

SECTION 504 ADVANCED ISSUES

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A note about these materials: These materials are not intended as a comprehensive review of all Section 504 case law or rules, but as an update of recent changes or issues of interest. Section 504 eligibility under the ADA and related issues are addressed separately in another handout in the conference notebook. These materials are not intended as legal advice, and should not be so construed. State law, local policy and unique facts make a dramatic difference in analyzing any situation or question. Please consult a licensed attorney for legal advice regarding a particular situation. References to the U.S. Department of Education will read “ED.”

Introduction: A Reminder about the Purpose of Section 504.

In 1973 when the Rehabilitation Act was passed, little was being done on a federal level to encourage participation and equal access to federally funded programs by the disabled. While largely geared toward providing job opportunities and training to disabled adults, the Act also addressed, though very discreetly, the failure of the public schools to educate disabled students. The single paragraph we now refer to as §504 of the Rehabilitation Act provided that

“No otherwise qualified individual with a disability in the United States, as defined in section 706(8) of this title, shall, solely by reason of her or his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service....” —29 U.S.C. § 794(a) (1973).

In §504, the focus is on non-discrimination. As applied to the schools, the language broadly prohibits the denial of public education participation, or enjoyment of the benefits offered by public school programs because of a child’s disability. The law recognizes that disability can mean that equal treatment and equal services may not be sufficient to convey equal benefit. For nondiscrimination to happen (that is, for eligible §504 students to have equal participation and opportunity for benefit) some eligible students will receive services that level the playing field. In addition, the law provides an umbrella of nondiscrimination protection. Both of these duties are addressed below.

I. Section 504 Accommodations in Accelerated Classes

Any discussion of accommodations in accelerated classes (here, shorthand for Advanced Placement, Honors, Magnet, Gifted, etc.) must begin with recognition of two competing, but polar opposite, assumptions. The first, held by some school folks, is that accommodations are not possible in accelerated classes. That position is rejected outright by a letter from OCR (with OSEP input) dated December 26, 2007, which clarified the basic Section 504 duty with respect to accelerated classes. Interestingly, the letter does not directly address the *other* assumption, commonly articulated by some parents, that disabled students are entitled to any accommodation they might need to be successful in accelerated classes, regardless of the effect of the accommodation on the “accelerated” nature of the class. The letter does seem to recognize limits to accommodations, but does not provide the clear guidance that schools desire when faced with unreasonable demands that may dilute above-grade level curriculum. *Dear Colleague Letter: Access by Students with Disabilities to Accelerated Programs*, 108 LRP 69569 (December 26,

2007)(*Hereinafter, “Dear Colleague” or “2007 Letter”*). To start, recognize that the Section 504 nondiscrimination duty requires equal access to accelerated classes.

A. “Qualifying” for Accelerated Classes.

Option 1—A simple qualification standard. Whether a student is qualified for the accelerated class can be a very simple matter. “Generally, under Section 504, an elementary or secondary school student with a disability is a qualified individual with a disability if the student is of compulsory school age.” *Dear Colleague, p. 1*. Schools are free, absent state law or district policy to the contrary, to allow all students unlimited access to accelerated classes. In essence, the only qualification question in this type of situation is whether the student is eligible to attend the school (a question answered based on the student’s age and where he lives). Transfer policies, parents employed by the school and other attendance rules may also add a bit more to this analysis.

Option 2—The school or state could impose other eligibility requirements for accelerated classes. “Please note that nothing in Section 504 or Title II requires schools to admit into accelerated classes or programs students with disabilities who would not otherwise be qualified for these classes or programs.... schools may employ appropriate eligibility requirements or criteria in determining whether to admit students, including students with disabilities, into accelerated programs or classes. Section 504 and Title II require that qualified students with disabilities be given the same opportunities to compete for and benefit from accelerated programs and classes as are given to students without disabilities. 34 CFR 104.4(b)(1)(n) & 28 CFR 35.130(b)(1)(n).” *Dear Colleague, p. 1*.

As in any discrimination context, legitimate, nondiscriminatory criteria matter. To the extent that objective criteria are utilized to determine eligibility to these programs, a defense to discrimination claims can be easier to articulate and defend. For example, disabled students may try out for any extracurricular activity they desire, but they must generally meet the regular performance standards applied to all students. A student with Tourette Syndrome was not subjected to discrimination when he was allowed to try out, albeit unsuccessfully, for a school baseball team. The parent was concerned that having supervised the in-school-suspension room, the baseball coach had knowledge of the student’s behaviors, and had excluded him from the team because of that knowledge. OCR found otherwise. The coach ranked the students on a variety of performance criteria: speed, balance, coordination, hand-eye coordination, sprint speed, lateral movement, and softness catching the ball. Out of fourteen students vying for two openings, the claimant finished eighth, and did not receive a position on the team. OCR found no violation since the “student was given an equal opportunity to compete for a position.” *Maryville City (TN) School District, 25 IDELR 154 (OCR 1996)*.

Similarly, disabled students have an equal opportunity to ‘try-out’ or apply for entrance into accelerated classes and programs, but they must meet admission criteria. Typically, entrance into these programs requires some level of success in the subject matter of the accelerated class as measured by prior classroom performance or perhaps testing. Note that a practice in some districts is to allow parents or the individual student to decide unilaterally whether the student will participate in these classes, without any other eligibility consideration. The absence of eligibility requirements would seem to undermine a school’s later argument that accommodation of the class requirements are diluting the accelerated nature of the class (after all, how accelerated is it if anyone can get in?).

B. IDEA & §504 students do not give up their services and accommodations as a condition of attendance in accelerated programs.

In its December 2007 letter, OCR focused on two major concerns with respect to disability discrimination in accelerated programs. “**Specifically, it has been reported that some schools and school districts have refused to allow qualified students with disabilities to participate in such**

programs. Similarly, we are informed of schools and school districts that, as a condition of participation in such programs, have required qualified students with disabilities to give up the services that have been designed to meet their individual needs. These practices are inconsistent with Federal law, and the Office for Civil Rights (OCR) in the U.S. Department of Education will continue to act promptly to remedy such violations where they occur.” *Dear Colleague, p. 1.* Further, “conditioning participation in accelerated classes or programs by qualified students with disabilities on the forfeiture of necessary special education or related aids and services amounts to a denial of FAPE under both Part B of the IDEA and Section 504.” *Id.* OCR has enforced this position in *Wilson County (TN) School District, 50 IDELR 230 (OCR 2008)* (“the evidence shows that the District’s decision was based on an erroneous interpretation and application of Section 504 requirements that resulted in an automatic denial of academic accommodations for the student in his honors class.”). This letter of finding is discussed in greater detail below.

C. Accommodations in Accelerated Classes.

While OCR’s declaration that accommodations are required in accelerated classes is not surprising (the notion that no accommodation would ever be required in an accelerated class seems indefensible in the context of a law that seeks equal participation and benefit in a recipient’s programs and activities), OCR takes the position that accelerated classes are “generally” part of FAPE. That position is interesting, as it means that accommodation in accelerated classes is not then subject to the limitations of “reasonable accommodation,” but is governed by the higher FAPE standard.

“Participation by a student with a disability in an accelerated class or program *generally* would be considered part of the regular education or the regular classes referenced in the Section 504 and the IDEA regulations. **Thus, if a qualified student with a disability requires related aids and services to participate in a regular education class or program, then a school cannot deny that student the needed related aids and services in an accelerated class or program.** For example, if a student’s IEP or plan under Section 504 provides for Braille materials in order to participate in the regular education program and she enrolls in an accelerated or advanced history class, then she also must receive Braille materials for that class. The same would be true for other needed related aids and services such as extended time on tests or the use of a computer to take notes.” *Dear Colleague, p. 3. (emphasis added).*

So, what does this mean?

1. Accommodations or services the student receives through §504 or IDEA in a regular education class or program are available to the student in an accelerated program.
2. As a corollary, a student with an IEP or §504 plan cannot be denied access to an accelerated class or program because he has an IEP or §504 plan, nor can the student’s admission to the accelerated class be conditioned on the student giving up accommodations or services he receives from a 504 plan or IEP.

As OCR concluded “The requirement for individualized determinations is violated when schools ignore the student’s individual needs and automatically deny a qualified student with a disability needed related aids and services in an accelerated class or program.” *Dear Colleague, p. 3.; Wilson County (TN) School District, 50 IDELR 230 (OCR 2008)* (OCR finds a §504 violation when the school refused to apply a student’s existing §504 academic accommodations to his honors classes, including extra time on class work, homework, and routine classroom tests, although he continued to receive the plan’s accommodations in his regular classes).

3. There is no indication in the OCR analysis/guidance that the student must be provided additional accommodations or services due to his participation in accelerated classes.

On the contrary, **the example provided in the OCR letter clearly envisions that the accommodations that the student was already receiving in regular classes will be those she receives when she enrolls in an accelerated or advanced history class.** Consequently, a student who wants additional accommodations (beyond those she currently receives) in order to tackle the more difficult subject matter, speed or coverage of the accelerated course would appear to have no entitlement to expanded accommodations based on the move to an accelerated class. Unfortunately, this was the only example provided by the 2007 letter, so whether this limitation is intended or is an unfortunate implication of the chosen example is unclear. Note, however, that in the *Wilson County* case, the result seems to follow that in the example. OCR's concern in *Wilson County* was that accommodations in the student's plan at the time he began accelerated classes were not applied to the accelerated classes. A clear statement of this rule from OCR would be helpful, especially as schools are confronted with parents demanding additional supports in the face of more difficult demands in accelerated classes.

4. There appears to be no concern over whether the accommodations or services provided in the regular class, when provided in the accelerated class, will still be appropriate.

Accelerated classes, by definition, are meant to be different from regular classes of the same subject matter. Accelerated classes typically move at a faster pace, involve more reading and writing, and can be otherwise more intense versions of their regular education counterparts. In some cases, these classes may also expose the student to curriculum in excess or above a grade-level class of the same subject matter, and may offer weighted grades to encourage participation and in recognition of the greater difficulty of the material. **Strangely, OCR treats grade level curriculum and accelerated curriculum as identical (although there may be significant differences).** While in other contexts OCR recognizes that remedial and special education classes may offer below-grade level curriculum, and accelerated classes may offer above grade level curriculum, OCR acknowledges no difference in curriculum level in this analysis on accommodations. (See for example, OCR guidance on notations to transcripts to indicate classes with modified or alternative education curriculum, *In Re: Report Cards and Transcripts for Students with Disabilities*, 51 IDELR 50 (OCR 2008))**“While a transcript may not disclose that a student has a disability or has received special education or related services due to having a disability, a transcript may indicate that a student took classes with a modified or alternate education curriculum. This is consistent with the transcript's purpose of informing postsecondary institutions and prospective employers of a student's academic credentials and achievements.** Transcript notations concerning enrollment in different classes, course content, or curriculum by students with disabilities would be consistent with similar transcript designations for classes such as advanced placement, honors, and basic and remedial instruction, which are provided for both students with and without disabilities, and thus would not violate Section 504 or Title II.”)(emphasis added).

