  - e. Adaptive behavior.
2. If the parent/guardian provides an independent, private evaluation or medical diagnosis, OCR advises that: "Information from all sources must be documented and considered by knowledgeable committee members. The weight of the information is determined by the committee given the student's individual circumstances."

#### **B. What if the parent/guardian either refuses or fails to provide the school district with a medical diagnosis? Can eligibility under Section 504 be denied on this basis alone?**

1. No. School districts may properly *request* that the parent/guardian provide a medical diagnosis. However, under no circumstance may the Section 504 team automatically deny eligibility based on the parent/guardian's failure to provide a medical diagnosis. In these situations, if the team feels that a referral is appropriate, they should seek parental consent to conduct an evaluation targeting the area of concern.
2. Importantly, school personnel **NEED NOT** make a medical diagnosis; they must simply determine whether the student exhibits signs evidencing a mental or physical impairment. Reaching this decision can typically be achieved through the standard evaluation process.
3. Another option is to reimburse or pay for a private medical evaluation of the student regarding the specific area of concern. The school district only pays for the evaluation itself, not any follow-up treatment, etc. This option is not strictly mandated by law, but is an option to consider in situations where a student requires assistance and the team feels that a medical diagnosis is a necessity.

## **IV. Relationship Between Section 504 and RTI**

### **A. Can RTI initiatives be used prior to conducting a Section 504 evaluation?**

1. Yes, but keep in mind that RTI initiatives are generally used in the context of students with suspected learning disabilities. In situations where a parent/guardian requests a Section 504 evaluation instead of RTI initiatives, school districts are well advised to proceed with the Section 504 evaluation.
2. OCR's FAQ guidance states that (see *Question #40*): "A regular education intervention plan is appropriate for a student who does not have a disability or is not suspected of having a disability but may be facing challenges in school."
3. The OCR guidance also states that (see *Question #31*): "School districts may always use regular education intervention strategies to assist students with difficulties in school. Section 504 requires recipient school districts to refer a student for an evaluation for possible special education or related aids and services or modification to regular education if the student, because of disability, needs or is believed to need such services."

### **B. Should school districts evaluate students for Section 504 services if they are not making progress with RTI?**

Yes. Just as the district would evaluate a student for services under IDEA, a district should evaluate a student under Section 504 if he or she is not making progress with RTI. Failure to evaluate a child who is suspected of needing special education and related services as a result of lack of progress with RTI could make a district liable for a child find claim. See *El Paso Independent Sch. Dist. v. Richard R. ex rel. R.R.*, 50 IDELR 256 (W.D. Tex. 2008).

## **V. Section 504 Evaluations**

### **A. Does Section 504 have Child Find requirements?**

1. Yes. The regulations implementing Section 504 require that school districts (34 C.F.R. §104.32):
  - a. "Undertake to identify and locate every qualified handicapped person residing in the [school district'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."

2. **Note:** A student's prolonged absence from school due to illness may trigger the district's Child Find duties. In a recent OCR opinion, OCR found a Georgia school district violated Section 504 by failing to evaluate a student under Section 504 who missed most of the spring semester due to mononucleosis. OCR ruled that once the district learned that the student would miss several months of school because of her illness, it had an obligation to evaluate her for special education and related services. *Cobb County Sch. Dist.*, 51 IDELR 52 (OCR 2008).

## **B. Who evaluates a student under Section 504?**

1. An evaluation team, consisting of persons knowledgeable about the student, must meet to consider 1) whether the evaluation is warranted and 2) what tests or other assessments will be administered as part of the evaluation. This team can be (and usually is) the same team that considers IDEA evaluations.
2. Parents/guardians are not required to attend this meeting; however, the school district should use the same procedure for considering whether to conduct IDEA evaluations (called a domain meeting) and Section 504 evaluations.
3. If the team decides not to conduct an evaluation, written notice must be provided to parents summarizing the reasons why an evaluation will not be conducted. In addition, Section 504 procedural safeguards should be provided to parents.
4. When evaluating the student, the team must draw upon information from a variety of sources, including a review of all existing documentation, teacher reports, tests, medical diagnosis, physical condition, social and cultural background, adaptive behavior, etc. Additional testing may be conducted by the school district if deemed necessary.