OCR appears to assume here that accommodations appropriate in a regular class will not (regardless of the type or scale of the accommodation) take away from the accelerated nature of the class, and thus potentially provide the accommodated student with weighted credit for mere grade-level work. The possibility is not directly addressed in the OCR letter (unless that is the implication of the word “generally” in the 2007 Letter).

Doesn't an academic accommodation make an “accelerated” class a “regular” class, constituting a fundamental alteration? Perhaps, but not this time.... *Wilson County (TN) School District*, 50 IDELR 230 (OCR 2008). While not prevented from enrolling in honors courses, the school mistakenly refused to allow a Section 504 student with ADHD and OCD to receive his §504 accommodations in honors classes. During the 2005-06 school year, the student was determined eligible for §504 to address the student's difficulty focusing on and completing work and “expending extreme amounts of time” on homework that negatively impacted his grades. Extended time was among his accommodations. In 2006-07, the student (now a 9th grader) enrolled in honors English and algebra, but in a §504 meeting, his previous accommodation plan was amended to exclude extra time

on class work, homework and classroom tests in his honors classes (although these same accommodations continued to apply to his other classes). Interestingly, the resistance to accommodate did not come from the honors classroom teacher (as is generally the case, due to concerns over diluting the accelerated class' curriculum) but from the school's §504 Coordinator, who took the position that academic accommodations were not possible in the honors class, and if the work could not be done, the student should be placed in regular education classes. The rationale provided by the §504 Coordinator was that:

- (1) The school needed to provide behavioral, medical/physical accommodations in honors classes (distraction-free seating, behavior plans, scribes for students with broken arms, etc., but that "changing the testing requirements would effectively change the criteria for the honors program."
- (2) Academic accommodations "are appropriate in 'regular' classes that assess the basic core curriculum standards that are not advanced or enhanced in regard to academic expectations[.]"
- (3) Finally, "in her opinion, it would be direct contradiction to declare that a student has a limitation in learning, yet place them in an academic honors program." OCR disagreed, citing its December 2007 letter, and data that Section 504 plans providing academic accommodations (including extra time on class work and homework) were provided to five other students, but not this one.

Lost in translation: You don't really want to take French, try Spanish instead.... *Washington Township*, 48 IDELR 80 (OCR 2006). In an issue analogous to the accelerated class analysis, a school district offered three foreign languages in middle school (Spanish, French and German) but did not provide in-class support (ICS), resource room, or curriculum modification in French or German. These services are only available for students in the Spanish class. As students with disability choosing French or German would effectively have to forego access to certain special education related aids and services, the impact of the school's foreign language policy was to offer only one language option: Spanish. An equal opportunity to participate was not available in French or German in violation of Section 504.

II. The Duty to Not Discriminate: Open Enrollment, Online Education and other programs and activities of the District.

A. Open Enrollment

The author claims no expertise in Utah school law, but provides the following analysis of a problem arising from Utah Open Enrollment rules and their intersection with school district obligations under Section 504 and ADA Title II. By way of briefest summary, the Open Enrollment rules allow for students residing in one district to seek enrollment in another district as long as there is capacity in the receiving district.

OCR finds discrimination in a district's determination of "capacity" for special education students. *Murray City (UT)*, 58 IDELR 141 (OCR 2011). A nonresident student with cerebral palsy attended the district pursuant to open enrollment from third grade through ninth grade. The student's IEP called for 200 minutes of regular education classes per day, together with 50 minutes daily in a special education Applied Skills classroom. He received a number of as-needed supports and aids including shortened tests, assignments, and projects, special seating, tests read aloud, and use of a computer, calculator and scribe. Pursuant to school policy, "all non-resident students transitioning from 5th grade to 6th grade and from 9th to 10th grade" were required to reapply for enrollment. This was the first time the student had been required to re-apply, as he had already completed the 5th to 6th grade transition prior to the introduction of the re-application requirement. The student's application to attend high school in the nonresident district was denied. The student's parent filed a complaint with OCR, alleging that the nonresident district's policies discriminated against students with disabilities, specifically, her student on an IEP. The allegations focused on the school's use of a funding measurement to determine special education capacity.

What's the rule? The specific Section 504 regulation governing the situation and the resulting resolution agreement is found at 34 C.F.R. 104.4(b)(4). It provides

“A recipient may not, directly or through contractual or other arrangements, utilize criteria or methods of administration (i) that have the effect of subjecting qualified handicapped persons to discrimination on the basis of handicap, (ii) that have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the recipient's program or activity with respect to handicapped persons, or (iii) that perpetuate the discrimination of another recipient if both recipients are subject to common administrative control or are agencies of the same State.”

To determine whether the rule has been violated, “OCR must establish whether there has been a disproportionate denial of opportunity to benefit from a program and determine if this is due to a neutral policy, process, or practice. If a disproportionate denial can be established, we assess whether the evidence establishes that the recipient's policy, process, or practice is educationally necessary. Even if the policy, procedure or practice is determined to be necessary, discrimination may still be occurring if there is a less discriminatory alternative that the recipient does not use that would meet the recipient's important educational goal.”

The school's approach to “capacity” differed based on the applicant student's disability status. OCR provided the following comparison of the methods used by the district to determine capacity for disabled and nondisabled applicants.

“For non-disabled applicants, the District determines its capacity based on average class size at a specific grade level. If capacity is determined to be less than 100%, non-disabled students are accepted into the District until 100% capacity is attained at each grade level. Once capacity is reached, the District denies enrollment at that grade level. Documentation provided by the District shows that for the 2011-2012 school year, 438 non-disabled students applied for open-enrollment. Of the 438 applicants considered, 384 were accepted, 19 were rejected based on grade level capacity, and 35 were pending.

For special education applicants, capacity is determined based on the total number of special education students ‘funded’ by Federal and state funds based on counts of special education students previously enrolled. The District does not take into account the applicant's specific special education needs in making its open enrollment decision. The District explained that for Federal funds, the previous school year's December 1st special education count is used, and for state funding, the end of year special education count from two previous years is used. Including the Student, the District received eight applications from non-resident special education students, four who were currently enrolled in the District seeking to transition to either 6th or 10th grade, and four who were attempting to enroll from outside the District. **Based on a combination of the counts explained above, the District determined that the special education program was full for the 2011-12 school year, and rejected all eight applications.**

According to the District's Superintendent, for the 2011-2012 school year, the District has 1283 non-resident students enrolled with 43 of those students having IEPs. We learned that these 43 students were not required to reapply for admission because they were not transitioning into either 6th or 10th grade.

When asked whether the Student or other non-resident special education students were included in the District's year-end counts for projecting funding capacity for the 2011-12 school year, the District's Director of At-Risk Services, who was responsible for determining funding capacity, said **the Student and other transitioning non-resident special education students were not included in the count.** She indicated that she already knew the 2011-12 budget for special education was going to be tight. She said the District did not accept any non-resident special education students for the 2011-

12 school year. In fact, she said the District has not accepted any such students during the five years she has been with the District.” [emphasis added].

What did OCR conclude? Violations occurred. As a general rule, “Section 504 and Title II do not preclude a District from limiting its enrollment of non-resident special education students based on resource capacity.” However, on these facts, the district’s determination of capacity for special education students had the effect of discrimination against this student and other nonresident special education students on the basis of disability. Specifically:

“The District categorically excluded the Student and other currently enrolled non-resident special education students from the year-end counts used to determine funding capacity, thus, ensuring that funding capacity would not be available for them to enroll if they applied to stay in the District.

Also, as implemented, the District’s use of its funding measurement has resulted in no non-resident special education students being allowed to transition to the 6th or 10th grade if previously enrolled or admitted from outside the District over the past five years.”

Isn’t there another approach that could allow consideration of cost of services is a more nondiscriminatory way? OCR recognized that the school’s need to “determine excess capacity for its special education program is educationally necessary.” But the school looked only at federal and state funding sources and not the “actual costs to serve the students, particularly those with lesser support needs, such as the Student in this case.” With that in mind, OCR suggested an alternative.

“The District could consider on an individual basis whether it has the excess capacity to provide the disability-related services needed by each non-resident applicant based on the availability of its special education resource teachers, speech therapists, occupational therapists, or other specialists who provide services to special education students.”

The resolution agreement. In broad summary, the District agreed to change its open enrollment policies and procedures to consider the individual needs of the disabled student and whether it can meet those needs when determining capacity, will offer the eight special education students denied enrollment in 2011-12 a chance to reapply under the new policy, will provide appropriate notices of the changes to a broad audience of interested individuals and groups, and will report to OCR on future compliance.

Anything else to worry about with respect to disability and open enrollment? Consider the following concerns raised in a “Dear Colleague Letter” from USOE, Civil Rights Monitoring Office, May 30, 2012, page 2.

“Some current patterns of Utah district and charter school ‘open enrollment practices’ that may be discrimination ‘red flags,’ as they may impact protected class students, include but are not limited to:

1. Requiring parents to re-enroll their children in charter schools each year, after first-year acceptance as part of lottery selection and/or having siblings enrolled in the school.
2. Blanket denial of open enrollment of students with disabilities, as a class.
3. Failing to follow ‘appropriate due process’ practices when considering exclusion or expulsion of students with disabilities, family language barriers, etc.
4. Preferential enrollment to students achieving above average grades, having consistent attendance, or having exemplary behavior with no suspensions.”

B. Section 504, New Technology & Online or Cyber Schools

1. Just because it's new technology does not mean it's accessible.

A lesson on visual impairments and book readers. On June 29, 2010, OCR issued a “Dear Colleague” letter directed at college and university presidents on the use of electronic book readers. *Dear Colleague Letter: Electronic Book Readers*, 110 LRP 37424 (OCR 2010). Electronic book readers or e-book readers “are handheld devices that allow users to read digital books and other materials by displaying content on screens (often referred to as ‘e-ink technology’). Though features vary, e-book readers can hold a digital library of books, provide access to online content like newspapers and magazines, allow the user to highlight passages, look up word definitions, and link to reference materials.” *Electronic Book Reader Dear Colleague Letter: Questions and Answers about the Law, the Technology, and the Population Affected* (OCR 2010). The letter comes on the heels of settlements between OCR, DOJ and four schools—Reed College, Princeton, Pace University and Case Western Reserve University—arising from their involvement in a pilot project utilizing Kindle DX electronic book readers. *USA Today, online edition, June 30, 2010*. The trouble was not the use of new technology, but the use of new technology that remained inaccessible to students with visual impairments. Specifically, the Kindle utilized in the pilot project lacked an accessible text-to-speech function. Wrote OCR **“Requiring use of an emerging technology in the classroom environment when the technology is inaccessible to an entire population of individuals with disabilities—individuals with visual disabilities—is discrimination” prohibited by the ADA and Section 504, “unless those individual are provided accommodations or modifications that permit them to receive all the educational benefits provided by the technology in an equally effective and equally integrated manner.”** Note that students with disabilities must receive “all the educational benefits of the technology.” *Book Reader Q&A, supra*.

What do the settlements require? The settlements require universities and colleges to refrain from purchasing, requiring or recommending the “use of the Kindle DX, or any other electronic book reader, unless or until the device is fully accessible to individuals who are blind or have low vision, or the universities provide reasonable accommodations or modification so that a student can acquire the same information, engage in the same interactions, and enjoy the same services as sighted students with substantially equivalent ease of use.” **As a warning, OCR stated that “It is unacceptable for universities to use emerging technology without insisting that this technology be accessible to all students.”** *Dear Colleague, supra*. As a practical matter, while the issue is framed here in the context of new technology, the same rule applies to old technology as well.

What about K-12 public schools? K-12 schools were not the target audience of this letter, but the message is nevertheless applicable. OCR notes that in 2006-2007, 29,000 students in elementary and secondary (ESE) students “had visual impairments, including blindness; about 2.6 million ESE students had a specific learning disability, which likely includes some students with a ‘print’ disability.” *Book Reader Q&A, supra*. Further, school districts have made similar errors. For example, a North Carolina school district ran afoul of Section 504 by failing to make computers and some of its programs accessible to students with visual impairments. Among other similar errors, the district automatically tested all first graders for the Talent Development Programs, with the exception of visually impaired students, because the testing mechanism utilized by the school district had not been adapted to their needs. Visually impaired students were also denied access to part of the state curriculum, a Technology Standard Course of Study, when the district failed to provide screen-reader software on computers in classrooms and common areas of the school including the computer lab and Media Center. Screen-reader software was available only in the resource room. *Charlotte-Mecklenburg (NC) Schools*, 51 IDELR 196 (OCR 2008).

A little commentary: It should be no surprise that as schools move forward in their provision of more media in the classroom, those changes must be made with a recognition that students with disabilities have an equal right to participate and benefit. Just because a technology is cutting edge does not necessarily mean that it is ready, out of the box, for the benefit of all students.

2. Cyber Schools and Online Education

Public schools' provision of instruction in a learning environment where students are not in attendance in a classroom setting, and the teacher provides course content by means of course management applications, multimedia resources, internet, video-conferencing, other alternatives, or combinations thereof, is a rapidly growing phenomenon. *See, for example, Muller, Virtual K-12 Public School Programs and Students with Disabilities: Issues and Recommendations* (NASDSE Policy Forum Proceedings Document, July 2010). NASDSE reports a 60% increase in K-12 online enrollment from 2002 to 2007, with current estimates of online enrollment of up to one million across the U.S. *Id.* at 1. The number of state-level virtual schools has also increased significantly over the last five years, with 15 virtual state-level schools and 12 states with K-8 virtual public school options. These new arrangements can create interesting disability law implications, a few of which are summarized below.

Equity and access issues for various types of students with disabilities. As schools expand their online instructional offerings, the issue of access and equity will arise naturally. *See, for example, Rose & Blomayer, Access and Equity in Online Classes and Virtual Schools, Research Committee Issues Brief, North American Council for Online Learning.* As part of the public schools' programs, online/virtual programs must be administered in a fashion that is not discriminatory on the basis of disability in order to not be in violation of Section 504 of the Rehabilitation Act. This does not mean that all students with disabilities have a right to participate in online programs—the IEP team must decide whether that can be an appropriate placement within which to implement the student's IEP. And, it is clear that for some students, online programs may not be able to meet their unique needs. Schools cannot, however, arbitrarily deny students with disabilities access to online programs, or design online programs in a way that will categorically exclude students with disabilities. This issue is likely to form the basis for litigation in the future, as parents become aware of, and interested in, virtual programs for their kids.

An additional access issue is the screening process for applicants to online programs. The screening process must be designed in a way that does not categorically or arbitrarily deny access to students with disabilities. Moreover, any screening process must be joined to the IEP team decision-making with respect to placement. Consider the following with your school attorney....

Where the online school is provided by the student's district of residence, the same district will have FAPE responsibility both before and after the change from the brick and mortar school to the online school. Consequently, the district, through the appropriate Section 504 Committee or IEP Team ought to consider whether the parent's choice to move place the student in the online school will deprive the student of FAPE. This review could take place upon the parent's application for the online program, or when the school learns of the parent's interest. Such a review could be added as an eligibility requirement for the resident district's online program. The review should include inquiries of the parents to determine their ability and willingness to perform a much-expanded role in their student's education (discussed below), together with an analysis of the student's impairments and need for services and supports (looking to current data) and a review of the nature and requirements of the cyber program (looking to the program description and program eligibility criteria). Consider the following questions as part of the review.

- Does the student exhibit the required degree of independence, initiative, motivation, and responsibility to receive FAPE through the online program?
- Does the online program's degree of ability to individualize instruction match to the student's needs?

- Are the student’s parents aware of, and willing to undertake, the additional responsibilities of monitoring the student’s work, assisting in organization of tasks, and ensuring the student is on-task a sufficient amount of time per day?
- Can the student’s IEP goals and objectives be implemented in the online setting?
- Can the program implement the instructional accommodations required by the student’s IEP or 504 Plan?
- Does the student demonstrate the minimum necessary proficiency on the computer and operating system?
- Will a staffperson be specifically designated to address any day-to-day problems?
- Does the online program have a set of policies addressing students with disabilities?

Should the results of this review convince the appropriate team or committee that the student could not receive FAPE in the online program, the Section 504 Committee or IEP Team could reject the placement pursuant to federal law. *See, for example, Douglas County, below.* A finding by the appropriate committee or team that FAPE can be provided to the student in the resident district’s online program ought to be a required element for admission. Such a requirement would prevent the resident district from being required through choice to provide something less than FAPE to a Section 504 or IDEA-eligible student.

What if the online school is offered by an entity other than the resident district? It’s a bit more complicated. Assuming that the resident school district is providing FAPE currently, it has no obligation under law to determine the appropriateness of a unilateral school choice by a parent in an entity other than the resident district. Consequently, it would be up to the entity providing the online program to determine whether the student meets eligibility requirements and whether, once accepted to the program, the student can be provided a FAPE there. Presumably, the online program district would want to conduct the same sort of review of the student data and program eligibility requirements outlined above, but would do so without the actual knowledge that comes from having served the child. With parental consent, the online program could access educational records of the student from the resident district. Further, with parental consent, the online program could also ask pertinent questions of the resident district’s service providers to determine whether the online program would be appropriate. It would also be prudent for the online school to make inquiries into the ability and willingness of the parents to perform a much-expanded role in their student’s education (discussed below). Should the student, based on an individualized review, be determined ineligible for the program because FAPE cannot be provided there, his application could be denied. Such a requirement would prevent the online program from being required through choice to provide something less than FAPE to a Section 504 or IDEA-eligible student.

Some additional thoughts with respect to Online Programs...

Students with motivational, social, or behavioral issues. While online methods can be highly effective, they can prove problematic for more dependent learners, or those with existing motivational or behavioral issues. *See, for example, Weaknesses of Online Learning*, Illinois Online Network, University of Illinois. The asynchronous nature of virtual programs give students greater flexibility and control over their learning experience, but also place greater responsibility on the student. Thus, some sources argue that virtual programs may not be appropriate for younger students or other students who are dependent learners and have difficulties assuming the responsibilities of virtual programs. *Id.*

Clearly, information on the student's level of self-motivation, ability to manage time, and skills in working independently play significantly in the decision of whether a virtual program is appropriate for the student. Or, the 504 Committee or IEP team may have to include safeguards in the program to ensure that the student is on-task and submitting his own work. This issue is likely to generate discussion and possible disputes, as parents of students who exhibit school refusal, attendance problems, or motivational issues at school may decide to have the student attempt online educational programs in lieu of traditional attendance. The problem is that this type of student may be one for whom an online program demands more self-responsibility and initiative than the student may demonstrate. After a period of attempted online instruction without success, it may prove difficult to re-transition these students to a regular campus setting.

A related issue is the student with social skills deficits who seeks virtual instruction as the sole method for his education. The IEP team/Section 504 Committee must determine how social skills deficits will be addressed as part of the program, and whether it is even possible to meet this area of need in a virtual program. For some high-functioning students with autism spectrum disorder, for example, development of appropriate social skills can be a key aspect of their educational program and IEP. Although these students may be well adept at managing the technological aspects of the programs, and will avoid potential social conflicts and problems that present themselves at campuses, IEP teams/504 Committees might decide that such a program is detrimental to acquiring improved social skills.

Transfers of students between virtual and brick-and-mortar schools. The safest legal assumption to make is that a change from a brick and mortar program to a virtual program is a change in placement under the IDEA and Section 504, subject to IEP team/Section 504 Committee decision-making and prior written notice. Not only does the student attend school in a different manner, the nature of the program changes in terms of the student's role and the parent's role. The movement of students between traditional physical campuses and online/virtual programs can be tricky for schools to manage, and can lead to disputes, as the following case demonstrates:

Douglas County Sch. Dist. RE-1, 109 LRP 32980 (SEA Co. 2009). After a student requested placement in an online charter school authorized by the District, the program allowed the student to participate in the online program by means of written work while her application was being processed, and while an IEP team convened to determine whether the program was appropriate to confer a FAPE. After the IEP determined that the program could not meet the student's needs for direct instruction with only consultative services in addition to the online program, the parent complained to the SEA. The SEA found that the District was required to ensure that FAPE was provided in the three-week period during which the application and IEP meeting process took place. Instead, the student had neither full access to the online program, nor to her required special education services. Thus, the student was entitled to 20 hours of compensatory education from a special education teacher (although the parent indicated she did not want such services, as the student was enrolled in another full-time online program).

A little commentary: Here, the problem appeared to be that the District allowed the parent to go to the virtual school to enroll a child who was new to the District, as she resided in another. Instead of offering services comparable to her current school-based IEP in a campus setting while the online program application and IEP team decided if the program was appropriate for her, she was allowed to enroll in the online program although she could not access the computer system while her application was pending. The District could have insisted that the student attend school under a comparable services temporary program while the application was being considered. Or, if the parent wished, the student could have remained in her home district while the application process and IEP team meeting could be finalized. From a policy standpoint, an online school's policies should require that applying students remain in their resident district or assigned campus until the online program accepts the student and the IEP team has approved the placement.