## **C. Is parental consent required before conducting a Section 504 evaluation?**

1. Yes. The school district must obtain consent from the student's parent or guardian prior to conducting a Section 504 evaluation.
2. If a parent/guardian refuses consent for an initial evaluation, the school district *may* (but is not required to) request a Section 504 hearing to seek to override the parent's denial of consent.

#### **D. How often must re-evaluations occur under Section 504?**

1. A school district must periodically, or before any significant change in placement occurs, re-evaluate the Section 504 Plan for each eligible student to determine continued eligibility and services.
2. A “significant change in placement” includes an exclusion from the educational program for more than ten school days (*i.e.*, due to an expulsion or pattern of suspensions), the transferring of a student from one type of program to another, or terminating or significantly reducing a related service. A district should also re-evaluate a student if it observes any significant changes in the student’s behavior or classroom performance. *See Denair Unified Sch. Dist.*, 53 IDELR 98 (OCR CA 2009) (finding a district violated Section 504 by removing a student with ADHD from a class as punishment without first convening his 504 team to review and update his plan where the student had exhibited escalating behavior problems over the course of three years). To comply with the “periodic re-evaluation” requirements, school districts should conduct re-evaluations no less than once every three years.
3. The school district must send a notice to the parents informing them of the intent to conduct a Section 504 re-evaluation. Parental consent must be obtained before any additional testing is conducted as part of the re-evaluation. The team that conducts the re-evaluation of the student’s Section 504 Plan need not be the same group of persons who determined initial eligibility and services.

### **VI. Section 504 Eligibility**

#### **A. Who determines whether a student is eligible for Section 504 services? What type of information must be considered when making this determination?**

1. The eligibility conference should involve a group of persons knowledgeable about the student, including the student’s parents/guardians, the student’s teacher, members of the assessment team, the Section 504 coordinator, the school psychologist, school nurse, and/or other appropriate individuals.
2. The school district must provide notification of the Section 504 conference to all conference participants, including the parent/guardian, at least ten (10) calendar days prior to the conference. Again, this timeline is not mandated by Section 504, but borrowed from IDEA. Parents can waive the 10-day notice and meet sooner.

3. The conference participants will determine eligibility under Section 504 and determine what services and/or accommodations are needed to meet the student's needs as they relate to the educational setting, if any. The participants must base this decision on a variety of sources, including its review of all submitted documentation, current teacher reports, past records, and tests, medical diagnosis, physical condition, social and cultural background, adaptive behavior, etc.
4. A district must document that its determination of eligibility and services was made by looking at the student's unique needs and at information from a variety of sources.

**B. Does Section 504 require that students receive FAPE in the LRE?**

1. Yes. Similar to IDEA, school districts must provide Section 504 eligible students with a free appropriate public education (FAPE) in the least restrictive environment (LRE).
2. Under the FAPE mandate of Section 504, school districts may be required to provide special transportation, therapeutic day placements, residential placements, or other related services free of cost. In addition, eligible students must be given an equal opportunity to receive counseling and to participate in physical education and athletics as appropriate.
3. Section 504 also requires students to be educated in the least restrictive environment (LRE) with non-disabled peers to the maximum extent appropriate.

**C. Can students be found eligible under both Section 504 and IDEA? If so, are school districts required to draft two separate plans?**

1. It is commonly understood that IDEA eligibility automatically confers Section 504 eligibility (but not vice versa).
2. However, two plans are NOT required to be drafted (*OCR FAQ Question #36*). In situations where the team would like to specify eligibility under both statutes, we think the better practice is to draft an IEP, which can reference (in the addendum notes) the student's Section 504 eligibility. Another option is to attach a secondary OHI (Other Health Impairment) eligibility label (assuming the child meets the criteria set forth in IDEA).

**D. Are temporary impairments considered disabilities under Section 504?**

1. A temporary impairment does *not* constitute a disability under Section 504 unless its severity is such that it results in a substantial limitation of one or more major life activities for an *extended period of time*. The 2008 Amendments state that a person shall not be “regarded as” an individual with a disability if such impairment is transitory or minor.
2. A “transitory impairment” is defined as an impairment with an actual or expected duration of six months or less. OCR has recently applied this new language under Section 504 and definitively stated that “any impairment the duration of which is less than six months would not constitute a disability.” *James A. Garfield (OH) Local Sch. Dist.*, 52 IDELR 142 (OCR Feb. 19, 2009).
3. **Note:** Be careful not to confuse temporary impairments with episodic impairments. A temporary impairment refers to those impairments with an actual or expected duration of six months or less, such as a broken bone, other injury, temporary illness, etc. An episodic impairment is a permanent impairment which may have periodic episodes or is in remission. Temporary impairments do not satisfy eligibility under Section 504, whereas episodic impairments do.