Disputes over appropriateness of virtual instruction for providing a FAPE. The advent of virtual/online programs inherently creates the potential for placement disputes involving the new type of setting. In one case below, the parents of the student alleged insufficiency of one-to-one instruction in the virtual program, and challenged the scope of their role in the implementation of the program. In the second case, parents that had experienced problems and conflict in a physical campus setting wanted a virtual program, instead of the brick and mortar placement advocated by staff, but then complained about their expected role in the virtual program and technological problems that had to be addressed as part of the online program.

Benson Unified Sch. Dist., 56 IDELR 244 (SEA Az. 2011). An Arizona parent alleged that the online program provided by the District for her daughter with multiple chemical sensitivities failed to provide her a FAPE. The student qualifies under the IDEA as having an “other health impairment” (OHI). For a time, the student received homebound instruction by a teacher who followed a variety of protocols to prevent the student from being exposed to chemicals. At an annual IEP meeting, the team discussed the possibility of instruction through an associated online academy, and believed that the program could meet the student’s needs. The parent disagreed, arguing that the online program did not provide sufficient one-to-one instruction and that neither parent was available to serve as “learning coach.” In response the team added 6 hours of paraprofessional support in the home. The treating psychologist testified that he believed the online program was not appropriate because the student could not “self-motivate.” The homebound teacher felt that the student was responsible and that requiring the student to do more work independently with the help of an online program would be beneficial. The Hearing Officer held that the online program, as individualized by the District, was appropriate for the student. The program could provide instruction with no printed materials whatsoever, and made available a certified teacher either online or in person. The paraprofessional, moreover, could fulfill the role of the “learning coach.”

A little commentary: As seen by this case, disputes can arise between schools and parent regarding whether the student is sufficiently self-motivated to benefit from an online program, whether sufficient instructional assistance is provided, and with respect to the role the parent is expected to play in the virtual program.

Virtual Community Sch. of Ohio., 43 IDELR 239 (SEA Oh. 2005). Parents of a severely disabled low-functioning child with Down’s Syndrome and associated impairments alleged that the virtual school district’s program failed to provide an appropriate IEP or confer a FAPE. They sought reimbursement for the costs of a private placement. They complained of IEP deficiencies, failure to provide and properly maintain appropriate software and hardware, and failure to properly train staff. The parents left a previous school-based program and sought out an online program due to displeasure with aides and staff at the prior district. The student participated in the virtual program’s “non-structured flexible program,” where parents play a significant part in the program and function as the primary source of teaching. Everybody involved in the student’s education, however, believed that he needed to be educated in a setting with other students and more intensive instruction and assistance. But, when the virtual school proposed a possible transition to a brick-and-mortar program, the parent expressed concern, based on past experience. In the process, the parents cancelled meetings and did not provide information regarding the student’s progress, any difficulties, or concerns about the IEP. “Problems inherent in technology,” including viruses, modem problems, changed passwords, and difficulties logging into the system were attended to promptly. And, the data indicated that the student made progress when he participated in the virtual school. Moreover, there was a unilateral withdrawal from the virtual school as of the date the student stopped completing any of the work from the virtual school and was merely logging in hours from the unilateral private placement, and providing no actual work product to the virtual school. The Hearing Officer thus denied reimbursement.

A little commentary: The Hearing Officer added that “FAPE delivered in a virtual school has a different method of operation and a different mechanism for the evaluation of its students.... **When parents elect to enroll their children in a virtual school they assume the responsibility of their new role as education facilitator and eyes and ears for the teacher.**” [emphasis added]. The case illustrates the increased responsibility and role for parents in many virtual programs, as they help pace and sequence the program, monitor progress, assist with keeping the student on task, and spot problem areas. This is, in a sense, both a positive feature of virtual programs, as well as a possible source of conflict and problems.

Addressing the increased role of parents. In the *Virtual Community School of Ohio* case reviewed above, the Hearing Officer focused on the fact that parents in many online programs assume new roles as monitors and facilitators of their child’s educational programs when they agree to participate in the online program. The cases illustrate that this is an aspect of the placement decision that must be carefully considered by the IEP team in close collaboration with the parent. The parent must be clearly, carefully, and completely informed of their expected functions and duties as part of the program. Normally, parents play little or no role in the implementation of their child’s IEP or 504 Plan in a physical campus setting, and have no legal responsibility to do so. If problems arise in a virtual program regarding parental duties, the IEP team or 504 Committee must meet to discuss the problems and brainstorm how the problems can be addressed. Note that in the *Benson* case (also reviewed above), the school had to add paraprofessional assistance when the parent indicated she could not meet the role of the “learning coach.”

Related services: the need for some face-to-face services. No matter how well-designed and high-tech, some related services can simply not be provided meaningfully in an online context. Physical and occupational therapy, for example, are services that in most cases require physical contact from the therapist. Thus, for some students, their online instructional program will have to be supported by some measure of in-person services. As part of the IEP development process, schools must address and state the location of related services. *See* 34 C.F.R. §300.320(a)(7). The IEP team or Section 504 Committee must address whether the related services that must be provided in person will be provided at a school site or in the home. In a related vein, the therapists must address the need for services from a different perspective, as those decisions typically hinge on how the student will physically manage the brick and mortar environment, rather than an online setting.

Clearly identifying staff roles and responsibilities in implementing and monitoring the IEP or 504 Plan. In online programs, a greater degree of responsibility is placed on both the student and the parent. This is inherent in online instruction, as many programs are self-paced and the parent may have to help organize the instructional day and monitor whether the student is on-task and working a sufficient amount with the required diligence. Thus, it is crucial to establish what the school staff will do and what responsibilities and duties are placed on the student and the parent. Moreover, one key duty of school staff is to monitor the overall effectiveness of the program for the student, troubleshoot any potential problems in the student’s role, and identify and address issues in the parent’s role. The IEP team/504 Committee should address recurring problems with appropriate measures, including additional assistance to the student and parent as needed. If such measures are ineffective, the IEP team/504 Committee may have to decide whether the online program is an appropriate placement option.

Technology problems and the key role of technicians. In the case of *Virtual Community School of Ohio*, which was reviewed above, the parent complained that there were periodic problems with both the software and hardware components of the online program. The Hearing Officer noted that these are “problems inherent in technology,” including viruses, down times, malfunctions, and other glitches. But, he found that the school addressed the problems promptly, and thus, there was no violation of the IDEA. Translated into the virtual realm, a legal argument that technology problems were not attended to in a timely or appropriate fashion can form the basis for a failure-to-implement claim if the facts show that the school was remiss in addressing the technological problems in a

proper and timely fashion. Thus, the response time of technicians and technical teams will have legal implications in online programs. Schools must iron out all possible technical problems, and have sufficient technician resources to address day-to-day problems and malfunctions. In addition, notices must be provided to parents that misuse or non-educational use of the program software and hardware can exacerbate the potential for technical problems. Staff must document any parental non-compliance with technology use policies in case disputes later arise.

Managing the instructional “shift” in the way material is organized and delivered. An instructional challenge for teachers who deliver online instruction is shifting the manner in which material is organized and presented. This is likely as much a matter of practice and familiarity as it is of training. Campus administrators will undergo a parallel shift as they adjust their supervision and monitoring of instruction to a virtual context.

Need for certain degree of student computer literacy. Both students and staff will have to reach a minimum level of computer and operating system literacy to function within an online program. Some entry-level training may be necessary for some students to reach the required technical proficiency, while for others, the technical prerequisites to functioning in an online program may be too significant to overcome. Thus, a component of determining whether an online program is an appropriate placement for a special education student must be based on an assessment of their computer and operating system savvy.

C. Extracurricular and Nonacademic Activities

Under §504, **students with disabilities must be provided an equal opportunity to participate in extracurricular and nonacademic activities.** The §504 regulations, at 34 C.F.R. §104.37(a), explain

“(1) A recipient to which this subpart applies shall provide non-academic 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.”

Does a “reasonable accommodation” limitation apply to extracurricular and nonacademic services? Yes. Although OCR does not recognize the “reasonable” limitation on accommodations that affect a FAPE, it appears to recognize that accommodations to allow for participation in extracurricular and nonacademic activities are subject to the “reasonable” limitation. *See, for example, Crete-Monee (IL) School District 201-U, 25 IDELR 986 (OCR 1996)(analyzed below).* Thus, there is a reasonableness limit to the type and scope of accommodations that districts will be obligated to provide students to assure their equal opportunity to participate in extracurricular/nonacademic activities.

When does an accommodation in the field of extracurricular or nonacademic activities become an unreasonable accommodation? When it would require a “fundamental alteration in the nature of a program,” which in turn means “undue financial and administrative burdens.” *See* OCR Senior Staff Memoranda, “Guidance on the Application of Section 504 to Noneducational Programs of Recipients of Federal Financial Assistance,” 17 IDELR 1233, (OCR 1990). For example, a 17-year-old student with Down Syndrome alleged that the district failed to allow him to participate in extracurricular activities to the maximum possible extent. The student was demoted from manager to co-manager of the varsity basketball team, was not allowed on away games, and was not allowed to sit with the team at home games. The school district showed that the student required too much supervision on away games,

could not use the phone or count change, could not keep a shot chart, was not alert enough to get out of the way of an incoming play on the bench, and could not perform most of the duties of a manager, resulting in the need to replace him with someone who could perform the required duties. Despite accommodations, the student was unable to perform the essential functions of the position. OCR found no violation of §504. *Crete-Monee (IL) School District 201-U*, 25 IDELR 986 (OCR 1996). In short, he could not perform the essential duties for which the position existed, and the district had no obligation to dramatically change the position to fit the student's abilities. Instead, the district created a position more suited to the student's ability level. OCR agreed that the varsity basketball manager had to be able to perform varsity basketball manager tasks.

How about some examples of issues arising from extracurricular activities?

Might a school be required to provide accommodations during try-outs? Yes. *See, for example, Marion County (FL) Sch. Dist.*, 37 IDELR 13 (OCR 2001)(School was required to provide accommodations to a girl with unspecified disabilities who wanted to try out for cheerleading. The school was required to allow her to videotape the sponsor's instructions and demonstrations.).

Swim Team cases on both sides of the fundamental alteration rule.

(1) Are independent walking and dressing essential to swim team eligibility? No. A student with an intellectual disability and a neuro-degenerative disorder wished to participate in the swimming team. OCR found that the district was required under §504 to provide accommodations to the student, in the form of an aide to assist with walking and dressing. Since those functions were not essential eligibility standards for participation in swimming, requiring the accommodations would not constitute a fundamental alteration of the swimming program. *Quaker Valley (PA) School District*, 352 EHLR 235 (OCR 1986).