**VII. Section 504 Plan**

**A. What information must be included in a student’s Section 504 Plan?**

The 504 Plan must include the following:

- a. A description of the identified or suspected disability that substantially limits a major life activity;
- b. A description of how the identified disability will be addressed in relation to school, including extracurricular activities;
- c. A list of the recommendations, including accommodations and/or modifications designed to address the identified needs; and
- d. The names of the individuals responsible for ensuring that the accommodations/modifications are put into effect – generally speaking, general education teachers.

**B. Must the district grant a parent’s request for additional accommodations/modifications?**

1. Not necessarily. If a student is receiving FAPE under his 504 Plan, school districts need not grant requests for additional accommodations. For example, OCR recently found that a district did not violate Section 504 when it declined to grant a parent’s request to permit a private aide to attend school with a kindergarten student with Type 1 diabetes during the school day. OCR held that the district developed and implemented a 504 Plan designed to meet the student’s needs, where the Section 504 Plan required diabetes training for staff members and provided for daily glucose checks. *Palm Beach County (FL) Sch. Dist.*, 52 IDELR 109 (OCR 2009).
2. Section 504 Plans Should “Level the Playing Field.” Leveling the playing field” means to create a fair academic setting in which students with disabilities can achieve success and demonstrate their knowledge.
3. School districts must ensure that the services and facilities provided to students with disabilities are comparable to those provided to their nondisabled peers. *Charlotte-Mecklenburg (NC) Schools*, 51 IDELR 196 (OCR 2008) (holding that if a school district provided nondisabled students with ready access to computers, it must ensure that student with visual impairments have ready access as well). Accommodations/Modifications are not designed to provide advantages for students with disabilities.

**C. What is the difference between an accommodation and a modification?**

1. **Accommodations:**
  - a. Change the way a student both (1) accesses instruction and (2) demonstrates they’ve learned something
  - b. Reduce or eliminate the effects of a student’s disability but do not reduce learning expectations
  - c. Do not lower or fundamentally alter the curriculum
  - d. Do not dilute the very substance or purpose of the material the student is expected to know (i.e., reading help on a reading test is not an appropriate accommodation)
2. Examples of accommodations:
  - Extended time on homework/tests
  - Tests given in alternative location

- Homework/tests broken down and given in sections
- Use of calculator
- Peer notes
- Tape class lectures
- Books on tape
- Study guides provided pre-test
- Correct but not penalize spelling, grammar errors

3. **Modifications:**

- a. Fundamentally alter what a student is expected to learn
- b. Change standards and alter instruction to fit a student's learning style, skill and performance needs
- c. May result in implications that could adversely affect a student throughout his/her schooling and life

4. Examples of modifications:

- Requiring the student to learn less material
- Revising/shortening tests
- Giving a student a modified (i.e., higher) grade

5. Communication is critical

- a. School district personnel need to make sure that parents are aware of the accommodations and modifications being made – honesty is key. The IEP/504 Teams need to tell the “hard truths” from the time the student is young
- b. Teachers must be given input or accommodations/modifications will not be effective – we need to listen to teachers about what works and what doesn't work
- c. We need to deliver the message early on that teachers are skilled at making accommodations moment by moment in the classroom – this is a critical part of their jobs. Parents understand when the relationship between the parent and school is solid and built on trust

**D. What should a team do when parents insist on a certain accommodation or modification that the team believes is not reasonable?**

1. Just say no – use anecdotal data and observations
2. Implement the accommodation/modification on a trial 6-week basis for one class and see if it works and/or if the student is benefiting

**E. If a student already has a health plan, does the district also need to create a Section 504 Plan?**

If a student's health plan provides a student with sufficient accommodations and services necessary to provide the student with a FAPE, the health plan may serve as the student's Section 504 Plan. For students who do have a health plan and require no other accommodations outside of the health plan, the team may simply write "see attached health plan" in the accommodations section of the Section 504 Plan, and attach the student's health plan to the form.