(2) What about staying in the pool during competition? That's different. *S.S. v. Whitesboro Central School District*, 112 LRP 5880 (N.D.N.Y. 2012)(“There is no reasonable accommodation that a swim team coach could make for an athlete who is suddenly and sporadically afraid of the water and thus has to exit the pool during practices and competitions.... [O]ne of the essential requirements of swim team members is the ability to enter, and remain in, the pool when required by the coach during practices and competitions. To require otherwise would fundamentally change the nature of the swim team and thus be unreasonable.”)

Can a parent be required to attend a field trip in order for his/her student to attend? No. The student's attendance cannot be contingent on the parent's willingness to go on a field trip, as that would be a discriminatory prerequisite to field trip attendance *unless* every student were required to have a parent attend. Here, despite the parent's allegation, OCR finds that the school provided a properly trained employee to attend field trips with the student in case of need for assistance with the student's diabetes. No discrimination was found. *Oxford Hills (ME) School District*, 57 IDELR 83 (OCR 2011); *See also, Conejo Valley (CA) Unified School District*, 109 LRP 54727 (SEA CA 2009).

Do the Section 504 nondiscrimination protections extend to After-School & Summer Programs? Yes. When a recipient operates a program before or after school, or during the summer, and the program is not required as part of a student's §504 Plan or IEP, “the District's obligation is to respond to requests for accommodations to ensure that students with disabilities are afforded equal access to participate in the Program.” As a result, the parent has the duty to notify the District, in a timely manner, of the student's disability “and make requests for accommodations based on supporting evaluations/documentation. The District is required to evaluate the request and to determine whether such a request would afford the student with equal access to participate in the Program.” *Douglas (MA) Public Schools*, 42 IDELR 209 (OCR 2004).

III. English Language Learners

Note: “the phrases ‘limited-English proficient’ and ‘English-language learner,’ and their respective acronyms, ‘LEP’ and ‘ELL,’ are similar in meaning. Both terms are used by the Office for Civil Rights.” OCR Website at <http://www2.ed.gov/about/offices/list/ocr/ellresources.html>

A. English language proficiency and disability are easily confused

From the earliest days of Section 504 & IDEA there was concern within ED about the complication of students for whom English is a second language who may or may not also have physical or mental impairments. These concerns were often reflected in warnings about inappropriate evaluation—that is, making the student eligible under Section 504 or IDEA not because of disability but because of the impact of limited English proficiency. For example,

OCR found discrimination against minorities in a district’s disability referral process where referral forms did not include information regarding primary language, student records failed to indicate procedures were followed to ensure that language proficiency was not a factor in the students’ disability evaluation process, committees failed to question validity of testing on language proficiency grounds, and parents were not always notified of their rights in their native language. *San Luis Valley (CO) Board of Cooperative Services*, 21 IDELR 304 (OCR 1994).

The District failed to ensure that students were not placed in disability programs on the basis of criteria affected by their limited English proficiency. Students who were in need of both alternative language programming and disability assistance did not receive both modalities of services. *Ogden (UT) City School District*, 21 IDELR 387 (OCR 1994).

B. Title VI protections from discrimination

Title VI of the Civil Rights Act of 1964 protects folks from discrimination based on race, color or national origin in programs or activities that receive Federal financial assistance. Title VI states that:

“No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” 42 U.S.C. § 2000d (1964).

In addition to Section 504 and ADA Title II, OCR also enforces Title VI in the public schools. In response to the question “What is the federal authority requiring districts to address the needs of English language learners?” OCR provided the following answer. “Title VI of the Civil Rights Act of 1964 prohibits discrimination based on race, color or national origin. In *Lau v. Nichols*, the U.S. Supreme Court affirmed the Department of Education memorandum of May 25, 1970, which directed school districts to take steps to help limited-English proficient (LEP) students overcome language barriers and to ensure that they can participate meaningfully in the district’s educational programs.” OCR, *Questions and Answers on the Rights of Limited-English Proficient Students*, March 8, 2005.

Consequently, schools with policies or practices that discriminate against ELLs by denying access to programs could result in Title VI violations.

“Programs and activities that receive ED funds must operate in a non-discriminatory manner. These may include, but are not limited to: **admissions**, recruitment, financial aid, **academic programs**, **student treatment and services**, counseling and guidance, discipline, classroom assignment, grading, vocational education, recreation, physical education, athletics, housing and employment, if it affects those who are intended to benefit from the Federal funds.” *Education and Title VI of the Civil Rights Act 1964*, (OCR March 14, 2005)(emphasis added), available on the OCR website at

For example, consider the following language from OCR with respect to ELL access to gifted/talented programs and other specialized district programs.

“The exclusion of LEP students from specialized programs such as gifted/talented programs may have the effect of excluding students from a recipient’s programs on the basis of national origin, in violation of 34 C.F.R. 100.32(b)(2), unless the exclusion is educationally justified by the needs of a particular student or the nature of the particular program. **LEP students cannot be categorically excluded from gifted/talented or other specialized programs.** If a recipient has a process for locating and identifying gifted/talented students, it must also identify gifted/talented LEP students who could benefit from the program.” *Memorandum: Policy Update on Schools’ Obligations Toward National Origin Minority Students with Limited English Proficiency*, OCR—September 27, 1991 (last modified March 14, 2005)(emphasis added).

A little commentary: OCR’s discussion of nondiscrimination here seems equally powerful in the context of ELL students attempting to access a nonresident school through open enrollment. And of course, students who are ELL *and* either Section 504 or IDEA-eligible also would have additional disability-based protections from discrimination.

IV. Revocation of IDEA Consent & the Section 504 FAPE

What happens when parents who revoke consent for special education services demand pieces or all of the student’s now-rejected IEP delivered by way of a Section 504 Plan? The answer is uncertain. When asked, ED said (in the commentary to the December 2008 changes) **“these final regulations implement provisions of the IDEA only. They do not attempt to address any overlap between the protections and requirements of the IDEA, and those of Section 504 and the ADA.”** 73 Fed. Reg. 73,013 (December 1, 2008).

In the absence of a direct answer from ED, two schools of thought have developed on the issue. One school of thought is that a student leaving special education should be referred and evaluated under §504, since students with disabilities that are not IDEA-eligible may nevertheless have eligibility under §504. “In order to be eligible for services under the IDEA, a child must be found to have one or more of the 13 disability categories specified *and* must also be found to need special education. OCR can not conceive of any situation in which these children would not also be entitled to the protections extended by Section 504.” *Letter to Mentink*, 19 IDELR 1127 (OCR 1993).

Another, more logical, school of thought is that rejection of a FAPE under IDEA is tantamount to rejection of FAPE under §504, and thus, schools would have no obligations under §504 to children whose parents revoked consent to IDEA services. *See, for example, Letter to McKethan*, 25 IDELR 295, 296 (OCR 1996)(When parents reject the IEP developed under IDEA, they “would essentially be rejecting what would be offered under Section 504. The parent could not compel the district to develop an IEP under Section 504 as that effectively happened when the school followed IDEA requirements.”).

This view is consistent with various pieces of the commentary indicating that when consent for special education is revoked, the student will be subject to regular discipline.

“When a parent revokes consent for special education and related services under Sec. 300.300(b), the parent has refused services as described in Sec. 300.534(c)(1)(ii); therefore, **the public agency is not deemed to have knowledge that the child is a child with a disability and the child may be disciplined as a general education student and is not entitled to the Act’s discipline protections. ...** Students who are no longer receiving special education and related services due to the revocation of parental consent to the continued provision of special education and related services will be subject to

the LEA's discipline procedures without the discipline protections provided in the Act. However, students will continue to receive the full benefit of education provided by the LEA as long as they have not committed any disciplinary violations that affect access to education (e.g., violations that result in suspension). **We expect that parents will consider possible consequences of discipline procedures when making the decision to revoke consent for the provision of special education and related services.**" 73 Fed. Reg. 73,012 (emphasis added).

Of course, if the student is eligible for FAPE under Section 504, that eligibility includes manifestation determination protection (and thus no regular discipline for the child). *Why would ED warn of the loss of manifestation protection if every student for whom consent were revoked is entitled to manifestation determination due to 504 FAPE eligibility?*

Further, ED indicates that should the student struggle academically without special education services, the parent may be motivated to consent to restore special education services.

"Concerning the comments asserting that parental revocation of consent for special education and related services could be detrimental to the academic future of a child with a disability, the Act presumes that a parent acts in the best interest of their child. If a child experiences academic difficulties after a parent revokes consent to the continued provision of special education and related services, nothing in the Act or the implementing regulations would prevent a parent from requesting an evaluation to determine if the child is eligible, at that time, for special education and related services." 73 Fed. Reg. 73,009-010.

It's actually a bit counter-intuitive. Section 504 services could encourage the parents to *delay* a return to the necessary special education services. As a practical matter, provision of some help reduces the possibility of "epiphany" moments where the parent realizes the impact of revoking consent for special education. A long, slow, painful educational journey (with §504 helping the student but not fully meeting a student's need for special education) is much more easily tolerated than an acute, serious, and obvious academic problem that would cause the parent to rethink consent for special education services.

Finally, ED provides an interesting statement with respect to the duty of regular education teachers to assist students for whom consent for special education has been revoked.

"Once a parent revokes consent in writing under Sec. 300.300(b)(4) for the continued provision of special education and related services, a teacher is not required to provide the previously identified IEP accommodations in the general education environment. However, general education teachers often provide classroom accommodations for children who do not have IEPs. Nothing in Sec. 300.300(b)(4) would prevent a general education teacher from providing a child whose parent has revoked consent for the continued provision of special education and related services with accommodations that are available to non-disabled children **under relevant State standards.**" 73 Fed. Reg. 73,012 (emphasis added).

And now a federal court weighs in.... A welcome development in the struggle for an answer in this area comes from a federal district court in Missouri. *Lamkin v. Lone Jack C-6 School District*, 58 IDELR 197 (W.D. Mo. 2012). The court found the "*Letter of McKethan* persuasive" and consequently, the "Plaintiff's revocation of services under the IDEA was tantamount to revocation under Section 504 and the ADA." The court noted the parent's objection to applying the *McKethan* letter, but recognized that the parents "failed to cite any judicial or administrative decision that calls it into doubt."

Bottom line: While there is difference of opinion on the issue, the "no residual FAPE in Section 504" position makes the most overall sense to the author, and at least has the backing of one federal court, but ED must resolve the issue, having declined the opportunity to do so in December of 2008. **Talk with your school attorney to determine how your school will respond to this issue.** As a conservative position to take when faced with a student for whom consent for special education services has been

revoked, the school could offer a Section 504 evaluation.

V. Does a Section 504 Plan need to include THAT?

A. §504 Evaluation basics

The §504 Committee knowledge requirement emphasizes the data-services link. The school must 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. §104.35(c)(3). Do not be confused by the word “placement.” In the §504 context, **“placement” simply means the regular education classroom with individually planned accommodations.** It does not literally mean taking the child out of the regular classroom and putting him someplace else. The knowledge required of the folks that identify the student as eligible and determine placement (or services) for the student demonstrates the importance placed on understanding student need and data as a prerequisite for providing services under §504.

Evaluation precedes eligibility, and precedes the delivery of services. The 504 regulations require that the school evaluate the student “before taking any action with respect to the initial placement of the person in a regular or special education program and any subsequent significant change in placement.” 104.35(a). In other words, there are no initial services without an evaluation, nor changes in the services provided under §504 without a re-evaluation. The rationale is quite simple: without data we do not know whether the student is eligible, whether the student needs a Section 504 Plan, and finally, if he needs a plan, what should be in it (how does the disability impact his ability to access the school’s programs and activities?). The §504 procedural safeguard provision at §104.36 further reminds us of the purpose of §504 (and the procedural protections created to further that purpose). “A recipient that operates a public elementary or secondary education program 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[.]” The law looks to need arising from disability, and focuses services and accommodations on meeting that disability-generated need.

“Evaluation” does not necessarily mean “test.” In the §504 context, “evaluation” refers to a gathering of data or information from a variety of sources so that the committee can make the required determinations. §104.35(c)(1). Since specific or highly technical eligibility criteria are not part of the §504 regulations, **formal testing is not required to determine eligibility.** *Letter to Williams*, 21 IDELR 73 (OCR 1994). Common sources of evaluation data for §504 eligibility are the student’s grades, disciplinary referrals, health information, language surveys, parent information, standardized test scores, teacher comments, etc. If formal testing is pursued, the regulations require that the tests are properly selected and performed by trained personnel in the manner prescribed by the test’s creator. §104.35(b)(2). When interpreting evaluation data and making placement decisions, the District is required to **“draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior.”** Information obtained from all such sources is to be documented and carefully considered. §104.35(c)(1)&(2). “[This] paragraph requires a recipient to draw upon a variety of sources in the evaluation process so that the possibility of error in classification is minimized.” Appendix A, p. 430.

A comprehensive reevaluation is required periodically for each eligible student. Districts are considered to be in compliance if they complete reevaluations every three years (as they do with IDEA students). As a practical matter, and to ensure some continuity in the child’s program, Districts should consider an annual review of the child to determine whether changes are necessary due to differences in the child’s schedule in the coming year or changes in the child’s abilities and disabilities. Once the information has been gathered by the §504 Committee, it will determine eligibility based on the criteria previously addressed. If the child is found to be eligible, the Committee will create an accommodation plan for the child that describes the child’s “placement.”

B. The Concept of FAPE: Free Appropriate Public Education

Each District has the duty to provide a free appropriate public education (FAPE) to each qualified disabled person within the district's boundaries regardless of the severity of the student's disability. §104.33(a). A FAPE has several distinct parts: (1) it is education provided at no cost to the parents, (2) it is designed to provide educational benefit despite the child's disabilities, [it is "appropriate"] and (3) it is provided in the environment that affords the greatest exposure to non-disabled peers.

1. No cost to the Parents. Simply put, this provision of FAPE mandates that the **educational costs to be paid by parents of a disabled child attending public school are no different than those paid by parents of nondisabled students.** So, while the school cannot charge the disabled child or her parents for highlighted textbooks or special manipulatives required by her disability for her to receive educational benefit, it may charge her for items for which all students are charged (costs of field trips, tickets to football or basketball games, purchase price of school uniforms, yearbooks, class pictures, etc.). §104.33(c)(1).

2. Appropriate Education. Under the regulations, an appropriate education is a blend of regular or special education and related aids and services created specifically for this student which is designed to meet his needs as adequately as the needs of nonhandicapped persons are met, and which satisfies the requirements for least restrictive environment, proper evaluation and placement, and procedural safeguards. §104.33(b)(1). More succinctly, it is a program created and maintained pursuant to the procedural requirements of the regulations that gives the disabled child an equal chance to succeed in the classroom.

An accommodation plan is created for the eligible §504 student who needs services to meet his needs as adequately as the needs of nondisabled students are met. This plan can have many names, including the simplest— 504 plan. The plan makes changes to the regular classroom so that the student has equal access to the educational benefits of the school's program. **The District cannot delegate away its responsibility to provide a FAPE.** Even if it chooses to place the §504 child outside the District, (which should rarely, if ever, occur) the District and not the entity where the child was placed, bears ultimate responsibility for providing the FAPE. §104.33(b)(3). While curricular modifications may be available to special education students (i.e., reduced mastery of the grade level curriculum), **there is no modification of the curriculum itself for §504 students.** Section 504 is not about reducing expectations for students with disabilities, but providing the types of accommodations and services that will compensate for their disabilities so that §504 students have an equal chance to compete in class. As a practical matter, modifying the curriculum is potentially disastrous for §504 students in states like Texas where graduation is conditioned on passing a competency test based on the state-mandated curriculum and no exemption exists for §504 students. The failure to expose §504 students to the required curriculum hardly gives them an equal opportunity to earn a diploma.

Behavior Intervention Plans. Should the student exhibit behaviors that are recurring or significantly impact upon education and do not seem to be diminishing under the regular discipline management plan, they need to be addressed in a Behavior Intervention Plan (BIP), which is typically part of the Section 504 Plan. Once in place, the BIP (and the rest of the §504 plan) must be followed to avoid violation of federal law.

3. Least Restrictive Environment. **The least restrictive environment is the setting that allows the disabled student the maximum exposure to nondisabled peers while still allowing him to receive an appropriate education.** §104.34(a)(1). The presumption is that the disabled child will be educated with regular education children. §104.34(b). **§504 presumes a regular classroom placement for the child (or education in the mainstream).** This presumption also exists in IDEA, but is even stronger in §504 since the disabilities encountered in §504 students are typically less severe. A placement other than the regular classroom is only appropriate if the disabled child cannot

be educated satisfactorily in the regular classroom with supplementary aids and services such as a behavior management plan, classroom modifications, assistive devices, counseling, etc. §104.34(a).

C. Some lessons on gathering and reviewing evaluation data

We know what's really going on here.... Ignoring evaluation data does not help. *Oak Harbor (WA) School District No. 201*, 46 IDELR 24 (OCR 2005). When the student was in third grade, the school completed the Attention Deficit Evaluation Scale (ADDES), and determined that the student was at risk for ADHD. The student had difficulty following directions, sustaining attention, being organized, finishing assignments and following rules. The school retained her in third grade, but provided no additional disability evaluation until 8th grade. Nevertheless, the student's struggles persisted during the interim, including poor to failing academic performance. During her seventh grade year, the students' parents made two requests that the student's disability related needs be evaluated. The first request outlined the continued troubles mentioned above. The second request noted a medical diagnosis of ADD.

Staffings by the school resulted in the rejection of both evaluation requests. The student's teachers took the position that her poor performance was volitional. The school psychologist involved in the rejections (1) relied on the teachers' opinions, (2) did not know the student's current grades, was unaware of the student's educational record and the seven-year history of academic performance problems, and had no knowledge of the school's identification of the student as at-risk in third grade. Said OCR in dramatic understatement: "We found that the Oak Harbor Middle School staff have not been trained in how to identify a student with ADD." The student was eventually (Fall of 2004) referred to special education, but did not qualify as LD (adequate academic achievement and no educational need for special education services.)

In June of 2004 (beginning of the 8th grade year), the school decided to provide a 504 plan, but did not conduct an evaluation until November of 2004, when the special ed evaluation process was completed. A 504 plan was then drafted and implemented in December of 2004. OCR finds that the school did not seem to realize that 504 evaluation must precede a plan, and that the staff was inadequately trained in identifying students with disability, and consequently, did not base their determinations on the appropriate data.

A little commentary: As campuses are focusing on improving the performance of all students as a result of NCLB, this type of train wreck should be easily avoided. When faced with this struggling student, a review of the folder should have revealed an obvious cause for the student's struggles. Unfortunately, years went by before someone connected the dots. An early intervention process where properly trained folks screens struggling students could have given this student help in a much more timely manner.

A neurologist's report cannot, by itself, constitute a 504 evaluation. *Cle Elum-Roslyn (WA) School District No. 404*, 41 IDELR 271 (OCR 2004). Rather than conducting its own evaluation, the school relied on an outside neurologist's report obtained by the parents to determine that the student was 504-eligible due to Tourette syndrome and ADD, and created a 504 plan. The school did not attempt to evaluate areas of educational need nor did it apparently review any data other than the outside report. OCR found a variety of intertwined violations relating to the absence of an evaluation of the student's educational needs.

A little commentary: The criticism here is not directed at the school's reliance on the neurological to identify the impairment, but on the school's failure to add to that data from the wealth of information it had on the student's educational needs. OCR was concerned that the impact of the student's disabilities on education were not considered, thus undermining any 504 plan (how do we know what to provide if we don't know how the disability impacts the student's access to, or benefit from, the school's programs or activities?)

Sudden Impairment: An accident can change everything. *Bradley County (TN) Schools*, 43 IDELR 143 (OCR 2004). In a case that reminds us how quickly things can change, a high school senior with high grades and no record of misconduct was involved in a motorcycle accident on July 31, 2003. He injured his spine, broke 11 ribs, and suffered collapsed lungs, a lacerated liver and a broken arm. The student's doctor provided the school with a medical diagnosis and in the space requesting a date when the student could return to school, the doctor simply inserted a question mark. The doctor indicated that the student could not attend school, but could receive homebound instruction. Due to a variety of post surgery complications, regular homebound did not begin until late September of 2003 and ceased in November 2003. After experiencing difficulty in reading comprehension, the student was provided with a tutor. When he failed to respond to the tutoring, he complained about the tutors, who in turn, complained that he was disrespectful and lacked intelligence. He returned to school on November 3, 2003. Due to continued medication for pain, the student was tired and easily frustrated. The district continued to provide tutoring, allowed for flexibility in attendance, work completion and extra time to complete tests.

Despite the extra assistance, the student did not complete the English 12 work from homebound, and failed the first semester of that class. Along with the obvious lingering physical problems, other residual effects were significant. OCR found that he experienced difficulty with comprehension and underwent an apparent change in personality, evidenced by his confrontation of a teacher (disrespect and bad language) in April, resulting in his placement in an alternative school. He refused to attend the alternative school, and failed both English 12 and Algebra I. He did not graduate. The student was never evaluated for Section 504.

OCR focused on the lack of §504 in the school's response to the student's sudden, and growing needs. "Based on the extent and duration of the Student's injuries, the evidence suggests that the Student was a qualified individual with a disability at least through his return full-time to classes, and perhaps for an additional period of time during the remainder of his senior year." The District failed to timely evaluate the student.

A little commentary: OCR did not overlook the school's obvious continued efforts to assist the student. On the contrary, OCR recognized the efforts extended on the student's behalf, but noted that the 504 regulations required something more.