## **VIII. Revocation of Consent for Section 504 Plan**

**A. What if a parent revokes consent for services under IDEA, but requests a Section 504 Plan?**

1. The answer to this question is, for now, unsettled. OCR has previously held that a parent cannot choose a Section 504 Plan instead of an IEP, reasoning that when parents reject an IEP, they would "essentially be rejecting what would be offered under Section 504." *Letter to McKethan*, 25 IDELR 295 (OCR 1996).
2. However, the comments and analysis that accompanied the amended IDEA regulations issued in December of 2008 concerning revocation of consent expressly state that they do not apply to Section 504 protections and requirements. For this reason, school districts may still have obligations under Section 504 to students whose parents revoke consent for IDEA services.
3. If a school district decides to adopt a Section 504 Plan in situations where parents have revoked consent for an IEP, it must carefully explain to parents the difference between a 504 Plan and an IEP, and should not simply provide the IEP services in a different form.

**B. Can a parent/guardian revoke consent for a Section 504 Plan?**

1. Yes. We advise clients that parents/guardians must consent to both evaluations or reevaluations and the Section 504 Plan itself. If parents either refuse to consent to implementation of the Section 504 Plan or they revoke consent for a Section 504 Plan already in effect, the school district should honor the parent/guardian's wishes.
2. The school district is allowed to request a hearing to override the parent's refusal or revocation of consent. However, this is not advisable in light of IDEA's recent change allowing parents/guardians to revoke consent that is not subject to challenge.

**IX. Section 504 and Special Categories of Students**

**A. Must school districts implement Section 504 Plans for students who transfer from other school districts?**

1. When a student with a Section 504 Plan transfers to a new school district, the receiving school district must convene a Section 504 meeting to review the Plan and supporting documentation. If the Section 504 team determines that the Plan is appropriate, the school district is required to implement the Plan (see *OCR FAQ Question #38*). The receiving school district often transfers the Plan on its own paperwork.
2. If the receiving school district determines that the Plan is not appropriate, the school district must evaluate the student, determine eligibility and (if the student remains eligible) draft its own Section 504 Plan. The OCR guidance seems to suggest that during the interim period, no Section 504 services need to be provided to the student.

**B. Are students who abuse alcohol/drugs eligible under Section 504?**

1. Generally, Section 504 eligibility does not extend to students who are currently engaging in the illegal use of drugs, however there are exceptions for students in rehabilitation programs who are no longer engaging in such illegal use.
2. However, keep in mind that Section 504 protects current users of alcohol because alcoholism is considered an impairment. However, Section 504 does generally allow schools to take disciplinary action against students with disabilities using drugs or alcohol to the same extent as students without disabilities. *OCR FAQ Questions #16 and #17*.

**C. Will students with allergies now be eligible under Section 504?**

A student with an allergy may be eligible for services under Section 504 even if the student's impairment does not impact learning. Rather, the student may be eligible if the student's allergy substantially limits any major life activity, such as breathing, walking, caring for oneself, etc. The student's Section 504 Plan, however, need only provide such services to ensure that the student receives a FAPE and equal participation in the school district's programs and activities. *See North Royalton City School District*, 52 IDELR 203 (OCR March 30, 2009). A student's health plan, for example, may be sufficient to fulfill this mandate, and thus may act as the student's Section 504 Plan.

**D. Are students with diabetes now eligible under Section 504?**

1. While most students with diabetes will require accommodations under Section 504, not all diabetic students will be eligible for 504 services. For example, if a student successfully manages his or her insulin pump with little or no oversight by school staff and does not miss more instructional time than the average nondisabled peer, the student may not be eligible for 504 services.
2. On the other hand, if the evaluation data demonstrates the student misses extended instructional time because of the impact her diabetes has on her ability to care for herself, (*i.e.*, frequently leaving the classroom for visits to the school nurse or water or bathroom breaks), the district may need to provide Section 504 accommodations.
3. Thus, school districts must determine whether the particular student's diabetes substantially limits the major life activity of "caring for oneself" (or other applicable life activities), considering the student's ability to self-monitor her blood sugar levels, to self-administer insulin, and the student's fatigue level during extended testing, recess, and physical education. In making this determination, districts should ensure that they evaluate the student based on his or her unique needs, drawing from a variety of sources of information.

**E. Does the district need to provide Section 504 accommodations for a student's participation in extra-curricular activities?**

Generally, yes. School districts must offer students with disabilities meaningful and equal access to non-educational programs. Thus, it must provide services to the student that are necessary to take advantage of the program's benefits, including any necessary accommodations for afterschool programs, unless doing so would cause an undue burden or a fundamental alteration of the program. *Alachua County (FL) Sch. Dist.*, 52 IDELR 204 (OCR 2009).

## **X. Section 504 and Student Discipline**

### **A. Can Section 504 students be suspended?**

1. Yes. IDEA rules regarding removals from school for more than ten days generally apply to Section 504 students. A school district may suspend a Section 504 eligible student for 10 days in any given school year if the student violates school rules. During days 1-10, school districts are not required to provide educational services, conduct a manifestation determination review, or draft a behavior intervention plan for the student.
2. As for in-school suspensions, we advise school districts to refer to IDEA guidance, which states that an in-school suspension is *not* considered a day of suspension as long as the child is afforded the opportunity to [Vol. 64 Fed.Reg. 12619]:
  - Continue to appropriately progress in the general curriculum;
  - Continue to receive the services specified on his or her IEP; and
  - Continue to participate with nondisabled children to the extent they would have in their current placement.
3. The analysis also provides that if a student is suspended for a portion of a day, the whole day must be included as a day of suspension. Vol. 64 Fed.Reg. 12619.

### **B. Can Section 504 students be expelled?**

1. Yes. If a Section 504 eligible student is removed from school for more than 10 days (due to a series of suspensions or expulsion), a manifestation determination review must be conducted to determine whether the misconduct is related to the student's disability. If the misconduct is related, the student may not be expelled.
2. If the student's misconduct is NOT related to his/her disabling condition, the student may be expelled in the same manner as general education students. During the term of the expulsion, services need NOT be provided (note that this differs from IDEA).

## **XI. Section 504 Policies and Procedures**

### **A. Do districts have to revise Section 504 policy, procedures, and forms to conform with the new changes to Section 504?**

Yes. Given the new changes under the 2008 Amendments, it is critical that school districts adopt clear and concise Section 504 policies, procedures, and forms that comply with the new definitions of major life activity and substantial limitation.

### **B. Do districts have to create separate procedural safeguards under Section 504?**

Yes, a District must establish and implement a system of procedural safeguards under Section 504 that includes procedures for impartial hearings. IDEA procedural safeguards are much more complex than what is required under Section 504; for this reason school district should create separate procedural safeguards solely for Section 504.

## **XII. Dispute Resolution and Section 504**

### **A. Does Section 504 have a statute of limitations like the IDEA?**

No. Unlike IDEA, which has a two-year statute of limitations within which time a claim may be brought, Section 504 does not have its own statute of limitations. The Third Circuit Court of Appeals recently applied the IDEA's two-year statute of limitations to Section 504 claims, however, holding that all Section 504 claims must be filed within two years of the conduct giving rise to the claim. *See P.P. v. West Chester Area Sch. Dist.*, 53 IDELR 109 (3d Cir. 2009).

### **B. Four Types of Section 504 Challenges**

#### **1. OCR Complaint**

- a. The Office for Civil Rights (OCR) investigates complaints involving Section 504. Most complaints concern the identification of Section 504 students and the appropriateness of accommodations.
- b. OCR allows complaints to be filed up to 180 days after the complainant knew or should have known about the allegation giving rise to the complaint. OCR will grant extensions of time on a case by case basis.
- c. An OCR investigator will request that the school district provide a written response that contains supporting documentation. Follow-up interviews (either by telephone or in person) commonly occur.

- d. OCR will ask the parties to engage in early complaint resolution, which is a form of mediation/resolution.
- e. OCR will generally not review individual placement or educational decisions. *OCR FAQ Question #5.*

2. **Section 504 Grievance**

- a. The school district must provide parents an opportunity to file a general grievance regarding any complaints that allege action prohibited by Section 504. The school district may request that the parents comply with the school district's uniform grievance procedure.
- b. Because the impartial hearing process (see below) is only available for disputes involving the identification, evaluation, or educational placement of a child, the uniform grievance procedure should be used for all other complaints arising out of Section 504 (which typically involve general discrimination claims).