"The District had numerous meetings with the complainant and the Student in efforts to help him complete course requirements for English 12. But the fact remains that these evaluation and placement decisions were not made by a Section 504 review committee in accordance with the evaluation and placement procedures required by OCR's regulations. The purpose of these requirements is to assure that an informed decision is made as to a student's eligibility and need for services. As the District did not follow these procedures, there is no way to know if the services that were provided to the Student actually were appropriate."

D. Some lessons on providing accommodations and services under Section 504.

The school employee's question: "how far does the school have to go to accommodate a student who..." begins many discussions on §504's duty to provide FAPE. While the question seems reasonable, it points to a misunderstanding of how accommodations are determined. **The duty is not to provide every possible service and accommodation until §504 can do no more.** The duty to accommodate (or more precisely, the particular services/accommodations a student will receive) is a matter of individualized evaluation and decision-making. That is, the nature of the student's disability and the student's resulting need (to alleviate the impact of the disability on the student's ability to access and benefit from the school's programs and activities) determines what he gets. What the question really means, is do we have to do what the parent is asking? The obvious answer: it depends.

The §504 FAPE duty, in the eyes of OCR, is not subject to a reasonable accommodation limitation. Many educators mistakenly believe that the §504 Plan they create for students in elementary and secondary programs are limited to “reasonable” accommodations. In response to a question on the subject, OCR concludes that reasonableness is not a factor in determining §504 accommodations on elementary and secondary campuses. “The key question in your letter is whether the OCR reads into the Section 504 regulatory requirement for a free appropriate public education (FAPE) a ‘reasonable accommodation’ standard, or other similar limitation. The clear and unequivocal answer to that is no.” *Response to Zirkel*, 20 IDELR 134 (OCR 1993). For K-12 extracurricular activities and nonacademic services (see below), employment situations and postsecondary students, the answer is different. In support of its conclusion, OCR notes that the §504 regulations on employment and postsecondary education include specific references to a reasonable accommodation standard while the elementary and secondary regulations do not. That omission was intentional because of the uniqueness of elementary and secondary education. A critical factor identified by OCR is the voluntary nature of postsecondary study as opposed to the compulsory attendance rules that require students, both disabled and nondisabled, to attend elementary and secondary schools.

Extracurricular activities & the “reasonable accommodation” limitation. Although OCR does not recognize the “reasonable” limitation on accommodations that affect a FAPE, it appears to recognize that accommodations to allow for participation in extracurricular or nonacademic activities are subject to the “reasonable” limitation. **An accommodation in the field of extracurricular or nonacademic activities becomes an unreasonable accommodation when it would require a “fundamental alteration in the nature of a program,”** which in turn means “undue financial and administrative burdens.” See OCR SENIOR STAFF MEMORANDA, “Guidance on the Application of Section 504 to Noneducational Programs of Recipients of Federal Financial Assistance,” January 3, 1990. For example, a 17-year-old student with Down’s Syndrome alleged that the district failed to allow him to participate in extracurricular activities to the maximum possible extent. The student was co-manager of the varsity basketball team, but was not allowed on away games, and was not allowed to sit with the team at home games. The school district showed that the student required too much supervision on away games, could not use the phone or count change, could not keep a shot chart, and could not perform most of the duties of a manager. In addition, the student was not alert enough to get out of the way of an incoming play on the bench. Despite accommodations the student was unable to perform the basic functions of the position of manager, and thus, was reassigned to co-manager. OCR found no violation of §504. *Crete-Monee (IL) School District 201-U*, 25 IDELR 986 (OCR 1996).

So, OCR does not consider cost and inconvenience as limits to the §504 FAPE. What, then, are the limits? The answer lies in the evaluation data. **Since the data determines need (and the areas where the disability gives rise to discrimination, and the need for services/accommodations), the data also limits the required accommodations to those necessary to meet the determined disability-based need. A few cases are instructive.**

Evaluation data forms the basis of the accommodation decision. Section 504 accommodation is designed to level the playing field, not to guarantee a particular result or maximize potential. The Second Circuit described the duty this way: “The heart of J.D.’s opposition to the proposed accommodation is that it was not optimal. However, Section 504 does not require a public school district to provide students with disabilities with potential-maximizing education, only reasonable accommodations that give those students the same access to the benefits of a public education as all other students.” *J.D. v. Pawlet School District*, 224 F.3d. 60, 33 IDELR 34 (2d Cir. 2000). Consequently, when creating §504 plans, the Section 504 Committee should focus on those areas where, because of disability, the needs of the eligible student are not met as adequately as his nondisabled peers, and provide services/assistance to bridge the gap. A few cases illustrate the importance of the data in providing appropriate accommodation.

The need must arise from the impairment. “It is clear that it is inconvenient for the parent to bring the student to school. However, no testimony indicated that he had a medical or other disability which would require transportation.” The student lives within 6 blocks of the school, thus not qualifying for regular transportation available pursuant to school policy for students outside a 1.5 mile radius from the school. His IEP team at the March 21, 2006 meeting determined that transportation would not be needed as a related service. The parent did not bring any testimony indicating otherwise. While the student “has a nebulizer at school for asthma, however, he only used it at the request of the parent during a short period. He was never observed having difficulty breathing, even after strenuous activity.” No transportation was required as a related service. *Lincoln Elementary School District 156*, 47 IDELR 57 (SEA IL. 2006).

Evaluation data requires an aide on the bus. *Manalapan-Englishtown Regional Board of Education*, 107 LRP 27925 (SEA NJ 2007). The student’s doctor reported that an EpiPen had to be administered “expeditiously” following the student’s exposure to peanut protein (whether ingested, touched or inhaled), and that should he have to wait for paramedics to be called and arrive to administer the EpiPen, “there is absolutely no way” he would survive. The Administrative Law Judge ordered an aide be placed on the bus, further finding that

“Peanuts are a common food and people, especially children, who have eaten or contacted peanuts do not always wash or otherwise completely remove peanut proteins from themselves and it is almost impossible to make the school environment completely peanut-free. Therefore, it is probable that J.B., Jr., whether on a school bus or in class, will probably have some exposure to peanut proteins in his school day. A school bus driver, driving conscientiously, would not be able also to simultaneously monitor a severely allergic student and, if the student were to begin to experience an allergic reaction, expeditiously administer an EpiPen and, thereby allow the student to avoid the above-described problems. J.B., Jr., is too young to be responsible to monitor himself and to administer his own EpiPen. Therefore, a nurse, aide or other trained adult is required for those purposes.”

An important distinction: “Parentally-desired” vs. “Doctor-required.” *Murfreesboro (TN) City School District*, 34 IDELR 299 (OCR 2000). In a Tennessee case, the parent removed a student with asthma from the school and threatened not to return the student until a nurse was present on the campus. The district refused to provide a nurse, but did contact the doctor in an effort to understand the student’s medical needs. Specifically, the school wrote a letter to the doctor asking if a nurse was required to be present at school. The doctor responded by letter, opining that “he was not aware of any acute medical indication for keeping the Student home from school, and that it is reasonable to provide *nonmedical* personnel with appropriate training in the administration of her medications.”

A little commentary: Evaluation data is the key to resolving these types of issues. A parent demand for an accommodation does not create a school duty to provide the accommodation under §504. The legal duty arises from the impairment, and the data (here, input from the doctor) helped the school to determine what the disability required as opposed to what the parent wanted (which was clearly much more than what the disability actually required).

Is unlimited water fountain access the only solution? *North Lawrence (IN) Community Schools*, 38 IDELR 194 (OCR 2002). A common problem encountered by schools is a disability related need, and a parent’s strong preference for a particular accommodation to address the need. In this case, the student was diabetic, and the parent was concerned that his needs for water were being disregarded during the school day as he had been denied access to the water fountain on a variety of occasions. The district was apparently concerned that too frequent water breaks were interrupting the educational process and interfering with the student’s ability to stay on task. To provide proper hydration while

maintaining the student's presence in the classroom, the district suggested allowing the student to keep a water bottle at his desk. After an initial objection for unspecified "hygiene" reasons and logistical concerns about refilling it, the parent agreed to the accommodation, and OCR determined the matter closed.

When accommodation goes too far... You can use a calculator, just not THAT calculator. *Sherman v. Mamaroneck Union Free School District*, 340 F.3d 87 (2nd Cir. 2003). A student with a learning disability in math was allowed through his IEP to use a scientific/graphing calculator in class. The plan did not designate a particular model of calculator, but provided that the student's teachers would determine the appropriate device. In the past, he had utilized a TI-82 that required the student to work through various steps before getting to an answer. The student's parent insisted that he be allowed to use a TI-92 that would provide the final answer but not require the student to work through the various steps (the factoring) necessary to get there. The student's teachers were convinced that he could learn to factor, and that use of the TI-92 would be inappropriate because it would circumvent the learning process by doing too much of the work for him. According to his teachers, factoring is a significant component of the Math 3A curriculum. "It is educationally beneficial for Grant to acquire new skills, well within his capability. It would, therefore, be inappropriate for him to retake tests using the TI-92 to factor." The TI-92 is inappropriate because "it would allow Grant to answer questions without demonstrating any understanding of the underlying mathematical concepts." The court concluded that the student's failing grades in math did not mean that the assistive technology provided was inappropriate. Instead, the failing grades were the result of the student's lack of effort. "The IDEA does not require school districts to pass a student claiming a disability when the student is able, with less than the assistive aides requested, to succeed but nonetheless fails. **If a school district simply provided that assistive device requested, even if unneeded, and awarded passing grades, it would in fact deny the appropriate educational benefits the IDEA requires.**" The student did not need the advanced calculator. In fact, a more advanced calculator was inappropriate on these facts.

Is it possible to accommodate-away sources of evaluation data? *Fayette County (GA) School District*, 44 IDELR 221 (OCR 2005). Yes, that can happen if the committee is not careful. Parents of a 14-year old student with Type 1 diabetes alleged that the school discriminated against their son by refusing to grant him automatic excused absences for his medical needs. Instead, the §504 plan stated that the Student would not be penalized for absences due to medical appointments or treatment. The parents sought the absence language in apparent reliance on draft 504 plan language from a national diabetes organization (see commentary below). The school rejected the automatic excused absence language, and instead, provided that, as was the case for all students, all absences would be evaluated and recorded as excused or unexcused in accordance with state law and local board policy. That meant that for purposes of absences for medical appointments, the student must provide a doctor's note. OCR found no discrimination or violation.