3. **Section 504 Impartial Hearing**

- a. Section 504 requires that parents/guardians be provided the right to an impartial hearing if they are unable to resolve disagreements with the school district relative to the identification, evaluation, or educational placement of their child. A hearing may be requested at any time.
- b. School districts should set forth impartial hearing procedures in their Section 504 Rights and Procedures.
- c. In Illinois, IDEA hearing officers do *not* have jurisdiction to hear Section 504 disputes. In Illinois, school districts are required to establish separate hearing procedures for Section 504 matters.
- d. School districts should refrain from using the following individuals as hearing officers: school district employees (from the same school district), employees of another school district that shares a contractual agreement for the provision of services with the school district (e.g., special education cooperative), school board members of the school district. *See Letter to Anonymous*, 18 IDELR 230 (OCR 1991); *Pennsylvania Dept. of Educ.*, 19 IDELR 1105 (OCR 1993).
- e. For those parents seeking an impartial hearing for a dispute involving the identification, evaluation, or educational placement of the child, school districts may *not* require parents to exhaust internal grievance procedures before obtaining an impartial

hearing. *Talbot County (MD) Public Schools*, 52 IDELR 205 (OCR May 29, 2008); *Leon County (FL) School District*, 50 IDELR 172 (OCR December 18, 2007).

- f. There is no mediation requirement under Section 504. School districts and parents/guardians may choose to participate in mediation to resolve their dispute, but if resolved, the school district must ensure that the mediation agreement clearly states that the parents' concerns have been resolved by the agreement (and new plan, if applicable). *Rochester (IL) Community Unit School District 3A*, 52 IDELR 80 (OCR January 9, 2009)(finding that the school district violated Section 504 by not providing an impartial hearing to a parent after the district entered into a mediation agreement with the parent but failed to confirm with the parents that the agreement resolved the parent's concerns).

#### 4. **Federal Court Lawsuit**

- a. In some situations, parents/guardians file lawsuits alleging violations of Section 504 directly in federal court, where attorney's fees and damages may be awarded.
- b. Generally, liability under Section 504 requires something more than a denial of FAPE. In order to prove disability discrimination under Section 504, parents generally must show that a school district denied a student a FAPE solely because of his or her disability. *Chavez v. Bd. of Educ. of Tularosa Municipal Schools*, 52 IDELR 197 (N.M.D. 2009).

### **C. Are there other remedies which students may seek under Section 504 that districts should be aware of?**

Unlike the IDEA, expert witness fees may be recoverable under Section 504 for prevailing parties. At least one court in New Jersey has ruled that Section 504 incorporates the remedies available under the Civil Rights Act, including recovery of expert witnesses fees. *See L.T. v. Mansfield Township Sch. Dist.*, 53 IDELR 7 (D.N.J. 2009) (ruling that a student's 17-day denial of FAPE amounted to a violation of IDEA and disability discrimination under Section 504 and allowing the student's parents to recover over \$5000 in expert witness costs).

## **THE CARE OF STUDENTS WITH DIABETES ACT, P.A. 96-1485**

On December 1, 2010 the Illinois Legislature overrode the Governor's prior amendatory veto to enact the Care of Students with Diabetes Act, P.A. 96-1485, effective immediately.

The Act establishes a process for ensuring students diagnosed with diabetes receive care in school. This process, which may differ from the process school districts have used in the past, includes the following requirements:

### **A. Diabetes Care Plan**

Parents must submit a signed Diabetes Care Plan to the District. A student's Diabetes Care Plan must serve as "the basis of a student's Section 504 plan." The services and accommodations specified in a student's Diabetes Care Plan must be "reasonable" and reflect the current standard of diabetes care. Accordingly, District staff should work to develop a Diabetes Care Plan with the parent/guardian that provides for reasonable accommodations and/or services. The District does not need to accept a diabetes care plan that calls for unreasonable accommodations and/or services.

The Diabetes Care Plan must include the following details:

1. The diabetes-related services needed by a student at school;
2. The diabetes-related services needed by a student at school-sponsored activities;
3. The appropriate staff to provide and supervise these services;
4. The treating health care provider's instructions concerning the student's diabetes management during the school day;
5. A copy of the signed prescription and the methods of insulin administration;
6. Appropriate safeguards to ensure that syringes and lancets are disposed of properly;
7. Requirements for diet, glucose testing, insulin administration, and treatment for hypoglycemia, hyperglycemia, and emergency situations;
8. A uniform record of glucometer readings and insulin administered by the school nurse or delegated care aide during the school day using a standardized format by ISBE; and
9. Procedures regarding when a delegated care aide shall consult with the student's parent/guardian, school nurse (where available) or health care provider to confirm that an insulin dosage is appropriate.
10. The school principal must consult with the Delegated Care Aide to facilitate compliance with the provisions of each Diabetes Care Plan.