A little commentary: An important element in this controversy was the parents' reliance on a sample §504 plan from the American Diabetes Association website. The American Diabetes Association provides a great deal of useful information and guidance to parents and schools about the impairment itself and possible school interventions to assist students with diabetes to access and benefit from public education. In those efforts, the Association provides a model §504 plan. On the top of the plan, the Association clearly and carefully indicates that *the plan lists a broad range of things that might be needed*. Unfortunately, some parents miss this crucial language on the Model Section 504 Plan:

"NOTE: This model 504 Plan lists a broad range of services and accommodations that might be needed by a child with diabetes in school. The plan should be individualized to meet the needs, abilities, and medical condition of each student and should *include only those items in the model that are relevant to that student*. Some students will need additional services and accommodations that

have not been included in this model plan.”

[<http://www.diabetes.org/assets/pdfs/schools/504-adanasndredf-2007.pdf>] The §504 Committee should be aware of this language and remind parents, where appropriate, that not all of the sample plan’s provisions are necessary for each student, and that excessive accommodation can deny the student the opportunity to acquire new skills or deny access to necessary instruction.

Why is an automatic excused absence a problem? Because compulsory attendance can easily be avoided in the guise of absences that really are not medically related. *Melrose (MA) Public Schools*, 44 IDELR 223 (OCR 2005). For example, consider the case of a parent keeping the student at home claiming a medical rationale for the absences, but refusing to provide the documentation required by campus policy. When campus efforts to get doctor’s notes to verify the nature of the absences were continually frustrated, and the student was close to missing the required number of days for truancy action, the campus contacted the student’s doctor. The doctor assured the school that there was no medical reason for the student to be absent so extensively. The school filed for truancy and the parent filed with OCR alleging retaliation. OCR rejected the parent’s complaint.

When the demands are complex and data incomplete. *Salem-Keizer School District*, 26 IDELR 508 (SEA Ore. 1997). Does the child who must be shielded from a wide variety of allergens at school (according to the doctor’s letter) live a life at home that seems unconcerned with exposure? That is, what does the child do when he/she is not in school? Does he/she go to the mall, play outside or at neighbors’ houses, go to church? Does the child play at the park, go to the zoo? If the child’s home life is very different in terms of reaction to allergens, another issue may be present. A hearing officer’s decision from Oregon is instructive. A.E., was a female student with, according to the parents, severe chemical sensitivities and allergies. Throughout the school’s relationship with the student, the parents and student’s physician were vague in identifying “what if anything within the school buildings was adversely affecting A.E.” In (over)response to the vague concerns, the school made considerable changes to the school building, installed fans, air filters, changed the types of chemicals, paints and cleaning supplies it used and the schedule under which it used them, and even built a “clean room” where A.E. could go to recover from exposure to whatever it was that bothered her. The school became suspicious when it noted the variety of activities A.E. was involved in outside of school, with no resulting physical reaction. “Apparently, she was not able to go just anywhere, but she was very capable of being around other people in settings which were seemingly much more polluted than various parts of the school buildings.” The hearing officer summarized the suspicions.

“A.E. sometimes has symptoms, such as flushing, hives, headaches, fatigue and other allergic type reactions. She experiences or complains of these symptoms in some settings, and around some people some times, but not other times. She cannot cope with some physical surroundings such as the ‘clean room’ at SSHS but can be around friends and other students in social settings where smoking and fragrances are relatively uncontrolled. She has problems in some social settings but not others. She cannot go to some stores, but has little discomfort in others. She complains of being bothered in some new construction areas, but not others.... The impact that substances have on her varies to the extent that sometimes she will put up with them if it means she can do what she wants to do while on other occasions she wants to do something, but simply cannot. She is a very strong willed young woman, and pretty much determines her limitations and what she will and will not accept.” *Id.*, at 513.

The hearing officer agreed that the inconsistencies were evidence that the disability was not what the parents would have the school believe. Further problematic was her rejection of tutors sent by the school to her home during periods when she did not attend school. The Hearing Officer believed that A.E. simply did not want to be subjected to the structure of school. “Keeping in mind that this is a very intelligent young woman, she also is very assertive, and, she sometimes informed her tutors that they did not pass the ‘sniff test’ and therefore they could not come into her home, that she did not want to

take tests or respond to questions or be required to do certain assignments, or take certain subjects in the prescribed order, or for that matter take some classes which are required for graduation of all.” *Id.*, at 511. In essence, A.E., with the help of her mother who also suffered from multiple chemical sensitivity, used an amorphous, confusing set of allergies or sensitivities as a school avoidance technique.

Student effort matters. There is no such thing as a free diploma. *Hills v. Lamar County School District*, 49 IDELR 188 (S.D. Miss. 2008). The parent of a twenty-year-old high school drop out alleged violations of the IDEA relating back to his entire school career. As relief, the court is asked to order the school to issue the student a diploma. Noting that the purpose of IDEA is to provide appropriate education so that qualifying students with disabilities can have their unique educational needs met and be prepared “for further education, employment and independent living,” the court has some trouble with the requested relief. **“He is not asking the court to order that he be allowed to return to school in order to earn a diploma under a revised IEP. In fact, the plaintiff’s testimony reveals that he voluntarily quit school mid way through his Senior year because he ‘just got sick of it. I didn’t want to go. I hated it.’** He also stated that school was not ‘fun’ anymore. The records reveal that he had excessive absences even before he quit. The fact that he simply desires his grades changed and to be given a diploma is not a remedy available under the IDEA.” (emphasis added).

A little commentary: The IDEA is sometimes asked to do things it was not designed to do, like granting a diploma that was not earned. Even assuming that there were a violation of IDEA, note that the court was not inclined to simply order graduation, but to return the student to school to receive appropriate services and to do the work necessary to get the diploma. Put simply, even if IDEA were violated, that violation does not mean a free diploma. The student has to work to earn it. A related misconception is the false assumption that students receiving FAPE must receive passing grades, regardless of student effort. A couple of older decisions make the point.

Can a student receive a failing grade and be receiving FAPE? Yes. A problem sometimes encountered by special educators is concern over a child who even with appropriate services has failing grades. A question often asked is what do we do if we know the IEP is appropriate and is being implemented in the classroom *and the child still fails?*

Student fails because he didn’t turn in work, and didn’t try. *Beaufort County (SC) School District*, 29 IDELR 75 (OCR 1998). The parent complained to OCR that the student’s IEP had not been implemented causing the student to fail in keyboarding and Spanish class. The student was learning disabled. Classroom accommodations included extra time for written work, the chance to redo work deemed unacceptable by the teacher, and verbal clarification of instructions and assignments. The student failed keyboarding when he failed to complete, print, or turn in work. In the Spanish class (where no accommodations were required) the student nose-dived after the third 9-week session when he failed to make up three tests, a vocabulary poster and a major composition. **The student left his final exam blank.** When given the opportunity to redo papers or make corrections on assignments for a new grade (something the teacher did for all students), the student chose not to participate. OCR found no violation. “Student B’s failure to pass keyboarding and Spanish was not related to the District not implementing his IEP. The District tired [sic] to implement his IEP, however, the student would not attend make up or tutoring sessions and did not retake exams when the opportunity was available.”

You can lead a horse to water... *Sequoia Union High School District*, 47 IDELR 209 (SEA CA. 2007). The parent of a 15-year-old special education eligible student with a speech-language impairment alleged that the IEP was inappropriate because the student’s grades were poor. The parent argued that the student should be receiving individual tutoring in science and math. The Hearing Officer rejected the claim, finding that the student was extremely capable, but loathe to avail herself of existing opportunities to receive tutoring and re-take tests. Both parent and student were aware of

existing opportunities for tutoring and retaking tests as a regular education service. According to the Hearing Officer, the low grades in geometry arose from the student's lack of background in Algebra I. The parent had insisted that the student take geometry in 9th grade without taking Algebra I first. In science, the poor grades were the result of the student's not turning in work. Interestingly, both science and math provided regular tutoring opportunities. The student attended science tutoring approximately five times during the school year, and geometry tutoring once or twice. "Tutoring did not substantially aid Student in science and math because she did not take significant advantage of the tutoring opportunities she knew she had." Similarly, the Hearing Officer found that "at all relevant times, the District offered Student the opportunity to retake any test on which she received a D or an F, but Student rarely chose to do so." If she had low grades on tests, said the Hearing Officer, it was because she either didn't re-take or she had low scores on the re-take. The student's IEP was appropriate.

A little commentary: The Hearing Officer's decision is nicely based on the philosophy of intervention. Why provide something through special education when there is no evidence that the special education version of tutoring or test re-takes will be any more effective for a student who has no interest in tutoring or re-taking tests as a general education opportunity available to all students? Additionally, there was no evidence presented that tutoring or test re-takes were required for the student to benefit. The hearing result is also influenced by the student's interesting disruptive behaviors (she frequently sketched or read comic books in class, disrupted instruction and "used profanity at inappropriate moments.") The school requested consent to interview the student as part of its efforts to create a behavior management plan (as was its practice with all students) but the parent refused to allow the student to participate. The parent likewise refused consent to conduct a functional behavioral assessment, and refused a mental health assessment of the student.

An important factor in these two cases is the districts' good faith and clean hands. In these cases, there was no question that school officials were concerned for the child and his performance. There was also a level of extra attention and effort in each case, and procedural compliance. Since OCR will typically not second-guess educational decisions made following the proper procedures, and the good faith of the school officials deflected any other concerns, the districts were found in compliance. **On the other hand, where the failure arises from the absence of appropriate services for which the student is qualified, the results are markedly different.** In a Texas case, a disabled student's microcomputer teacher accepted late assignments, gave the student special instructions and extended deadlines, but the teacher did not use all of the accommodations required in the accommodation plan. The student received a final grade of 68. OCR found a violation and the district agreed to resolve the allegation. *Arlington (TX) ISD*, 31 IDELR 87 (OCR 1999). It would have been nice to see what accommodations the teacher failed to implement, and to know specifically why the child failed, but OCR appears to be willing to overlook causation and lay the blame on the school based simply on the failing grade and the implementation problem.

A quick note on maximizing potential: Maximizing potential is not the goal of §504 or IDEA. "The IDEA 'does not secure the best education money can buy; it calls upon government, more modestly, to provide an appropriate education for each disabled child.' *Lunceford v. District of Columbia Bd. Of Educ.*, 745 F.2d 1577, 1583 (D.C.Cir. 1984). There is 'no requirement that services be sufficient to maximize each child's potential commensurate with the opportunity provided other children.'The IDEA guarantees an 'appropriate' education, 'not one that provides everything that might be thought desirable by loving parents.'" *Weixel v. Board of Education of the City of New York*, 33 IDELR 31 (S.D.N.Y. 2000). On a Section 504 claim, the Second Circuit provided this great language. "The heart of J.D.'s opposition to the proposed accommodation is that it was not optimal. However, Section 504 does not require a public school district to provide students with disabilities with potential-maximizing education, only reasonable accommodations that give those students the same access to the benefits of a public education as all other students." *J.D. v. Pawlet School District*, 224 F.3d. 60, 33 IDELR 34 (2d Cir. 2000).