## **B. Delegated Care Aides**

Each district must assign a “delegated care aide” to each student with a Diabetes Care Plan. The Act defines “delegated care aide” as “a school employee who has agreed to receive training in diabetes care and to assist students in implementing their diabetes care plan and has entered into an agreement with a parent or guardian and the school district or private school.”

## **C. Delegated Care Aide Agreements**

School districts should consult any applicable collective bargaining agreements before negotiating and/or entering into an agreement with the selected employee to determine whether a union representative must be involved. The Act prohibits school districts from retaliating against any school employee for choosing not to agree to serve as a delegated care aide.

The Delegated Care Aide must perform the duties necessary to assist a student with diabetes in accordance with his or her diabetes care plan and “in compliance with any guidelines provided during training.” In addition, the Delegated Care Aide must consult with the student’s parent/guardian, school nurse (where available) or other health care provider to confirm the insulin dosage is appropriate given the number of carbohydrates to be taken and the student’s blood glucose level as determined by a glucometer reading.

## **D. Mandated Trainings**

School District staff must coordinate mandated trainings for all school employees and delegated care aides. The “initial training” must be conducted by a licensed health care provider with expertise in diabetes or a certified diabetic educator.

1. Requirements for All Trainings:
  - Trainings must be individualized by a student’s parent/guardian.
  - All trainings must be consistent with the U.S. Department of Health and Human Services’ guidance entitled “Helping the Student with Diabetes Succeed.”
  - Trainings must be updated at least annually, and when any changes to a student’s Diabetes Care Plan occurs.
2. Training for All School Employees  
All school employees must receive training on:
  - Basics of diabetes care;
  - How to identify when a diabetic student needs immediate or emergency medical attention; and
  - Whom to contact in emergencies.

3. Training for Delegated Care Aides

Delegated care aides must be trained “to perform the tasks necessary to assist a student with diabetes in accordance with his or her diabetes care plan,” including training in the following tasks:

- Check blood glucose and record results;
- Recognize and respond to the symptoms of hypoglycemia and hyperglycemia according to the Diabetes Care Plan;
- Estimate the number of carbohydrates in a snack or lunch;
- Administer insulin according to the student’s Diabetes Care Plan and keep a record of the amount administered; and
- Respond in an emergency, including how to administer glucagon and call 911.

4. Training for School Employees Who Transport Students

An information sheet must be provided to any school employee who transports a student for school-sponsored activities that identifies the diabetic student, potential emergencies that may occur as a result of the student’s diabetes, and the appropriate responses to such emergencies. The information sheet should also contain emergency contact information for the student.

**E. Student Rights**

1. Student Self-Management

If authorized by the student’s Diabetes Care Plan, a student must be permitted to self-manage his/her diabetes, including: 1) check blood glucose when and wherever needed, 2) administer insulin with the insulin delivery system used by the student, 3) treat hypoglycemia and hyperglycemia in any area of the school or school grounds and at any school-related activity or event, and 4) possess at all times any necessary supplies and equipment to monitor and treat diabetes.

2. Student Assignment

Under the Act, a school district may not restrict the assignment of a student with diabetes to a particular school solely because the school does not have a full-time school nurse.

3. Student Access

The Act also prohibits school districts from denying a student access to any school or school-related activities on the basis that a student has diabetes.

## **F. Civil Immunity**

Under the Act, school employees are immune from liability for any damages related to the care of a student with diabetes, except for willful or wanton misconduct.

## **G. Protection from Discipline**

The Act also provides that a school employee must not be subject to “any disciplinary proceeding” resulting from an action taken in compliance with the Act, except for willful or wanton misconduct.

## **H. Potential Legal Issues**

### Labor and Bargaining Implications

- Delegated Care Aide Agreements: Impact of collective bargaining agreement on school district’s ability to enter into separate agreement with Delegated Care Aide
- Impact of Reductions in Force (RIFs) and recall rights on Delegated Care Aides
- Requirement of certified diabetic educator trainer to train potential non-nurses
- Potential conflict with Section 504
- Disputes regarding reasonableness of Plan